THOMPSON & BOYER *vs.* FOSTER'S ADM'R.

In judgments by confession the law expressly dispenses with the necessity of any writ, either original or judicial—Rev. Stat. ch. 116, sec. 118.

Nor does the statute require any declaration to be filed, and where one is filed, and judgment confessed upon it, it is immaterial whether it will stand the test of strict, technical principles or not.

Where a judgment is confessed for the defendants, by an attorney in fact, in pursuance of a warrant of attorney executed to him by them, and where it appears from the record that the warrant of attorney was in fact filed in court, the neglect of the clerk to endorse the filing upon it, will not prejudice the rights of the parties.

Such an omission of duty, on the part of the clerk, is cured by the statute of amendments, after judgment by confession.

Where it appears from the record that the plaintiff filed an affidavit, that the debt was justly due, and there was no fraud in the transaction, before taking a judgment by confession, it is sufficient without any statement on the face of the affidavit that it was filed before the entry of the judgment.

Writ of error to the circuit court of Crawford county.

THIS was a judgment, by confession, in the circuit court of Crawford, at the February term, 1845, before the Hon. R. C. S. BROWN, judge.

It appears from the transcript, that, on the 6th Jan'y, 1845, Josiah Foster, as adm'r of Henry S. Foster, filed in the office of the clerk of the circuit court of Crawford, a declaration, on a note, against Thompson & Boyer. He filed at the same time an affidavit that the debt was justly due, and that there was no fraud in the transaction.

Next follows, in the transcript, a power of attorney, made by Thompson & Boyer to Henry Wilcox, in which they recite the execution of the above note, state that Foster had filed a declaration upon it, against them, in the Crawford circuit court, and authorize Wilcox to confess judgment, in his favor against them, for the amount of it, at the term of the court to be held on the first Monday of February following. The power of attorney is in the usual form, and dated 1st January, 1845. Then follows the judgment, as confessed by Wilcox, in pursuance of the power of attorney, though it does not appear, from the transcript, that the clerk made any endorsement upon the power of attorney of its being filed in court. It is, however, copied in the transcript as part of the record of the cause. The judgment bears date 11th February, 1845.

The defendants below brought the case to this court by writ of error: the errors which they assign, appear in the opinion of the court.

BLACKBURN & W. WALKER, for plaintiff. In this case the following points are submitted for the adjudication of this court:

1st, If an affidavit, taken and subscribed on the 6th of January, 1845, is sufficient to prove that the debt was justly due, and that there was no fraud in the transaction previous to the entering of the confession on the 11th of Feb. 1845. See 138 *sec.* of the 116 *chap., R. S. page* 638.

2d, If the record of the court should not show that the power of attorney of the party confessing judgment was filed, and at least, if filed, should be so endorsed on it by the clerk? The power of attorney copied in the transcript forms no part of the proceed-

ings in the case: it does not appear to have been ever filed in the court below.

And 3d, If the said power of attorney delegating to Wilcox a power to confess judgment on a certain declaration then filed in the clerk's office, could authorize the confessing of a judgment on a declaration filed in the same court, 5 days afterwards. See 137 *sec., R. S. page* 638.

JOHNSON, C. J., delivered the opinion of the court.

The plaintiffs in error have raised several objections to the judgment and proceedings of the court below. They contend, *first,* that the court erred, because they were not served with process, or any notice, either actual or constructive, of the institution of the suit. *Secondly,* that there was no sufficient warrant of attorney filed, authorizing or empowering Henry Wilcox to confess the judgment: *Thirdly,* that the defendant in error did not file an affidavit in the circuit court or in the office of the clerk thereof, stating that the debt aforesaid was justly due, and that there was no fraud in the transaction previous to entering the confession; And *Fourthly,* that the declaration and the matters therein contained are not sufficient in law for the said Josiah Foster, as administrator as aforesaid, to have or maintain his aforesaid action thereof against him. We will now dispose of these objections in the order stated.

In judgments by confession the law expressly dispenses with the necessity of any writ, either original or judicial. See *Rev. St. Ark. chap.* 116, *sec.* 118. The warrant of attorney copied into the transcript is in the usual form and regularly executed by the plaintiffs. But it is insisted that it is not sufficient in law, as it does not appear to have been marked filed by the clerk of the court. It is admitted that no endorsement of the filing appears in the transcript, yet the instrument is copied into the record, and expressly authorizes and empowers the attorney to do and perform the very identical act which he is shown to have done by the record itself. The plaintiffs do not pretend to deny the execution of the instrument, but insist that it conferred no authority upon

the attorney until it was actually filed, and so endorsed by the clerk. The statute already referred to, after curing almost every conceivable defect and imperfection in judgments by confession, provides further that no judgment by confession shall be reversed or impaired for any other default or negligence of any clerk or officer of the court, or of the parties, their counsellors or attornies, by which neither party shall have been prejudiced. The fact that the clerk has copied it into the transcript, and sent it into this court, shows conclusively that it is in his possession and custody, and if so, it was his imperative duty to have marked it filed. It is clear then that it was the duty of the clerk, and he has neglected to perform it. The question now is, can it operate to the prejudice of either party in this suit? We think not. The endorsement upon the back could neither add to, nor diminish from the validity of the deed itself. It was complete and perfect as the deed of the parties, and its legality or validity as such did not depend in the slightest degree upon the endorsement by the clerk. The affidavit filed by the plaintiff below is in strict accordance with the statute, and it certainly could not be required to state upon its face that it was filed before the entry of the judgment, when it is apparent upon inspection of the record, that such was the fact. The last assignment is that the declaration is insufficient in law. We have examined the declaration, and believe it to be substantially good, though it is wholly immaterial whether it will stand the test of strict and technical principles or not. In cases where judgments are confessed, it is not essential that any declaration whatever should be filed. The statute does not require it. All that the party has to do in taking judgment is to show by his affidavit that there is no fraud or collusion between himself and the defendant. This requisite has been complied with. From a careful examination of all the points made in the cause, we are clearly of opinion that there is no error in the judgment of the circuit court.

Judgment affirmed.