Opinion of the court.

In granting the new trial the District Court seems to have been governed by two reasons: *First*, because the statutes of Iowa prescribed that a second trial may be had of course in actions brought for the recovery of real estate; and *Secondly*, because the court below had the power, after the cause was presented there by a mandate from this court and the judgment of reversal entered, to hold that the cause stood on the same footing that it would have done, had the District Court entered the judgment for the defendant before the cause was brought up to this court. And in that case it is true the District Court could have granted a new trial at its discretion.

The 24th section of the Judiciary Act of 1789 governs the practice in cases brought up and reviewed in this court. It is bound to give such judgment as the court below ought to have given, and the law directs that a mandate shall be sent down to have the judgment entered as final in the lower courts, when it is for the defendant below, as here. The District Court had no power to set aside the judgment of the Supreme Court, its authority extending only to executing the mandate.*

We order that a writ of mandamus do issue to the Circuit Court of the District of Iowa, commanding it to vacate and erase the order granting a new trial in the aforesaid cause; and that a judgment be entered in conformity to the mandate of this court.

ORDER ACCORDINGLY.

ORCHARD *v.* HUGHES.
Id. *v.* Id.

1. It is no defence to a suit for debt that the debt arose from the receipt of the bills of a bank that was chartered illegally and for fraudulent purposes, and that the bills were void in law, and finally proved worthless in fact; the bills themselves having been actually current at the time the defendant received them, and they not having proved worthless in *his* hands, nor he being bound to take them back from persons to whom he had paid them away.

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* Ex parte Sibbald, 12 Peters, 492.

2. When a bond is given for appeal in a bill of foreclosure of mortgage, the condition of the bond being simply that the appellant shall pay *costs and damages*, it does not operate to stay a sale of mortgaged premises already decreed.
3. Independently of a rule of court, execution cannot issue in a decree for foreclosure of a mortgage in chancery for the balance left due after a sale of the mortgaged premises (*Noonan* v. *Lee*, 2 Black, 499, recognized); and this (by opinion, however, of but a majority of the court), applies to the Territorial Court of Nebraska, as much as to the courts of States organized under the Judiciary Act of 1789.

THESE were, in form, two causes; though in fact, two branches of one case, which were heard and disposed of together; both of them coming here on appeal from the Supreme Court of the Territory of Nebraska, to which tribunal they had been taken by appeal from the District Court for the same Territory.

A suit had been brought by Hughes, the appellee in this court, against Orchard, the appellant, to foreclose a mortgage. Orchard set up by way of answer, that a part of the consideration of the mortgage consisted of the bills of the Bank of Tekama, of the Territory of Nebraska; that this bank, though chartered by the legislature of that Territory, had never been approved of by Congress, as was necessary that it should be, in order to be *legally* chartered; that the bank was never organized; that it was a device to deceive the public; that its notes were fraudulently issued and put in circulation without authority of law, and were of no validity or value whatever. But the answer showed that the bills were current and in circulation at the time they were received by him, and did not state in any sufficient way that they had proved worthless in Orchard's hands, or that they had ever been tendered back either to or by him. On the contrary, it set forth that many of them had been paid away to his creditors; some to a certain Davis, and that they had turned out to be worthless in *his* hands. To this answer there was a demurrer; upon which the District Court gave judgment for the complainant, so deciding that the defence set up was insufficient. A sale of the premises was accordingly decreed. After this decree Orchard gave bond for an appeal to the Supreme

Court—the condition of the bond being that "he shall diligently prosecute said appeal, and shall pay all *costs and damages* that may be awarded against him." The sale went on under a master's direction, and on the coming in of his report, Orchard filed several exceptions to it. Most of these were on matters which were the subject of discretion with the court below, as that the sale had not taken place at the exact hour advertised, but an hour or more afterwards. The Supreme Court considered none of the exceptions of force, and confirmed the proceedings. Among the proceedings confirmed, was the master's report, *which showed that the mortgaged premises sold for* $519.23 *less than the mortgage debt; and the decree of the District Court, which ordered that execution should issue for this amount and interest.*

On appeals here the following among other points were raised:

1. How far the illegal character of the bank, and the final worthlessness of its notes, were a defence to the bill of foreclosure.

2. Whether the sale was properly proceeded with in the District Court after Orchard had given a bond for appeal.

3. Whether an order for execution for the *balance* ($519.23) due on the mortgage was rightly made; and whether the fact that the Supreme Court of Nebraska Territory, which made it, was so organized under the organic law, by the legislature of the Territory, and not by the Judiciary Act of 1789, that a precedent binding courts established by the act, did not apply to one like the Supreme Court of the Territory aforesaid.

Messrs. Woolworth and Kernan for the appellant, Orchard; Messrs. Redick and Carlisle, contra.

Mr. Justice NELSON delivered the opinion of the court:

1. The fatal defect in both the answer and the proofs is, that, admitting every allegation against the legality of the bank charter, and of the worthlessness of the paper issued by the bank, Orchard, the maker of the note and of the mortgage, has not been the sufferer. The bills constituting a por-

tion of the consideration of the note, he used in payment of his debts, while they were current in the community, and he has not taken them back, either, voluntarily, assuming that he might have done so, and set up the fact as a defence to the note; nor has he been subjected to the repayment of the debts he discharged by the use of them; and even were he permitted to succeed in reducing the present demand by rebating the bank bills received by him, it does not appear that he is under any obligation to account for that amount to the creditor or creditors to whom he paid them. The defendant, therefore, is not in a condition to contest the several questions raised and discussed on the argument in respect to the power of the legislature to charter the bank, or the conduct of the parties concerned in its organization, or in keeping up its credit for the purpose of imposing upon and defrauding the community by means of the circulation of its paper. The decree, therefore, of the court below was right, and should be affirmed.

2. The appeal from the decree of the court below directing a sale of the mortgaged premises, did not operate to stay the proceedings, as the bond given was simply a bond for costs. The complainants below, therefore, proceeded to execute the decree by a sale of the land, under the direction of a master, and on the coming in of his report of the sale, certain exceptions were taken to the report and overruled, and a decree of confirmation entered. An appeal was taken by the defendants below from that decree, and has been argued in connection with the appeal from the previous and principal one. This second appeal seems to be a necessity from a very early decision of this court in the case of a foreclosure of a mortgage, that the decree in favor of the complainant, adjudging a sale of the mortgaged premises, was a final decree within the meaning of the Judiciary Act authorizing an appeal. We have accordingly looked into the second record in connection with the first, and are satisfied that there is no well-grounded objection to the report of the master, and that the court below was right in confirming it.

But there is a clause in this decree that is in conflict with

a recent decision of this court. According to the report of the master, the sale of the mortgaged premises did not cover the debt, but left a balance of $519.23. The decree of confirmation orders execution to issue for this amount with interest.

It was held by this court in *Noonan* v. *Lee*,* in an appeal from a decree in a foreclosure of a mortgage in chancery by the District Court of Wisconsin, with Circuit Court powers, in which execution was directed for the balance of the debt, that this part of the decree was erroneous, inasmuch as the equity courts of the United States, under the Constitution, are governed by the practice of the Court of Chancery in England, modified by acts of Congress and the rules of the Supreme Court: and as no execution could issue according to the practice in the English Chancery for this balance, and no rule had been adopted in this court authorizing it, this part of the decree was reversed.

The decree in the present case was rendered in a territorial court, and it has been contended that this court is not a court under the Constitution, nor organized under the Judiciary Act of 1789, but by the legislature of the Territory under the organic law, and whose jurisdiction is regulated by that law, and therefore that the decision in the case of *Noonan* v. *Lee* does not apply.† Of this opinion are Messrs. Justices Swayne, Field, and myself. But a majority of the court are of opinion that the case is governed by the previous one. This part of the decree is therefore reversed, and the residue affirmed.‡

DECREE ACCORDINGLY.

* 2 Black, 499–501.

† American Insurance Co. *v.* Canter, 1 Peters, 546.

‡ By rule of court, adopted since this decision, execution may now issue. See *ante*, p. iii.