AVERY POWER MACHINERY COMPANY *v.* MCADAMS.

Opinion delivered June 11, 1928.

1. WILLS—ASSIGNMENT OF DEVISE.—Where, after execution of a will, a devisee gave to the testator his note reciting that, if the note or any part thereof remained unpaid at the testator's death, the amount due should be deducted from or set-off against any interest given to the devisee by will, *held* such agreement constituted an assignment of any devise by such will as collateral security for the payment of the note, and where the amount due on the note was greater than the value of the devise, nothing was payable under the will to the devisee.
2. EXECUTORS AND ADMINISTRATORS—JURISDICTION OF PROBATE COURT.—The probate court has jurisdiction to make a settlement and distribution of a testator's estate, and, in doing so, to determine a devisee's indebtedness to the estate and to order a deduction thereof from his share.

Appeal from Arkansas Chancery Court, Southern District; *Harvey R. Lucas,* Chancellor; affirmed.

STATEMENT OF FACTS.

Appellees brought this suit in equity against appellants to enjoin them from levying an execution on certain real property, on the ground that the judgment debtor had no interest in said real property received by him as a legacy from his father, because he owed the estate more than the value of the property devised to him. The suit was defended on the ground that the interest of a devisee in his testator's real estate comes to him free from his general debt to the estate.

The facts necessary to a statement of the issues raised by the appeal may be set forth in brief form as follows: On May 13, 1921, S. M. McAdams, father of I. T. McAdams, duly executed a will of all his property, and I. T. McAdams was a residuary legatee or devisee under the will. On June 1, 1922, I. T. McAdams executed a promissory note to S. M. McAdams for the sum of $6,895.50, payable on or before June 1, 1923, with interest at the rate of six per cent. per annum from date until paid. The note contains a clause which reads as follows:

"It is further agreed by both parties hereto that, in the event this note, or any part thereof, remains unpaid

at the time of the death of S. M. McAdams, then the amount remaining due thereon is to be deducted from and set-off against any legacy or interest that may be given to I. T. McAdams by S. M. McAdams in his last will and testament; and that the executor of said will and testament shall make said deductions or set-off against the interest given to I. T. McAdams in said estate, and said executor shall assign this note to I. T. McAdams in full exchange of such amount of his claim as will equal the amount due under this note."

On September 23, 1923, Avery Company procured a decree against I. T. McAdams in the sum of $1,293.43. On May 15, 1926, S. M. McAdams died in the Southern District of Arkansas County, and I. T. McAdams, as a residuary devisee under said will, became entitled to certain real estate. On the 15th day of August, 1926, I. T. McAdams filed his petition in the probate court for a distribution of his share of and interest in the estate. The will had been duly admitted to probate, and the executor under the will asked that the interest claimed by I. T. McAdams be set-off by the amount of the promissory note found to be due, which was $6,895.50 and the accrued interest. This sum was more than the value of the real estate to which I. T. McAdams was entitled under the will. It was therefore found by the probate court that I. T. McAdams, in accordance with his written agreement above set forth, had received more than the share of the estate to which he was entitled under the will. Therefore it was adjudged that he was not entitled to anything under the will.

Avery Power Manufacturing Company became the owner by assignment of the decree in favor of the Avery Company against I. T. McAdams, and on December 26, 1926, the decree was revived in its name against I. T. McAdams. On January 14, 1927, appellant, Avery Power Machinery Company, caused an execution to be issued and levied upon the interest of I. T. McAdams in the estate of S. M. McAdams, deceased.

The chancery court found that appellees were entitled to an injunction, on the ground that, under the written agreement signed by I. T. McAdams with S. M. McAdams and the order of the probate court, the land upon which the execution had been levied belonged to appellees as devisees under the will of S. M. McAdams, and that I. T. McAdams had no interest in the same. It was decreed that appellants be permanently enjoined from proceeding further in the sale of said land under the execution, and it was expressly decreed that the property upon which the execution had been levied belonged to appellees under the will of S. M. McAdams, deceased. The case is here on appeal.

W. A. Leach, for appellant.

G. W. Botts, for appellee.

HART, C. J., (after stating the facts). Appellants seek to reverse the decree upon the authority of *Wheeler & Motter Mercantile Co.* v. *Knox,* 136 Ark. 95, 206 S. W. 46, and *Falls* v. *Driver, post* p. 703, in which it was stated that the court adheres to the doctrine that the real estate of an intestate descends directly to the heirs upon the death of the ancestor, subject to the statutory exceptions, and that there is no statute incumbering an heir's interest in real estate with his indebtedness to his ancestor. In other words, it may be stated as the settled rule in this State that, except where the indebtedness be held an advancement, the distributive share of an heir or devisee in the real property of the estate is not chargeable with the heir's or devisee's indebtedness to the estate, either as against the land itself or the proceeds of the sale thereof; but the indebtedness must be collected in the same manner as any other indebtedness due the estate. We do not think, however, that this rule is applicable under the facts presented in the case at bar.

In a case-note to 1 A. L. R., p. 1009, it is said that, irrespective of the attitude of the courts in any particular jurisdiction, on the question where a legacy be retained in satisfaction of a statute-barred debt owed to the tes-

tator, it is uniformly held that, where a testator directs that any debts due, or owing to him, from legatees, shall be brought into the division of the estate, or deducted from the share of the one so indebted, the debt must be deducted, though barred by the Statute of Limitations. *Holt* v. *Libby* (1888), 80 Me. 329, 14 Atl. 201; *Baker* v. *Safe Deposit & T. Co.* (1901), 93 Md. 368, 48 Atl. 920, 49 Atl. 623; *Cummings* v. *Bramhall* (1876), 120 Mass. 552; *Allen* v. *Edwards* (1883), 136 Mass. 138; and *Gillingham's Estate* (1908), 220 Pa. 353, 69 Atl. 809.

The reason is that the legatee or devisee is a mere volunteer, and must take the bounty of the testator upon the terms upon which it is bestowed. In other words, where a devisee elects to take under the will of the testator, he must take subject to all conditions the testator has seen fit to impose. In this connection it may be stated that the Supreme Courts of the States of Maryland and of Massachusetts are among those holding that the share of an heir in the real estate of the intestate is not chargeable with a debt from the heir to the estate. The holdings of these courts are in accordance with our own holding on the subject; and their decisions, that a testator may make his own debts, due from devisee, a charge to be satisfied out of his portion, and which must therefore be met before the devisee is entitled to the devise, would have peculiar force with us.

In *Foulkes* v. *Foulkes,* 173 Ark. 188, 293 S. W. 1, it was held that one electing to take under a will must take under the terms of the will, and, if he elects to take the property, he must do so under the conditions expressed in the will.

There would seem to be no good reason why the testator might not impose like conditions in an agreement executed between him and a devisee under his will subsequent to the execution of the will. In the case at bar, after the will had been executed, one of the devisees in the will executed a promissory note to his father, the testator, for a sum which was much more than the value of the part of the estate devised to him. I. T. McAdams,

the signer of the note, executed an agreement with his father that, in the event the note or any part of it remained unpaid at the time of the death of his father, the amount due should be taken from or set-off against any legacy or interest which might be given to him in the last will and testament of his father. It was further agreed that the executor of the will should make said deduction or set-off, and that he should assign the note to I. T. McAdams in full exchange of such amount of his claim as would equal the amount due under the note. It was found that the interest which would have been received by I. T. McAdams under the will was less than the amount of the note which was due at the time his father died. In other words, the debt of I. T. McAdams to the estate of S. M. McAdams, deceased, was much greater than the share of the estate to which he would have been entitled as a residuary devisee under the will of his father. His agreement should be considered as an assignment of his devise as collateral security for the payment of his note. I. T. McAdams, being indebted to S. M. McAdams at the latter's death in an amount greater than his share of the estate under the will, his agreement that such indebtedness should be charged to him upon final distribution is valid, and should be carried out.

The probate court properly so held. That court had jurisdiction to make settlement and distribution of the testator's estate, and, in doing so, might determine the share of each devisee or distributee, and to that end might inquire into and determine the indebtedness of the devisee to the estate, and order a deduction of the same from his share. *Stenson* v. *H. S. Halvorson Co.*, 28 N. D. 151, 147 N. W. 800, Ann. Cas. 1916D, p. 1289, L. R. A. 1915A, 1179.

It follows that the decree of the chancery court was correct, and it will be affirmed.