adopted by general rule of the circuit and district courts," it seems to me that the modification or the suspension of a judgment lien during appeal must be held to be embraced within the scope of these general provisions, not only as a "mode of proceeding" in the suit, but as one of the means of making the judgment effectual—that is, as a part of the remedy thereon—by "execution or *otherwise*," and therefore subject to the discretionary power of the judges of the district and circuit courts in common-law actions to grant an order suspending the lien during appeal, in accordance with the state practice. If the lien had any other foundation than the laws and practice of the states themselves, it might be different; but as that is its foundation, it must be subject to such changes, modifications, and discretionary powers as are from time to time made or conferred by the laws and practice of the several states, when these are adopted by rule under sections 914 and 916.

In December, 1881, this court and the circuit court, by general rules, adopted all the provisions of the state practice and of the Code of Procedure in existence on that date, so far as the same might be applicable in common-law actions to remedies or judgments, and they thereupon became the law of this court. 19 Blatchf. 573; *Beers* v. *Haughton*, 9 Pet. 360; *Bank of U. S.* v. *Halsted*, 10 Wheat. 51, 61.

The present application is in pursuance of section 1256 of the New York Code as then existing. The relief provided by this section is of great practical benefit. Without it, judgments during appeal, though fully secured, are liable to become oppressive embarrassments in transactions in real estate. The remedy has been carefully matured in the state practice, so as to guard against abuses, by the experience of many years, and by legislative amendments. The order seems to me to be within the power of this court to grant, under the statutes and rules above referred to; and, being consented to, it should, therefore, be granted.

CLARK *v.* BLAIR.

(*Circuit Court, D. Nebraska.* January, 1883.)

1. EQUITY PRACTICE—MODIFYING INTERLOCUTORY DECREE BEFORE FINAL DECREE.

It is competent for the court, at any time before the final decree has been signed, to reconsider, modify, or set aside any of the interlocutory rulings or orders made in the course of the proceedings.

2. FORMER SUIT AS A BAR.
The judgment in a former suit based upon the same facts, or between the same parties or their privies, but to enforce a different demand and obtain another form of relief, is conclusive only as to what was in fact litigated and decided in such suit.

3. SAME—EVIDENCE AS TO POINT DETERMINED.
Where the record is silent, evidence is admissible to show what was actually litigated and determined in the former suit, and in the absence of such evidence the former adjudication is conclusive only as to questions which were necessarily tried and determined therein.

4. SAME—DIFFERENT PROOFS.
If different proofs be required to sustain the two actions, a judgment in one of them is no bar to the other.

5. EVIDENCE—TAX RECEIPTS.
Where the burden is upon a party to show payment of taxes, for which lands were legally liable, tax receipts alone are not sufficient.

In Equity. On exceptions to master's report.

This is a bill in equity brought to set aside and cancel certain tax deeds executed by the county of Cuming, through its treasurer, to the respondent. At the hearing upon the final proofs the court held that the tax sale and deed complained of were void, and that the plaintiff was entitled to the relief sought, but not until he should pay or tender to respondent such legal taxes as the latter has paid upon the land in controversy. The case was accordingly referred to the master to ascertain and report the amount of the legal taxes so paid by the respondent. It was insisted on the former hearing that a decree of the district court of the state of Nebraska, in the case of the *Nebraska Land & Imp. Co.* v. *John J. Blair and John Kloke, County Treasurer*, which decree was pleaded in bar and offered in evidence, was, in law and in equity, an adjudication of the issues between the parties in the present suit. This defense was overruled at the former hearing, and has been renewed and elaborately reargued. Besides this defense, certain questions arising upon the report of the master, and fully stated in the opinion, are now to be considered.

E. Estabrook, for complainant.

J. C. Crawford and *J. M. Woodworth*, for respondent.

MCCRARY, C. J. Although the defense of the former adjudication was raised, considered, and passed upon at the hearing upon the proofs, yet the same question may be again considered upon exceptions to the master's report. It is competent for the court, at any time before the final decree has been signed, to reconsider and modify or set aside any of the interlocutory rulings or orders made in the course of the proceeding. The final hearing in such a case as this is

when exceptions to the master's report are considered and passed upon, and if the court is then of opinion that in any of its previous orders it has committed errors, the same may be corrected. *Fourniquet* v. *Perkins*, 16 How. 82.

I have accordingly reconsidered, in the light of the thorough reargument of counsel, the question whether the former decree relied upon by respondent is a bar to the present suit.

Although the parties are not identical, I assume that in legal contemplation the parties to the present suit are bound by the former adjudication to the same extent as if they had all been parties to that proceeding. The former suit, however, was brought to obtain a different remedy and secure a different relief from that which is sought in the present case, although the relief sought in the two cases was predicated upon the same facts. The former suit was brought before the tax deed was executed, and for the purpose of enjoining its execution, while the present suit is instituted after the execution of the tax deed, for the purpose of having the same set aside as fraudulent and void. For the purposes of this question, we may say that the present is a suit based upon the same facts, or between the same parties or their privies, but to enforce a different demand and obtain another form of relief. It is, therefore, not a case in which the parties are conclusively bound by all that might have been litigated in the former suit. They are conclusively bound only by what was in fact litigated and decided. *Cromwell* v. *County of Sac*, 94 U. S. 351.

The record of the former suit shows that the bill was dismissed. It shows nothing more, but the court will undoubtedly presume that it was dismissed, because the court held upon some ground that the complainant had failed to make out a case for relief. In such a case it is no doubt competent to prove, by evidence *aliunde* the record, what questions were in fact contested and decided, if under the pleadings numerous questions might have been litigated, and the case might have turned upon any one of several questions. We are, however, in the present case left to the consideration of the pleadings and decree of dismissal alone. From these we are asked by the respondent to assume that the state court decided the taxes in question to be legal, notwithstanding the matters alleged in the bill, and that the sale for said taxes was valid, so that the purchaser would acquire a good title. All this we must assume in order to hold that the former adjudication is a bar to relief here. We should be very reluctant to assume this, since to do so would be to declare that the state court in the former suit held that a tax sale may be valid, notwithstanding

the grave irregularities, not to say frauds, alleged in the bill and shown by the proofs in this case. As we have said, where the record is silent, evidence is admissible to show what was actually litigated and determined in the former suit. In the absence of such evidence we can consider the former adjudication as conclusive upon the parties in the present suit only as to questions which are common to both suits, and which were necessarily tried and determined in the former. Such is the doctrine laid down by the supreme court of the United States in the case of *Packet Co.* v. *Sickles*, 5 Wall. 580, where Mr. Justice NELSON, speaking for the majority of the court, said:

"But even where it appears from the intrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

Upon looking at the record of the former suit, we discover that the defendants therein alleged in their answer as follows:

"And this defendant says that by reason of the premises, and because the said petition of the plaintiff shows neither the payment of said several sums of money and interest, nor contains any offer to pay the same, or any sum of money whatever, in redemption of the said lands from the said tax sale, or in discharge of the lien aforesaid of this defendant thereon, that the same is wholly insufficient to sustain the claim for relief therein prayed for by the plaintiff, or to sustain this suit or action against this defendant, or any suit whatever. And this defendant, having now answered the said petition as fully as he is advised that it is material that the same should be answered, asks to be dismissed hence, with his costs."

This paragraph of the defendant's answer in that case, taken in question with other allegations showing that defendant had paid certain legal taxes upon the lands in controversy, constituted, under the decisions of the supreme court of Nebraska, a complete defense. *Hallenbeck* v. *Hahn*, 2 Neb. 426, 427; *Railroad Co.* v. *York Co.* 7 Neb. 495; *Wood* v. *Helmer*, 10 Neb. 75; *Southard* v. *Dorrington*, Id. 122; *Hunt* v. *Easterday*, Id. 166; *Boeck* v. *Merriam*, Id. 201.

Some of these cases also hold that equity will not interfere by an injunction to restrain the execution of a tax deed which, if executed, would be void, on the ground that the remedy at law in such a case is adequate. It is apparent therefore, that the district court of Nebraska may have dismissed the bill in the former suit upon either of these grounds, without considering at all the question of the validity of the tax sale, then and now in controversy. And it is also apparent that it was not at all necessary for that court to pass upon the question of the validity of said sale. Under such circumstances we will presume

that it did not do so. We must hold that the former adjudication is no bar to this action for another reason. The law is well settled that if different proofs be required to sustain the two actions, a judgment in one of them is no bar to the other.

"If the evidence in a second suit between the same parties is sufficient to entitle plaintiff to recover, his right cannot be defeated by showing any judgment against him in any action where the evidence in the present suit could not, if offered, have altered the result." Freem. Judgm. § 259. That the evidence in this case is sufficient to entitle complainant to relief has already been decided. That it would not have availed the complainant in the former action is clear from what has already been said. The suit was to enjoin the execution of a tax deed, and the court was bound by the decisions of the supreme court of Nebraska, according to which the bill was fatally defective in not alleging an offer to pay legal taxes, and in showing a case where there was a complete and adequate remedy at law. The proof now relied upon would have been properly excluded in the former case, or, if admitted, would have availed the complainant nothing, because, in that case, there was no offer to pay or refund legal taxes. There is such an offer in the present bill, which makes the proof here both admissible and efficacious. It results from these views that the plea of former adjudication must be overruled. It remains only to consider the exceptions to the master's report, filed by the plaintiff's counsel. It appears that the only evidence presented to the master to establish the fact that respondent had paid legal taxes, were certain tax receipts. It is objected that these do not show that the taxes were legal, and it is insisted that their legality must be established by other and better evidence, showing a substantial compliance with the law. The burden is upon respondent, in order to establish his lien, to show that he has paid taxes for which the land in question was liable, and which the complainant would have been obliged to pay if respondent had not paid them.

It is therefore ordered that the case be referred to Webster, as master, to take further proof and report, on or before the first day of next term, what, if any, legal taxes against the land in controversy have been paid by respondents.

UNITED STATES v. MARTIN.

(*District Court, D. Oregon.* February 3, 1883.)

1. INDIAN COUNTRY—UMATILLA AGENCY.

Since the repeal of section 1 of the Indian intercourse act of 1834 (4 St. 129) by section 5596 of the Revised Statutes, the only Indian country in the United States, within the purview of that phrase, as used in chapter 4, title 28, of the Revised Statutes, is the tracts of country set apart by the authority of the United States for the exclusive use and occupancy of particular Indian tribes, and known as Indian reservations; and the Umatilla reservation in Oregon is such Indian country.

2. CRIMES COMMITTED BY OR AGAINST AN INDIAN.

In the exercise of its constitutional power to regulate intercourse with the Indian tribes, congress may define and punish crimes committed by white men upon the person or property of an Indian, and *vice versa*, within as well as without the limits of a state.

3. MURDER ON THE UMATILLA RESERVATION.

Congress having provided for the punishment of murder committed in the Indian country, (sections 2145, 5339, Rev. St.,) the United States circuit court for the district of Oregon has jurisdiction of the crime of murder committed on the Umatilla reservation by an Indian upon a white man; and therefore it is a violation of section 5398 of the Revised Statutes for any one to resist or obstruct the execution of an order made by a circuit court commissioner, engaged in the examination of an Indian charged before him with the commission of murder, under such circumstances.

Information for Obstructing the Service of Process.

James F. Watson, for the United States.

H. Y. Thompson, for defendant.

DEADY, D. J. On January 9, 1883, an information was filed in this court by the district attorney, charging the defendant with a violation of section 5398 of the Revised Statutes, which enacts:

"Every person who knowingly and willfully obstructs, resists, or opposes any officer of the United States in serving or attempting to serve or execute any mesne process or warrant, or any rule or order of any court of the United States, or any other legal or judicial writ or process, or assaults, beats, or wounds any officer or other person duly authorized, in serving or executing any writ, rule, order, process, or warrant, shall be imprisoned not more than 12 months, and fined not more than $300."

The information contains two counts.

The first one alleges that on December 18, 1882, in this district, two Indians, namely, Peteus and Capsawalla, being then and there under the charge of an Indian agent, were duly arrested by the marshal of this district upon a warrant duly issued by a commissioner of the circuit court for this district, upon a charge of murder committed