

ON MOTION FOR REHEARING. After the foregoing opinion was filed the plaintiff moved for a rehearing.

Robert W. Upton, by brief, for the motion.

PAGE, J. Besides the claim of fraud in obtaining the release, the plaintiff's replication pleads that "the plaintiff was mentally and physically incapable of executing the alleged election with understanding." If this claim be substantiated, the election and release never had any reality at all, since there was no meeting of minds.

The issue thus raised, being an issue as to the existence of a release and not one relating to equitable relief from an existent release, is for the jury.

The order of procedure is for the trial justice to determine in the exercise of a sound discretion. If on the equitable issue of relief from fraud, he makes a decree in favor of the plaintiff, the next step will be a trial by jury of the action at law on the merits. If he decides the equitable issue in favor of the defendant, he will still in discretion have to determine whether undue prejudice will result from submitting to the jury at a single hearing the issue of incompetency and the issues on the merits. In other respects the former result is affirmed.

Motion denied.

ALLEN, C. J., and MARBLE, J., dissented, except in respect to a jury trial of the issue of incompetency; the others concurred.

Grafton, }
May 4, 1943. } No. 3425.

SAMUEL GREEN, *Adm'r*

v.

ARTEMISE H. PARKER, & *a.*

Green & Green, for the plaintiff, filed no brief.

Stephen M. Wheeler, Attorney-General, for the State, filed no brief.

Hazen K. Sturtevant, County Solicitor, for the trustees, filed no brief.

Artemise H. Parker, sole heir-at-law, entered no appearance.

Per Curiam. The finding that the trust is impossible of execution as the will provides implies that there is no reasonable prospect of the accumulation of the fund becoming sufficient to establish the charity or of maintaining it if it should be established. The contingencies are thus so remote in possibility of fulfillment that the trust fails for impracticality. Restatement, Trusts, s. 399g. The doctrine of *cy pres* may not be applied, since the scheme of the testatrix in its general purpose fails. The doctrine avoids failure of a charity only when minor features of it become impossible or impractical of performance.

There is, therefore, an intestacy of the residue which belongs to the testatrix' mother who is the sole heir-at-law.

Case discharged.