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EXPERT TESTIMONY IN CRIMINAL PROCEDURE INVOLVING THE QUESTION OF THE MENTAL STATE OF THE DEFENDANT

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It is with some temerity that I attempt to discuss this somewhat threadbare subject in these pages. In recent years so much has been said about it and yet so little, for practically all of the papers revolve in about the same circle and it is rare that any one of them throws any new light upon the questions involved. The most striking thing perhaps about the whole discussion is the vehemence with which everybody denounces the present method of procedure and the comparative impotence of those same persons when presented with the necessity of a constructive attitude of mind and asked what they are going to do about it. My only excuse for discussing nt upon this occasion is that I have been forced for a considerable period of time, not only to come into practical relations with the operations of the methods of procedure in criminal cases involving expert testimony, but that I have been forced in addition to give all of the questions involved a considerable deal of thought in my service for two or three years upon a committee of the American Institute of Criminal Law and Criminology.

I have referred to the discrepancy between the attitude of the majority of persons who believe the system wrong and would tear it down, and the results of their labors when they endeavored to build anything in its place. This is a psychological situation with which we are familiar, and must necessarily mean that the destructive attitude is an emotional one, that the reasons for the feelings that exist against the present method of procedure are not clearly perceived, and that therefore no adequate constructive efforts can issue. In proof of this proposition, namely, that the attitude against the system is an emotional one, and that the reasons for the emotions are not clearly perceived, I may cite the frequent efforts of the two professions—law and medicine —each to lay the blame upon the other, while the general public see in every criminal trial, where the defense of insanity is introduced, a perfectly clear case of flagrant attempt to avoid the legal consequences of crime by hiring expert witnesses to testify to the insanity of the defendant. It is needless for me to disprove in this Journal the justifi-

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cation for such extreme attitudes of mind. However, such attitudes exist, such attitudes are facts, and it is pertinent to this inquiry to ask why they exist, and to wonder if perhaps this question could be answered. The answers might not illuminate the motives that give rise to these emotional attitudes that I have already suggested, and so enable the intelligence to grasp and deal with them more effectively.

The main difficulty, it seems to me, about the present method of procedure is that it is not in fact what it pretends to be. The method of trial of a criminal case before a jury is in the nature of a combat in which two opposing forces are lined up against each other and the battle goes to the strongest. The judge is a referee, if you will, whose business it is to prevent fouls and the taking of unfair advantages. How this system has grown up into its present state the gentlemen of the law know better than I, but I do not believe they will deny this general proposition. Now into the arena where this battle is taking place the expert witness is introduced. He is hired and paid by one of the parties to the issue, his direct testimony is given in response to the attorney representing that party. The attorney representing the opposite side then undertakes to tear to pieces the contributions to the evidence which he has made in favor of the side for which he was employed. This is essentially and fundamentally a partisan conflict, and the expert witness is asked to do something that society does not ask of a man, so far as I know, in any other capacity. It asks him to preserve the same judicial attitude of mind which is expected of the judge on the bench and to answer all questions fairly and impartially and free from prejudice. Everywhere else where the best effort is demanded of an individual, it is endeavored to make his personal interests run parallel to the effort demanded. A man who owns, for example, a department store, has elevators installed for the convenience of his customers. He is not trusted, however, to take care of those elevators because the fear is that he might not go to the expense necessary to maintain them free from dangerous accident. This would be particularly true if he himself were seriously embarrassed financially. What is the solution of such a problem? He must have his elevators insured. What is the real insurance back of such requirement? A perfectly patent one—that the insurance company, being responsible for all financial losses that may arise, due to accident dependent upon bad or worn-out equipment, will see to it, because it is to their interest to see to it, that the elevators are always safe. The expert witness, on the other hand, is supposed to go on the witness stand, representing one side of the controversy, receiving his compensation from that side, and then

without hesitation, without any attempt to evade in any way the question at issue, he is expected the moment the opportunity presents itself in the shape of a question to which an answer would be to the disadvantage of the side that has employed him, to give that answer.

The thing that astonishes me is not that medical expert testimony is so bad, but that it is so good. My personal acquaintance with the men who take the witness stand as expert witnesses makes me feel, in fact makes me know, that they have measured up to the demands in a way that seems to me little short of miraculous. They have not met the demands absolutely, but if they have not it is not because they have not tried, nor is it because they have not wanted to—it is because the demand is psychologically an impossible one to meet. The witness generally errs in one of two directions—either he is distinctly partisan, or because being in fear that he will be partisan, he leans over so far backward that he unnecessarily injures the cause which he represents. The former of the two errors is naturally the more frequent, but it is not an error born of dishonesty, for far from having any intent to deceive the witness honestly tries his best in the great majority of cases to present his views fairly, but it is an error borne of a natural weakness of human nature as it fails before an impossible task. It is this partisanship which does, as a matter of fact, exist, no matter how strongly it may be denied, which is at the bottom, in my estimation, of the feeling attitude toward the expert situation, but it is not a matter solely to blame the medical man for. In my belief, he does his best; he is only one wheel in the great machinery of the law, and that machinery is not of his making. Unfortunately for him, however, he occupies a position which temporarily gives him a place where all eyes are centered upon him. He seems to bear the burden for the moment of the entire system, and it is because of his prominent place on the stage, because the spot-light is upon him, so to speak, that he has been supposed by the public to be to blame. He is rarely personally to blame at all. It is only his work which shows up to disadvantage in a system which is wrong.

Having admitted the defect in the system, what are we going to do about it? Let me first present the results in the shape of a suggested statute which the committee upon which I have served, and which I mentioned above, has finally adopted as the result of its labors. I am sure it is so plain that it requires no special comment. I may only say that its preparation has extended over a considerable period of time and that the committee has had much of the advice and opinion and assistance of the best men in the country. It is a suggestion only for

correcting the method of procedure as it now exists in so far as to remove the element of partisanship, real or implied, that now exists in that method, and it is a suggestion only in so far as we can hope to succeed in its adoption and not have it torn down immediately it is put into effect, because of being declared unconstitutional. The committee has therefore kept well within the bounds of what it believes to be constitutional, and have therefore attempted to draw a statute which not only was directed at the solution of the problems as I have suggested, but which was constructed in a practical way so that it could be actually adopted and put into use, and rather than attempt too much in formulating such a statute and run the risk of losing all, the committee has erred on the conservative side. Here it is:

Section 1. Where the existence of mental disease or derangement on the part of any person becomes an issue in the trial of a case, the judge of the trial court may summon one or more disinterested qualified experts, not exceeding three, to testify at the trial. In case the judge shall issue the summons before the trial is begun, he shall notify counsel for both parties of the witnesses so summoned. Upon the trial of the case, the witnesses summoned by the court may be cross-examined by counsel for poth parties in the case. Such summoning of witnesses by the court shall not preclude either party from using other expert witnesses at the trial.

Section 2. In criminal cases, no testimony regarding the mental condition of the accused shall be received from witnesses summoned by the accused until the expert witnesses summoned by the prosecution have been given an opportunity to examine the accused.

Section 3. Whenever in the trial of a criminal case the existence of mental disease on the part of the accused, either at the time of the trial or at the time of the commission of the alleged wrongful act, becomes an issue in the case, the judge of the court before which the accused is to be tried or is being tried shall commit the accused to the state hospital for the insane, to be detained there for purposes of observation until further order of court. The court shall direct the superintendent of the hospital to permit all the expert witnesses summoned in the case to have free access to the accused for purposes of observation. The court may also direct the chief physician of the hospital to prepare a report regarding the mental condition of the accused. This report may be introduced in evidence at the trial under oath of said chief physician, who may be cross-examined regarding the report by counsel for both sides.

Section 4. Each expert witness may prepare a written report upon

the mental condition of the person in question, and such report may be read by the witness at the trial. If the witness presenting the report was called by one of the opposing parties, he may be cross-examined regarding his report by counsel for the other party. If the witness was summoned by the court, he may be cross-examined regarding his report by counsel for both parties.

Section 5. Where expert witnesses have examined the person whose mental condition is an element in the case, they may consult with or without the direction of court, and if possible prepare a joint report to be introduced at the trial.

This projected statute so impressed the American Institute that it was received and adopted without a dissenting voice.

With the adoption of such a statute as this, the difficulties with the whole question of criminal procedure and medical expert testimony are not by any means all solved, in fact a beginning only is made. I wish briefly to touch upon a few additional points as they relate to the two professions—law and medicine.

In the first place, the criminal law, as it exists on the statute books, is essentially a law of revenge; it was formulated in the spirit of the Mosaic law, and if it is not always administered in that spirit it is not because it does not exist in that form. The feeling of revenge is a feeling common in the breasts of mankind, but one which has progressively had to be restrained as civilization advanced, until finally the revenge which the community wreaked upon any individual was done by a specially delegated portion of that community. This was an essential change as society became complex and divided its responsibilities and its duties, but within the last, the scientific era, a still further and more significant advance has been made. We have come to learn a great deal about the human individual, and the more we learn about him the more we know that there is little or nothing to be gained by writing the spirit of revenge into our criminal statutes. Crime does not exist apart from the criminal, although the law for centuries has been endeavoring to consider crime as something that did so exist, just as it has been endeavoring to consider other hypothetical absolutes as having concrete existence. It is the same with the concept of insanity. Insanity has no existence in itself; in fact it has no existence at all in medicine—it is purely a social and legal concept, and even them can only be dealt with in the concrete instance of an actual individual. As soon as science began to deal with the individual, instead of with abstract concepts, such as crime and insanity, the medieval attitude towards the offender against the social requirements began to drop

away. If the individual be studied carefully it can always be seen how a given crime issues logically out of the antecedents in that individual's life. The unfolding of the individual's character in relation to the total situation in which the crime occurred makes it at once understandable. In this day and age the revenge attitude of society against the criminal is unintelligent. The attitude that should be assumed and which science is forcing upon the courts and the legislatures is the attitude of endeavoring to efficiently deal with the problems that the individual presents, with the deep conviction that arbitrary terms of imprisonment and capital punishment are not the last words in serving this end.

Present day psychology is essentially behavioristic in its trend; it seeks to understand man's conduct in terms of his reactions to stimuli from within as well as from without. The criminal law seeks to define certain types of conduct which society believes should be dealt with by punitive measures. Definitions tend necessarily to become static and to limit advances in thinking. The tendency is to press all conduct into the mould of the definitions rather than to approach it with an open mind that seeks only to understand and explain it. And finally the definition must of necessity, because it is an abstraction, be vague in face of a concrete issue and therefore it easily lends itself to all sorts of interpretations, which interpretations become the creatures of the opposing sides in their endeavor to effect their respective purposes. It is time that criminal procedure should aim at correcting bad social adjustments rather than vicariously serving alone the spirit of revenge. All social maladaptions whether they come within the purview of the criminal law or the lunacy law should be dealt with with the sole end in view of curing the fault and it must be evident to all students of social phenomena and psychological problems nowadays that that can not be brought about by measures that are solely repressive in character. Recent studies in psychology in general and in fields of criminal psychology in particular have demonstrated this over and over again. The reform in prison management that has been wrought during recent times has grown out of this conviction, more or less consciously appreciated, and it is now high time that the principles should find concrete recognition in reforms of procedure. This does not mean, of course, that repressive measures or punishments should be done away with but that they should be more scientifically used with this constructive end more consciously in mind. Punishment is of value in making the anti-social pathway the least attractive, but should be associated with other methods which are calculated to emphasize in a positive manner the forms

of conduct which are socially useful. Parole laws and the indeterminate sentence are movements in this direction.

With these few general remarks I will make a few comments upon some of the vital elements in the present criminal procedure.

I will discuss only three of the concepts which are controlling in the administration of the criimnal law and which I think need to be reviewed in order that the best interest of society and the offender may both be better safeguarded, and to the end that criminal procedure shall have these ends more consciously in view and therefore more under intelligent control.

Prejudice. The legal machinery has been created largely with the idea of considering the offenders in as impersonal a way as possible. Judge and jury are supposed to have no personal feelings involved but to be able to consider the evidence solely upon its merits and arrive at conclusions free from personal bias and from the operations of emotional factors. An attempt is made to so present the evidence that it may have a coldly intellectual consideration and the punishment meted out under such circumstances is apparently supposed to approximate or at least to aim at abstract justice. The impracticability of supposing that anything like abstract justice can be attained is perfectly evident to anyone with the least experience in actual trials of concrete issues. Everyone with such experience must soon come to realize, no matter how idealistically he may have originally approached the problem, how essentially human the whole proceeding really is. Of course, to make such a statement as this is really the tritest of truisms, yet few realize how the passions, the emotions, the prejudices really find an outlet in the course of the trial and are expressed in the final judgment.

Aside from this statement it must be evident to all students of present-day psychology and philosophy that such a thing as an unprejudiced individual does not exist.

The reason why I make this statement so definitely is because it is generally conceded by those engaged in the study of psychology that mental actions are necessarily conditioned by all that has gone into the composition of the fabric of the mind whether all those elements which for the time being are operative are present in consciousness or not. In other words an opinion is the outcome of the whole tendency of the individual as it has been built up during his lifetime, and whether he thinks it or not, he is swayed at every point by these ingrained tendencies.

Every human being must therefore of necessity approach every problem with the natural bias of his own personality make-up based,

as it is, upon the totality of his hereditary tendencies, his upbringing and his past experiences. The existence of such a background which must give form and color to any present experience is not only generally recognized but has been specifically dealt with in considering the effect which it has in determining judicial decisions.[1]

Prejudice in this sense is an ineradicable element of the human mind and the best that can be done is to attempt to reduce it to a minimum. The medical expert who is aware of the true state of affairs is a safer witness than one who is blind to its possibilities and the same may be said of the judge or in fact anyone searching for the truth in the tangled network of human motives. The law should face this fact squarely and no longer refuse to see it. The procedure in attempting to get at the facts would be made simpler by so doing.

The papers cited in the footnotes indicate how judicial opinions can be shown to follow logically from the make-up, the previous experience and the emotional attitudes of judges, and although the grounds for prejudice are not ordinarily apparent, still trial lawyers learn these facts by experience and regularly attempt to bring their cases before judges whom they know to be favorably disposed toward their attitudes in the particular issue involved.[2] A similar understanding of the expert is due him rather than an instinctive condemnation for prejudices which he necessarily harbors.

The Hypothetical Question. I firmly believe that the hypothetical question is, from at least a philosophical point of view, an absurdity and should be discarded. In the first place, the patent criticism against the hypothetical question is that it has absolutely no reason for existence, so far as I can see, except a reason founded upon what seems to me a rather unnecessary effort to conform to a theory, namely, the theory that it is the jury's function and not the expert's to decide whether the person is or is not of unsound mind. This is certainly a quibbling in unessential matters of the character which is at present discrediting the whole structure of criminal procedure in the eyes of the public. What possible reason can there be for denying the right of the jury to hear the expert express *his* opinion about the defendant in any such way as this at least? If it worked, if the expert, as a matter

[1]Everson, George: The Human Element in Justice. Jour. Am. Inst. Crim. Law and Criminology, May, 1919.

Schroeder, T.: The Psychological Study of Judicial Opinion. California Law Review, Jan., 1918.

[2]Another way in which lawyers regularly recognize this principle is by introducing evidence which they know will be ruled out. By its introduction they have put it before and into the minds of the jury and no ruling on its admissibility can eradicate it and make it as naught. It is bound to play its part in the final decision.

of fact, did not express his opinion about the defendant, then perhaps there might be some sense in this attitude; but when the expert answers the hypothetical question the jury and everybody else knows that as a matter of fact he is expressing his opinion with regard to the defendant, no matter whether he says he is or he is not, and no matter whether he attempts to put the defendant out of his mind or not, because it is a psychological impossibility for the expert to take all of the facts that are in evidence and which are included in the hypothetical question and which relate in their evidential value to the defendant, and to no one else, and to consider them by themselves, apart from the knowledge that he has that they do relate to the defendant in this way. He may think that he can discard such knowledge and consider the matter judicially, but I do not believe it psychologically possible. Therefore, the theory of the hypothetical question is based upon a state of affairs which it is presumed to bring about, but which in fact is not brought about and everybody knows that it is not. Why should such illogical requirements continue?

The whole method of examination based upon hypothetical inquiries involves the assumption that the witness is able to reach conclusions regarding the statements set forth in the hypothetical question apart from all other considerations, as if these separate statements could be taken out of relation to everything else and be considered in the abstract. The practical absurdity of the position is at once apparent if we attempt to apply it to certain fundamental elements in most everyone's psychological equipment. For example, if the witness were asked to put out of mind, for the purpose of the question, all his knowledge of the multiplication tables and give his opinion of what the product would be of multiplying two by two; or to put aside all knowledge he had of reading and then handed a printed paper and asked his opinion of what was set forth thereon. This is at once seen to be absurd, but the request is no more imposisble than to ask him to put aside all knowledge, feeling, attitudes and tendencies that he may have acquired in his lifetime or, more specifically, in his connection with the issue on trial. Such an understanding of the background upon which all opinions rest is due the expert rather than a wholesale condemnation for a state of mind over which he of necessity can have, at least, only a limited control.

Further than this, I might urge at considerable length, from a philosophical standpoint, the essential absurdity of the hypothetical question. Acts cannot be separated from actors, mental states from people having them; the two cannot be considered apart, and it is not

sufficient to my mind to correct this philosophical error that a hypothetical individual be assumed who is the bearer of all these alleged states of mind and body. However, I will not enlarge upon philosophical considerations. I may only add that in a large experience I have never known a hypothetical question, in a trial involving the mental condition of the defendant, which, in my opinion, offered a fair presentation of the case. It is admittedly prepared to contain only those elements which favor the side offering it, despite the fact that most of them are contradicted by the opposite side. It eliminates from consideration every human element which every common-sense man takes into consideration when he formulates an opinion. There are statements of fact in the hypothetical question which the expert has to sit and listen to, and knows because he has heard the testimony and seen the person who gave it to be absolutely worthless, and yet such a statement is given the same value in the question as any other. I reiterate that it is not strange to me that expert testimony has been so unsatisfactory and when I conceive of the impossible things that are asked of the expert, I simply marvel that he has been able to meet the requirements in any measure at all.

Responsibility. One other matter, the question of responsibility. Strangely, and for what reason I know not, the expert who is not permitted to say that the defendant is sane or insane, because that sacred duty resides with the jury, is permitted to say whether in his opinion the defendant was responsible or irresponsible at a certain time. Whether I am technically right in this as a matter of practice I am not sure. The point I wish to make is that in the law responsibility is dealt with just like crime and insanity, as having some kind of a nebulous separate existence. The criminal is either supposed to have it or not to have it, as much as if he might or might not be possessed of certain real estate, or some other equally tangible asset. Such ways of dealing with human beings show an absolute lack of understanding of the principles of conduct, and belong to the same stage of development as the spirit of revenge. To conceive that an individual is either absolutely responsible or absolutely irresponsible is to fly in the face of perfectly patent facts that are in everybody's individual experience and is only comparable to such beliefs of the middle ages as that a person is possessed of a devil or is not possessed of a devil, and is therefore a free moral agent. Certain steps in advance have been made in this crude concept. France, for example, I believe has a statute of graduated responsibility. Whether any such similar provision exists in this country I do not know.

My own conception of the way in which the responsibility question is met in criminal trials is this: The jury listens to the evidence that is offered in the case, it hears something of the history of the crime, the conditions which led up to it, its actual performance, and the behavior of the defendant thereafter. It learns also, more or less, of various surrounding circumstances, so that from a rather superficial standpoint the jury, so to speak, has the crime framed in a set of events which relate to it and which serve to some extent to explain it. Now the jury takes all these things into consideration and in doing so represents, or stands for, in miniature, the body of society of which it is a part. The jury represents the minds of the community, and its action is binding upon that community, who, through the machinery of the courts, has chosen it to represent them. Now having considered all these facts, the jury makes up its mind whether they think the man ought to be punished or not. If they think he ought to be punished they conclude him to be responsible, and therefore, guilty; if they think the circumstances are such that in their feelings towards him they feel that he ought to be let off, they find him irresponsible, and therefore not guilty. In other words, the community, through the medium of its selected agents, the jury, projects its own feelings upon the accused, so that from this point of view responsibility is something which exists in the minds of the jury rather than in that of the defendant.

To my mind the function of the expert should be to bring his specialized knowledge to the service of the particular issue being tried, and upon the witness stand to explain as far in detail as his examination permits the mental state of the defendant. To this end it is just as absurd that the experts for the prosecution may not be permitted to see the defendant as it is that he may be permitted not to testify, as it is also equally absurd that the court should be called upon to instruct the jury and should have to so do that the failure to testify by the defendant shall not be considered against him. Action is not always positive, but may be negative; it requires as much energy, as much determination, and sometimes more, not to do a certain thing, for example, to reply to a question, as it does to do that thing, and the refusal of an individual to comply with a certain request can be made the object of a deduction as to the reasons of that refusal and as to the underlying mental state of the individual as accurately and as properly as a compliance with the request may be used in like manner. I can easily see, however, that in the present state of affairs a refusal of the prisoner to testify may well be considered as having a certain justification, however, which would be removed if the people did the

logical thing and showed themselves as keenly alive to the protection of an innocent man as they do to the prosecution of a guilty one. Every community that has a district attorney should have also a public defender, and the expert should be freed, as far as existing conditions permit, along the lines suggested by the proposed statute from all bias, either actual or implied.

The logical outcome of such suggestions as I have made are in part incorporated in the proposed statute. I refer specifically to the opportunity provided the expert of reading his report. This would enable him to set forth a coherent, connected account of the defendant, analyzing his character makeup, show how he came to be the manner of person he was, and would include a setting forth of the crime in this setting showing just how it issued and was explained. This should be the specific function of the expert. The jurors then can pass intelligently upon the issue with such a complete picture of the manner of man the criminal is before them.

As a matter of practice, it is rarely permitted the expert to set forth his opinion in a connected discourse of this sort. He is usually subjected to innumerable interruptions in the efforts of opposing counsel to exclude certain matter they canceive to be inimical to their interests, with the result that the jury gets a disconnected, chopped-up statement which does not begin to present fairly the expert's real opinion. The cross-examination may then very properly ask all manner of questions, pulling apart the expert's statement, presenting hypotheses, etc., for the double purpose of testing the expert's knowledge and learning more in detail just how he came to his conclusion.

The principles which I advocate are that the criminal and not the crime should be made the matter of prime consideration and that the sentence, or better the decision of the court, should be calculated to cure the social illness as it has been shown to exist in the conduct of the defendant. Under the operation of these principles a defendant who was only charged with a minor offense might well have to spend the rest of his life more or less restricted in his liberty if an analysis of his make-up and a study of his behavior showed that he never sufficiently improved or profited by his experience to warrant discharge as a free citizen into the community. In the same way a person who had committed a serious offense might be ultimately discharged after a comparatively brief internment. It is the same here as in the practice of medicine. All cases of pneumonia are not treated alike just because the disease happens to be pneumonia. The patient is treated and allowances have to be made for age, previous condition of health, concurrent

diseases of organs other than the lungs, power of resistance, etc., etc. The patient is treated and not the disease and it is as illogical to sentence a person who has committed a certain offense to a specific term of imprisonment as it would be to decide when a patient is admitted to a hospital the day upon which he shall be discharged. The hospital patient is not discharged until it is thought that he is well enough to leave and the criminal should not be discharged until there is good reason for believing that he is able to take his place as a responsible member of society.

To approach the problem of criminology in this way would require considerable changes in our legal machinery. It would require, among other things, that judges should specialize along the lines of their individual interests just as physicians specialize in their profession. A trend in this direction is already apparent in the establshment of special courts, in particular juvenile and domestic relations courts. Such courts tend to come to be presided over by justices who have special interests in the matters brought before them and such justices tend to develop a constructive attitude toward the problems brought before them, much as does the physician, rather than be satisfied at fitting the particular case into some definition and thus passing an arbitrary, predetermined sentence.

Until such day as the criminal courts can be conducted after this fashion effort should be continued to give the expert as favorable a placement in the scheme as the judge and jury now hold. He needs to be placed in as near as possible an unprejudiced attitude toward the issues. The old way of requiring the expert to hear all the evidence, rather than pass upon a hypothetical question, was psychologically far preferable, but of course too time consuming for the present day. Theoretically I believe the jury should be limited to a determination of the facts; that is, in a criminal case they should pass only upon whether the accused did or did not commit the anti-social act as charged. If he is found guilty then it is the right of the state to prescribe the treatment which, after careful consideration by those skilled in such matters, seems best calculated to effect the best results in the end. In this way many a youngster might well be saved from a career of crime by not contaminating him with the influences of the prison and definitely anti-social characters could be indefinitely confined at useful occupation instead of repeatedly being set free to take up their criminal practice again with the necessary expense and lost motion incident to again apprehending them, and a repetition of the same old process of trial and conviction.