

No. 1747 Equity.

the true construction of said testament and last will and the manifest intentions of the testator, it decreed to the heirs at law of said Casper Mantz, and claim and intend to enforce their claims in a Court of law to one undivided third part of the real estate, purchased after the. Wasting and executing said will, thereby to deprive the said Teresa McElfresh the residuary devise of said real estate, and to defeat the manifest intention of the testator, and to claim both under the will and against the will. The defendants state further for answer that they are advised by their Counsel, that it appearing clearly that the testator intended that all the lands of which he died the owner and sponsor, not specifically devised, should not in go to the residuary legatee the rule in Equity is that the said complainants cannot take both as heirs and legatees and devisees, and that this Honorable Court as a Court of Equity will put them to their election to take under the will or as heirs and that they will not be allowed to take in both capacities as heirs and legatees. - These defendants state further for answer to said bill of complaint that they are ready and willing, so soon as the said complainants will under the authority of this Court, elect to take under the will and abandon all claims to the after acquired land intended for the said Teresa McElfresh, as residuary devise; to account to and pay over all sums of money to a trustee to be appointed to take charge of said pretended trust fund, or to do or perform any other act which it shall seem just, and equitable for this Honorable Court to make in the premises; but the defendants respectfully submit to the Honorable Court, whether they are compelled to yield up to the said complainants the said pretended trust estate, until they make their election, whether they take under the will, or as heirs at law. These defendants admit that John H. McElfresh is dead, and that he died intestate, leaving Ann Mary McElfresh Henry McElfresh Annanna McElfresh, and Casper M. McElfresh his children and only heirs at law, who are all infants under the age of twenty one years, and that these defendants obtained letters of Administration from the Orphan Court of Frederick County on the personal estate of the said John H. McElfresh, as stated in said bill of complaint, and that they