OPINION BY JUDGE KINNEY,

In District Court, Third Judicial District, March Term, A.D., 1862.

Wm. F. Dyer & Co. commenced suit, by attachment, against Gilbert & Gerrish as non-residents, and recovered judgment in the Probate Court of Great Salt Lake County.

Defendants appealed to the District Court, and, as the ten days required by statute between the day on which the judgment was rendered and the day of the sitting of this court had not intervened, the appeal was docketed for the next regular term of the District Court.

On the 3d day of April application was made for a writ of certiorari, the defendants alleging that the court below erred in overruling their motion to dismiss the writ of attachment.

Certiorari was issued, and, in pursuance thereof, the court below filed in this court a certified transcript of the proceedings in said case.

It is now contended by Gilbert & Gerrish that the court erred, *first*, in deciding that they were non-residents. *Second*, in giving force and effect to the Attachment law passed by the Legislature of last winter, and *third*, that neither *that law*, nor the attachment law of March 3d, 1852, were in force at the time these proceedings were instituted, the act of last winter not having yet taken effect as is said, and the law of 1852 having been repealed by the "Act regulating the mode of procedure in civil cases in the courts of the Territory of Utah," approved Dec. 30, 1852.

We will briefly examine these points made by counsel for Gilbert & Gerrish, in the order here stated.

First. The question whether the defendants below were non-residents, *cannot be inquired* into by this proceeding. *That* was a question of *fact* for the court to determine from the testimony adduced. Having been decided, the law presumes that it was decided correctly, and upon sufficient evidence to authorize the decision that Gilbert & Gerrish were non-residents. The writ of certiorari only brings up the record, and such matters as *are* of record can only be examined. Testimony upon a given point or issue does not belong to the record, and can only be made such by bill of exceptions, properly certified to, and signed by the judge; and, even then, before a court of error, would be justified in reversing the judgment below founded upon facts, it should appear affirmatively of record, that the testimony set out in the bill of exceptions was *all the evidence* adduced. No bill of exceptions was taken in this case, and, as to the question of *fact* found by the court, to wit: that Gilbert & Gerrish were non-residents, we cannot now inquire. This is a proceeding to test questions of law, and not matters of fact.

Second. The attachment law of last winter, under which it would appear from the record the writ of attachment was sued out, was not in force at the time. Courts are obliged to take judicial notice of the enactment of all general laws, and of the time when they take effect.

By an act approved January 19, 1854, it is provided, that each act and resolution is in force from the date of its *publication in any public manner*, unless a certain time is specified.

No time is fixed for the attachment law of last winter to take effect, and by virtue of the statute above quoted, it could not become operative until it was published in a *public manner*. As such publication was not made antecedent to the issuance of the attachment against Gilbert & Gerrish, it follows as a necessary sequence, that the attachment proceedings cannot be supported by the law of last winter. We said it appeared that the writ was issued in pursuance of this law. We judge so, from the fact, that the attachment law of March 3, 1852 does not require the plaintiff in attachment to give bond, in case the defendant is a non-resident. The law of last winter requires bond in such cases, and in the case before us, the plaintiffs entered into bond with approved sureties. In other respects the proceeding in attachment is substantially according to the attachment law of March 3, 1852. If this law is not repealed, the proceedings are valid. The bond may be treated as surplusage. At all events, the defendants in attachment cannot object on that account. *It is a principle of law well settled* that a party cannot take advantage of an error by which he is benefited.

This brings us to the *third*, and last point, made by counsel for Gilbert & Gerrish, to wit: is the law of March 3, 1852, repealed by the act regulating the mode of procedure in civil cases in the courts of Utah, approved December 30, 1852 Section 5 of the act of March 3, 1852, under which it is claimed by the plaintiffs below that the writ of attachment can be sustained, reads as follows:

"When any person or persons shall have left the Territory, or shall not be a resident of the Territory, leaving behind him debts unpaid, if such person or persons have property within the Territory it may be lawful for such creditors to sue out a writ of attachment against such absent debtor, his goods, chattels and effects, dues and demands. And all such property, dues and demands, shall be held to pay all the debts such debtor shall have left unpaid, if upon a trial a judgment shall be had against the defendant." Laws of 1855, page 147.

It will be observed that this statute is for the benefit of persons who have unpaid demands against debtors who have left the Territory, or who are non residents of the Territory, and having property within the Territory. The only cause for suing out the attachment against Gilbert & Gerrish, as appears from the record, was that they were non-residents. Upon this ground, the writ issued, and their property attached. It will be well to keep this point in view as we proceed to examine the law of Dec. 30, 1852.

This is an act to regulate proceedings in civil cases in the courts of Utah, approved some nine months after the act of March 3, 1852. This law contains the following repealing clause: *All laws or parts of laws conflicting with this act are hereby repealed.*

Section 14 provides, "when complaint is made and substantiated against a non-resident or abscondent debtor, and the plaintiff has given the requisite security, the court shall issue an order to the proper officer to take his property, or sufficient thereof to liquidate the debt and costs, and appoint three competent persons, who shall proceed forthwith, under oath, to appraise the property. Whereupon, the court shall advertise its order in one newspaper printed in this Territory and send a copy thereof to the defendant if his residence is known or presumed, and shall offer the property to the plaintiff for his acceptance, and if refused, shall proceed to sell the same at public or private sale, for money, at not less than three-fourths its appraised value, and pay the demands, and deposit any surplus into the County Treasury to the credit of the defendant, and such defendant may be heard in the matter at any period within seven years."

Section 15 provides, "upon complaint that defendant is a *transient person*, or *about* to *remove* his *property from the Territory*, or is *disposing of his property to defraud*, or *secreting himself* or *property*, and is *indebted* to the *plaintiff*, the court may issue an order requiring the proper officer to take into his custody such *portion of his property as will satisfy the demand* and costs, and hold the same subject to the order of the court." Let it be borne in mind, that these sections are a part of the code of civil procedure prescribed by the Legislature for the courts of Utah, and passed subsequent to the attachment law relied upon by plaintiff's below.

All proceedings seeking the remedy therein provided, must be commenced, and carried on, conformable to the provisions it contains. Prescribing the *remedy*, and the *manner* of enforcing it, any and all other, looking to the same end, is necessarily forbidden.

The remedy in the 14th section against a non-resident, or abscondent debtor, and in the 15th section, against a transient person, or one about to remove his property from the Territory, or disposing of it to defraud, or secreting himself or property, is as ample, and affords the creditor as perfect security as any law usually enacted for such purpose.

By referring to, and comparing the law of December 30, 1852, with that of March 3, 1852, it will be found that the 14th section of the former provides as complete a remedy for the creditor against a non-resident or abscondent debtor, as sec. 5 of the law approved some nine months prior, and no doubt was intended by the Legislature to take the place of said section. It will also be found that the remedy provided in section 1 of the old law against persons about to leave the Territory without paying their debts, is fully incorporated in section 15 of the new or subsequent law. Here then are two statutes, *each providing the remedy to be pursued by the creditor against non-resident debtors.*

The elder law is called an attachment law! the other directs how proceedings against non-resident debtors *must be conducted in the Courts of Utah.* Gilbert & Gerrish were sued by attachment as *non-residents:* upon this ground alone the affidavit was made and the writ issued. The question arises, under which act, the *old* or the *later* law, should the proceedings against them have been commenced, and carried on. Certainly both are not in force. It is a settled principle of law that a subsequent statute, comprising the same subject matter, and giving a similar remedy, repeals the antecedent one, even without a repealing clause. But the act of December 30th, 1852, contains a repealing clause, and the principle of law above stated applies with much more force. What is repealed? Most assuredly the prior statute on the same subject, giving the remedy against non-resident debtors, and the later statute providing as *ample a remedy in favor of creditors against* such debtors, take its place, but prescribes a different mode to reach the remedy.

Keeping in mind that the last law points out the course to be pursued *in all civil cases* in the Courts of Utah, when the creditor invokes the aid of the Courts to enforce the remedy given by law, and that the law clearly directs how the creditor *shall proceed* before the Court, against a non-resident debtor, the conclusion is irresistible, that such course, and no other must be adopted.

Hence we most unhesitatingly decide that the act of March 3, 1852, so far as relates to proceedings in attachment against non-resident and abscondent debtors, was repealed by the act of December 30, 1852, and all proceedings against Gilbert & Gerrish in attachment in pursuance of said attachment law, are void.

The requirements of section 14 of the law of 1852, by which the plaintiffs below should have been governed, were not observed. No order was issued by the court as therein directed. The three competent persons to appraised the property, were not appointed. No advertisement in the newspaper, was made. These are all *concurrent acts*, and essentially necessary to give validity to the proceeding.

It is said that the 14th section of the law of December 30th, 1852, can only apply to cases in which the defendant does not appear at the trial, and as he has seven years for a hearing, he waives all rights under this act by his appearance on the trial.

Appearance cannot be denied any person The basis of the action is, that he is a non-resident.

Appearance by attorney as in this case, does not charge his legal *status*. If the suit is maintained, it can only be upon the ground of non-residence, and if maintained to judgment, only by virtue of this statute, as there is no other, authorizing suit against a non-resident debtor.

If the position assumed by counsel be correct, the proceeding under this law should be dismissed if the party appeared by attorney. This cannot be. The defendant may have a hearing any time within seven years, and if not present at the trial, he may afterwards come in, and upon sufficient shewing open up the judgment, and resort to the bond for any damage sustained by wrongful issuance of the order.

It is also said that the legal question presented by the record cannot be reached by certiorari. This is a common law writ, and commands the inferior court to send up the transcript. The object is to inspect the record, and ascertain whether the alledged errors of law, have been committed. Differing from appeal in this, that on appeal the case is tried *de novo*, and on certiorari, by a review of the record.

The statute of Utah provides that the District Courts shall have a general supervision over all inferior Courts, to prevents and correct abuses where no other remedy is provided. The remedy by appeal would not reach the error of law committed by the Court in issuing the writ of attachment. as the case on appeal must be tried on its merits.

The attachment proceeding is merely auxiliary to the main action, and the former may be set aside, and the judgment remain undisturbed. Especially is this the case, when there is an appearance as in this instance. If errors in law are committed in the auxiliary proceeding, they may be reached, and corrected by certiorari, while the appeal from the judgment in the main action would not be at all affected.

Holding that all the attachment proceedings of the court below are erroneous and void, for reasons given in this opinion, they are therefore set aside, and held for nought, and an order will be issued under the seal of this court directing Robert T. Burton, sheriff of Great Salt Lake County, to release and restore to Gilbert and Gerrish the property attached as per invoice returned to the Probate Courts in the suit of William F. Dyer, Randolph H. Dyer, George M. Dyer, Robert Walker, Samuel G. Mason, and John Heth vs. Abel Gilbert and William Gerrish.

The Nevada Press.

The *Territorial Enterprise*, published at Virginia City by Goodman and McCarty, and the *Silver Age*, published at Carson City by Church, Glessner and Laird, find their way quite regularly to our table and although they are somewhat on the "seven by nine" order as to size they *are more ably edited*, manifest a more liberal spirit and are less antagonistic towards their Eastern neighbors than formerly, but towards each other they seem a little belligerently inclined and occasionally are facetious in their allusions. Both institutions are evidently devoted to the interests of that infant Territory and advocate the development of its agricultural as well as its mineral wealth. They are not, particularly the *Age*, so overawed by the august presence of Government officials, that they dare not express dissentient opinions in relation to their official acts when they are not in accordance with the principles of justice and right.

The *Age* of the 11th inst., has a long article on the reported Indian difficulties in that Territory and along the *Overland Mail* route, and *speaks commendably* of the course that has been pursued by the old Chief Winnemucca to prevent a collision between his warriors and the whites, and thinks Governor Nye would do well to move around among his people (the whites) and keep them straight and right as Winnemucca has been doing and intends hereafter to do among his people in order to prevent war between them and the pale faces The *Age* further says:

"Nine times out of ten the whites are the aggressors and cause the difficulties with the Indians. Where the Indians have rights, they should be protected, and it is the duty of the Governor to see that they receive the necessary protection.

Mr. Butterfield, sub-agent, who has been out among the Indians on the mail route, in the vicinity of Ruby Valley, came in yesterday. He reports things at the present time as being quiet in that locality.

The Bannocks had made a proposition to the Pi-Utes, some time since, to unite with them in stealing the stock from the Mail Company, but the Pi-Utes dislike and fear the Bannocks and declined to co-operate with them, preferring to keep on friendly terms with the whites. They have promised to apprise the whites of any warlike demonstration on the part of the Bannocks, if they conclude to make a descent on the overland stock.

The difficulty which the whites had with the Indians in Ruby Valley several weeks ago is represented by *him* as having been caused by the whites *transcending* their authority and taking possession of the young chief's squaw without cause or provication. When she was delivered up the troubles ceased.

A short time since there came near being further trouble in that section from a similar cause. A young man in the employ of the Mail Company took possession of one of the squaws and the Indians made repeated applications for her; but the applications were not successful. The young man insisted upon keeping the squaw, and was upheld in it by the other whites in the neighborhood, and did not give her up until he was informed by the company that he would be discharged and compelled to walk out of the country unless he done so.

When the Indians get possession of a white woman there is always a great outcry, and everybody wants to kill the whole tribe; but when white men steal their squaws no person is found to sympathize with the poor Indian, who is supposed to feel an affection for his wife similar to that felt by the white man."

These are unquestionably the facts, and the reported difficulties at other places along the Overland Mail Route are attributable to similar or other unlawful acts committed by the employees of the Mail Company and other persons passing over the road or lounging about the stations, towards the Indians, which makes them mad and occasionally they may make threats of retaliation, when a great hue and cry is made about "imminent war" and "*Indian depredations*," by interested parties, not unfrequently by government officials in order to gratify their leeching propensities.

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