

he contracted for, and provided for in his mortgage, or that he did any act to induce complainants to believe, or that they did believe, that he intended to make any such waiver.

It is my conclusion that all of the positions taken by the complainants are untenable. A decree will be entered foreclosing both mortgages, but protecting the rights of all parties so far as may be done, and to this end directing that, if the property be not redeemed within a period of 30 days, the same shall be sold in two parcels, subject to redemption as provided in the statutes of this state in force at the date of the mortgages. Under present conditions, sufficient may be realized at the sale to pay both mortgages in full; but, if not, the complainants may bid in lots 7 and 8, and Hopkins will have the right to redeem from them after the sale, and Hopkins may bid in the other part, subject to the right of the complainants to redeem from him.

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#### HANCHETT v. HUMPHREYS.

(Circuit Court, D. Nevada. January 29, 1898.)

No. 643.

#### REPLEVIN—JUDGMENT.

In an action for claim and delivery of personal property, where the complaint demands alternative relief, and there is no finding by the jury that the property itself cannot be returned, a judgment for the plaintiff must, under Gen. St. Nev. §§ 3201, 3224, be entered in the alternative for the possession of the property or its value in case a delivery cannot be had.

Reddy, Campbell & Metson and James F. Dennis, for plaintiff.  
M. A. Murphy, for defendant.

HAWLEY, District Judge (orally). This is an action for claim and delivery of personal property, in the nature of replevin. The prayer of the complaint is:

"Wherefore the plaintiff demands judgment against the defendant, first, for the recovery of the said goods and chattels, or for the sum of \$8,000, the value thereof, in case a delivery cannot be had," etc.

The verdict of the jury is as follows:

"We, the jury, in the above-entitled cause, find for the plaintiff; and we further find the value of the property in suit to be \$6,852."

At the close of the trial, the plaintiff was given time to prepare and submit a judgment to be entered herein. The form as prepared by the plaintiff is simply for a money judgment. He is not entitled to such a judgment. It is true that upon the trial one witness testified that he had the custody of a barrel of hams, which he had stored away at his house, and upon cross-examination said that the odor of these hams was not very pleasant, and for that reason he had removed them from the house, and hung them up outdoors. There were no issues submitted to the jury upon the question as to whether or not the property involved, or any part thereof, could be returned. Under the provisions of the statutes of this state (sections 3201, 3224, Gen. St. Nev.), and the decisions of the supreme

court of the state (*Lambert v. McFarland*, 2 Nev. 58; *Carson v. Applegarth*, 6 Nev. 187), the judgment in such actions must be entered in the alternative, for the possession of the property, or its value in case a delivery cannot be had. See, also, *McCue v. Tunstead*, 66 Cal. 486, 6 Pac. 316; *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. 605; *Washburn v. Huntington*, 78 Cal. 573, 577, 21 Pac. 305; *Cooke v. Aguirre*, 86 Cal. 479, 25 Pac. 5; 20 Am. & Eng. Enc. Law, 1113, and authorities there cited. This case, in its facts, is unlike that of *Burke v. Koch*, 75 Cal. 356, 17 Pac. 228, where the court found that the defendant sold and disposed of a large portion of the property sued for, and appropriated the proceeds thereof; and, upon such finding, the court sustained a money judgment for the value of the property. Of course, it is not necessary that the judgment should be in the alternative where the goods and chattels have been previously sold by the judgment debtor. *McCarthy v. Strait* (Colo. App.) 42 Pac. 189. But no such facts are involved in this case. It will be time enough to decide the question, argued by counsel, as to whether or not plaintiff could be compelled to accept a return of the property in lieu of its value if any part of it, however small, had been lost or destroyed, when it is properly presented to the court. Upon the facts of this case, and upon the verdict of the jury, the judgment must be drawn up and entered in the alternative, as required by law.

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BUCHANAN v. DENIG et al.

(Circuit Court, W. D. Pennsylvania. February 2, 1898.)

**WILLS—CONSTRUCTION—TRUSTS.**

Testator devised lands to his son "in special trust and confidence as trustee" of his daughter, with directions to permit her to occupy and enjoy the same for her separate use, free from the debts or control of her husband; the land at her death to descend to the issue of her body; if she left no issue, then to revert to the residuary estate. The trustee was authorized, if fully satisfied of the propriety thereof, to surrender the trust, and assign the same to the beneficiary, but this was never done. *Held*, that the children of the daughter took no interest whatever in the land until her death, and only on condition of surviving her. *Wallace v. Denig*, 25 Atl. 534, 152 Pa. St. 251, and *Wilson v. Denig*, 30 Atl. 1025, 166 Pa. St. 29, followed.

This was an action of ejectment by J. W. Buchanan against C. Denig and others. At the trial a special verdict for plaintiff was returned, subject to the opinion of the court upon a question of law reserved.

Montooth Bros. & Buchanan and J. M. Garrison, for plaintiff.  
N. W. Shafer and J. A. Langfitt, for defendants.

ACHESON, Circuit Judge. Both parties claim title to the land in dispute through James S. Wallace, who acquired his title under the will of his grandfather, Barnet Gilleland, deceased. The plaintiff claims under a deed dated July 15, 1875, from the assignee in bankruptcy of James S. Wallace to B. F. Wilson, who, by deed dated July 12, 1895,