**968.33 History:** 1969 c. 427; Stats. 1969 s. 968.33.

## CHAPTER 969.

### Bail.

**969.01 History:** 1969 c. 255; Stats. 1969 s. 969.01.

**Comment of Judicial Council, 1969:** Sub. (2) continues the current law which requires bail in misdemeanor cases after conviction and upon appeal and gives discretion to the trial court as to the release of the defendant after conviction in felony cases.

Sub. (3) is the present s. 954.20.

Sub. (4) restates the considerations which the judge should utilize in setting bail and which are spelled out in State v. Whitty, 34 Wis. 2d 278, 149 NW 2d 557. [Bill 603-A]

See note to sec. 8, art. I, on bail, citing In re Perry, 19 W 676.

See notes to sec. 6, art. I, on excessive bail, citing State v. Whitty, 34 W (2d) 278, 149 NW (2d) 557, and Gaertner v. State, 35 W (2d) 159, 150 NW (2d) 370.

**969.02 History:** 1969 c. 255; Stats. 1969 s. 969.02.

**Comment of Judicial Council, 1969:** See comment after s. 969.03. [Bill 603-A]

**969.03 History:** 1969 c. 255; Stats. 1969 s. 969.03.

**Comment of Judicial Council, 1969:** This section, and the preceding section which is concerned with misdemeanor bail, represent a complete revision of existing bail practice in Wisconsin. Modeled primarily after 18 USCA s. 3146, the Federal Bail Reform Act of 1966, and the bail provisions found in the 1965 revision of the Illinois Criminal Code, these sections are designed to see that a maximum number of persons are released prior to trial with a minimum of financial burden upon them and to give the courts greater flexibility in insuring the appearance of the more serious law violater. Cash and surety bonds by individual or corporate sureties are still permitted. In addition, a judge has an option of permitting a defendant to post 10% of the amount of the bail, and if all of the conditions of the bond are met, then this deposit will be returned if the defendant is acquitted; or if he is convicted, 90% of the deposit will be returned. If a defendant is fined, the amount of the fine is taken from any deposit made.

Sub. (1) requires a bond in every felony case although it may be unsecured at the judge's option. Other alternatives available in felony cases include the right to place restrictions on travel, association or residence of a defendant. Further, the judge may, under sub. (1) (e), require a defendant to return to custody after specified hours. This provision would permit a defendant to work, confer with his attorney and assist in the preparation of his case all outside of jail and still insure his appearance in court for trial. It is anticipated that this provision would be used very sparingly and only in those cases where there was substantial doubt that the defendant would appear. This concept is contained in the Federal law and while it has been used but infrequently, it seems to offer a partial solution to the artificial practice at present of setting unreasonably high bail to insure that a defendant remains incarcerated prior to trial. The Wisconsin constitution guarantees bail in every case, and the United States constitution proscribes excessive bail. It is believed that far too many people are restrained prior to trial at a great cost to both the individual and to the counties involved. These provisions are designed to alleviate those problems. Illinois' experience with the 10% proviso has been that there has been no significant change in the number of defendants who fail to appear for trial. It should be noted that in Illinois the law has abolished the use of professional bondsmen while this section still permits the judge to require a security bond which may be furnished by a corporate surety. [Bill 603-A]

Taking new bail releases the former bail because it changes the custody of the accused. If one of the sureties on the original recognizance becomes the sole surety upon a second bond a judgment for the fine and costs imposed upon the principal against the sureties upon the original bond cannot be affirmed as to such one without a determination of his liability upon the second bond. State v. Becker, 80 W 313, 50 NW 178.

Where the surety on the bond failed to qualify and deposited the amount with the clerk, such deposit was in lieu of sureties and the money could be forfeited and paid into the county treasury. Although the money was furnished by the surety the deposit was that of defendant and no judgment need be entered against the surety. State v. Brown, 149 W 572, 136 NW 174.

When all claims of the state are satisfied money deposited as bail remains as a deposit, and is prima facie the property of the defendant; but if claimed by a third party the court may: (1) Summarily determine the true title, or (2) impound the fund and direct an action to be brought to determine the title. State ex rel. Glidden v. Fowler, 192 W 151, 212 NW 263.

For all the purposes of the deposit and until those purposes are fully satisfied the money deposited must be treated as that of the defendant. When these purposes have been fully satisfied, the statute has no further application and furnishes no barrier to any proper proceeding to determine the true title to the fund deposited. If it, in fact, belongs to a third party the attorneys for the defendant cannot apply the funds to the defendant's debt to them. Gentilli v. Brennan, 202 W 465, 233 NW 98.

The court may not order costs collected from cash bail unless accused is sentenced to pay a fine and costs. Fine and costs properly taxed against defendant may be collected out of cash bail notwithstanding that such bail was posted by a person other than the defendant. 39 Atty. Gen. 209.

Bail forfeited in a criminal case under 954.42, Stats. 1951, belongs to the county. The failure of the accused to appear does not authorize imposing a fine in absentia and collecting it out of the bail money. The foregoing does

not apply to deposits by persons accused of speeding in violation of 85.40. 41 Atty. Gen. 166.

**969.04 History:** 1969 c. 255; Stats. 1969 s. 969.04.

**Comment of Judicial Council, 1969:** Present s. 954.31. [Bill 603-A]

**969.05 History:** 1969 c. 255; Stats. 1969 s. 969.05.

**Comment of Judicial Council, 1969:** This section is a restatement of language found in s. 954.034 (2) (a). [Bill 603-A]

**969.06 History:** 1969 c. 255; Stats. 1969 s. 969.06.

**Comment of Judicial Council, 1969:** This section, which applies only to misdemeanors, is designed to insure the right of a defendant to a prompt determination of bail when he cannot be taken before a judge immediately upon his arrest. In traffic matters, bail schedules have been utilized successfully in the state for many years. See s. 8.02 (1) of the ALI Model Code of Pre-Arraignment Procedure. [Bill 603-A]

**969.07 History:** 1969 c. 255; Stats. 1969 s. 969.07.

**Comment of Judicial Council, 1969:** This provision formalizes a practice which has been in use in this state for many years. It lays down some conditions to insure uniformity and freedom from abuse. [Bill 603-A]

**969.08 History:** 1969 c. 255; Stats. 1969 s. 969.08.

**Comment of Judicial Council, 1969:** Circumstances may require that the amount of bail be reduced or raised after it is initially set. This section is designed to give the greatest flexibility in this regard. [Bill 603-A]

**969.09 History:** 1969 c. 255; Stats. 1969 s. 969.09.

**Comment of Judicial Council, 1969:** Sub. (3) requires that a copy of the bond be given to a defendant who is released. This is so that he may have notice of the conditions of his release. Some of those conditions are contained in subs. (1) and (2), and in addition, broad latitude is given to the releasing judge to set other conditions. [Bill 603-A]

**969.10 History:** 1969 c. 255; Stats. 1969 s. 969.10.

**969.11 History:** 1969 c. 255; Stats. 1969 s. 969.11.

**Comment of Judicial Council, 1969:** Substantially the same provision that is currently contained in s. 954.034 (1) (a). [Bill 603-A]

**969.12 History:** 1969 c. 255; Stats. 1969 s. 969.12.

**969.13 History:** 1969 c. 255; Stats. 1969 s. 969.13.

**Comment of Judicial Council, 1969:** This section represents a complete revamping of the current procedure. Currently, it is necessary to start a separate action to collect a forfeiture.

Sub. (3) requires the defendant and surety to appoint the clerk as their agent for the service of process in a forfeiture proceeding. Also, it provides that it is unnecessary to commence a separate action and the case may be heard before the judge who was to hear the principal criminal case. [Bill 603-A]

**Editor's Note:** On the collection of a forfeited recognizance under the prior practice see State v. Wettstein, 64 W 234, 25 NW 34, and 20 Atty. Gen. 38. See also State v. Rosenberg, 219 W 487, 263 NW 368.

**969.14 History:** 1969 c. 255; Stats. 1969 s. 969.14.

**Comment of Judicial Council, 1969:** This is substantially present s. 954.43. [Bill 603-A]

## CHAPTER 970.

### Preliminary Proceedings.

**970.01 History:** 1969 c. 255; Stats. 1969 s. 970.01.

**Comment of Judicial Council, 1969:** Sub. (1) restates existing case law. See Van Ermen v. Burke, 30 Wis. 2d 324, 140 NW 2d 737; Reimers v. State, 31 Wis. 2d 457, 143 NW 2d 525. What is a reasonable time in a rural county may be unreasonable in a large metropolitan county.

Sub. (2) recognizes the requirements of Pillsbury v. State, 31 Wis. 2d 87, 147 NW 2d 187. [Bill 603-A]

Reasonableness of detaining suspect before taking him before magistrate. 1960 WLR 164.

**970.02 History:** 1969 c. 255; Stats. 1969 s. 970.02.

**Comment of Judicial Council, 1969:** This section spells out the duties of a judge in the initial appearance of a defendant charged with either a misdemeanor or a felony.

Sub. (1) requires the judge to advise a defendant of certain basic rights in every case and to give him a copy of the complaint against him. The furnishing of a copy of the complaint will assist counsel in the preparation of the case, since normally counsel first sees a defendant either in jail or in his office and does not have access at that time to court records. It is consistent with the view that both sides should have copies of all pleadings. The requirement of par. (b) is found in present s. 957.26 (1) and in Jones v. State, 37 Wis. 2d 56.

Sub. (6) is basically a restatement of s. 957.26 (2) providing for the appointment of counsel for indigents. [Bill 603-A]

**Editor's Notes:** (1) In Jones v. State, 37 W (2d) 56, 154 NW (2d) 278, the supreme court adopted and announced the rule, for prospective application only, "that at an indigent defendant's initial appearance before a court or magistrate he be advised of his right to counsel and that counsel be appointed at that time unless intelligently waived". See also: Sparkman v. State, 27 W (2d) 92, 133 NW (2d) 776; State v. Strickland, 27 W (2d) 623, 135 NW (2d) 295; Wolke v. Rudd, 32 W (2d) 516, 145 NW (2d) 786; and Kaczmarek v. State, 38 W (2d) 71, 155 NW (2d) 813.

(2) In State ex rel. Plutshack v. Dept. of H.