over the age of eighteen years, of sound mind, may, by last will, dispose of all his estate, real and personal," etc. Sec. 2648, Id.. provides that "A will, or part of a will, procured to be made by duress, menace, fraud, or undue influence, may be denied probate; and a revocation, procured by the same means, may be declared void." Sec. 2651, Id., provides how a will must be executed. It will be seen that if the allegations set out in proponent's petition are sustained by the evidence in the case, the said will must be held valid and admitted to probate even though its provisions may be unconscionable, as against the family of the deceased. The burden of proof to satisfy the mind and conscience of the court as to the truth of said allegations is on the proponent.

Delafield vs. Parish, 25, N. Y. 9.

Redfield on Wills, vol. 1, page 80 and note 2.

Japman on Wills, vol. 1, pp. 67 to 69, and note 10.

The contestant among other points raises a question as to the mental capacity of the testator at the time of making and executing the will. The legal presumption is that every man is *compos mentis*, and the *onus probandi* is on him who alleges the contrary to show that an unnatural state of mind existed in the testator.

Delafield vs. Parrish, *supra*.

There appears to be no question as to the jurisdictional facts in the case, and an examination of the evidence reveals no conflict as to the following facts: That Samuel Kramer, the alleged testator, and Alice J. Kramer, the contestant, had been married for a period of five years; that at the time of the death of deceased they had resided in Salt Lake City about three years; that they lived happily together; that Esther Kramer, mentioned in proponent's petition, is the child of deceased and his said wife; that there was no difficulty or misunderstanding between husband and wife prior to the time of his last illness; that prior to said last illness deceased appeared anxious to make provision for his family; that he did make provision for them by procuring the life insurance policies mentioned in proponent's petition, and giving said policies to his wife for a birthday present; that deceased was taken sick on or about the 14th day of October, 1890; that after he was taken sick he directed his wife to pay the premium on said policies, and seemed pleased after she had done so; that in accordance with the wish of the deceased the wife called in Dr. R. A. Hasbrouck on the 16th day of October, 1890; that Dr. Hasbrouck attended the deceased until the evening of the 3rd day of November, 1890, and saw him on the 4th day of November, and was on friendly terms with him; that deceased was suffering from typhoid fever and pneumonia, and the wife waited on and cared for him until the 4th day of November, and was willing and anxious to do so afterwards; that on the said 4th day of November Dr. I. E. Cohn was called in at the instance of proponent, and took charge of the patient; that Mrs. Kramer, the contestant, was opposed to this change of physicians, but was willing to have other physicians to consult with Dr. Hasbrouck; that proponent assisted in waiting on the patient from the 22nd day of October to the time of his death; that said Dr. I. E. Cohn was an entire stranger to deceased, was introduced to him on the said 4th day of November, as a master Mason, and on the same day said Cohn called an attorney-at-law, and told him that he wanted a will of Dr. Kramer drawn; that Mr. Lewis went to house of deceased to obtain data to draw the will; that the names of the devisees were given him by proponent; that said Dr. Cohn assisted in the preparation of said will; that the testator was held up in bed by two men to execute the same after it had been read to him by Dr. Cohn; that the wife was not present in the room at the time of said execution of said will and was not aware that a will was being made and executed and remained in ignorance of it until after her husband's death, when she was informed by Dr. Cohn; that she was at times asked to leave the sick room; that after the making of said will the deceased occasionally called for his wife and occasionally pressed the child to his breast in an affectionate manner; that at the time of the execution of said will there were present S. A. Lewis, Esq., Dr. I. E. Cohn, Sherman Kramer, Monheim Schwartz and Samnel Jacobson; that on the said 4th day of November, before the execution of said will, deceased said his wife had not treated him as a wife should, and that his child was provided for; that no provision for the future of said child had ever been made, except $5, the legacy in said will; that Monheim Schwartz and Samuel Jacobson attested said will as witnesses, in the presence of the testator; that deceased was not on intimate terms with said Schwartz, while in health, but appeared to have an aversion for him; that the testator was greatly weakened by disease at the time of the execution of said will, had much difficulty in breathing and in talking, and that death resulted in less than six days thereafter; that Mrs Kramer, the contestant, always treated deceased's relatives kindly.

The mental capacity of the testator will, in the first instance, be the basis of examination and inquiry.

That the testator, at the time of making the said will, was sound in mind and executed the same understandingly and knowingly, was testified to by Dr. I E. Cohn, S. A. Lewis, Esq., Sherman Kramer, the proponent, Monheim Schwartz and Samuel Jacobson, and while these witnesses differ somewhat in detail, yet in the main they seem to agree.

That the deceased was delirious and of unsound mind most of the time after the fifth or sixth day of his sickness and was unable to make a will knowingly and understandingly on the said 4th day of November, was testified to by Dr. R. A Hasbrouck, and I must confess that the testimony of the physician who attended the patient from the first stage of the disease watched its progress from day to day and noticed its effect upon the mind. and who had an opportunity to acquire some knowledge of the constitution of the patient. has made a deeper impression on my mind than has the testimony of the physician who was called in at a late stage of the disease, but three or four hours before said will was made, and who was an entire stranger to the patient; and the fact that he was introduced to deceased as a Master Mason does not diminish that impression, nor do I regard that circumstance a good reason for naming an entire stranger as executor in a will. He who would use as a shield that ancient and most honorable order must not forget his duties to a Master Mason's wife in time of need. Dr. Hasbrouck's testimony on this point is fully corroborated by that of Dr. E. J. Tubbes, Daniel Eyer, John Harvey, who went to see deceased at the instance of Dr. Cohn, Henry Monheim. C. Diehl, Mrs. Eyer and Mrs. Wheeler—an array of respectable and disinterested witnesses whose testimony is entitled to no little weight. The testimony of the contestants, after a most searching cross-examination, is to the same effect. This is still further strengthened by the testimony of Mrs. Kramer and Mrs. Wheeler, and which is at least partially admitted by the proponent, in regard to deceased getting out of bed and attempting to get his clothes, on the 2nd of November, and in regard to the choking of his brother on the 3rd of November, and yet, being so weak on the following day that it required two men to raise him up in bed to sign the alleged instrument. Nor is this impression weakened by the confession of Sherman Kramer, on the evening after the death of his brother. as narrated by a number of witnesses, although partially denied by himself; nor by the universally recognized fact that typhoid fever is attended with delirium. Thus far, I find myself wholly unable to reconcile my mind to the view which the evidence of the proponent would indicate, if it were uncontradicted.

I cannot help but notice how directly opposite the whole course of the married life of deceased, toward his family, was in health, to that exhibited after disease had laid hold its fatal grip.

The query forces itself upon the mind: Why this change? Why do the objects of his greatest affection now become the objects of his aversion? Why does he insist that his child is provided for and that his wife has not treated him as a wife should when. as is clearly shown by the evidence, there was no provision ever made for the child and no change in the treatment of the wife toward her husband? Can these inconsistencies and opposite characters be reconciled with the theory that the deceased was laboring under no delusion, was not delirious, that the moral perceptions and mental faculties were in their usual vigor? That on the said 4th day of November the testator's mind was clear, that he knew what he was doing and understood all that was said to him, comprehended the nature of the instrument he was executing? That his recollection was unclouded and he knew the destitute circumstances in which he was leaving that wife and dependent child, and bestowing his property upon those not dependent upon him for support?

I am unable to adopt such a theory. It is clear to my mind that the circumstances surrounding this case point unerringly to the true theory that the mental powers were partially obliterated, his intelligence dimmed, and that he was unconscious of the nature of the act he was doing and was not an accountable being.

While giving the evidence full and proper weight in the most favorable light possible to the proponent, I find much less difficulty in adopting this theory of the case than in adopting the theory of the learned counsel for the proponent that the alleged testator was in the possession of his full mental powers and signed the said will understandingly and knowingly: and the conclusion after a careful examination of the authorities and of the evidence is irresistible, that the proponent has failed to show that at the time of making and executing the said will the testator was of sound and disposing mind. but, on the contrary, it is clearly established by the evidence that his mind was so weakened by disease that he was incapable of making a valid disposition of his estate.

Were I to assume, however, that the will was formally executed, that the mind of the testator was not so impaired as to render him incapable of making a valid will, and that its provisions were understood and assented to by him, I am inclined to the opinion that the instrument would still have to be denied probate on the ground of undue influence; but as inquiry on this point would lead to unpleasant reflections, and as it is not essential to justice in this case, I shall refrain from its further consideration.

Let us now look at the scene from the light of the facts established by the evidence and the surrounding circumstances. The husband and wife lived happily together, full of hope of future prosperity. One little daughter, the fruit of the marriage; husband, anxious to provide for his family, changes his insurance policies so as to make the wife