

was acquitted. If they had been found not guilty of the commission of the crime, they would have been entitled to their discharge out of custody; the Criminal Code makes no provision for detention in such a case. It is to be observed, too, that the provisions of the Criminal Code under which these men were tried and are imprisoned do not apply to those who are insane at the time of trial, but only to those who are then so sane as to be capable of defending themselves; other like provisions are contained in the Criminal Code respecting those who are so insane as to be incapable of conducting their defences, and also as to those who have become insane after sentence; all are, generally speaking, made subject to the order of the Lieutenant-Governor of the province.

It therefore seems to me that these men were in custody under the criminal law of the Dominion, by reason of the crimes which they had committed; and no one can doubt the power of Parliament to impose such a penalty even upon one who has the excuse of insanity for his misdeed; though it has been held that such legislation would be *ultra vires* in some of the United States of America.

[Reference to *The King v. Ireland*, [1910] 1 K. B. 654.]

These men were, therefore, in my opinion, in lawful custody, under a sentence of imprisonment for crime; and so their escape was one coming within the provisions of the Criminal Code respecting escapes and rescues. That, at the trial, it was agreed, on all hands, otherwise, cannot alter the fact, if such it be; nor warrant this Court in treating the case as if it really were such an one as counsel were agreed that it was.

The case seems to me to come under sec. 192 of the Criminal Code; the men were in lawful custody under a sentence of imprisonment for less than life. The order at the trial of each was that he be kept in strict custody until the pleasure of the Lieutenant-Governor should be known; the order of the Lieutenant-Governor was that he be conveyed to and detained in the Provincial Asylum at Hamilton. These things surely amount to a sentence of imprisonment, and none the less so because "indeterminate." It is less than imprisonment for life, because, although it may last for life, yet it may be shorter a day, a month, a year or years.

Upon the other point in the case, whether there was any evidence to support the conviction, little need be said; there being so little to support Mr. O'Reilly's contention in this respect. There was the positive testimony of the witness who is said to have been an accomplice, corroborated, very much, by the testimony of the police constable, and to some extent by circumstances surrounding