

SEPARATE COUNTS IN  
NERLICH INDICTMENT

*Mr. I. F. Hellmuth, K. C., Objected to Form and Had It Changed---Prosecution Does Not Examine Some Witnesses Called---Accused's Brother Says He Believes Both Are British Subjects*

(See Also Page 7).

The trial of Emil Nerlich for treason, traversed from the winter setting of the Assizes and postponed from time to time during this present spring sitting, commenced today, with Mr. Justice Sutherland on the bench.

For Nerlich appeared Mr. I. F. Hellmuth, K.C., Mr. George T. Hepley, K.C., and Mr. W. G. Mason. The case for the crown was presented by Mr. W. C. Mikel, K.C., and Mr. E. H. Greer. Mr. Gordon Shaver acted as junior to Mr. Mikel.

At the opening of the case Mr. Hellmuth rose. "I desire to take exception to the indictment," he began. He submitted that the indictment was drawn up on the English form, "and we have a treason act in Canada," he said.

The words "in such war," he insisted should in the indictment follow "assisting any public enemy."

Mr. Hellmuth read the indictment:

"That in September, October, November and December, 1914, and in January, 1915, he did maliciously and traitorously aid and comfort the enemy of His Majesty the King, by inciting and assisting one Arthur Zirzow, a German subject of the Emperor of Germany, a public enemy, now at war with His Majesty the King, to leave the Dominion of Canada and join the enemy's forces, and by giving information to assist the said enemy and by trading with the enemy contrary to the Criminal Code."

#### Three Overt Acts Charged.

The second objection raised by Mr. Hellmuth was that, as there were three separate overt acts charged in the indictment, namely, assisting Arthur Zirzow to leave the country; second, supplying information to the enemy; and third, trading with the enemy contrary to the Criminal Code, there should be three separate counts which should be proceeded with separately. The same amalgamation of charges in the conspiracy trial had caused confusion in the Appellate Court, he said.

There was no object in putting the definition of treason in the indictment, said Mr. Mikel. There was no mystic power in the words of the statute. To separate the counts as asked by Mr. Hellmuth would prolong the case very much.

A lengthy discussion between his Lordship, Mr. Hellmuth and Mr. Mikel followed.

His Lordship ruled that in the interests of justice three separate charges should be brought.

The Crown argued that ten day's notice is required after any new indictment before the trial can proceed.

#### Change of Form Only.

Mr. Hellmuth maintained that this was not the case, as the change he asked would be merely a change of "form" not a change of "substance."

When a true bill is brought, the Grand Jury formally assents that the court may make a change in the form, but not in the substance of the indictment.

Counsel then retired in a body to change the form of the indictment.

#### Judge's Suggestion.

Counsel returned to court at five minutes past eleven. His Lordship said that, without the slightest wish to criticize the conduct of the last case against Mr. Nerlich, he thought that on so serious a charge as this it would be better, safer, more reasonable, that one of the counts be tried before the others be tried either together or separately.

He thought that the course of the last trial went to strengthen the view he had taken. It was a matter of discretion and fairness, he said. Having so ruled, the indictment had been changed as he had indicated, with a foot note added, that the form, and not the substance, had been changed. This had been signed by the Crown counsel.

#### Accused Assents.

"Do you consent to this, Mr. Ner-

lich?" asked his Lordship, and Mr. Nerlich replied that he did.

Mr. Hellmuth rose to give formal notice that he took objection to the second and third charges against his client: that of giving information to and trading with the enemy. This objection he would amplify later.

He indicated that the objection would be on the ground that Chief Justice Sir William Mulock in the former trial had directed that there was no evidence against the prisoner on these counts, and that the jury had assented.

Emil Nerlich then entered the box. He was arraigned on a charge of assisting Arthur Zirzow, a German, to leave Canada and join the forces of the enemy.

### **Pleaded Not Guilty.**

He pleaded not guilty, and jury was then picked, as follows:

Messrs. John Carr, jr., Arthur W. Parr, Wm. Brooks, Wm. Canning, Wm. Bellman, Phineas Bedford, Henry Ellis, Wm. R. Baird, Jas. Atkinson, Elgin Barker, Norman B. Billings and Stephen Bosworth.

The Crown challenged Richard Jerrett and Fred Webb.

When the jury had been sworn,

Mr. R. H. Greer commenced to outline to the jury the Crown's case on which the serious charge of treason was based.

#### Born in Germany.

It was alleged, said he, that the father of the accused was a naturalized British subject. The accused was born in Germany. He had followed his father in the business in Toronto where his brother handled the local end, while he (Emil) handled the European end.

In pursuance of this business he had gone frequently to Germany whence he had returned in May.

Mr. Greer then went on to speak of Arthur Zirzow, a lieutenant in the German army, who had received his discharge and come to Canada, where he had met the accused half a dozen times. He had explained to him that he was not able to rejoin the German colors partly on account of his poverty and partly because he had made an "undertaking" with the Canadian Government, promising to report at stated intervals and not to leave the district without leave.

A letter sent by Mr. Zirzow's sister to Zirzow on October 8, 1914, written from Germany was then read to the jury. The letter said the sister was surprised and pained that on the first day of mobilization he had not gone to the neutral United States and in a neutral ship made his way to Germany "as you would very soon get an opportunity to do."

"I am very sorry to see the opportunity go by," said the letter. "I am glad we have found a way to correspond. Direct correspondence would, of course, be impossible."

The letter went on to speak of Ernest, Zirzow's brother in the German army, who had been shot through the neck and who was being nursed by the sister. He had received the Iron Cross. She wished that Arthur were likewise serving the Fatherland.

#### Gave Zirzow Money.

This letter had been shown to Nerlich, who had given him \$10, not directly, but through Zirzow's roommate at 5 Jones avenue, one Keintz, a waiter at Krausman's Hotel.

Zirzow had been arrested with a Pullman reservation and a ticket to New York with \$18 in his pocket.

"The crux of the question you have to consider is: Did Nerlich give this money to Zirzow to go to join the forces of the enemy?" Mr. Greer then went on to say that the jurors should so try the case as to uphold the traditions of British justice and fair play and without undue prejudice.

#### Counsel Objects.

It was unprecedented; he had never heard of such a thing; it was not consistent with the dignity of the Crown, said Mr. Hellmuth when he learned that the Crown did not intend to call Rev. Dr. Hoffman, Mr. J. H. Peters and Mr. Otto Hoppe.

Mr. Mikel said he could see no reason, neither he nor his learned friends could see any reason why they should examine a witness from whom they did not expect to obtain any relevant facts.

His Lordship ruled that it was the duty of the Crown to produce the witnesses whose names appeared on the back of the indictment; but that he could not force the Crown to examine them.

Rev. Dr. Hoffmann was put in the

box as the first witness. The Crown asked if he lived in Toronto, and handed the witness over to the defence. Thereat Mr. Hellmuth protested, saying he did not wish to use strong language, but the situation was unprecedented.

Mr. Mikel informed his Lordship that he had informed the defence by letter a month ago that he did not intend to examine these witnesses.

Mr. Hoffmann, Mr. Peters and Mr. Otto Hoppe all testified that they had believed Zirzow had intended to go to New York merely to obtain work.

### British Citizens.

Mr. Henry Nerlich, brother of the accused, said that though he and his brothers were born in Germany he believed he was a British subject. A slip attached to a fall catalogue had informed their customers that he and his brother were British citizens.

When Mr. Mikel began to ask concerning a conversation between the brothers Mr. Hellmuth objected.

After discussion his Lordship permitted the questioning on the point to go on.

"I asked him if he knew Zirzow was going to Germany. We had no other conversation regarding Zirzow," said Mr. H. Nerlich.

"You see how dangerous it is to object sometimes," said his Lordship.

Mr. Mikel began to ask questions regarding the accused's political leanings. "I object," Mr. Hellmuth was on his feet again.

"I have no objection to answering," said Mr. Nerlich, who added that his brother had said it would be in his interest if Britain won.

### Mail Came Direct.

"I never knew how the firm got its mail before the last trial," Mr. Nerlich was referring to mail delivered indirectly from Germany. "Any mail I received came direct," said he.

### Treated as British.

Their firm had been doing business in Canada since 1858. Since 1895 he and his brother had obtained passports in Dresden, treating them as British subjects. The brothers saw little of one another in private life. Their business relationships during the last twenty-five years had always been the most happy.

As to the trip taken by Mr. Emil Nerlich to Montreal just prior to his arrest, Mr. Henry Nerlich said it was entirely for business. They had discussed between themselves which of the brothers should go.

At this point the court adjourned until 2 o'clock.

Bail, given yesterday was allowed to stand.