iron-works erected upon the land previous to his purchase, both in machinery and other things, to the amount of several thousand dollars, whereby the annual value thereof [541] has been greatly increased, and that since the complainant's right to dower has accrued; and it appearing to us that it is inequitable to allow her to be benefited out of the defendant's expenditures without paying her portion thereof, and that to do this may be impossible for her; and it being impossible so to allot her dower, with fairness to herself, without letting her into an enjoyment of a part of the works, which cannot be done by making her a tenant in common, to the extent of her interest, with the defendant, without making her his copartner to that extent which justice to him will not permit, on the account of his individual outlay for the improvement of the property.

We therefore direct that the clerk and master take an account, showing what was the annual value of the property at the time the complainant's right of dower accrued, and what it was when the defendant took possession under his purchase from Mrs. Brunson; and from that time we decree against the defendant the one-sixth part thereof anually, with interest up to the time of this decree, for which judgment will be given against him in favor of the complainant. And from this time forward we decree that she be allowed annually the one-sixth part of the same valuation during her life as her dower, and that the same be charged upon the estate. And if, at any time hereafter, said works should cease to secure to her the amount from any cause whatever, that she may then have her interest of one-sixth part of the whole tenement laid off to her by metes and bounds, and be let into possession of the same.

BEAUMONT & IRWIN v. YEATMAN et al.

NASHVILLE, DECEMBER, 1847.

1. **Probate by Deputy Clerk.** A certificate of probate of a deed which states that the bargainor appeared before the deputy clerk, and is signed by the deputy clerk, without naming the principal, is good. [Cited in Ament v. Brennan, 1 Tenn. Ch. 433.]
2. **Mortgage of Steamboat—Registration.** The registration of the mortgage of a steamboat, made to secure the purchase-money, in the county of this state in which the sale and mortgage were made, is good in Tennessee, whatever it may be elsewhere, and the boat being found in Tennessee will be subjected to the satisfaction of the mortgage debt as against a purchaser claiming under a subsequent judicial sale made by the commercial court of the city of New Orleans by attachment of the boat, in the State of Louisiana, for debt.

Cited in: 10 Heis., 565; 13 Pickle, 288.

[542] On the 2d day of February, 1844, Joseph Irwin sold to A. D. Wetherspoon, of Montgomery county, the one-fifth part of the steamboat "Water Witch," for $500, payable on the 1st day of October, 1844. And on the same day Wetherspoon made a mortgage or conveyance to Beaumont as trustee, to secure the note given for the purchase-money as above. This deed was acknowledged before the deputy clerk of Montgomery county court on the 10th February, and registered in the register's office of said county on the same day. The certificate of probate was as follows:

State of Tennessee, Montgomery County:

Personally appeared before me, John H. McFall, deputy clerk of the county court of Montgomery county, A. D. Wetherspoon, the within named bargainor, with whom I am personally acquainted, and acknowledged that he executed the within mortgage for the purpose therein contained. Witness my hand at office, this 10th day of February, 1844.

John H. McFall, Deputy Clerk.

This deed was not registered on, nor filed with, the title-papers of the steamboat. The boat proceeded from the port of Clarksville, where it was lying at the time of the sale and mortgage, to New Orleans, and was there attached by Yeatman & Co. for a debt due to them from other part owners of the boat, on the 13th February, 1844, by attachment issued from the commercial court of the city of New Orleans. After the boat was attached the crew and officers filed their claims [543] for wages, etc., claiming preference over the attaching debt; and subsequently, to wit, on the 13th of March, 1844, the said boat was sold by the sheriff of the commercial court, under a decree of the court settling the priority of debts, etc., and the said Yeatman & Co. became the purchasers, at $1,300, and received a deed from the sheriff. Upon the return of the boat to Nashville, on the 17th June, 1844, Irwin and Beaumont commenced their attachment suit to enforce their mortgage lien on said boat. The cause came on to be heard at the October term of the chancery court at Clarksville, before

the Hon. Terry H. Cahal, chancellor, etc., and a decree was rendered in favor of complainants, and the defendants appealed.

Bailey, for complainants.

The mortgage was registered in accordance with the laws of Tennessee, and, independently of the acts of Congress on this subject, the title clearly passed.

The object of Congress in passing the registration laws was to protect American shipping. And, so far as creditors or subsequent purchasers from the mortgagor are concerned, the registration required by the acts of Congress is unnecessary. 16 Pet. 216; Story's Conf. Laws, 270, 271.

An act of 1794 provides that the deputy clerks of the different county courts shall take the oath prescribed for their principals, and thus they are made officers of the court, recognized as such by law, and not the mere servants of their principals. The act done in this case by the deputy was a mere ministerial act which a deputy might lawfully do.

Of his appointment, being an officer of the court and his appointment a matter of record, the courts will judicially take notice, and why require of him to state that he was deputy for a particular person, when that fact is a matter of record?

In 1 Lord Raymond, 688, where a deputy sheriff appointed a [544] bailiff to do a particular act, under his own seal, it was held by the court to be good. See, also 12 Modern, 467; Cro. Eliz. 538.

A return made by a deputy sheriff in his own name, held good. 5 Lit. 198; 4 Vt. 616.

Justice Story says that although agents are required to do every act connected with their agency in the names of their principals, yet this rule does not apply to the deputies of public officers. Story on Ag. 176, in note.

G. A. Henry, for defendants.

There are two questions presented by this record on which Yeatman relies: 1st. That the acknowledgment of the trust-deed before the deputy clerk, as such, was insufficient and did not authorize its registration, and created no lien against creditors and purchasers without notice. The act of 1838, Nicholson's Supplement, page 236, is the only act of our legislature which authorizes a deputy clerk to take the acknowledgment of deeds at all, and that provides he shall do this act in the name of his principal only.

Our system of registration is one of positive law, founded on grounds of general policy created by the statutes of the state, and must be strictly followed, and all probates must be in pursuance of the statutes of the state. Garnett v. Stockton, 7 Humph. 84.

The clerk, in taking probates, is a judicial rather than a ministerial officer, and the power of the deputy to take probates of deeds is not an incident to his office as deputy, but is derived from the statute law of the state.

If at common law the deputy could take probate of a deed, he must do it in the name of his principal, and not in his own name as deputy, 3 and 4 Cruise's Dig. 90, title Office. See, also, Story on Ag. 136-138.

The principle referred to in the note 2, page 139, of Story [545] on Agency applies to cases where the office is purely ministerial merely.

2. Yeatman contends the mortgage or deed of trust from Witherspoon to Irwin should have been registered on or deposited with the title-papers of the boat, and that a mortgage of the ordinary character, registered in another state only, creates no lien on the boat. The purchaser of a vessel in a foreign port looks only to the register and other ship-papers to ascertain the title and encumbrances on the boat. 7 La. 492.

Turley, J., delivered the opinion of the court.

Two questions are presented for consideration in this case.

1. Is the deed or mortgage, under which the complainants claim, legally proven for registration? We think it is. It was acknowledged before John H. McFall, the deputy clerk of the Montgomery county court, Tennessee, on the 10th of February, 1844, who certifies thereon that it was on that day acknowledged before him, as deputy clerk of the county court of Montgomery county, by the bargainor, O. D. Wetherspoon, with whom he was personally acquainted, to have been executed by him for the purposes therein mentioned. It is argued that the certificate of acknowledgment is not good, because the same was not taken in the name of the principal, by the deputy, as is required by the 1st section of the act of 1838, ch. 150. That statute, after legalizing certain probates and acknowledgments of different kinds of conveyances theretofore taken and certified by deputy clerks, provides "that thereafter the legally-appointed deputy clerk of any county court in this state shall be authorized to take

the probate and acknowledgment of all such instruments of writing in the name of the principal, by his deputy; provided such probate and acknowledgment be taken and certified in the manner directed [546] by law." Now, how this acknowledgment of the execution of the mortgage made before the deputy clerk could have been taken in the name of the principal clerk it seems very difficult to conceive. How would the entry of the acknowledgment be endorsed? "This day personally appeared before A. B., the principal clerk of the county court of Montgomery, by his deputy, C. D." This is not so, for an appearance before the deputy is not an appearance before the principal, and cannot possibly be. Well, let us see again. "This day personally appeared before A. B., the deputy, and acknowledged to C. D., the principal." This will not do, for an acknowledgment to A. B. is not, and cannot be, an acknowledgment to C. D.; it not being a case where the acknowledgment inures upon the relation of principal and agent, there being nothing acknowledged for the benefit of the principal. Well, again: "This day personally appeared before A. B., the principal clerk, C. D., and acknowledged. Test, E. F., deputy." This is not true; the appearance was not before A. B., the principal, but E. F., the deputy; and if it had been before the principal, the principal must have certified. Then it seems to us that an acknowledgment of deed can only be taken in the name of the person before whom the acknowledgment is made, and that there is no sense in talking about taking it in the name of a person before whom it is not made. It is true the signature to the certificate might be A. B., principal clerk, by his deputy, C. D.; but cui bono? The signature by the deputy binds the principal to nothing; it is not like a contract, where the agent must bind the principal by his signature or there is no obligation on his part; the act is merely ministerial on the part of the deputy, and is good by law, independent of the statute, which makes no new rule except it be (as is contended) by implication. We will not take from the deputy clerk a ministerial power existing before the statute, by implication. That this power exists independent of the statute, see 1 Lord Raymond, [547] 688; 12 Modern, 467; 5 Lit. (Ky.) 198; 4 Vt. 616.

2. It is argued, though not pressed, that, inasmuch as the mortgage is upon a steamboat, the mere registration of it in the county of Montgomery, the boat, at the time when it was executed, being in the port at Clarksville, in Montgomery county, is

not such a registration as would defeat the sale in Louisiana, under which the defendants claim; but that the same should have been registered on, or deposited with the title-papers of the boat. We know of no law in this state requiring such proceeding. The registration of the mortgage is good in Tennessee, whatever it may be elsewhere, and the boat, being found in Tennessee, will be subjected by decree under the mortgage. The decree of the court below will be affirmed.

ARNETT, Executor, v. WEEKS et al.

NASHVILLE, DECEMBER, 1847.

Witness—Executor—On Issue of Devisavit Vel Non. Upon trial of an issue of devisavit vel non, the executor who claims no interest under the will is a competent witness, and his declarations against the validity of the will are, consequently, not admissible. [Cited in Barbee v. Mason, 5 Coldw. 116.]

Samuel Weeks, a citizen of Franklin county, Tennessee, was married to his third wife at an advanced age, and made a will a short time before he died, which took place in his eighty-eighth year. He willed his property to his last wife and two daughters. He appointed David Arnett executor of this will. An issue was made up by the children of a previous marriage, with the executor and the devisees in the will, as to the validity of the will, which was certified to the circuit court for trial. It came on at the January term, 1847, and was submitted, by the presiding judge, Marchbanks, to a jury. It was proved on the trial that the executor said "he never felt so awful as he did when the witnesses proved old man Weeks' [548] will; that it was no more the old man's will than it was his." This evidence was objected to, but it was admitted to go to the jury.

The judge, in his charge to the jury, made the following comments on the evidence, to wit, that David Arnett had no personal interest in the subject-matter of the will, but, being a party to the suit, it was competent for the defendants to give in evidence his declarations; such declarations, however, were not conclusive, but were competent to be taken into consideration by the jury, in connection with all the other evidence before them; and it was for them to determine, when taken in such connection, what