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 July 29;  
 Aug. 18.

## [COURT OF CRIMINAL APPEAL.]

THE KING *v.* MACHARDY.

*Criminal Law—Appeal—Conviction—Special Verdict—Guilty but Insane at Time he did Act charged—Right of Appeal—Trial of Lunatics Act, 1883 (46 & 47 Vict. c. 38), s. 2—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 3.*

Where upon the trial of an indictment a special verdict is returned under s. 2, sub-s. 1, of the Trial of Lunatics Act, 1883, that the accused was guilty of the act or omission charged against him, but was insane so as not to be responsible according to law for his actions at the time when he did the act or made the omission, and an order for his detention is thereupon made under s. 2, sub-s. 2, of the Act, the accused is "a person convicted on indictment" within the meaning of s. 3 of the Criminal Appeal Act, 1907, the finding that the accused was guilty of the act or omission charged against him being a conviction, and therefore he has a right of appeal against the conviction.

*Rex v. Ireland*, [1910] 1 K. B. 654, approved.

The conviction, however, does not include that part of the finding that the accused was insane at the time when he did the act or made the omission charged against him, such finding being in relief of the accused, and therefore no appeal lies from that part of the verdict.

## APPEAL against conviction.

The appellant was indicted at the Lancashire Assizes before Lush J., under s. 2 of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), for having on June 24, 1911, feloniously, unlawfully, and maliciously set fire to a dwelling-house, certain persons being at the time therein.

During the course of the case for the prosecution it was elicited by the learned judge from one of the witnesses that the appellant had been under medical care in an asylum for ten months with regard to his mental condition, and that he came out of the asylum in November, 1907. The defence of insanity was not raised or relied upon in any way by or on behalf of the appellant, and the learned judge, in his summing up, told the jury that there was, in his opinion, no evidence to justify them in finding, under s. 2, sub-s. 1, of the Trial of Lunatics Act, 1883, that the appellant was insane at the time. The jury, however, found that the appellant was guilty of the act charged against him, but

was insane so as not to be responsible, according to law, for his actions at the time when he did the act, and the learned judge ordered him to be detained in custody as a criminal lunatic until His Majesty's pleasure should be known. (1) The appellant, in his notice of appeal against the conviction, stated as the grounds of appeal, first, that there was not sufficient evidence that he set fire to the house, and, secondly, that there was no evidence that he was insane at the time of the fire.

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The appeal was first argued before a Court composed of three judges (Lord Alverstone C.J., Pickford and Avory JJ.), when it was contended on behalf of the appellant that upon one or both of the grounds stated in the notice of appeal the conviction should be quashed. The Court, after hearing the arguments, stated that they desired the case to be re-argued before a Court consisting of five judges, the questions upon which they desired further argument being (1.) whether the case of *Rex v. Ireland* (2) was rightly decided; and (2.) whether, assuming that case to have been rightly decided, there was any appeal against that part of the special verdict which found that the appellant was insane at the time when he did the act.

The case was accordingly re-argued before Lord Alverstone C.J., Lawrance, Phillimore, Pickford, and Hamilton JJ.

July 29. *A. H. Bodkin* and *J. McKeever*, for the appellant. The first question is whether a person against whom a special

(1) Trial of Lunatics Act, 1883 (46 & 47 Vict. c. 38), s. 2:

"(1.) Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane so as not to be responsible according to law for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as

aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission.

"(2.) Where such special verdict is found, the Court shall order the accused to be kept in custody as a criminal lunatic in such place and in such manner as the Court shall direct till Her Majesty's pleasure shall be known . . . ."

(2) [1910] 1 K. B. 654.

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verdict has been returned under s. 2, sub-s. 1, of the Trial of Lunatics Act, 1883, and who has thereupon been ordered to be detained under sub-s. 2 as a criminal lunatic until His Majesty's pleasure shall be known, is "a person convicted on indictment" within the meaning of s. 3 of the Criminal Appeal Act, 1907, and as such can appeal against his conviction. In *Rex v. Ireland* (1) that question was decided in the affirmative. That case is exactly in point and is good law and ought to be followed. Sect. 3 of the Act is intended to include every case of a verdict of a jury adverse to a prisoner who is being tried on indictment so as to provide a means of remedying any miscarriage of justice arising from the verdict. "Conviction" may mean either the verdict and the judgment thereon or merely the verdict. In ss. 1 and 2 of the Crown Cases Act, 1848 (11 & 12 Vict. c. 78), "conviction" is contrasted with the "judgment on such conviction." So also in s. 3 of the Criminal Appeal Act, 1907, "conviction" is contrasted with "sentence." The verdict of the jury is therefore the conviction, and against that conviction an appeal lies. If on the other hand an accused person has, before being put upon his trial on the indictment, been found by a jury to be insane and unable to plead and take his trial, he is not a person "convicted on indictment," and no appeal lies: *Rex v. Larkins*. (2)

The verdict of the jury, including the finding of insanity, is one entire verdict and cannot be split into two parts. The verdict as a whole must be looked at, and if there is no evidence to support that part of the verdict finding insanity, the Court must quash the conviction. Before 1800 in case of insanity the jury found either a special verdict, or a general verdict of acquittal, and in either case the accused went free. Under s. 1 of the Criminal Lunatics Act, 1800 (39 & 40 Geo. 3, c. 94), if the jury found that the accused was insane at the time of committing the offence they returned a verdict of acquittal on the ground of insanity, and he was ordered to be detained until His Majesty's pleasure should be known. That section has been repealed by s. 4 of the Trial of Lunatics Act, 1883, and by s. 2 of this latter Act the jury in such a case now return a verdict that the

(1) [1910] 1 K. B. 654.

(2) (1911) 105 L. T. 384; 75 J. P. 320.

accused is guilty of the act or omission charged, but was insane at the time when he did the act or made the omission. The verdict, though in a different form, is still one entire verdict. The section draws a distinction between the "offence" and "the act or omission" charged. The offence includes all the elements necessary in law to constitute the offence. In the present case the offence charged is founded upon s. 2 of the Malicious Damage Act, 1861, which makes it a felony for a person "unlawfully and maliciously" to set fire to a dwelling-house, any person being therein. By s. 58 every punishment by that Act imposed on any person maliciously committing any offence "shall equally apply and be enforced whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed or otherwise." Malice is therefore an essential element in the offence. The offence consists in doing the act with a malicious mind. The mere doing of the act is not sufficient to create the offence. The jury must be taken to have found that the appellant, from disease of the mind, either did not know the nature and quality of the act he was doing when he set fire to the house, or, if he did know it, that he did not know that the act was wrong. That finding negatives malice. Malice "means any wicked or mischievous intention of the mind": per Best J. in *Rex v. Harvey*. (1) Malice in its legal sense means "a wrongful act, done intentionally, without just cause or excuse": *Bromage v. Prosser* (2); *M'Pherson v. Daniels*. (3) In Foster's Crown Law, 3rd ed., p. 257, speaking of the words "malice" and "maliciously" as used in a certain Act, it is stated that the term "plainly importeth in general a wicked, perverse, and incorrigible disposition"; and this passage was cited with approval by Mellor J. in *Reg. v. Ward*. (4) See also *Reg. v. Pembrilton*. (5) A person found to be insane cannot have a malicious mind, and the verdict of the jury that the appellant was guilty of the act charged merely means that he in fact set fire to the house. They did not find him guilty of

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(1) (1823) 2 B. & C. 257, at p. 268.

(2) (1825) 4 B. & C. 247, at p. 255.

(3) (1829) 10 B. & C. 263, at p.

(4) (1872) L. R. 1 C. C. R. 356, at

p. 361.

(5) (1874) L. R. 2 C. C. R. 119.

1911 the offence. There must be mens rea to constitute the offence.  
 REX "The full definition of every crime contains expressly or by  
 v. implication a proposition as to a state of mind. Therefore, if  
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 to have been absent in any given case, the crime so defined is  
 not committed; or, again, if a crime is fully defined, nothing  
 amounts to that crime which does not satisfy that definition":  
 per Stephen J. in *Reg. v. Tolson*. (1) It is like the case of  
 a child between the age of seven and fourteen, who is presumed  
 not to have sufficient capacity to know right from wrong: *Rex v.*  
*Owen*. (2) The verdict is rather loosely described as a special  
 verdict. It is really a statutory verdict equivalent to one of not  
 guilty of the offence charged. The case of *Reg. v. Dudley* (3)  
 affords an instance of a special verdict in the proper sense of the  
 term. The jury have not found the appellant guilty of the  
 offence charged against him, and, as there is no evidence to  
 support the finding of insanity, the Court must, under s. 4,  
 sub-s. 1, of the Criminal Appeal Act, 1907, set aside the verdict  
 and discharge the appellant. The Court cannot dismiss the  
 appeal under the proviso to that sub-section upon the ground  
 that, though the finding as to insanity is not supported by the  
 evidence, no substantial miscarriage of justice has actually  
 occurred. Detention in a criminal lunatic asylum is very  
 different from a term of imprisonment. Nor has the Court  
 power to act under s. 5 of the Act. The Court has no power in  
 such a case to pass a sentence of imprisonment instead of the  
 order for detention as a criminal lunatic, the jury not having  
 found that the appellant was guilty of the offence charged against  
 him; nor has the Home Secretary any power to remit to a prison  
 for punishment a person who has been found guilty but insane,  
 and afterwards becomes or has been throughout sane.

[LORD ALVERSTONE C.J. We have heard from the Home Secretary, and he does not claim to have any such power.]

Under s. 2 of the Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), the Home Secretary has power to order a prisoner who is insane to be removed to an asylum and there detained as

(1) (1889) 23 Q. B. D. 168, at p. 187.

(2) (1830) 4 C. & P. 236.

(3) (1884) 14 Q. B. D. 273.

a criminal lunatic, and by s. 3, when a criminal lunatic (other than a person with respect to whom a special verdict under s. 2 of the Trial of Lunatics Act, 1883, has been found) becomes sane, the Home Secretary may direct such person to be remitted to prison. That, however, does not affect this case. The Court must therefore allow the appeal and quash the conviction.

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*A. J. Lawrie*, for the prosecution. No appeal lies in this case. There has not been a "conviction" of the appellant within the meaning of s. 3 of the Criminal Appeal Act, 1907. The special verdict prescribed by s. 2, sub-s. 1, of the Trial of Lunatics Act, 1883, does not amount to a conviction of the crime charged. The enactment twice uses the word "offence," and then goes on to provide that if it appears to the jury that the accused was insane at the time when he did the act or made the omission charged, they shall return a special verdict that he was guilty, not of the offence, but of the act or omission charged against him, and that he was insane at the time. From 1800 down to the Act of 1883 the verdict in such a case would have been not guilty on the ground of insanity, and the order of the Court would have been the same as that under s. 2, sub-s. 2, of the Act of 1883. There is nothing in the Act of 1883 which changes the law upon the point; the only alteration is in the form of the verdict. That verdict does not amount to a conviction within the meaning of s. 3 of the Criminal Appeal Act, 1907. The sentence is one fixed by law, s. 2, sub-s. 2, of the Act of 1883 giving the judge no discretion as to the order he shall make, and therefore by s. 3 (c) of the Criminal Appeal Act, 1907, no appeal can lie against the sentence. The decision in *Rex v. Ireland* (1) is wrong and ought not to be followed. Even assuming that it can be said that the special verdict under s. 2, sub-s. 1, of the Act of 1883 can be called a conviction, it is not so for all purposes. For instance, under s. 10 of the Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), a person who has been three times previously convicted of a crime is liable to be treated, on a subsequent conviction on indictment for a crime, as a habitual criminal and sentenced to a term of preventive detention. It is impossible to suppose that a conviction as a

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criminal lunatic would be a conviction within that Act. It is not a conviction for the purposes of that Act, nor is it a conviction for the purposes of the Criminal Appeal Act, 1907.

Next, assuming that the decision in *Rex v. Ireland* (1) is right, the accused can only appeal against that part of the verdict which says that he was guilty of the act or omission charged against him. He cannot appeal against the finding of insanity. Sect. 5 of the Criminal Appeal Act, 1907, contains special provisions enabling the Court to vary a verdict and sentence, and no other case besides those specified can be brought within the Act. There is nothing in that section which empowers the Court to touch the finding as to insanity. The Court can only deal with the finding that the accused did the act or made the omission charged. Sect. 5, sub-s. 4, gives power to the Court, if it thinks that, though the appellant was guilty of the act or omission charged against him, he was insane at the time, to quash the sentence passed at the trial and to order the appellant to be kept in custody as a criminal lunatic under the Trial of Lunatics Act, 1883, in the same manner as if a special verdict had been found by the jury under that Act. The section does not give the Court power to reverse a finding of insanity under the Act of 1883; and r. 4 (d) of the Criminal Appeal Rules, 1908, is necessary for the purpose of enabling notice of appeal to be given by a person who desires to appeal and with reference to whom it was contended at the trial that he was insane at the time the act was done. It cannot have been intended that the Court, having come to the conclusion that the finding that the appellant was guilty of the act charged against him was right, should let him go free because it comes to the conclusion that he was sane at the time he did the act.

*Cur. adv. vult.*

Aug. 18. The judgment of the COURT was read by  
 LORD ALVERSTONE C.J. In the opinion of the majority of the Court this appeal should be dismissed.

The appellant was indicted on a charge of arson under s. 2 of

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24 & 25 Vict. c. 97. The jury found a verdict, in accordance with the Trial of Lunatics Act, 1883, that the appellant was guilty but insane at the time so as not to be responsible according to law. In the case of *Rex v. Ireland* (1) this Court decided that an appeal can be brought under the Criminal Appeal Act, 1907, against such a verdict. Argument was addressed on behalf of the Crown to the question whether this decision was correct. In the opinion of the Court it was. The appellant was "convicted on indictment" within the meaning of s. 3 of the Criminal Appeal Act, 1907, the finding of the jury that he was guilty of the act charged against him being a "conviction." The appellant is detained under an order following that verdict, and if the view taken in *Rex v. Ireland* (1) is not correct, although the finding of the jury as to the guilt of the appellant might have been the result of the admission of improper evidence or of gross misdirection, there would be no appeal.

The Court has now to consider whether, assuming *Rex v. Ireland* (1) to be correctly decided, an appeal lies against the finding of the jury that the appellant was insane, and whether in fact that part of the finding is a part of the conviction against which an appeal lies. In the opinion of the Court it is not. It is a finding of the jury in aid of the prisoner and in his relief. Under the statute they found him guilty of the act or omission charged against him, but that he was insane when he did the act or made the omission. It is doubtful whether it can be successfully contended that the finding negatives any essential ingredient of the offence; but, even assuming that it does, it is not, in the opinion of the Court, a part of the conviction, but a special verdict of the jury in relief of the prisoner. In the opinion of the Court this view is supported by s. 5, sub-s. 4, of the Criminal Appeal Act, 1907, which allows the Court, in the case of a person convicted and sentenced in the ordinary way, to find that he was insane and to make an order under the Trial of Lunatics Act, 1883. The detention of the prisoner under the Act of 1883 is not a part of the conviction, but is the result of a statutory provision as to how a person found insane by such a special verdict shall be dealt with.

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MACHARDY. For these reasons the Court is of opinion that there is no appeal against the part of a special verdict under the Act of 1888 which finds the prisoner to be insane.

*Appeal dismissed.*

Solicitor for appellant and prosecution: *Director of Public Prosecutions.*

W. F. B.