in the most solemn form known to our laws, consecrated to the service.

But, without intruding upon your province, I shall be able to assist you materially, and as the exigencies of the case require.

The learned counsel have repeated and dwelt upon the evidence, in your hearing, so fully that I need not detain you by going over these volumes of testimony. A repetition now, in any form, of what you have heard from the 111 witnesses, would send you to your deliberations, days hence, weary and perplexed.

That I may not be performing a fruitless service, I must assist you to so arrange and classify the evidence that you can grasp and apply it. That I may not leave your minds troubled by the conflicting authorities you have heard cited, I must state the rules of law according to our present conception of them. If I can help you to a clear apprehension of the precise questions you are to consider, and of the character of the evidence, and the rules and principles applicable to each of those questions, you may be prepared to pass by a rational process, through the several stages of inquiry to a result.

That great body of testimony can only be resolved by a proper arrangement and distribution. Some of it relates to the principal question in issue, some of it to the credit due to certain witnesses, some of it to the mere question of damages.

The pleadings have been stated in your hearing, and you perceive that the charge of adultery, denied by the answer, lies at the foundation of the case.

THE BURDEN OF PROOF ON THE PLAINTIFF.

Upon the issue thus joined the burden of proof rests on the plaintiff.

You are also to understand that the evidence should be such as to carry conviction to the minds of just and prudent men—should point to the actual guilt more directly than to any other reasonable hypothesis.

The wrong charged in this complaint might be proved by direct or by circumstantial evidence. But such a charge is not usually proved, or indeed provable, by direct and positive evidence. The reason is obvious. In most instances where, under social restraints, an apparently proper intimacy degenerates into licentious acts, the evil intent and life put on the garb of innocence. To such cases, to all cases of doubt and difficulty, the law of evidence, searching and flexible, applies peculiar tests—presumptions and inferences drawn from facts and from conduct, according to the dictates of experience, so that, finally, the question of guilt or innocence may be determined by the jury in the light reflected by the surrounding circumstances.

A few simple illustrations, stated with reference to a case of this character, may enable you to understand, sufficiently for our present purpose, the difference between direct, circumstantial and presumptive evidence. If a witness should testify that he had seen the actual commission of the sexual act charged, that would be what is called direct and positive evidence. If a witness should testify that the wife and the paramour, defendant, had occupied the same room all night in such manner as tended to the conclusion that they had slept together, or if he had admitted his guilt, that would be circumstantial evidence. If, to a letter received by the defendant explicitly charging him with the adultery, he had answered, simply saying, "I am sorry, and hope to be forgiven," or if, on being thus charged in a conversation, by one having an interest in the matter, he had made no answer whatever, that, by a natural process of reasoning, would be presumptive evidence.

CIRCUMSTANTIAL EVIDENCE.

In acting on circumstantial or on presumptive evidence a jury should exercise great care, proceed cautiously, as men are wont to do when travelling in dim twilight on unfamiliar roads, and must distinguish the notion arising on suspicion or conjecture from the relation existing between the observed and the inferred facts.

Within the spirit and terms of the illustrations stated you will have occasion to consider the existing facts and the inferences that may justly be drawn from them. The inferences must have a healthy growth, spring from the facts naturally as fruit from the vine, and although you cannot trace the connection as you could feel the links of the chain which binds material objects together, yet, to satisfy the rule, you should perceive and be fully convinced that the connection does exist.

The evidence bearing on the principal question, that of adultery, may be taken up in its order, thus—First, as to the writings referred to; second, as to the oral admissions; third, as to the facts or implied admissions, and, fourth, as to the general conduct of the defendant.

I purpose briefly to call your attention to some of the more important matters falling under each of those heads. Your conclusions, however, should not be drawn from one of these classes of evidence, but from all the testimony on this branch of the case combined.

In taking up the writings referred to you will observe that the plaintiff's letter of the 26th of December, 1870, demanding that the defendant should leave his pulpit and the city was the first open act of hostility.

MRS. TILTON'S CHARGE.

The demand was withdrawn at the interview had by the parties at Mr. Moulton's house on the evening of December 30, 1870. The plaintiff claims that that was in deference to the wishes of his wife. At that time a paper written by Mrs. Tilton in respect to her relations to the defendant was held by Mr. Moulton. The copy of it which the plaintiff had was torn up after having been read or stated to the defendant, and the original was also torn up afterward by Mrs. Tilton, with her husband's assent. Proof of the contents of that paper was ruled out, because the writing was a confidential communication by the wife to the husband and because he was a party to its destruction. But that ruling was no deprivation, as no charge written by Mrs. Tilton could have been evidence against the defendant. That same evening Mr. Beecher, with the assent of the husband, called on Mrs. Tilton. He then obtained the paper commonly called "the retraction," afterward surrendered to Mr. Moulton.

THE "LETTER OF CONTRITION."

The next paper in order is that of January 1, 1871. It is in Mr. Moulton's writing, except the line at the bottom, and the signature, written by Mr. Beecher.

A question of fact in dispute as to this paper deserves your attention. Mr. Moulton says that it was dictated, sentence by sentence, and that it was read over. Mr. Beecher denies that dictation and that reading.

As to the degree of credit to which these witnesses, thus in conflict, may be relatively entitled, you are to remember that they speak of what occurred at a time of great excitement. They may not have been equally affected, but while the one was pouring out his thoughts in the agony of self-depreciation, the other may well have been moved in sympathy. The law has tender consideration for an infirmity of memory thus inherited; the witness is not expected to speak of events with clearness and certainty.

As to the subject thus spoken to by those witnesses, you should be prudent in reference to mere probabilities. You are not to indulge in speculations, or lightly consider a matter which has been affirmed because it may not seem reasonable. If you were asked to determine a question from the character, thought, or style of one well known, you would hesitate, because no one is always temperate or master of himself. Our moods and freaks of temper mar the harmony of thought and utterance. Your neighbor may usually have a staid quality of speech, which so well comports with his character that you recognize him by it. But the same man, when unduly moved, may have quite another method, and surprise you by the incongruity. You will, therefore, seek to be guided by the evidence as given. You take, first, this paper, with whatever of latent and apparent quality may tend to support or impeach it; secondly, the statements, explanations, and denials, and the fact that the paper was to be used in correcting the plaintiff's impressions.

While Mr. Beecher was speaking Mr. Moulton was writing, and with his assent. It may well be that in the absence of a deliberate course of dictation he could only note, in a hurried and imperfect manner, detached and striking expressions. You will consider whether he did so in good faith or not, and with what degree of success.

But if the circumstances were not favorable to the making of a correct report, had the writer wished to make it, neither were they favorable to the invention of what was written.

You are to consider how this paper, read often and criticised freely in your hearing, is to be regarded, with especial reference to the controverted question of fact to which I have called your attention.

THE DEFENDANT'S LETTERS.

The other papers belonging to this class of evidence, in which the defendant takes blame to himself, have been read several times, and need, in this connection, no special treatment.

As a general rule it is the province of the Court to instruct the jury as to the import of a writing in evidence. That is more especially so as to contracts. But if the writings are ambiguous, the circumstances under which they were prepared may be resorted to, and the question of intent and meaning be left to the jury. If it does not appear that words were used in a special sense, you will assume that they were used in their ordinary sense.

It appears from the papers before you, that of January 1, 1871, if you adopt it, and the defendant's letters written later, that he was conscious of having committed some wrong or offence affecting the plaintiff and his family. With that observation as to the import of the papers, I submit them to your consideration, that you may, taking them in connection with the proofs at large, determine what that wrong or offence was.

Passing to the second branch of the evidence as to the principal charge in the order stated, I call your attention to the alleged oral admissions.

The confessions of a party made deliberately against his own interest, as to facts known to and understood by him, if clearly proved, are regarded as of a high class of evidence, and deservedly so, because it is contrary to experience for men to admit what hurts them, if not true. Experience proves, rather, that men evade or deny the truth when the truth hurts.

ORAL ADMISSIONS TO BE SCRUTINIZED.

Testimony to prove oral admissions should be carefully scrutinized. The jury should be satisfied that the witness clearly understood, correctly remembered and fairly repeated what was said. But caution against relying on such testimony too implicitly should find its counterpoise in the caution against the too ready rejection of it.

It may be well to remember that many contracts made orally are enforced in courts of justice, that engagements to marry, and, with us, marriage itself, after its consummation, may be shown by proof of words spoken; that, in the absence of all possible collusion, a defendant's confession that he or she was actually guilty of the act of adultery charged will support an action for a divorce. You are also to remember that most witnesses find it difficult to recall the words heard, and, from necessity, are allowed to state the substance of a conversation. But, in some instances, greater precision may be necessary. A single word may be vital to identify the subject, and determine the effect and application of an admission.

The testimony as to actual admissions of guilt by the defendant was given by the plaintiff, and by Francis D. Moulton, and by Emma C. Moulton, his wife.

That testimony has been contradicted by the defendant.

TACIT OR IMPLIED ADMISSIONS.

The third class of evidence in the arrangement stated is as to tacit or implied admissions. In theory it appeals to a principle peculiar to presumptive evidence. It is assumed that, on suitable occasions, most men have such regard for their own interests that, on being unjustly charged or maligned, they will speak out in denial or justification. Hence it is that silence may often be regarded as confession.

The most obvious difficulty in applying this doctrine arises from the consideration that all men may not act alike in the same circumstances, and that the jury may possibly ascribe to a sense of guilt what really was due to mere surprise or to some unknown restraint. But, as commonly applied, the doctrine seems quite reasonable. Is it not consistent with our experience, a just inference, that a man asked to pay money not due will deny his indebtedness—that if unjustly accused he will assert his innocence?

It is of the essence of the presumption arising from mere silence that the accusation or charge be made in express terms. When the testimony appears to come within the rule the inference, if any, to be drawn from and the excuse for silence are to be considered by the jury.

The testimony of the plaintiff and of Mr. and Mrs. Moulton is as to two forms of admission: the one oral, previously noticed; the other tacit or implied, now under consideration.

You may not find the application of some of that testimony to one topic, and some of it to another, difficult. But some specific directions may be useful.

GREAT CAUTION ENJOINED.

In considering those portions of their testimony which relate to the defendant's actual admissions of guilt you will recall the doctrine stated under a former head, to the effect that a reasonable doubt as to a want of apprehension, or of memory, or of fairness, in the witness proving such admissions imposes upon the jury the exercise of great caution. Upon the testimony you will inquire whether the witnesses are correct in their statements or whether the defendant was misunderstood by them.

In considering the other portions of their testimony as to implied admissions, also contradicted by the defendant, you inquire whether in the conversations had by him with the witnesses his adultery with the plaintiff's wife was spoken of in clear and express terms. If you find that he was thus charged, so that, acting on the impulse common to innocent men, he would have denied it if without foundation, you will consider the inference to be drawn from, and any apparent excuse for, his silence.

The remaining class of evidence as to the principal question in issue relates to the conduct of the defendant.

TESTIMONY OF MRS. TILTON'S BROTHER AND NURSE.

In the first place, you will consider his conduct in his intercourse with Mrs. Tilton, as proved by Joseph H. Richards and Kate Carey. The circumstances stated by them are claimed to disclose an undue familiarity.

Your attention has been called to a series of events, to the reasons which may have led to certain modes of action, of acquiescence, of restraint; to occasional disturbances, apprehensions and resentments, lapsing into seasons of peace and patient endurance. The learned counsel have given you their views as to the significance of each fact and circumstance. But, in and through it all, the vital and absorbing question remains, not whether the defendant acted wisely and well, but as he would not have acted if innocent of this particular charge.

"STEP DOWN AND OUT."

I recur to the letter of the 26th of December, delivered by Mr. Bowen, in which the plaintiff said to the defendant, "I demand that, for reasons which you explicitly understand, you immediately cease from the ministry of Plymouth church, and that you quit the city of Brooklyn as a residence." The question is as to the manner in which this demand was received. The plaintiff's theory seems to have been that, as the offence charged in this complaint had been perpetrated, the reasons thus generally referred to would be apprehended. On reading the letter the defendant said, "This man is crazy." It is for you to consider whether that remark was or was not in the nature of a suggestion that there were no sensible reasons for making that demand, and whether, in conversation, or in tone and manner, the defendant betrayed any consciousness of guilt.

It may be observed, also, in reference to the interview of December 30, 1870, at Mr. Moulton's house, when the copy of the paper called "the confession" was torn up, that the oral presentation of the subject, whether in the exact terms of the written paper or not, may have been sufficient to awaken the apprehensions of the defendant, and to enable you to judge, upon the evidence, of his manner.

THE POLICY OF SILENCE.

The policy of silence or suppression, as it has been called, deserves notice with reference to the motives which led the defendant to act upon it. It was adopted upon conference, at an early stage of the trouble, initiated a system of management and led to many devices. In some aspects it may have been prudential; in other aspects unwise. But, whatever the "ugly circumstance" underlying it may have been, the parties sought peace in that way, and we have no occasion to condemn the effort. Like many artificial expedients, however, it failed. Mr. Beecher and Mr. Moulton held to that course until the committee of investigation was appointed. Mr. Tilton was not equal to such strict adherence, though it is claimed that, fitfully it may be, like one troubled in spirit, he performed some service in that cause until service became hopeless. But there were uncharitable whisperings in the public ear, their source or origin not new material, and finally actual denunciation came.

Your attention has been called to the meetings held by Mr. Beecher, Mr. Moulton and others, to the discussions had, to the papers prepared or proposed, to the neglect to make early answer to the Woodhull card as published, and to the so-called "Woodhull scandal," to the alleged disfavor with which the West charges were met and finally suppressed, to the spirit of timidity, vacillation and mystery which characterized the period. Mr. Beecher's course throughout is to be carefully scrutinized.

Some of the events claimed to have occurred under that arrangement are in dispute.

PRECAUTIONARY MEASURES.

You will inquire whether attentions were paid to Mrs. Woodhull to conciliate her at the instance or with the approbation of the defendant; whether before Miss Turner was sent off to school he favored that as a precautionary measure, or contributed money in that view; and whether he repressed the presentation and prosecution of the West charges.

If you find that Mr. Beecher did not thus act those questions will give you no trouble. But if you find that he took such part in those transactions, or any of them, then you will inquire whether he did so in the apprehension that his sexual intercourse with Mrs. Tilton might be exposed, or from some other and independent cause.

You will also inquire whether the defendant refrained from publishing a denial or refutation of the allegations contained in the paper known as the Woodhull scandal, from answering the particular inquiry made by Mrs. Bradshaw in her letter to which he sent a reply, or was held in the bondage of fear to Mrs. Morse from a sense of the guilt now charged.

You will remember, in this connection, that, as to the several acts of repression admitted by the defendant on his examination, two views, as motives of action, are put forth, the one, that having agreed with Mr. Moulton, to whose sagacity he deferred, that silence should be observed, he merely acted on that; the other, that in those instances he was governed by sympathy for the plaintiff and his family.

PLYMOUTH CHURCH COUNSELLED SILENCE.

The learned counsel sought to qualify somewhat the pressure resting upon the defendant from this policy of silence, as applied to the Woodhull scandal, by showing that the church shared that view. I thought that due to the defendant, and it appeared that at a stated meeting of the official representatives of the church, held soon after the publication, the subject was mentioned, and the sense of those present was that no action should be taken. It also appeared that such had been the opinion of the Rev. Mr. Halliday, a gentleman entitled to great consideration in his relations to the church.

HE MIGHT HAVE TRAMPLED IT OUT.

You have before you the evidence as to what was done and suffered by the defendant under the policy of silence and suppression, and the question is as to his motives. The inference you might be justified in drawing could be readily applied if the wrong he was conscious of having committed, and which he sought to conceal, was so clearly identified as to exclude the idea of any other wrong. But if there were a series of wrongs other than that now charged, as to some one or more of which he might court concealment, the application of the principle requires serious attention. If a person to whom several crimes are imputed be guilty of one offence, and, sensible of that, seeks to escape and avoid arrest, it would be a perversion if the inference of suspicion which would attach were used to eke out the circumstantial evidence, to convict him of one of the other crimes imputed. You might wish to punish a meretricious lover, who, on visiting his mistress, is caught at night hiding under a bed, but you would not, because offenders are often caught thus concealed, convict him of burglary, with intent to steal. These suggestions may indicate the care with which the real question before us should be considered. They are the more proper because, in any view of the case, you may be disposed to ask why Mr. Beecher, if innocent, should have garnered up in his heart all that pain and fear so long when he might have made proclamation to the world and trampled out the scandal as with iron hoofs.

But, gentlemen, the spirit which characterizes and chastens a judicial investigation should be distinguished from that which prevails in other forms of public inquiry and debate. Notwithstanding all the appeals you have heard to the common experience of life, you should not adopt opinions as freely, or reach conclusions as readily, as in your ordinary business affairs. When you make a bad bargain you repent and make up the loss. If we negligently commit an error here we may repent, but the wrong remains irreparable.

WAS HE CHARGED WITH ADULTERY?

The question upon all the proofs is whether the defendant understood that he was charged with the adultery and spoke, wrote, acted and suffered from and in consequence of that, or whether, laying that out of view, he understood the charges to be that he had made the improper proposals or advances and had robbed the plaintiff of a rich inheritance in the love of his wife, and whether, coupled with those charges, he believed that he had wronged the plaintiff by favoring a family separation and the dismissal by Mr. Bowen, and for those reasons spoke, wrote, acted and suffered as described.

If the wrong was the adultery, the solution of what followed is easy.

BEECHER'S ESTIMATE OF HIS WRONG DOING.

But, if the wrongs or offences, actual or imputed, were of the other character stated, then a just apprehension of the relation between the defendant's state of mind and his conduct involves several considerations. What was his personal estimate of his relation to the Church, to the world, to literature and of the reputation he should leave behind him?—what his conception of the nature and gravity of the charge of impure solicitations, of alienating a woman's love from her husband, and of the effect of such accusations, if publicly made?—what his notion of the extent to which Mr. Tilton had been injured as a journalist, in his family, and as to their means of subsistence?

The learned counsel claims that, upon the evidence, Mr. Beecher had no occasion for grief, as his advice that Mrs. Tilton should separate from her husband was not followed, or as to Mr. Bowen's action, as that was not influenced by Mr. Beecher. You will consider the evidence and that view. But did the defendant, under a misapprehension, believe that he had been instrumental in inflicting those injuries upon the plaintiff, and what, if any, effect had that upon his conduct?

I make these suggestions that you may give them such consideration as you think they deserve.

Thus much as to the principal question in issue. I have now to call your attention to a question which, as I have said, belongs exclusively to you—namely, the credit due to witnesses.

CREDIBILITY OF WITNESSES.

The statements of witnesses are to be considered and weighed with a due regard to their relation to the case, as in interest, to the bias or prejudice they may have in respect to the parties or the subject matter under investigation, to contradictions, previous inconsistent statements, to their knowledge of facts and the apparent disposition to make just and true disclosures and to their known or ascertained characters.

A good degree of respect and confidence is due to every citizen who has occasion to speak under oath in a court of justice as to his own rights or the rights of others.

But a certain degree of infirmity may and often does attach; the memory may be defective, dates and events be confounded. Witnesses, simple-minded and honest, contradict themselves and each other. On a trial some months ago I remember to have been much impressed by the testimony of a worthy man, the president of an insurance company, who, while the case was still on, came back from the city of New York to acknowledge his error and make a correction. He was as honest in his first as in his last affirmation; there was no actual perjury in either. This offence, as such, is the fruit of a wicked intent, of a wilful perversion of known facts, to work an injury to another. The legislation of this State has borne striking testimony to the virtue of our people, in allowing parties to be witnesses in their own behalf; even the prisoner on trial for a crime to testify to his innocence.

But while I believe that perjury is of less common occurrence than is imputed by the popular view, it is a crime of the gravest magnitude, is not qualified by the special circumstances leading to its perpetration. He who, upon any mere theory of honor, would be guilty of it, might, if he had the temptation, commit any other crime. It has been said, and upon high authority, that there is a distinction between a mere falsehood and a lie—the former an untrue statement, made without guile and without knowledge or its want of truth, the latter a statement of what is known to be false, and with intent to injure another. I am disposed to respect the distinction. So, too, a modern dramatist has said, "The truth always, when it is proper to be spoken;" a theory of value as applied to mere social intercourse. But good men have stood for the truth though it cost their lives. So, good men have uttered falsehoods when only their own interests were concerned. Walter Scott, as long as he thought proper, denied that he was the other of the Waverley Novels; it was his secret.

CONFLICTING TESTIMONY.

It is the duty of a jury, when witnesses contradict each other, to seek to reconcile the conflicting statements, to make allowances for honest errors, and to accept the suggestion of perjury reluctantly and from necessity. All testimony, as I have intimated, is at the risk of imperfect knowledge and imperfect memory. Witnesses, who appear equally entitled to credit, may give different accounts of the same transaction; the difference going to the substance and effect, or only to the immaterial details. In such cases you have substantial identity with circumstantial variety. Too much importance should not be attributed to such differences, to the discredit of witnesses. You may believe that they intended to tell the truth, unless the contrary is reasonably clear, and, as far as you can, seek to harmonize their testimony and discover the substantial truth.

MOULTON'S CONTRADICTIONS.

It is proper to refer, in less general terms, to one or two witnesses. Mr. Moulton seems to have intervened as the open and avowed friend of Mr. Tilton. He appears to have undertaken to mediate between the parties, to reconcile them, and, as far as possible, to prevent the specific character of their differences from obtaining publicity. He states that such was the real purpose and character of his intervention, and the defendant, in his letters and otherwise, has borne large and generous testimony to that effect. Yet Mr. Moulton on various occasions, as he himself testifies, and as other witnesses state, declared that the defendant was not guilty of the sexual intercourse which he now says had been admitted. It is for you to consider how far the inconsistency in his statements goes to discredit him. If you shall be of opinion that he intended to state the truth in his examination here, and that his previous declarations were inspired by a spirit of loyalty to the defendant's reputation, and to that of Mrs. Tilton, and from an earnest wish to divert the minds of others from the subject, in carrying out the policy of suppression adopted, you are at liberty to make such allowance for that as shall seem proper.

TILTON'S PECULIAR STATEMENTS.

As to Mr. Tilton, you will consider whether his testimony to the confession of the defendant's guilt can be reconciled with his previous declarations that his wife was innocent. The peculiar theory which he has explained to you has been sufficiently illustrated by counsel, and may be accepted as far as you think proper. If his purpose was to protect the fame of his wife and not to injure unduly or maliciously another—if in the fitful conflicts and emotions which may have possessed him—you discover a moral purpose as contrasted with a depraved spirit, you will give him the benefit of that view.

The general rule as to persons who have wilfully testified, under oath, to what is false, on any material point, is that their testimony is discredited. You are not bound to disregard it all. The witness, to be entirely discredited, must have given the false testimony with reference to a fact as to which he could not be presumed liable to mistake, and given it with knowledge that it was false. You are to apply the rule cautiously and discreetly. The maxim, wilfully false in one thing, false in all, is sound, subject to the caution stated, and to your right to decide how much credit you will give the witness.

IS MRS. MOULTON DISCREDITED?

The testimony of Emma C. Moulton is sought to be discredited on quite different ground. It is claimed that there is an inherent improbability in the supposition that a lady of her confessed refinement and delicacy would have conversed so freely with the defendant as to his adultery, or undertaken to advise him on that subject. It is also said that on the occasion when she claims to have had an important interview with the defendant he was not at her house. You will consider and apply the proof which stands in conflict and in corroboration. In the discussions that proof has been recited and illustrated so freely that I have but to commend it to your careful consideration. Did she, at or about the time stated, have that interview, and was the conversation substantially as given by her? If so, and she were in error as to the length of the interview, that mere incident would not be conclusive. The question, gentlemen, rests with you.

Two other observations may be proper. Had Mrs. Moulton got the impression that the defendant's guilt was adultery and in her conversation regarded that as the subject in his mind as it was in her mind? Do you believe that, whether mistaken or not, she testified honestly? Her manner on the stand and the opinion which the defendant himself had of her moral character and worth, as stated in his letters, commend her to your respect.

SHE IS SUSTAINING HER HUSBAND'S TESTIMONY.

I had occasion to state in your hearing my view of the suggestion that this witness testified at the will or on the instruction of the husband. I still hold to the opinion then expressed. There is no proof of artifice, or coercion, or undue influence.

The fact, however, that her husband is deeply concerned in this controversy and that her testimony, without repeating, concurs with his, is to be considered on the mere question of bias. In sustaining the plaintiff's cause she is sustaining her husband as a witness.

KATE CAREY'S IMPEACHMENT.

As to the witness Kate Carey, it is proper to state that persons called to prove an alleged bad character for truth and veracity should have the general knowledge to be fairly derived from the opinions expressed by the people who knew the witness. Such impeachment is weak in proportion as the circle in which the unfavorable opinion prevails is narrow, and as that opinion can be traced to special difficulties.

GENERAL TRACY EXONERATED.

As to another witness, Benjamin F. Tracy, two suggestions have been made—the first, that having acted as counsel for the defendant he should not have been called as a witness for him in the case; the second, that owing to an arrangement with or promise to the plaintiff he should not have acted as such counsel.

It appears from the testimony that before he accepted the relation of counsel for the defendant he consulted the other distinguished gentlemen, who had been retained and have since acted with him in the cause, as to the proper course to be pursued by him, and that he has acted on their advice. It also appears that when circumstances seemed to make his testimony necessary on the trial he submitted the question to his associate counsel, and acted on their advice in coming forward to testify. The matter, in both aspects, is thus strongly contrasted with those cases where professional men, acting upon their own notions, enter into improper relations.

The principle which restrains an attorney or counsel from acting in a litigation against one by whom he had been consulted, and from being a witness for his client on the trial of a cause is salutary and should be respected.

But in cases where the practice of acting in the double capacity of counsel and witness on the trial of a cause has been most strongly reprobated, an exception to the rule has been recognized. Had such an exception arisen in this instance? The conversation which took place between himself and others in an interview at Mr. Moulton's house, having been received in evidence, that fact may well have imposed upon him the duty of becoming a witness. If that was his view, and was the opinion of his associates, to whom he deferred, you will not readily perceive any substantial ground of criticism.

The other suggestion, as to his not being at liberty to act as counsel for the defendant, assumes that he had been in professional relations to the plaintiff, or in their confidential intercourse had learned his secrets or obtained information which gave an advantage to the party afterward represented by him.

NO RELATION OF ATTORNEY AND CLIENT.

No such relation existed; Mr. Tracy had not been the attorney or counsel or adviser of this plaintiff.

At the interview at Mr. Moulton's house the paper, dated January 1, 1871, was shown to and examined by Mr. Tracy. After that Mr. Tilton was called in, and, before proceeding further, asked Mr. Tracy whether if difficulty should arise between him and Mr. Beecher he would act for the latter, and Mr. Tracy said that he would not. Mr. Tilton then made explanations. Did he communicate to Mr. Tracy and the other persons present any matter not previously known and that would enable him to serve Mr. Beecher better than he could otherwise have done?

In testifying to conversations with the defendant, and thus what through him Mr. Tracy had known, Mr. Moulton stated to Mr. Beecher that he had told Mr. Tracy "the truth of the matter—told him the fact of the case as it was." "Theodore Tilton had denounced me for so doing, and had said to me that I had no business to reveal the guilt of Elizabeth to Mr. Tracy without his consent."

You will therefore observe that, before the promise made by Mr. Tracy, he had become possessed of the case, and that Mr. Tilton censured Mr. Moulton for making the communication.

What confidential communication could Mr. Tilton have made beyond the information which Mr. Moulton had already given? You may also consider, now that the whole case is before you, whether any fact or secret that Mr. Tilton would have withheld was transferred over as a benefit to Mr. Beecher.

Moreover, at that interview, as Mr. Tracy understood the conversation, Mr. Tilton's complaint was to a matter which could not become the subject of litigation, that is, the improper advances.

I have only to add that my own view of the propriety of the course pursued by Mr. Tracy agrees with that of his associate counsel in the cause. I think, with them, that there has been no violation of duty on his part, personal or professional.

THE QUESTION OF DAMAGES.

The third branch of the general division of evidence relates to damages.

I call your attention to it simply that you may be advised of the evidence peculiar to that subject.

The gist of the action being the loss of the society, comfort and assistance of his wife, evidence as to their condition, of love and harmony, or the contrary, becomes material. The letters of the wife, written before the alleged offence, have been read. I mention this that you may understand why the voluminous correspondence between plaintiff and his wife was received. A defendant could put in evidence the letters of the plaintiff, as he could any other declarations of his touching a matter in dispute. But neither party could use the letters of the wife, except as to the damages.

You perceive that the rule is founded in good sense. The action is not to punish the defendant, but to indemnify the plaintiff. If the wife, loving and worthy, be misled, the home, in comfort and harmony, be invaded, the loss of the plaintiff is greater than under less favorable conditions.

So, too, to reduce the amount of recovery, the defendant may show that the plaintiff was unfaithful to his marriage vows, the theory being that a husband consorting with lewd women suffers from the invasion of his own household less than he would have suffered if pure in heart and life.

TILTON'S CHARACTER.

But the impure association of the plaintiff with other women is no defence to the action. It was held, as early as 1801, by Lord Kenyon, that such conduct went to the husband's right of action; but, in 1803, Lord Alvanley ruled otherwise, and his view has since prevailed.

But, without pursuing the subject, you will perceive that we have here a large amount of evidence, including the plaintiff's alleged misconduct, at home and abroad, peculiar to this mere question of damages.

Some other features of the case remain to be noticed.

"EXTREME IMPROBABILITY."

Upon principle and authority, and also with reference to our accepted rules of social order, the intimacy and intercourse which are allowed between a married woman and her legal adviser, physician or pastor, are greater than those which would be considered proper or becoming between the woman and a man holding no such special relation. That principle applies here, and the defendant is entitled to the benefit of it. Lord Brougham, in considering a case where a clergyman was concerned, and in repelling the imputation of want of chastity, applied the term "extreme improbability." That learned jurist was given to strong expressions, and the term thus used was extravagant. What can be claimed is a mere presumption of innocence. In this connection it is proper to observe that after many years spent in religious teaching and intellectual service, the defendant comes into court with a character which, until proof given against him, offers a shield of protection. We are wont to say that all suitors are treated alike, and in most respects they are; but yet in a case of this character a man grown old in prayer and pious service has *primâ facie* the benefit of a presumption which the mere man of the world has not.

BEECHER'S MONEY CONTRIBUTIONS.

Mr. Beecher's advances of money, which, through Mr. Moulton, went to the benefit of Mr. Tilton and family, appear to have been mere acts of generosity. That money was not extorted by Mr. Moulton, nor does it appear to have been the fruit of improper artifices. Although it is of no special moment, I think it proper to say that the uncontradicted evidence shows that Mr. Tilton did not know that he was thus benefited by Mr. Beecher.

CONSPIRACY AND BLACKMAIL.

I said, early in my remarks, that, except on points of slight importance, I did not express opinions to jurors upon controverted questions of fact. I regard the conspiracy and attempts to blackmail suggested as of that character. Those are crimes punishable as such, not to be predicated on mere suspicion. We have before us no evidence which could support such charges; and if we had, the defendant's position would remain the same; if innocent, to be so declared independently of such artifices.

The nearest approach to blackmail would seem to have arisen between Mr. Tilton and Mr. Bowen, if the former did threaten to publish a card injurious to the latter unless the money were paid. But we have no interest in that question. Moreover, he did not publish the card, nor was he paid until after due course of investigation. It seems that the covenant of Mr. Bowen and Mr. Tilton in respect to compensation for service on the two papers provided for certain payments on a termination of the employment before the end of the term, and that the claims or disputes should be determined by arbitration. In the notices of dismissal put in evidence Mr. Bowen proposed that mode of adjustment. He had a legal right to stand on that. He did so, and the arbitration was had. The gentlemen acting as arbitrators, men of character and integrity, found that $7,000 was due, and that was paid. No special purpose could have led such men to that determination if the money had not, in their judgment, been actually due.

THE INVESTIGATING COMMITTEE.

It seems proper to refer to two subjects of considerable importance, which, to some extent, have been brought into the case. The one, the proceedings and report of the Investigating Committee appointed by Mr. Beecher, after the defendant's letter to Dr. Bacon had been published. That was a matter which concerned Plymouth church and the defendant as its pastor. The report of the committee, after such investigation as they thought proper, was in favor of the defendant. I have simply to remind you that that determination should not have any weight or influence with you here.

THE CONGREGATIONAL COUNCIL.

The other subject is the advisory convention held at the instance of two of our principal churches. The question presented here had no relation to the subject there involved. The West charges, which are in evidence before you, not having been prosecuted by the Plymouth church, and Mr. Tilton's name having been dropped as a member without censure, notwithstanding the charge of slandering the pastor had been made by Mr. West, the advisory counsel had cognizance of that as a question of discipline and church polity. You will readily perceive that that proceeding did not affect or assume to reach Mr. Beecher. You are not to accept the notion that those two powerful churches were pursuing Mr. Beecher. I simply call your attention to this subject that the defendant may not suffer from any misconception as to that ground on which that council was convened.

"IT RESTS WITH YOU."

Gentlemen, the case is now submitted to you. It is of a nature to call for the exercise of your highest intelligence and most scrupulous care. You will retire to your deliberations with an impartial and earnest purpose to be just to the witnesses, just to the parties; and to render a verdict which you may think of hereafter with satisfaction, as a duty honestly performed in the presence of God and of men.

THE REQUESTS TO CHARGE.

You will give me your patience a few moments, gentlemen. In respect to these requests which Mr. Abbott handed up last night and which were read in your hearing, I will make some suggestions in regard to them. Mr. Spaulding (the court officer), step down to Parker's and see if they will send dinner up to the jurors, or what can be done about it. Gentlemen, the third of these requests is:—

The defendant is not required to prove his innocence. He is to be presumed innocent until his guilt is affirmatively established by a clear preponderance of evidence.

That is so. My charge indicates that.

The jury must find for the defendant unless convinced, by the proofs, of actual adultery, beyond all reasonable doubt.

I decline to modify my charge in that respect. This matter of proving a thing actually to the satisfaction of just and prudent men, whether by direct or by circumstantial or presumptive evidence, in order to see where the proof really lies, covers whatever direction might be necessary as a rule of evidence. In a civil case, this being an action for damages, a civil action and this proposition of the charge being proved beyond a reasonable doubt, is peculiar to a criminal case, and, as our books show, it does not apply here. I don't feel it to be of any real moment.

VI. The verdict must be for the defendant, unless the result of the whole evidence on both sides be such as to produce in the deliberate conclusion of the jury a legal certainty of guilt.

Well, a reasonable certainty means a legal certainty.

VII. The charge of adultery is one that not merely involves a pecuniary claim against the defendant, but criminates the plaintiff's wife and tends to disgrace her children and threatens the marriage relation itself; and it is proper for the jury to consider these ordinary and natural consequences of a conviction, in scrutinizing the evidence and exacting adequate proof to establish an accusation involving such grave, permanent and remediless consequences to others.

Very early in the case I threw out some suggestions to you then about this being a question between plaintiff and defendant, not having regard to Mrs. Tilton as upon trial, although in a certain sense, of course, you know that the effect of the determination does lap over and reflect upon her; but still it is too remote for us to judge by.

The charge of adultery is one not only of pecuniary claim, but of grave and moral considerations affecting him. That is all I feel myself called upon to say in regard to this request.

VIII. If, on weighing the evidence on both sides, there remains in the mind of the jury doubt or perplexity as to the actual adultery they must find for the defendant.

Well, if that means, after considering and hearing all the testimony, you are as prudent men convinced in heart and mind that the adultery was committed you should find for the plaintiff.

IX. The higher the crime or the graver the wrong sought to be established the more stringently the rules of evidence should be enforced, and a charge of criminal conversation is not to be fixed upon a person but by the highest evidence.

That is correct, gentlemen. We are not dealing with evidence here as if it were an action on a promissory note, or if it were an action for slander, or of one gentleman calling another a liar.

X. If there were any evidence in the case pointing to adultery at any specific time and place the defendant might have some means of supporting by other witnesses his own testimony to his innocence; but upon the evidence adduced by the plaintiff the defendant is the only witness who has any actual knowledge of what the relations between himself and Mrs. Tilton were, and is the only person whom the law permits to speak as a witness as to those relations.

Doubtless that is so.

XI. Circumstantial evidence, to establish guilt, must be such as to exclude to a moral certainty every hypothesis but that of guilt; in other words, the facts proved must not only all be consistent with and point to guilt, but they must be inconsistent with innocence.

That is so, gentlemen, of course.

XIII. The law does not dispense with the direct proof of the sexual act and accept circumstantial evidence of intimacy in lieu thereof, unless there is actual proof of conduct of the parties deviating from open and honorable adherence to the proprieties of chaste society, and showing a lustful disposition and purpose on their part, and the opportunity by their resort to seclusion and security.

No evidence of mere intimacy of course would not be substituted in place of actual evidence. I don't see there is any substantial value in that part of the request commencing "unless there is actual proof," because I indicated in the general charge an offence of this character is not provable by direct evidence, and may be proved in any other way that will be satisfactory to the minds and the consciences of the jury.

XIV. The circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion of actual guilt. For it is not to lead a harsh and intemperate judgment, moving upon appearances that are equally capable of two interpretations; neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man.

I add, "a reasonable and prudent man." Well, "to the conclusion of guilt," because guilt is actual guilt, and when you have a question of guilt or fact of guilt, it is not well to load it down with adjectives or expletives. It is a question of guilt or a question of innocence which you are to determine. It is not to be a matter of artificial reasoning, and is not to lead to a harsh or intemperate judgment. I have tried to illustrate that, and it does not require me to say anything in addition to what I have said in the general charge.

This proposition is very clearly worded, but somehow there is a special property in it which I do not approve. The mere proof of an opportunity to commit adultery is no proof whatever of guilt, but you don't need to be told that, for there must be evidence of other circumstances coupled with it at the same time.

XVIII. When, in addition to the open relation of intimate friendship, there is superadded the pastoral relation, an intendment against the chastity or propriety of that intercourse can be drawn, except upon proof of actual lustful deviations from the intercourse of society appropriate to such relations.

I explained to you the theory of that.

XIX. Where a party has destroyed a paper material to his case and the contents of the paper are disputed, the presumption arises that, if it had been produced, it would have been against his interest, or in some essential particular unfavorable to his representation of its contents.

XXI. In considering whether the testimony of the alleged verbal admissions is cor