ANNUAL MEETING OF THE WISCONSIN BRANCH.

E. A. GILMORE.

The third annual meeting of the Wisconsin Branch of the American Institute of Criminal Law and Criminology was held in the Council Chamber, City Hall, Milwaukee, on December 1-2, 1911, under the auspices of the Bench and Bar of Milwaukee County. The address of welcome was delivered by Christian Doerfler, Esq., president of the Milwaukee Bar Association. This was followed by the annual address of the president, Hon. Alexander H. Reid, Circuit judge, Sixteenth Circuit. The president reviewed the history of the organization of the institute and the Wisconsin Branch, and gave an account of the work of the branch for the preceding year. He also discussed the problem involved in dealing with the recidivist, and pointed out by numerous statistics the wastefulness and inefficiency of the present system. The president's address was followed by the report of the secretary and the report of the treasurer. The next business in order was the consideration of the reports of the committees. The committees, their subjects, and the action on their reports were as follows:

To Committee A, four questions were submitted:

1. "What regulations should govern the use of expert opinion evidence in the determination of the issue of mental responsibility?

2. "Should expert alienists be called by the trial judge and compensated by the county rather than by the litigants?

3. "Is it feasible or desirable to provide a state commission of expert alienists?

4. "Should the offices of district attorney and of clerk of court be made appointive by the judiciary, and should such officers be selected for circuits rather than for counties?"

The committee reported in part as follows:

"The conditions which cause the evils connected with expert testimony are substantially four:

1. "Among the great mass of reputable practitioners there is scattered here and there a charlatan or purchasable expert.

2. "A large number, but still a small proportion of the whole, are too likely to become unconscious partisans.

3. "Juries cannot always easily sift the reliable expert testimony from the chaff.

4. "Expert questions are often, perhaps usually, so framed that,

even if intelligible to the questioner, they often are not so to either witness or jury.

"Both the legal and medical professions are anxious to remedy the resulting evils if possible. The last session of this conference considered this matter, expressed itself in favor of the creation of a board of expert alienists, from which witnesses should be called by the court only as experts on the issue of insanity in criminal cases. The original proposition contemplated that the parties should not be permitted to call as experts any other witnesses than those chosen by the court from this body. The committee on legislation proposed to the last legislature a less drastic bill known as No. 320, Senate, a copy of which is hereto annexed. The bill did not pass. We believe another attempt should be made to secure its passage, but that permission to call two other experts who are not members of the board should be absolute. A very similar statute, including this permission, was held unconstitutional in Michigan. (*People v. Dickerson,* 129 N. W. 199.) It was there held that 'due process of law' requires that witnesses be called by the parties only and that since the court in calling experts as witnesses would thereby give them greater credence, the law violated that constitutional clause. The decision has been very much criticized and, without seeming presumptuous, this committee believes the decisions entirely overlooked this one controlling fact, that 'due process of law,' as it has existed prior to and since the adoption of our constitution, gave the trial judge the right not only of examining upon pertinent points witnesses who were called, but also *of calling on his own motion other witnesses* who might throw light upon the issue. For reference we cite the following authorities:

3 Wigmore's Evidence, Sec. 2484. 1 Wigmore's Evidence, Sec. 910 (4), 918. *Rex v. Simonds,* 1 C. & P. 84. *Rex v. Bodle,* 6 C. & P. 186. *Regina v. Holden,* 8 C. & P. 186. *Coulson v. Disborough,* 2 Q. V. 316. *Fullerton v. Fordyce,* 144 Mo. 579; 44 S. W. 1054. *Selph v. State,* 22 Florida 537.

"It is our judgment that such a statute if passed by the Wisconsin legislature would not be held void.

"We do not consider the requirement that the court must choose its experts from the state board of experts as necessary, and if that provision would imperil the bill, it could be omitted. If we have the state board of alienists, with the power in the court to choose such alienists as it deems wise, they would in nearly all cases be chosen from that board."

The proposed bill is as follows:

"Section 1. There is added to the statutes a new section to read. Section 4697m. The governor shall before July 1, 1911, file with the secretary of state his designation of not less than ten nor more

than twenty practicing physicians who shall be residents of this state and specially skilled and experienced in the diagnosis and treatment of insanity and who shall be known as 'State Accredited Alienists' and each shall continue as such until superseded by another designation by the governor or by death, removal from the state, or declination to act. Before making such designation in each instance the governor shall request of and if possible obtain from the governing board of the Wisconsin State Medical Society, the Homeopathic Medical Society of Wisconsin, and the Wisconsin State Eclectic Medical Society, recommendations for such designations and advice as to qualifications of those under consideration therefor. The governornor may at pleasure withdraw at any time the designation of any accredited alienist and designate some other in his stead and shall fill vacancies caused by death, removal from the state, or declination to act so that there shall be at all times not less than ten state accredited alienists ready to act. The secretary of state shall, immediately upon the filing with him of the designation of such alienists and whenever any change shall thereafter occur in the same, immediately send to the clerk of every court in this state having jurisdiction to try felonies, a correct certified list of the alienists then duly designated, with their addresses. In every criminal action wherein the defendant shall interpose the special plea of insanity as a defense he shall at least ten days before the opening of the first term at which a trial may be had, notify the presiding judge and district attorney of the intention to so interpose said plea. Failure so to do shall constitute a contempt of court on the part of defendant's counsel unless the counsel shall satisfy the court that the facts upon which such plea is based did not come to his or their attention until a later time and in such case such notice shall be given immediately upon learning of such facts. The presiding judge shall forthwith on being so notified appoint three of said accredited alienists to examine the accused as to his sanity, attend the trial of said special plea, and testify on the issue of insanity as experts and they shall be the only witnesses permitted to give expert opinion evidence on the trial of said issue; except that the court may in its discretion after application of defendant made and notice to the district attorney given at least five days before beginning the trial, permit defendant to give expert opinion evidence of not to exceed two additional witnesses named in the application and in that case may after application made at least two days before the trial allow the prosecution to give expert opinion evidence of not to exceed two additional witnesses named in the application, in rebuttal. The court shall, by order, fix the compensation to be paid to the experts appointed by the presiding judge at not more than fifteen dollars per day and expenses and the same shall be paid out of the county treasury in the same manner that fees for witnesses for the state are paid."

On question 4 the committee asked for time for further investigation.

To Committee B two questions were submitted:

1. "In what way can the state secure the testimony of non-residents in the trial of criminal cases?

2. "The formulation of the necessary legislation to accomplish such purposes."

The committee reported in part as follows: "Obviously the best

way to secure the testimony of a nonresident, when it can be so done, is to secure the voluntary attendance of the witness at the trial, and this may ordinarily be done by the district attorney. Judge Clementson states that in an experience of nearly thirty years upon the bench and previous experience as district attorney he has never known this means to fail. But occasions may arise when nonresident witnesses will not attend voluntarily, and the question was of course intended to cover only the compulsory attendance of witnesses to give testimony, either at the trial or outside the state by deposition.

"Compulsory attendance at the trial can be secured only in two ways that we are able to discover. 1. By uniform interstate legislation authorizing the extradition of witnesses as persons accused of crime are extradited. 2. By uniform interstate legislation providing means to compel persons resident or being in another state to travel to the boundary of the state where they are desired, where their further travel may be compelled by the ordinary methods.

"Putting witnesses to such indignity as the first method involves would hardly be conducive to a free and full disclosure, if it would be legal, and we do not think attempts along that line desirable.

"Progress has been made in line with the second method far enough to get a decision of the Appellate Division of the Supreme Court of New York upholding legislation of the kind suggested. The recent decision of the case of *Commonwealth of Massachusetts v. Klaus,* reported in the New York Supplement, Vol. 130, p. 713, upholds such a statute, and from the opinion it appears that the states of Massachusetts, Pennsylvania, Vermont, Maine, New Hampshire and Rhode Island, as well as New York, have such statutes.

"They meet the constitutional requirement that the accused shall have the right to meet the witness face to face. Does the method of compelling the witness to attend at his place of residence to give his deposition do so?

"Our Supreme Court has held that where a witness has testified at one trial his testimony then given may be read at a future trial if the witness has since died, or if for any reason he is physically unable to attend a subsequent trial. Other courts have held that testimony given at a former trial may be read when the witness is beyond the jurisdiction of the court at the time of the later trial, and our courts would probably so hold in line with its other decisions referred to. If the constitutional rule as to confrontation is met by a confrontation at a previous trial or preliminary examination, would it not be by a confrontation at the taking of the deposition of the witness? The committee is of the opinion that it would.

"If this conclusion is correct it seems to follow that a statute providing for the taking of depositions by the state would be valid if it secured to the accused the right and the means to attend the examination so that confrontation might occur if he desired it. Actual confrontation would not be secured, necessarily, unless the accused were produced by an officer. But if means and opportunity to attend were provided, failure to attend would waive confrontation, just as non-attendance waives it under the present statute authorizing the taking of depositions in behalf of the accused; at least it would not be unreasonable, in our view, for the courts to so hold.

"Any such statute, however, would be ineffectual without interstate legislation. To provide for the taking of depositions outside the state, therefore, is as much of an undertaking as to provide for compulsory attendance at the trial, and we are inclined to think that legislation of the latter sort can be more easily obtained by reason of the progress along that line that has been already made. To secure effective effort along either line, however, it seems desirable to work in connection with the committees on the subject appointed by branches of the institute in other states. And as no legislation can be procured in this state during the coming year, as our legislature will not be in session, we incline to think it better to make no definite recommendations until opportunity for conference with such committees or examination of their reports and for further study of existing statutes is given. We therefore ask that the matter be left open for final report at the next meeting."

The committee was of the opinion that an accused person has a constitutional right of confrontation and that therefore depositions in criminal cases, not taken in the presence of the witness, could not be used.

To Committee C the following questions were submitted:

1. "The consideration of the advisability of the substitution of a system of municipal courts or some other inferior courts of record in place of the justice court, and the formulation of a plan to accomplish such substitution, if deemed advisable.

2. "The consideration of the advisability of the unification of courts and the abolition of concurrent jurisdiction, and the formulation of a plan to accomplish such unification, if deemed advisable."

The committee reported progress. The questions were continued for further investigation.

Two questions were submitted to Committee E as follows:

1. "Means of controlling newspaper reports, comments and discussions as to the guilt or innocence of accused persons, both before and during trial.

2. "What changes, if any, should be made in the existing law governing peremptory challenges and the impaneling of the jury in criminal cases?"

The committee reported that under the existing law there was ample power in the court to control newspaper reports.

On the second question the committee recommended that the number of peremptory challenges in criminal cases should be the same for the defense as for the prosecution, and proposed a bill to accomplish that purpose.

On the question: "To what extent should the state undertake the application of the earnings of convicted persons to the support of their families and to the education of their minor children?" Committee F reported progress and asked for time for further investigation.

To Committee G six questions were submitted:

1. "Should the function of courts be limited to the determination of the guilt or innocence of accused persons?
2. "Should all sentences to the reformatory be for the same determinate period?
3. "Shall the indeterminate sentence be adopted for all penal and reformatory institutions?
4. "The relative efficiency and merits of the indeterminate sentence and of the determinate sentence with unlimited power of parole.
5. "Should the power of parole be extended to all penal, reformatory and correctional institutions, and should parole be grantable irrespective of the portion of the sentence served?
6. "Should the existing statute providing for good time allowance to prisoners be repealed?"

The committee having made no definite recommendations these subjects were re-referred for further consideration.

On Friday evening a banquet was held. Chief Justice John B. Winslow, president of the American Institute, presided. Hon. F. C. Eschweiler, Circuit judge, Second Circuit, spoke on "The Judge and the Criminal." Colonel Nathan William MacChesney, former president of the American Institute, spoke on "The Purpose and Scope of the Work of the American Institute of Criminal Law and Criminology." Stephen S. Gregory, Esq., president American Bar Association, spoke on "Insanity as a Defense and Some Cases."

Two new topics were recommended for consideration for next year:

1. The subject of a uniform system of criminal statistics.
2. Whether or not persons sentenced for serious crimes who have served their terms should not be further detained upon a showing that they are likely to repeat similar crimes.

The following officers were elected for the ensuing year: President,

Hon. Alexander H. Reid, judge of the Circuit Court, Wausau; vice-presidents, Hon. James Wickham, judge of the Circuit Court, Eau Claire; B. R. Goggins, Esq., Grand Rapids; councilors, C. B. Bird, Esq., Wausau; Hon. F. C. Eschweiler, judge of the Circuit Court, Milwaukee; H. H. Jacobs, Esq., Milwaukee; Ralph E. Smith, Esq., member of the State Board of Control, Merrill; Hon. E. Ray Stevens, judge of the Circuit Court, Madison, secretary; Professor W. U. Moore, Law School, Madison, treasurer; Dean Louis E. Reber, extension division of the University of Wisconsin, Madison.