CHAPTER XXXII.

Judge Dewey's Charge to the Jury.

THE chief justice addressed the prisoner as follows: Lizzie Andrew Borden—Although you have now been fully heard by counsel, it is your privilege to add any word which you may desire to say in person to the jury. You now have that opportunity.

The prisoner arose and responded: "I am innocent. I leave it to my counsel to speak for me." The charge to the jury was then delivered by Mr. Justice Dewey, as follows:

Mr. Foreman and Gentlemen of the Jury—You have listened with attention to the evidence in this case, and to the arguments of the defendant's counsel and of the district attorney. It now remains for me, acting in behalf of the court, to give you such aid towards a proper performance of your duty as I may be able to give within the limits for judicial action prescribed by law; and, to prevent any erroneous impression, it may be well for me to bring to your attention, at the outset, that it is provided by a statute of this state that the court shall not charge juries with respect to matters of fact, but may state the testimony and the law.

I understand the government to concede that defendants' character has been good: that it has not been merely a negative and natural one that nobody had heard anything against, but one of positive, of active benevolence in religious and charitable work. The question is whether the defendant, being such as she was, did the acts charged upon her. You are not inquiring into the action of some imaginary being, but into the actions of a real person, the defendant, with her character, with her habits, with her education, with her ways of life, as they have been disclosed in the case. Judging of this subject as reasonable men, you have the right to take into consideration her character such as is admitted or apparent. In some cases it may not be esteemed of much importance. In other cases it may raise a reasonable doubt of a defendant's guilt even in the face of strongly criminating circumstances. What shall be its

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effect here rests in your reasonable discretion. I understand the counsel for the government to claim that defendant had towards her stepmother a strong feeling of illwill, nearly if not quite amounting to hatred. And Mrs. Gifford's testimony as to a conversation with defendant in the early spring of 1892 is relied upon largely as a basis for that claim, supplemented by whatever evidence there is as to defendant's conduct towards her stepmother. Now, gentlemen, in judging wisely of a case you need to keep all parts of it in their natural and proper proportion, and not put on any particular piece of evidence a greater weight than it will reasonably bear, and not to magnify or intensify or depreciate and belittle any piece of evidence to meet an emergency. I shall say something before I have done on the caution to be used in considering testimony as to conversations. But take Mrs. Gifford's just as she gave it, and consider whether or not it will fairly amount to the significance attached to it, remembering that it is the language of a young woman and not of a philosopher or a jurist.

What, according to common observation, is the habit of young women in the use of language? Is it not rather that of intense expression, whether that of admiration or dislike? Consider whether or not they do not often use words which, strictly taken, would go far beyond their real meaning. What you wish, of course, is a true conception of the state of the mind of the defendant towards her stepmother, not years ago, but later and nearer the time of the homicide, and to get such a true conception you must not separate Mrs. Gifford's testimony from all the rest, but consider also the evidence as to how they lived in the family, whether as Mrs. Raymond, I believe, said, they sewed together on each other's dresses, whether they went to church together, sat together, returned together, in a word, the general tenor of their life. You will particularly recall the testimony of Bridget Sullivan and of defendant's sister Emma bearing on the same subject. Weigh carefully all the testimony on the subject, in connection with the suggestions of counsel, and then judge whether or not there is clearly proved such a permanent state of mind on the part of defendant toward her stepmother as to justify you in drawing against her upon that ground inferences unfavorable to her innocence. The law requires that before a defendant can be found guilty upon either count in the indictment every material allegation in it shall be proved beyond a reasonable doubt.

Now you observe, gentlemen, that the government submits this case to you upon circumstantial evidence. No witness testifies to

seeing the defendant in the act of doing the crime charged, but the government seeks to establish by proof a body of facts and circumstances from which you are asked to infer or conclude that the defendant killed Mr. and Mrs. Borden. This is a legal and not unusual way of proving a criminal case, and it is clearly competent for a jury to find a person guilty of murder upon circumstantial evidence alone. Then, after you have determined what specific facts are proved, you have remaining the important duty of deciding whether or not you are justified in drawing, and will draw, from those facts the conclusion of guilt. Here, therefore, is a two-fold liability to error, first, in deciding upon the evidence what facts are proved, and second, in deciding what inference or conclusion shall be drawn from the facts. This is often the critical or turning point in a case resting on circumstantial evidence. The law warrants you in acting firmly and with confidence on such evidence, but does require you to exercise a deliberate and sober judgment, and use great caution not to form a hasty or erroneous conclusion. You are allowed to deal with this matter with your minds untrammeled by any artificial or arbitrary rule of law. As a great judge has said: "The common law appeals to the plain dictates of common experience and sound judgment."

In other words, failure to prove a fact essential to the conclusion of guilt, and without which that conclusion would not be reached, is fatal to the government's case, but failure to prove a helpful but not an essential fact may not be fatal. Take an essential fact. All would admit that the necessity of establishing the presence of the defendant in the house, when, for instance, her father was killed, is a necessary fact. The government could not expect that you would find her guilty of the murder of her father by her own hand unless you are satisfied that she was where he was when he was murdered. And if the evidence left you in reasonable doubt as to that fact, so vital, so absolutely essential, the government must fail of its case, whatever may be the force and significance of other facts, that is, so far as it is claimed that she did the murder with her own hands. The question of the relation of this handleless hatchet to the murder. It may have an important bearing upon the case, upon your judgment of the relations of the defendant to these crimes, whether the crime was done by that particular hatchet or not, but it cannot be said, and is not claimed by the government, that it bears the same essential and necessary relation to the case that the matter of her presence in the house does. It is not claimed by the government but what that

killing might have been done with some other instrument. I understand the government to claim substantially that the alleged fact that the defendant made a false statement in regard to her stepmother's having received a note or letter that morning bears an essential relation to the case, bears the relation of an essential fact, not merely the relation of a useful fact. And so the counsel, in his opening, referring to that matter, charged deliberately upon the defendant that she had told a falsehood in regard to that note. In other words, that she had made statements about it which she knew at the time of making them were untrue, and the learned district attorney, in his closing argument, adopts and reaffirms that charge against the defendant. Now what are the grounds on which the government claims that that charge is false, knowingly false? There are three, as I understand them. First, that the one who wrote it has not been found: second, that the party who brought it has not been found, and third, that no letter has been found. And substantially, if I understand the position correctly, upon those three grounds you are asked to find that an essential fact, a deliberate falsehood on the part of the defendant, has been established. Now what answer or reply is made to this charge? First, that the defendant had time to think of it; she was not put in a position upon the evidence where she was compelled to make that statement without an opportunity for reflection. If as the government claims, she had killed her stepmother some little time before, she had a period in which she could turn over the matter in her mind. She must naturally anticipate, if she knew the facts, that the question at no remote period would be asked her where Mrs. Borden was, or if she knew where she was. She might reasonably and naturally expect that that question would arise. Again, it would be urged in her behalf, what motive had she to invent a story like this? What motive? Would it not have answered every purpose to have her say, and would it not have been more natural for her to say simply that her stepmother had gone out on an errand or to make a call? What motive had she to take upon herself the responsibility of giving utterance to this distinct and independent fact of a letter or note received, with which she might be confronted and which she might afterwards find it difficult to explain, if she knew that no such thing was true? Was it a natural thing to say, situated as they were, living as they were, living as they did, taking the general tenor of their ordinary life, was it a natural thing for her to invent? But it is said no letter was found. Suppose you look at the case for a moment from her standpoint, contemplate the possibility

of there being another assassin than herself, might it not be a part of the plan or scheme of such a person by such a document or paper to withdraw Mrs. Borden from the house? If he afterward came in there, came upon her, killed her, might he not have found the letter or note with her, if there was one already in the room. Might he not have a reasonable and natural wish to remove that as one possible link in tracing himself? Taking the suggestions on the one side and the other, judging the matter fairly, not assuming beforehand that the defendant is guilty does the evidence satisfy you as reasonable men, beyond any reasonable doubt, that these statements of the defendant in regard to that note must necessarily be false.

However numerous may be the facts in the government's process of proof tending to show defendant's guilt, yet if there is a fact established—whether in that line of proof or outside of it—which cannot reasonably be reconciled with her guilt, then guilt cannot be said to be established. In order to warrant a conviction on circumstantial evidence it is not necessary for the government to show that by no possibility was it in the power of any other person than the defendant to commit the crimes; but the evidence must be such as to produce a conviction amounting to a reasonable and moral certainty that the defendant and no one else did commit them. The government claims that you should be satisfied upon the evidence that the defendant was so situated that she had an opportunity to perpetrate both the crimes charged upon her. Whether this claim is sustained is for your judgment. By itself alone, the fact, if shown, that the defendant had the opportunity to commit the crimes, would not justify a conviction; but this fact, if established, becomes a matter for your consideration in connection with the other evidence. When was Mrs. Borden killed? At what time was Mr. Borden killed? Did the same person kill both of them? Was defendant in the house when Mrs. Borden was killed? Was she in the house when Mr. Borden was killed? Gentlemen, something has been said to you by counsel as to defendant's not testifying. I must speak to you on this subject. The constitution of our State, in its bill of rights, provides that: "No subject shall be compelled to secure or furnsih evidence against himself." By the common law persons on trial for crime have no right to testify in their own defense. We have now a statute in these words: "In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offences, a person so charged shall, at his own request, but not otherwise, be deemed a competent witness; and his neglect

or refusal to testify shall not create any presumption against him." You will notice that guarded language of the statute. It recognizes and affirms the common law rule that the defendant in a criminal prosecution is an incompetent witness for himself, but it provides that on one condition only, namely, his own request, he shall be deemed competent. Till that request is made he remains incompetent. In this case the defendant has made no such request, and she stands before you, therefore, as a witness incompetent, and it is clearly your duty to consider this case and form your judgment upon it as if the defendant had no right whatever to testify. The Superior Court, speaking of a defendant's right and protection under the constitution and statutes, uses these words: "Nor can any inference be drawn against him from his failure to testify." Therefore I say to you, and I mean all that my words express, any argument, any implication, any suggestion, any consideration in your minds unfavorable to defendant, based on her failure to testify, is unwarranted in law. Nor is defendant called upon to offer any explanation of her neglect to testify. If she were required to explain, others might think the explanation insufficient. Then she would lose the protection of the statute. It is a matter which the law submits to her own discretion, and to that alone. The defendant may say: "I have already told to the officers all that I know about this case, and my statements have been put in evidence. Whatever is mysterious to others is also a mystery to me. I have no knowledge more than others have. I have never professed to be able to explain how or by whom these homicides were committed." There is another reason why defendant might not wish to testify. Now she is sacredly guarded by the law from all unfavorable inferences drawn from her silence. If she testifies she becomes a witness, with less than the privileges of an ordinary witness. She is subject to cross-examination. She may be asked questions that are legally competent, which she is not able to answer, or she may answer questions truly, and yet it may be argued against her that her answers were untrue, and her neglect to answer perverse. Being a party she is exposed to peculiar danger of having her conduct on the stand and her testimony severely scrutinized and perhaps misjudged, of having her evidence claimed to be of little weight, if favorable to herself, and of great weight so far as any part of it shall admit of an adverse construction. She is left free, therefore, to avoid such risks.

If, proceeding with due caution, and observant of the principles which have been stated, you are convinced beyond reasonable doubt

of the defendant's guilt, it will be your plain duty to declare that conviction by your verdict. If the evidence falls short of producing such conviction in your mind, although it may raise a suspicion of guilt, or even a strong probability of guilt, it would be your plain duty to return a verdict of not guilty. If not legally proved to be guilty, the defendant is entitled to a verdict of not guilty. Then take the matter of Mrs. Reagan's testimony. It is suggested that there has been no denial of that testimony, or, rather, that the persons who busied themselves about getting the certificate from Mrs. Reagan had no denial of it. Mr. Knowlton; "Not by me, sir. I admit it." Judge Dewey; "Admit what?" Mr. Knowlton; "That she did deny it." Judge Dewey; "Mrs. Reagan?" Mr. Knowlton; "Yes, sir." Judge Dewey; "O, no doubt about that. It is not claimed that Mrs. Reagan does not deny it. But I say it is suggested that the parties who represented the defendant in the matter, and who were seeking to get a certificate from Mrs. Reagan were proceeding without having received any authority to get the certificate, and without having had any assurance from anybody that the statement was false and one that ought to be denied. You have heard the statement of Miss Emma about it here; and it would be for you to judge as reasonable men, whether such men as Mr. Holmes and the clergymen and the other parties who were interesting themselves in that matter, started off attempting to get a certificate from Mrs. Reagan contradicting that report without first having taken any steps to satisfy themselves that it was a report that ought to be contradicted. Gentlemen, I know not what views you may take of the case, but it is the gravest importance that it should be decided. If decided at all, it must be decided by a jury. I know of no reason to expect that any other jury could be supplied with more evidence or be better assisted by the efforts of counsel. The case on both sides has been conducted by counsel with great fairness, industry and ability. The law requires that the jury shall be unanimous in their verdict, and it is their duty to agree if they can conscientiously do so. And now, gentlemen, the case is committed into your hands, the tragedy which has given to this investigation such widespread interest and deeply excited public attention and feeling. The press has ministered to this excitement by publishing, without moderation, rumors and reports of all kinds. This makes it difficult to secure a trial free from prejudice. You have doubtless read, previous to the trial, more or less of the accounts and discussions in the newspapers. You must guard, so far as possible, against all impressions derived from having

read in the newspapers accounts relating to the question you have now to decide. You cannot, consistently with your duty, go into discussion of those accounts in any way. Use evidence only, for the discovery of the facts, and any other course would be contrary to your duty. And, entering on your deliberations with no pride of opinion, with impartial and thoughtful minds, seeking only for the truth, you will lift the case above the range of passion and prejudice and excited feeling, into the clear atmosphere of reason and law. If you shall be able to do this, we can hope that, in some high sense, this trial may be adopted into the order of providence, and may express in its results somewhat of that justice with which God governs the world."

The jury retired to its room and remained one hour and ten minutes.

The jurors having answered to their names, the clerk said: Lizzie Andrew Borden, stand up.

The prisoner arose.

The clerk—Gentlemen of the jury, have you agreed upon your verdict?

The foreman—We have.

The clerk—Please return the papers to the court.

The officer returned the papers to the clerk.

The clerk—Lizzie Andrew Borden, hold up your right hand. Mr. Foreman, look upon the prisoner; prisoner, look upon the foreman. What say you, Mr. Foreman.

The foreman (interrupting)—NOT GUILTY.

There was an outburst of applause from the spectators which was at once checked by the officers. The prisoner dropped into her seat.

The clerk—Gentlemen of the jury, you upon your oaths do say that Lizzie Andrew Borden, the prisoner at the bar, is not guilty?

Several jurors—We do.

The clerk—So say you, Mr. Foreman; so say all of you, gentlemen?

The foreman—We do.

Mr. Knowlton—May it please the court. There are pending two indictments against the same defendant, one charging the murder which is charged in this indictment on the first count, and the other charging the murder which is charged in this indictment on the second count. An entry should be made in those cases of *nol prossed* by reason of the verdict in this case. Now, congratulat-

ing the defendant and the counsel for the defendant on the result of the trial, I believe the duties are concluded.

Judge Mason—The jurors may be seated.

The clerk—Lizzie Andrew Borden. (The prisoner arose.) The court order that you be discharged of this indictment and go thereof without delay.

Judge Mason—The court desires to express to the jury its appreciation of their faithful service, and recognize its performance under conditions imposing great hardship upon the members of the jury. I trust it is not necessary to assure them that it is only in deference to the usages of the law and to what is deemed essential for the safety of rights that they have been subjected to the inconvenience in question. I trust that they will have the satisfaction of having faithfully performed an important duty as their compensation for this inconvenience. You are now discharged from any further attendance.

Thus ended, on the thirteenth day, the famous trial of Lizzie Andrew Borden, and she returned guiltless to her friends and home in Fall River.

THE END.