

Carroll, }  
June 7, 1910. }

## PIKE v. BUZZELL.

The acceptance and collection of a check which expressly states that it is "in full settlement of account," but is for a smaller sum than that claimed to be due, does not furnish conclusive evidence of the payee's assent to the proposition of settlement.

ASSUMPSIT. Plea, accord and satisfaction. Facts agreed. Transferred without a ruling from the November term, 1909, of the superior court by *Plummer, J.*

The suit is upon a disputed account for lumber. The defendant, claiming damages in the sum of \$150 against the plaintiff for breach of contract to ship other lumber, sent his check to the plaintiff for the sum due less that amount, stating in the letter and upon the face of the check that it was "in full settlement of account to date." The plaintiff indorsed the check and received the money upon it, which he credited to the defendant on account. Upon these facts it is claimed that the plaintiff is "concluded" and that the defendant is entitled to judgment. If this claim is not sustained the case is to stand for trial.

*Leslie P. Snow*, by brief and orally, for the plaintiff.

*Elmer J. Smart*, by brief and orally, for the defendant.

WALKER, J. As the case is understood, the question presented is whether the plaintiff's receipt of the defendant's check and the collection of the money thereon necessarily amounted to an assent on his part to the defendant's proposition that the money thus received should be deemed to be in full settlement of the account. This transaction is undoubtedly strong evidence that the minds of the parties met upon the proposition of a settlement; but if for some sufficient reason the plaintiff did not in fact assent to the defendant's proposition, his application of the money on account did not amount in law to a settlement. The defendant's position seems to be that no additional evidence of the plaintiff's understanding is admissible, because there is a conclusive presumption arising from the facts reported that he assented to the defendant's proposition. Whether he assented or not is clearly a question of fact—not of law—which is to be found by considering, not a part, but all of the relevant evidence which is legally admissible upon that issue. *Gowing v. Thomas*, 67 N. H. 399. The plaintiff

may be able to produce competent evidence tending to prove that, notwithstanding the language of the defendant's letter and check, there was under the circumstances no agreement in fact between the parties for a settlement. The court cannot say that such evidence may not exist. If it does exist and is offered, it should be received and considered in connection with the rest of the evidence in the case.

Whether upon the evidence reported a jury could reasonably find that the plaintiff did not assent to the proposed compromise of his claim is a question which has not been considered, since in view of what has already been decided, and in accordance with the terms of the case, a further trial may be had.

*Case discharged.*

All concurred.

Hillsborough, }  
June 7, 1910. }

MORSE v. OSBORNE, *Guardian.*

An adopted child is not "issue," within the meaning of the statute defining the rights of a surviving husband or wife in the estate of a deceased wife or husband; and the share of a surviving adopting parent in the estate of the one deceased is the same as it would be if no child had been adopted.

PROBATE APPEAL. Transferred from the January term, 1910, of the superior court by *Wallace, C. J.*, on an agreed statement of facts.

Joseph C. Morse died January 13, 1909, leaving as the only persons entitled to share in his estate a widow, Drusilla A. Morse, who is the appellant, and the appellee's ward, Doris A. Morse, who was legally adopted by Joseph and Drusilla on April 4, 1903. December 13, 1909, the widow duly executed and filed a release of her dower and homestead rights in the real estate of her deceased husband, and claimed to be entitled in fee to one half of the estate remaining after the payment of debts and expenses of administration, under sections 10 and 11, chapter 195, Public Statutes. Upon her petition for a division of the real estate, the probate court decreed her to be entitled to one third only, and from that decree this appeal was taken.

*Branch & Branch (Oliver W. Branch orally)*, for the plaintiff.

*Alfred Osborne*, guardian, *pro se.*