

PECKER & a. vs. HOTT.

In assumpsit for goods sold and delivered, the plaintiff is not bound to rely upon his book of accounts as evidence of the sale and delivery of the goods, although they may be there charged.

Books of account possess none of the uncontrollable qualities of a record, but are open to the same explanations as any other species of parol evidence.

A person who, at the request of another, makes an admission, is not estopped as against him from showing that the admission is not in fact true; but he may explain the circumstances under which it was made, in order to rebut any presumption against him arising from the admission.

The plaintiffs sold and delivered goods to the defendant, but at his request made the charges on their books against one Bradbury, for whom the defendant bought them, for the convenience of the defendant. In an action against the defendant to recover the price of the goods—*Held*, that the plaintiffs might show these facts, in order to rebut any presumption arising from the books that the credit was given to Bradbury.

ASSUMPSIT upon an account annexed to the writ, for goods sold and delivered.

At the trial, the plaintiffs proved that the defendant called at their store, with one James Bradbury, his apprentice, and selected some clothes for Bradbury's use, and requested the plaintiffs' clerk to charge them to Bradbury, as he wished the articles he took for his own use to be kept separate on the books from those which he procured for Bradbury, and said he would settle for them when he paid his own bill, and the clerk charged them to Bradbury accordingly.

The defendant objected to this evidence, on the ground that the book showed to whom the credit was given, and the charges being in writing, and made by the plaintiffs' clerk when the articles were delivered, parol evidence was not admissible, to contradict or control what was thus reduced to writing. But the objection was overruled, and the evidence admitted.

A verdict was returned for the plaintiffs, which the defendant moved to set aside.

Ainsworth, for the defendant. The books partake of the character of record evidence. It would be dangerous to permit

Pecker v. Hoit.

parties to vary, at pleasure, charges regularly made on their books. In *O'Harra vs. Hall*, 4 *Dall.* 340, it was held that where there was a written assignment of a bond, in general terms, parol evidence was not admissible to show that the assignor guaranteed the payment of the bond. So in *Jackson vs. Foster*, 12 *Johns.* 488, it was held that parol evidence was inadmissible to show that a lease, executed in the name of, and reserving a rent to one person, was intended for the benefit of another.

Fowler, for the plaintiffs. The answer to the defendant's position is, that the entries were not made as charges against Bradbury, but merely as memoranda, at the request of the defendant. Upon this evidence they would not be admissible in a suit against Bradbury. The plaintiffs are not bound to prove their case by their books, and any entries on them are susceptible of explanation.

GILCHRIST, J. The books of account of a party, fortified by his supplementary oath, are admitted in evidence, in his favor, by reason of the great convenience of this mode of proof of the ordinary dealings between individuals. *Woodes vs. Dennett*, [12 *N. H. Rep.* 510.] The evidence is inferior to the oral testimony of disinterested witnesses, and at common law is not admissible. The party may, in his discretion, waive his books altogether, and rely upon common law proof, by witnesses, or otherwise, although the books contain evidence of the matter for which he seeks to recover.

Nor do charges upon books of account possess any of the uncontrollable qualities of a record. They are as unlike a record, in the legal sense of the word, as anything written can well be. They are simply memoranda, made by a person in the course of his business. They are evidence made by himself, and are worthy of credit, or otherwise, according to the appearances which the books present. *Eastman vs. Moulton*, 3 *N. H. Rep.* 157; *Cummings vs. Nichols*, [13 *N. H. Rep.* 420.]

The charge against Bradbury, although regularly made upon the books of the plaintiffs, was made at the request of the defend-

 Pecker v. Hoit.

ant, and for his convenience. Estoppels would be as odious as they are sometimes said to be, if the plaintiffs should be estopped by this entry from showing that the defendant is the true debtor. The charge against Bradbury is, without explanation, an admission that he is the debtor, but the other evidence shows that the contract was made with the defendant. It was held, in *Davis vs. Sanders*, 11 *N. H. Rep.* 263, that where a person has procured another to admit a fact to answer a particular purpose, he cannot, in a suit against the party making the admission, insist upon it as an estoppel. The same principle is applicable here; for it is always material to consider whether an admission is made independently and because it is true, or is merely conventional; entered into between the parties from other motives than a conviction of its truth, and only a convenient assumption for the particular purpose on hand. *Greenl. on Ev.* § 275. We are of opinion that the evidence was properly admitted, and that there should be

Judgment on the verdict.

 WEEKS vs. EATON.

A quitclaim deed by a mortgagee, of all his interest in the land, will convey no title unless the debt secured by the mortgage be transferred.

Whether a deed of the land with warranty will transfer the debt, *quære?*

If a mortgage be conditioned for the payment of money, and there be no other security for the debt than the mortgage, whether a deed of the land will transfer the debt, *quære?*

A mortgage was made to indemnify the mortgagee on account of his liability as surety upon a bond for the mortgagor. The mortgagee made a settlement with the obligee of the bond, to which it did not appear that the mortgagor was a party, and paid him the sum of \$500.00. He, then, not having entered upon the land, released all his interest in the mortgaged premises, but made no transfer of the debt.—*Held*, that his deed conveyed no title.

Land was described in a deed as "one undivided third part of a certain tract of land I purchased in—S. C. Badger and John Whipple of Joseph Robinson." Whether there be a patent ambiguity in the description, *quære?*

TRESPASS, for taking and carrying away a quantity of hay on the 18th day of July, 1843.