

Cornell. The testimony of *Jones* was then properly admitted in this case.

Phelps
vs.
Sinclair.

But it is contended that *Hall* had a lien upon the saddles, and the right of possession, so that the plaintiff, having neither the possession, nor the right of possession, can maintain no action. But we consider it as settled, that if an agent or factor, for sale, agree with a third person, to take charge of a consignment, pay the freight and duties, and sell the goods; yet as against the principal, such third person has no lien on the goods. 2 *Maule & Selw.* 299, *Solly vs. Rathbone*, and *ibid.* 301, *Cockran vs. Irlam*. We are, therefore, of opinion, that there must be

Judgment on the verdict.

THE TOWN OF BATH vs. THE TOWN OF HAVERHILL.

If a town appoint a person to the office of hogreeve, who is a minor, the town cannot afterwards object to his competency.
Quære, whether a minor is competent to fill any elective office in this state.

This was an action of assumpsit for relief furnished to *John Hacket* and family, who were alleged to be paupers.

At the trial here, in May A. D. 1822, the parties agreed, that said *John* was the illegitimate son of one *Esther Simpson*, and was born in Haverhill, on the 10th of April, A. D. 1790.

When about eight months old, he was taken to Bath, and continued in the family of one *John Charles* an adopted child till A. D. 1810. No indenture or written agreement existed in respect to the pauper; and on the 21st of September, A. D. 1809, he was legally married, and, though a minor, was in March, A. D. 1810, elected by the town of Bath to the office of hogreeve, was duly sworn to perform the duties of it, and continued there during the year.

The parties further agreed, that a default or nonsuit should be entered, according to the opinion of the court as to the settlement of *John Hacket*.

Bath
vs.
Haverhill.

Goodall, counsel for the plaintiffs.
Bell, for the defendants.

(1) 1 N. H.
Rep. 281.

(2) 1 N. H.
Laws 362.

(3) 1 N. H.
Laws 240.

(4) 1 N. H.
Laws 362, 363.

(5) 1 N. H.
Laws 407.

(6) 1 N. H.
Laws 254.

WOODBURY, J. The birth of the pauper in Haverhill, in A. D. 1790, gave him, being illegitimate, a *prima facie* settlement there. (1) By our statute of January 1st, A. D. 1796. this rule is now altered and a provision is also made, that any person, who shall "be chosen and actually serve one year in the office of clerk, &c. shall thereby gain a settlement in said town." (2) The office of hogreeve is one embraced by the statute, and the pauper in this case must be considered to have actually served one year in that office, as he was duly chosen, sworn, and ready in the town during the whole year to perform any duties appurtenant to the office.

His competency to fill the office on account of his minority may be somewhat questionable. It is true, the statute as to town officers does not expressly make full age a qualification. (3) Nor does the statute as to settlements make it so except in the case of a settlement acquired by the payment of taxes. (4) By the common law, also, infants might execute ministerial offices. *Co. Litt.* 3, b.—*Cro. Ch.* 279, 557, *Young vs. Stowel*, & *Young vs. Fowler*.

In some books, this is said to rest on the ground, that they require diligence only, and not discretion; in others on the ground, that they may be executed by deputy; and in others, because an oath of office is not necessary. *Co. Litt.* 172, and section 259.—*Reeve's Dom. Rel.* 281.

But whatever may be the true reason there, the office in question cannot be executed by deputy, or without an oath; and the duties of it, as well as the penalties for not accepting it, seem improper to be imposed upon a person not arrived at years of discretion. (5) The offices in England, which can be held by minors, seem to be those obtained by inheritance, or purchase, or devise, and not by election. Infants here are expressly forbidden to vote for any elective officers. (6) And it would be somewhat derogatory and absurd to require higher qualifications in the electors than in the elected.

But however this may be, we think, that the town of Bath are now estopped to deny that the pauper was duly qualified to fill the office. They themselves thought proper to select him, they have recognized him as competent, and should not be permitted to blow both hot and cold in relation to the same person and the same transaction. 3 *D. & E.* 365. —*Johnson vs. Wilson, ante.*—1 *Phil. Ev.* 170, 171.

Bath
vs.
Haverhill.

The reasons for this principle would not preclude third persons, when interested, from objecting to his competency; but here the very persons object who conferred on him the trust; and such an attempt to avoid their own doings cannot be tolerated on any sound legal principles. Our construction is also required by public policy, in order to produce greater caution in all elective bodies concerning the qualifications of those on whom they bestow their suffrages; and the penalty for negligence, improvidence or prejudice on such occasions is sufficiently light, if the voters are only made to abide by all the ordinary consequences of their own voluntary acts.

Plaintiffs nonsuit.



JAMES TIBBETS vs. JACOB KIAH.

A writ will not abate, on the ground, that the name of the defendant is spelt differently in the writ from his manner of spelling it, provided both modes of spelling have the same sound.

2 557
70 331

This was assumpsit on an account annexed.

The defendant pleaded in abatement that he "was known and called by the surname of *Carrier*, and not *Kiah*." The plaintiff replied that the defendant "was called and known as well by the name of *Jacob Kiah*, as by the name of *Jacob Carrier*," and an issue being joined on this fact, it was found for the plaintiff, under a direction from the court, that however the defendant might spell his name, yet if it was pronounced according to the spelling used by the plaintiff, he was entitled to their verdict.

Tibbets
vs.
Kiah.

A motion was made for a new trial, on the ground of misdirection.

P. Walker, counsel for the plaintiff.

N. Rogers, for the defendant.

WOODBURY, J. The issue in this case, was not how the name of the defendant was written or spelt, but how he was "called and known."

The sounds of words often differ so much from what we would expect on seeing them written, that a pronouncing dictionary like that of *John Walker's*, writing the words as they are sounded, has been deemed a great acquisition to the world of letters. Pronunciations of the same word differ also in different sections of the same country; and a man's identity by his name must to most of the people of his neighborhood depend solely upon the customary pronunciation of it. "*Usus et jus et norma loquendi.*"

(1) Shep. T.
55.

It has long been settled, that bad spelling does not vitiate deeds. *Falsa orthographia non vitiat chartam.*(1) The use of a name is merely to designate the person intended; and that object is fully accomplished, when the name given to him has the same sound with his true name.

(2) 3 Caines
219.

Thus in an indictment it has been held no variance in setting out an instrument, if the word "received" is spelt "reicevd." 2 *Strange* 889.—2 *East Cr. Law* 978. So a writ will not abate, if the name of the defendant be written "*Petrie*" instead of "*Petris*, it being *idem sonans*.(2) On the same principle, it is no variance if the name of the defendant in the writ be spelt "*Kay*" and the instrument in evidence be signed "*Key*."(3)

(3) 16 East
112. How vs.
Bowes et al.

These doctrines pervade all the following cases. 1 *East* 542, *Shapcott* instead of *Shipcott*.—2 *Taunt.* 401, *Benedetts* instead of *Beniditts*.—2 *Caines Rep.* 362, *Hinsdale* instead of *Hinsdall*.—4 *Mod.* 347, *Symonds* instead of *Symons*. See also, 1 *Bos. & Pul.* 60.—2 *Phil. Ev.* 2, note.—13 *John. Rep.* 436, *Wood vs. Bulkley*.