KELLOGG & KENNETH *vs.* MILLER & ROGERS.

Duplicity in a plea or replication consists in its containing two distinct matters, either of which would be a bar to the action or an answer to the plea.

The bond is a pre-requisite to obtaining a writ of attachment, and where such bond, as required by the statute, is not given, the writ may be abated. *Didier vs. Gal.* 3 *Ark. R.* 501.

A valid bond must be filed before the issuance of the writ.

If the bond be executed in the name of the plaintiff by one without authority, a ratification of the act, by the plaintiff, subsequent to the issuance of the writ, will not avail.

Such a case does not come within the general rule, that a subsequent ratification by the principal, is equivalent to an original grant of authority to the agent.

A ratification before the issuance of the writ would be good.

Assumpsit by attachment—plea, that the bond was executed, in the name of the plaintiffs, by one without authority—replication, that the person had authority; and, also, that plaintiffs ratified the act subsequently to the issuance of the writ—demurrer to the replication, for duplicity—demurrer held bad, because the latter part of the replication was no answer to the plea, and might be treated as surplusage.

Writ of error to the circuit court of Pulaski county.

This was an action of assumpsit, by attachment, brought by Kellogg & Kenneth against Miller and Rogers, and determined in the Pulaski circuit court at the May term, 1844, before CLENDENIN, Judge.

The declaration charged the defendants, as owners of the steam boat, GOV. YELL, for supplies &c. furnished the boat by plaintiffs.

In order to obtain the attachment, the plaintiffs' counsel filed the following bond: (also the usual affidavit of indebtedness.)

"Due Davis Miller and Thomas Rogers, &c. six hundred dollars, signed and sealed.

The condition of the above is this, that whereas the said KELLOGG & KENNETH are about to sue out an attachment from the Pulaski circuit court against the said Miller & Rogers, owners of the steam boat Gov. Yell, now if they shall prove the debt or demand, upon a trial at law, or pay such damages as shall be adjudged against them, then this obligation to be void.

Kellogg & Kenneth, [SEAL.]
By Jno. Hagerty,
F. W. Trapnall, [SEAL.]"

Whereupon the writ was issued, and levied, by the sheriff, upon the boat, &c.

The defendants filed the following plea:

"And the said defendants by, &c. come, &c. and pray judgment of the said bond and condition, and the said writ, because they say that the said John Hagerty, by his style of Jno. Hagerty, who signed the name of the said plaintiffs, had no competent authority to bind said plaintiffs in the matter of said bond, and in respect of signing the name of said plaintiffs to said bond and condition, to wit &c.; and this the defendants are ready to verify, wherefore they pray judgment of the said bond and condition and the said writ founded thereon, and that the same may be quashed &c. The plea was verified by affidavit."

To this plea, the plaintiffs filed the following replication:

"And the said plaintiffs say that the said bond and condition, and the writ, by reason of anything by the said defendants, in their said plea above alleged, ought not to be quashed; because they say that the said John Hagerty, at the time of signing and sealing said bond, had competent authority to bind the said plaintiffs in the matter of the bond, and in respect of signing their name to said bond and condition; and further, they say, that the act of the said John Hagerty, in signing their name thereto, has been ratified by them under seal, to wit on the 24th of May, 1844, and is herewith ratified, to wit, etc., and this they are ready to verify, wherefore they pray judgment etc."

To this replication the defendants' counsel demurred, and assigned for causes: "1st, said replication is double, setting up two different issues: 2d, a subsequent ratification of an attachment bond is not sufficient to make the bond good: and 3d, an attachment bond is pre-requisite to instituting a suit by attachment, and unless the bond is then good, it cannot be made so by any subsequent act."

The court sustained the demurrer, and, the plaintiffs declining to amend their replication, rendered judgment quashing the writ of attachment &c.

The plaintiffs brought error.

RINGO & TRAPNALL for the plaintiffs.

Duplicity in pleading was only matter of special demurrer at

common law. 1 *Chitty,* 262. 1 *Saunders,* 337, *a. note* 3. The 76 *section* of the Statute on the practice at law gives the plaintiff the right specially to reply as many several matters as he may think proper with the leave of the court; and the court permitting the replication to be filed is evidence of the leave given.

A ratification by the principle of the acts of the agent is equivalent to an original grant of authority. *Conn. vs. Penn.* 1 *Peters C. C. R.* 498. *Fisher vs. Willard,* 13 *Mass. R.* 381. *Pratt vs. Putnam, id.* 363. The subsequent ratification relates back to the execution of the instrument. *Story on Agency,* 541.

This case however does not depend on the subsequent ratification of the acts of the agent. The first part of the replication expressly avers that Hagerty, the agent, had sufficient authority in law to execute the bond, which fact is admitted by the demurrer.

HEMPSTEAD & JOHNSON, contra.

The replication to the plea in abatement, raised two distinct issues: 1st, that the person, who assumed to act as agent, had competent authority at the making of the bond to sign the name and bind the plaintiff: 2d, that on the 24th day of May, 1842, the plaintiffs ratified the act of that person. The first was an answer to the plea: the second was new matter; a subsequent fact, which, according to the rules of pleading, could not be introduced into the replication, without making it double. 1 *Chitty Pl.* 260, 637.

In attachment the plaintiff must give bond, which is a pre-requisite, in order to maintain that species of action. *Rev. Stat. sec.* 5 *p.* 116. *Didier vs. Galloway,* 3 *Ark. R.* 501. No other person can do it for him. If Hagerty could become their agent in this matter, it must have been by sealed instrument; and unless both of the partners joined in it, it could not be binding, since one partner cannot, by a sealed contract or instrument, bind his co-partner. *Collyer or Part.* 257. *Harrison vs. Jackson,* 7 *Term R.* 207. Besides, Hagerty's authority must have been created by a sealed instrument, prior to his signing the name of the firm. It could not have been created afterwards. The bond must have

been good and valid at the time it was filed in the clerk's office. *Purple vs. Purple,* 5 *Pick.* 226.

Although, perhaps in some cases, a subsequent ratification may make the act of the agent good; but not as to giving an attachment bond, which must be executed under a full and explicit authority. A subsequent ratification could not make it good; because, a defendant, who has his property taken from him by a summary proceeding is entitled at the very outset, to the security which a valid bond can furnish, and it does not cure the defect that the bond was subsequently perfected. *Story on Agency, page* 241 *to* 244.

OLDHAM J., delivered the opinion of the court.

It cannot be doubted but that the first part of the plaintiff's replication would be a good answer to the defendants' plea in abatement, if pleaded separately and with technical accuracy, as it is a direct denial of the allegations contained in the plea. But the defendants insist that the replication is bad for duplicity in as much as it also avers that the plaintiffs ratified the act of signing and sealing the bond on the 24th May, 1842, which was after the return day of the writ.

Duplicity in a plea or replication consists in its containing two distinct matters, either of which would be a bar to the action or an answer to the plea. 1 *Ch. Pl.* 164. If the subsequent ratification of the act of executing the bond as avered in the replication would avoid the plea, if pleaded separately, the replication is double; otherwise, it is not. It has been held by this court that "the proceeding by attachment is a peculiar privilege granted to creditors, is in violation of the common law, and can only be authorized by express enactment, and is watched with great jealousy. The bond is a pre-requisite, and the plaintiff must comply with the condition upon which he is allowed his writ, before he can avail himself of the privileges of the act. The effect upon the suit, where there is no such bond as is required by the statute, would be to abate the writ. *Didier vs. Galloway,* 3 *Ark.* 501.

It is true that a subsequent ratification by the principal of the act of the agent is equivalent to an original grant of authority, so

far at least as the principal himself is affected by the transaction. Such a ratification would render the bond operative and binding upon the principal and he could not thereafter call in question the original want of authority upon the part of the agent or avoid the bond for that reason. The question is not, however, whether the bond was valid and binding upon the plaintiffs after its ratification by them as alleged, but whether they complied with the conditions of the statute by filing a good and sufficient bond as required by law before suing out their writ of attachment against the defendants. The statute requires, that before the writ shall issue the plaintiffs shall file a bond in double the sum sworn to with good and sufficient security. *Rev. St. ch.* 13, *sec.* 5. A compliance with this requisition exacts a bond, valid and obligatory, to be filed before the writ shall issue. If the bond was executed in the names of the plaintiffs by a person having no authority for that purpose, a ratification before the issuance of the writ would cure the omission, but no subsequent ratification would be available for that purpose. This case differs from an action upon a bond originally executed for the obligor, by a person having no authority, but which is sought to be enforced in consequence of a subsequent ratification. In such case the question is whether the instrument is then the bond of the obligor, and not whether it was binding upon him at the time of its original execution. In this case the question is not whether the bond was valid at the time of the filing of the replication, but whether the plaintiffs filed such a bond as the law requires, as a condition precedent to their right to sue out a writ of attachment against the defendants. The case stands in the same attitude as though the writ had been issued without any bond whatever having been filed, but after the return day the plaintiffs had come into court, and filed a bond conditioned as required by law. The bond never was binding upon the plaintiffs until they ratified it, and consequently there was a failure to observe the requirements of the statute in that respect.

This averment in the replication, if pleaded separately, would not constitute an avoidance of the matters contained in the plea in abatement, and does not, consequently, render the replication

double. It is merely surplusage which may be struck out without injury to the replication, and therefore it does not vitiate. Inasmuch as the replication is not double, it is not necessary to determine whether duplicity is good cause for demurrer to a replication.

The circuit court should have overruled the demurrer, wherefore we reverse the judgment, and remand the cause.