

NEARING THE END!

The Celebrated Umberger Murder Case will be Given to the Jury To-Day.

THE TESTIMONY ALL IN!

They Can't Choke off "Your Uncle John."

The Prisoners Growing More Nervous and the Intense Interest Increasing.

HON. JOHN CESSNA WILL CLOSE THE COMMONWEALTH'S CASE.

F. J. KOOSER, ESQ., MAKES THE OPENING ARGUMENT FOR THE PROSECUTION.

AND Wm. H. KOONTZ, ESQ., FOR THE DEFENSE.

The sixth day of the trial of Joseph and David Nicely for the murder of Herman Umberger closed with one speech from each side yet to be made.

General Coffroth will sum up for the defense this morning and will be followed by Hon. John Cessna on part of the Commonwealth. It is more than probable that all of the morning's session will be consumed by counsel in summing up and that Judge Baer will deliver his charge and give the case to the jury this afternoon.

The day was a trying one on the prisoners and when, at the close of court at 9:15 last evening, they were taken back to prison by Sheriff McMillen, they looked haggard, anxious and nervous. The intense interest taken by the general public in the case has not abated, but has rather increased each day as the end draws near.

Mr. Kooser opened the case this afternoon on part of the prosecution in a speech of an hour and forty minutes in length. His arguments were clear, forcible, convincing and logical. We give below a very brief synopsis of what he said.

He was followed by Mr. Koontz, who, in the two hours and thirty-seven minutes that he spoke, made a strong and eloquent plea for the lives of his clients.

We regret that we are unable to give both speeches in full.

MORNING SESSION.

Henry Rauch, recalled—(The court ruled that testimony in regard to the survey of land at Sand Flat could be given by the Commonwealth made a survey of the land at the hemlock, shown me by the Vaneers day before yesterday; the measurement was made by myself and N. B. Critchfield; the two Vaneers were along; it was seven and three tenths rods from the butt of the log to the center of road, at point No. 2, on the draft, the eastern line is 73 rods and western line ten and four-tenths rods; the length of the flat is about 30 to 117 yards; the elevation of the pike is 30 feet. Mr. Critchfield walked on the pike and I stood at the butt of the tree at point No. 1; could see him as far as the waist when he was in the center of the wood and down below the hips when he came nearer; as he walked along the view was obscured by the foliage; at point No. 2, I could see his head and shoulders at the center of the pike and down to the lower part of his waist when he came nearer to me at the edge; could see him moving along to the point No. 3, where I could see him about the same as at the point marked No. 2.

Cross-examination—The butt is on the north side of the road.

N. B. Critchfield—Was along with Spire Rauch and helped to make the measurements; Mr. Rauch walked along the road while I stood at the butt of the hemlock tree. [The witness then testified practically the same as Mr. Rauch.]

Cross-examination—The trees between the point where I stood on the pike are large; did not notice any spruce or hemlock; saw some birch and bass; stepped the pike; it was eight paces wide; [The survey was then offered in evidence.]

Thos. Sinclair—Was working on the 27th of February for Mr. Vaneer; I was where they were sawing the trees; left them there; could see any person passing along the pike.

Noah Serena—Know David Nicely; worked with him February 23 at Mr. Kimmel's sawing wood; was sawing with a circular saw; he was handling wood all day, putting it up on the table; the wood was being cut for stove wood.

Cross-examination—Some pieces were six or eight inches through and four to six feet long; others were smaller.

John Rauch—There was no wire or steel rim on the hat when I got it; it is a little more worn than when I got it on account of the number of times it has been handled.

Cross-examination—Took the hat from the wall myself; Lorenzo brought in the lamp and I took the hat down; the lamp was taken out of the setting room into the kitchen.

Cross-examination—Don't know whether he had any other business; there is a mail from Ligonier; saw him again at Ligonier between that and February.

THE TESTIMONY ALL IN.

As Daniel Peterson left the stand counsel for defense said their case was made up and they would rest. Judge Baer said that in arguing the case to the jury counsel would not be limited as to time.

Two officers were called and sworn; the jury was given into their keeping and court adjourned till 1:30 p. m.

the day of the arrest; took all the pass books; there was no money in any of them when I searched them.

Reins Shaffer—Was not present when the hat was got; was present when the pocket-book was got; was present when the pass books were got; Martin O'Connor found them; we all examined them; was no money in any of them; examined the tracks to and from Umberger's; examined a dozen or more tracks closely; there were nails around the outer edges of the heels; there were no nails in the center of the heel; there was no diamond shaped impression in the center of the heel.

Cross-examination—Left Rauch and Joe Nicely down stairs when O'Connor and I went up stairs to search; was out of the room and left them together.

Hammer Canfield—Made examination of the tracks; cannot tell how many; there were nail tracks on the outer edge of the heel; there was no diamond shaped nail track in the center of the heel; heard conversation at time of David Nicely's arrest; Mrs. Nicely said she did not know where her husband was between Monday and Friday.

Cross-examination—I asked her where he was working last week; she said he was working for Kimmel on Monday, but she could not say where else he was during the balance of the week until Friday; she did not say he was at home every night during the week; the conversation was shortly after the arrest.

John Thomas—Know John Kaylor; know the community in which he lives; his general character for truth and veracity is bad.

Cross-examination—Have heard several parties say so.

Michael Sipe—Know John Kaylor; know that his standing for truth and veracity in his neighborhood is not good.

Cross-examination—Have heard several parties say so.

Edward Mowry—Know John Kaylor; know that his general character for truth and veracity is bad.

Cross-examination—Was subpoenaed yesterday; I suppose about 7 o'clock; heard several parties say that his reputation for truth was bad.

Aaron Walker—Live in Jenner township; know John Kaylor; know his general reputation in the community for truth; I think it must be bad.

Cross-examination—Heard his own brother-in-law say he didn't tell the truth, Joseph Walter.

Solomon Judy—Live in Jenner town; know John Kaylor's character for truth is pretty bad; know all his neighbors and the people of the community.

Cross-examination—Heard Kautz's boys, Friedline, Peterson, and a good many others say he was a bad man; Aaron Walker subpoenaed me.

Daniel Peterson—Live in Jenner town; know John Kaylor; know the people of the community; his character for truth among them is bad.

Benjamin Kline—Live in Jenner township, one mile from Jenner town; John Kaylor's reputation is bad, not just for one but for all.

Frank Helpe—Live in Jenner township; half mile from Jenner town; know John Kaylor and his reputation for truth among the people; it is not good.

Cross-examination—He is an undertaker; they would call him that if they called him a proper name.

Jacob F. Kautz—Live in Jenner town; know John Kaylor's character for truth is bad.

Cross-examination—I am of the firm of Kautz Bros.; have heard Mr. Judy, Mr. Peterson and Mr. Rauch's family say it was bad; this was a year ago.

"WE REST," said Mr. Cessna, as witness Kautz left the stand.

"What have you in sur-rebuttal," asked Judge Baer, addressing the counsel for the prisoners. After some consultation they called Harriet Nicely, wife of Joseph Nicely, as their first witness.

IN SUR-REBUTTAL.

Harriet Nicely—Was at home the night Rauch and Ambrose came to get my husband's hat; I had laid down on the bed; they rapped at the door and I told Lorenzo to go and see who was there; the lamp was back in the sitting room; it was a side lamp; it was the full length of the room to the kitchen door; I could see out from where I was sitting; they asked for the hat; Lorenzo got it and gave it to them; neither Rauch nor Ambrose came in; from where they were they couldn't see where the hat was hanging; the lamp wasn't moved; it was a large lamp.

Lorenzo Nicely—Remember of John Rauch and Ambrose coming to our house the night my father was arrested; they came in the kitchen door at the east side of the house; the lamp was in the sitting room in the north end of the room; I opened the door; Rauch just stepped in the kitchen door; I asked mother where the hat was, she told me and I went and got it for them; there was no light in the kitchen only what shone through the dining room door; Ambrose stood on the outside.

Cross-examination—There was no lamp only the one in the sitting room; one of the men had a lantern; I think Rauch; Ambrose stood at the edge of the door on the outside.

Daniel Peterson—Lived last May in Jenner town; remember Joe Nicely coming to see me in August; am director of Westmoreland Insurance Company; Mr. Nicely came there to see me about a case in Greensburg; don't know whether there was anybody with him; saw him right after dinner.

Cross-examination—Don't know whether he had any other business; there is a mail from Ligonier; saw him again at Ligonier between that and February.

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ATTERNOON SESSION.

For the first time during the two weeks Judge Baer was not in his seat at the hour appointed for opening court. This afternoon, it was precisely 20 minutes of 2 o'clock, (by the clock in the court room) when his Honor walked in and took his seat on the bench, and one of the last sessions for the trial of celebrated Umberger murder case was formally opened. After ascertaining that there were no motions for the continuance of any of the cases on the calendar his Honor announced that he was ready to hear from the defense. Mr. Koontz arose and read the following:

POINTS: COMMONWEALTH vs. JOSEPH AND DAVID NICELY. No. 2, May Term, 1889.

The Court is respectfully asked to instruct the jury as matter of law as follows:

1. That the defendants are presumed to be innocent of the crime with which they are charged, and this presumption must stand until it is overturned by evidence on part of the Commonwealth, which establishes the guilt of the defendants beyond a reasonable doubt.

2. That a reasonable doubt is that of the case which after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

3. That the charge in this case is that the defendants are guilty of murder in the first degree, the Commonwealth is held to a more rigid compliance with the rule that the guilt of the accused must be established beyond a reasonable doubt, and if the jury, upon a comparison of all the evidence, believe that there is reasonable doubt of the guilt of the defendants, then they are entitled to an acquittal.

4. That it is the duty of the Commonwealth in this case to make out every essential feature of the crime with which the defendants are charged, and must show by proof beyond a reasonable doubt, not only that the crime of murder was committed, but that the defendants are the parties who committed the crime, and if the jury, upon all the evidence in the case, find that there is a reasonable doubt of the commission of the crime by the defendants, then the verdict must be not guilty.

5. That the evidence of Ella Stearn, Nancy Umberger and Nannie Horner as to the identity of the defendants is not of such a character as would enable the jury to say that the guilt of the defendants is established beyond a reasonable doubt.

6. That if the jury believe the testimony of Gilbert Ross, Aaron Marks, John Koontz, David A. Geeting, A. A. Nicely, Eliza Nicely, Ella Menoher, Hetty Nicely, Lorenzo Nicely and Harriet Nicely, that Joseph Nicely was at his home on Wednesday, the 27th of February, 1889, the day the murder is alleged to have been committed, from 12 o'clock, noon, until next morning, then there can be no conviction of Joseph Nicely.

7. That if the jury believe the testimony of Sarah Barton, Hetty Nicely, Lewis Payne and Catharine Nicely, that David Nicely was at his home on the 27th of February, 1889, from 3 o'clock p. m., until next morning, then there can be no conviction of David Nicely.

8. That as the theory of the Commonwealth is that the defendants were seen going together east up the mountain on the afternoon of Wednesday, the 27th of February, 1889, the testimony of all the witnesses showing that the defendants were at their homes, so far distant from the scene of the alleged murder, that they could not have committed the crime, entitles to the benefit of both defendants in the case.

9. That the defense of an *alibi* is, when a person alleges that at the time when the offense with which he is charged was committed, he was elsewhere, and that he could not in the nature of things have committed the offense.

10. That the burden of proof never shifts in criminal cases, but rests upon the Commonwealth throughout, so that a conviction can only be had after the jury have been convinced, upon a comparison of all the testimony, beyond a reasonable doubt of the guilt of the defendants.

11. That if the evidence of an *alibi*, together with the evidence in the case, raise a reasonable doubt in the minds of the jury then the defendants are entitled to an acquittal.

12. If from all the evidence the jury have a reasonable doubt as to the guilt of either of the defendants, then under the evidence in the case, that doubt must inure to the benefit of both defendants.

13. If the jury believe that David Nicely was in such a state of health, either from heart disease or other disability, as to incapacitate him from walking from his home to the residence of Herman Umberger, a distance of about fifteen miles, within the time and at the rate of speed, testified by the witnesses in behalf of the Commonwealth, or if the evidence of his physical disability is such as to raise a reasonable doubt in the minds of the jury as to his connection with the murder of Herman Umberger, then there can be no conviction of David Nicely.

14. If the jury believe that David Nicely could not by reason of physical disability have made the journey necessary to commit the crime, within the time and at the rate of speed testified by the Commonwealth's witnesses, or if the evidence creates a reasonable doubt in the minds of the jury as to his connection with the crime, then, as the theory of the Commonwealth is that the defendants were both present and jointly committed the crime the verdict must be not guilty as to both of the defendants.

Mr. Koontz submitted a brief of authorities and made an argument to the Court sustaining the position he had taken in his points. His colleague, Mr. Ruppel, made an argument from their side of the case and Messrs. Kooser and Cessna replied for the Commonwealth. The Court directed the Stenographer to write out the points submitted, on his type writer, and he will pass upon them when he comes to charge the jury.

All witnesses in the case were discharged from further attendance upon the court, it wouldn't work.

Counsel for defense made an application in writing to the court asking that the District Attorney be ordered and directed to make the closing argument in the case on the part of the Commonwealth. General Coffroth addressed the Court on this question and gave their reasons for making this somewhat extraordinary application. District Attorney Bieseker, and he had been in close attendance upon the court for the past two weeks and was sick and worn out. His appearance, as he addressed the court, showed clearly that it would be a physical impossibility for him to make any protracted effort or argument. While the counsel for the prisoners disclaimed that such was their desire or intention, the result of a favorable ruling on their motion on the part of the Court would have been to prevent the "Grand Old Man," Hon. John Cessna, from arguing the case or going to the jury, as it had been agreed before the morning adjournment that there should only be two speeches on each side. The Court overruled the motion and Mr. Cessna will make the closing argument.

Following is the motion made: Commonwealth vs. Joseph Nicely and David Nicely. No. 2, May Term, 1889, Over and Terminer, Murder.

And now to-wit: June 9th, 1889, the evidence having been heard and the points of the counsel having been submitted to the Court, counsel for the defendants moved the Court to order and direct that the closing argument to the jury on behalf of the Commonwealth be made by the District Attorney.

Wm. H. KOONTZ, COFFROTH & RUPPEL.

The Court rules as follows: The District Attorney waives his right to closing, on account of indisposition. Whilst calling to his assistance private counsel, the District Attorney acts as a *quasi* judicial officer, and under the law they act under his direction. He has an undoubted right under the law to make the closing argument, and there is no law preventing his yielding this right to private counsel; but the private counsel representing him in the closing argument must be bound by the same rules as a *quasi* judicial officer, and as such can press for conviction as far, but no farther than the District Attorney. So far as his duties in arguing are concerned, they must be in conformity with the law, and his argument should be a fair illustration of the theory propounded in the opening speech; in answer to the arguments of the defense and not something new that the defense may be deprived from answering. This is the rule that applies to the District Attorney and must also apply to private counsel employed in the case.

Mr. Kooser then went to the jury on behalf of the Commonwealth.

SYNOPSIS OF MR. KOOSER'S SPEECH.

Mr. Kooser began by congratulating the jurors and himself that the labors of several weeks were drawing to a close; yet he must ask the jury to indulge him and others patiently awhile longer; congratulated the defense and the Commonwealth that they had succeeded in securing twelve jurors of a high degree of intelligence, of undoubted courage, who would be able to render a verdict under the evidence and charge of the Court, he agreed with the counsel for defense in his opening, when he stated it was an important trial—perhaps the most important ever tried in the county; that the name of Umberger was now known all over the land, because of the peculiar brutality of the murder, and the magnitude of the sum of money secured by the murderers and robbers; that while their duties were grave and responsible they would ever recollect their connection with this historical case. He then defined murder at common law; read the statute regulating the degree of murder; conceded the position taken by the counsel for the defense that the burden of the proof was on the Commonwealth throughout the trial, and that the defendants must be acquitted if there was a reasonable doubt of their guilt; defined what was meant by a reasonable doubt and claimed that the force of the expression laid on the word *consciently* a doubt with a reason behind it. He then adverted to the testimony; began by picturing the peaceful scenes at the house on the twenty-seventh of February; farmer Umberger, old and sick, with the accumulations of a lifetime, some \$15,000 or \$20,000 in his house; with his wife and grand child and servant gathered around the evening lamp; no thought of the assassin that lurked about; he then shifted the scene to Ligonier. Hamilton Smith a witness, saw David Nicely wearing a gray overcoat and cap wending his way Eastward beyond the point at which he should have turned off to get to his home; found him next upon the mountain where he is identified by witnesses Beener and McCracken who first saw some other party cross the road and pass into the woods; these witnesses say it was David Nicely; further on they passed Charles and Lewis Vaneer who knew both parties well and say they were David and Joseph Nicely. Dave with a cap and Joe with a brown hat on; further on they passed Mrs. Walter on the pike who recognized them and says they are the men; further on they passed John Friedline who says there was a short man and a tall man resembling these; further on at the hill above Umberger's is found the remains of a lunch which pointed unmistakably to the fact that who ever murdered Herman Umberger came a long distance and had brought his lunch with him. This was corroborated by the track

leading down the hill into the house. He then detailed the search of the search of the house; the production of the search warrant, the sudden demand, "Your money or your life," the sudden firing of the shot, the flight of Nannie Horner and Ella Stearn, the faithful wife pulling the bell to alarm the neighbors, the plunging forward of Herman Umberger from the sitting room into the kitchen, dead at the feet of his wife, and the flight of the prisoners. He then pointed out that after their flight a lamp stood upon the table without a chimney and the broken fragments of the chimney lay upon the floor five to ten feet from the table, indicating that the lamp had been used to find the pocketbook that had fallen from the inside of the open vest of Herman Umberger before he was struck by the fatal bullet. He then pointed out that at least half an hour's time was spent in this house by these people before they commenced operations, during which time there was not a bit of excitement, giving Mrs. Umberger, Ella Stearn and Nannie Horner every opportunity to carefully scrutinize the dress, form, features, shape, etc., of the men. Next took up their clothing and called attention to the particularity with which Ella Stearn identified the hat, with a piece out of the rim, the gray overcoat, the leather boots and the gum boots. How Nannie Horner identified the same articles and in addition located the brown patch on the gray overcoat. He then pointed out that after the arrest the singular fact that whilst Dave Nicely was the tall man and Joe the short one, that the gray overcoat with the brown patch, worn by the tall man, was found at Dave Nicely's and the hat with the piece out of the rim was found at Joe Nicely's; that the tell-tale handkerchief with the red spots on it was found on Dave Nicely; how Ella Stearn and Nannie Horner testified it was tied and the further damaging fact that the handkerchief, when found, came out of his pocket. He then pointed out the fact that whilst Umberger was shown to have been killed by a bullet from a 32 calibre revolver, centre fire, no revolver of centre fire was found in Joe Nicely's possession, yet at the time of his arrest nine centre fire cartridges were found in his possession. He argued that from the possession of the centre-fire cartridges that Joe Nicely must have had a centre-fire revolver that was concealed somewhere with the money; he then told how Rauch, in the presence of Ambrose, had taken the hat from a nail at Joe Nicely's house, and the piece was then out of it; then told how the position of the defense conceded that the pocketbook was Umberger's, and denied that there could have been any motive in the world for anybody to commit the fraud that the defense is now compelled to urge; showed how Thomas could not say it was, or was not the pocketbook; how brother-in-law Menoher was able to say it was not the pocketbook, and that brother-in-law Menoher could not ask to be believed by a jury, because he had separated the book and the money, and concealed the knowledge of the money from the officers, and admitted afterwards that he had lied about it; he then declared that the defense rested upon an *alibi* set up by the Nicely family, and a lot of unreliable witnesses and unkin women; demanded to know why none of the responsible citizens had seen David or Joseph Nicely on the 27th of February; why only such men as Aaron Marks, David Geeting, Lewis Paint and John Koontz, could undertake to speak for them; told how these men were contradicted by numerous substantial farmers in the valley, to whom they had told stories at variance with their testimony on the stand; how all of them had stated that it was Thursday, the 28th they saw the defendants and not Wednesday the 27th, and how \$15,000 or \$20,000 in money could be used as an engine to manipulate the character of witnesses. He then paid his respects to the Nicely family and insisted that the awful pressure of the death penalty to two of them and the prospect of the concealment of \$15,000 or \$20,000 on the other hand were motives that could be expected to swear the lot of them. Demanded to know why brother-in-law Barron was not put upon the stand when David had testified that he was at Barron's on the 27th. He then argued that the physician had not said that Dave Nicely was incapable of the execution of such a trip; admitted that while the doctor might perchance know more about the inside of a man than himself or the jury, yet there were twelve pairs of eyes upon the jury as competent to see and measure the outside of a man as Dr. Brubaker or any other doctor, and submitted to the jury if there was any such developments over the heart of Joe Nicely as Dr. Brubaker seemed to think. He then argued that Kimmel, Serena and others had worked with Dave Nicely and knew that he was able to do a serious and competent day's work, showed how completely witness Kaylor was blasted and argued that Paint, Marks, Koontz and Geeting were of a similar pattern and their testimony ought to weigh as nothing before the jury. He then asked that for the interests of the 35,000 to 40,000 inhabitants of this county whose interests they were selected to protect, that, whilst to give the prisoners the benefit of all reasonable doubt, yet if the evidence satisfied them beyond a reason-

able doubt of the guilt of the accused, it ought to satisfy every reasonable mind, that they be convicted and punished according to the laws of the Commonwealth.

Mr. Kooser was followed by Mr. Cessna, who spoke until six o'clock, when the court adjourned to meet at 10 o'clock on the next evening.

Court convened at half past eight o'clock. Mr. Koontz continued his argument till a quarter past nine, when the court adjourned till half past eight o'clock on the morning.

Drift From the Finny.

Mr. Frank W. Hay who is the owner of S. Endsley, Esq., received a letter from a gentleman in Rochester, Pa., on the 23rd inst. that contained the following particulars:

"The body of a sweet little girl, who was found in the Ohio river here, was being kept; it was taken to an undertaker in Cambridge and a photograph taken of it; it was then taken to the M. E. Church, where John's funeral service was held, all the people in town taking part; a lot of the money was donated and five hundred dollars was contributed to the cause. The child, of course, whose dear little babe was so precious, may never know, but we shall not. All G. more tenderly taken care of so had on it, especially shown it than the others. The child was sent to Johnstown, Pa., to be buried in town taking part; a lot of the money was donated and five hundred dollars was contributed to the cause. The child, of course, whose dear little babe was so precious, may never know, but we shall not. All G. more tenderly taken care of so had on it, especially shown it than the others. 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