

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.*"

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.

(1) Shep. T.
55.

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)

(2) 3 *Caines*
219.

(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*.

A striking illustration of the different ways of spelling a word so as to retain the same sound is to be found in *Tomlin's Repertorium Juridicum*, (Pref. 3.) The name "Allen" is sometimes written *Alan*, *Allan*, *Allane*, *Allein*, *Alleyn* and *Allen*.

Tibbets
vs.
Kiah.

Judgment on the verdict.