

were compelled to let them have their own way. The people in the cars became panic-stricken, and many of them crouched trembling on the floor of the cars, praying for rescue from the elements, while the drivers dodged the aerial missiles as best they could.

All over the city the damage was heavy. In Charles street the windows looked as if they had been on a battlefield. In the annexe the rain, wind and hail did more severe damage than in the city. Walls were swept down, houses unroofed, glass smashed and other damage done.

### DISPOSING OF ESTATES.

At the last session of the Territorial Supreme Court, a decision was made in the S. S. Walker estate case, and it was announced that Judge Anderson would at a future date deliver the court's opinion. Saturday afternoon, April 26th, the judge completed and filed the following as the court's ruling:

In the Supreme Court of the Territory of Utah in the matter of the estate of Samuel Sharp Walker, deceased.

Appeal from the Third District Court, Henderson, Judge.

Marshall & Royle, attorney for the executor.

W. H. Dickson, attorney for the purchaser.

P. L. Williams, *Amicus Curiae*.

ANDERSON, J.: This is an appeal from a judgment of the Third District Court refusing to confirm certain sales of real estate made by the executors of Samuel S. Walker, deceased. The deceased died September 10th, 1887, in Salt Lake County in this Territory seized of a large amount of real estate. He left a widow and six children. He left a will made in 1882, by which he devised to his widow, during her natural life, one third of all his estate, and the balance of his estate to his children. He also directed in his will that his executors pay to each of his children, on attaining the age of majority, the sum of five thousand dollars. The seventh clause of the will is as follows:—

"Seventh:—The executors of this will shall have power to sell either at public or private sale, in their discretion, any portion of my estate for the purpose of effectuating the intentions and commands hereof."

The last clause of the will is as follows:

"Lastly:—I hereby appoint my brothers, Joseph R. Walker and Matthew H. Walker (or in case of the death of either of them, the survivor) the executors of this my last will and testament; and neither of them shall be required to give bonds for the faithful performance of their duties hereunder."

The will was duly admitted to probate, and the executors named entered upon their duties, and in their capacity as such executors made various contracts for the sale of portions of the real estate for the purpose of paying off the indebtedness of the estate. These contracts were reported by the executors to

the probate court, and an order was asked confirming the sales and notices were given pursuant to the statute that a hearing would be had. Upon the hearing the probate court refused to confirm the sales because no notice of such sales had been given by the executors, and the executors appealed from that order to the district court. Upon the hearing in the district court it was shown that the several parcels of real estate had been sold by the executors at private sale without notice. The widow and some of the children testified that the sales were fair, that they were in the interest of the estate and that no one was opposing the confirmation. The court found that the executors had acted in good faith and that the sales had been fairly made, but denied the motion of the executors to confirm the sale because no notice had been given. From this order the executors have appealed to this court, and the sole question presented for our determination is, whether the executors had the authority, under the will, to make the sales without advertising, before the sales were made.

At common law the power and authority given under a will was exercised the same as any other authority, and the will was to be looked to and consulted on the question of power, the same as where a party acted under a power of attorney, and it was unnecessary to have the aid of the Probate Court in executing it; but in this Territory, while the right to dispose of property by will is not limited by statute, the statutes regulate the exercise of the right and prescribe the manner in which, in certain cases, the authority conferred by the will may be executed by the executors.

The statutes of this Territory in regard to the settlement of estates of decedents provides that, "No sale of any property of the estate of a decedent is valid unless made under an order of the Probate Court, except as otherwise provided in this chapter. All sales must be reported under oath to and be confirmed by the court before the title of the property sold passes." Compiled Laws, Sec. 4145. Other sections of the statute prescribe what the order of sale shall contain, the notice of sale that shall be given, the return of the sale to the court, the manner in which sales may be confirmed and the notice that shall be given of the application for the order of confirmation. The statute provides with much particularity the mode of procedure in all cases of sale of the real estate of decedents, where there is no will, or where the will fails to direct how sales shall be made. The exceptions to the mode of sale prescribed in the statute, referred to in section 4145, are found in sec. 4181, and are as follows:

"When property is directed by a will to be sold, or authority is given by the will to sell property, the executor may sell any property of the estate without order of the court, and at either public or private sale, and with or without notice, as the testator may have directed; but the executor must make return of such

sales, as in other cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case no title passes unless the sale is confirmed by the court."

Where a will confers upon an executor a power coupled with an interest, or the fee in the estate is devised to the executor in trust for the benefit of other persons, and the intention of the testator to take the management of his estate out of the Probate act is clear, the interest vested in the executor and the power and authority given him by the will, authorize him, after the will has been probated, to proceed to sell real estate in the manner directed by the will without obtaining an order of sale from the Probate Court, and without giving the statutory notice of such sale, and without asking the court for an order of confirmation.

Estate of Delaney	49 Cal.	76.
Payne vs. Payne	18 "	292.
Norris vs. Harris	15 "	255-6.
Larco vs. Casaneuvo	30 "	568.
Estate of Durham	49 "	455.

But a different rule prevails where the will confers upon the executor a mere naked power not coupled with any interest. In such a case, if authority to sell is given by the will, or the will directs a sale of property, an order of sale by the court is unnecessary and the executor may sell without such order, in the manner directed by the testator. But if the testator has given no directions in the will, the case comes within the provisions of the Probate act and the sale must be conducted under the orders of the Probate Court and in accordance with the statute. Estate of Durham, *supra*. In this case it is not contended that the will confers anything more than a mere power. The executors have so treated it, and have in all respects complied with the statute, except that no notice was given of the sale. But counsel for appellants contend the will authorized the executors to sell without notice if in the exercise of their discretion they determined to sell in that way; that the language of the will, authorizing them to sell "either at public or private sale, in their discretion" left the question of notice as much in their discretion, as the question as to whether the sale would be public or private.

At the time this will was made the statute of this Territory provided that an executor should give notice of the sale of property, the same as an administrator, unless there were special directions given in the will, in which case he was to be governed by such direction. The present statute provides that the sale may be either "with or without notice, as the testator may have directed," and that if "directions are given as to the mode of selling, or the particular property to be sold, such directions must be observed." We think that, as to the question of notice, there is no material difference in the two statutes. The earlier Utah statute was an exact copy of the California statute in force prior to July, 1874, and the