1969 Stats.	*1967 Stats.*
975.08	959.15 (8)
975.09	959.15 (9)
975.10	959.15 (10)
975.11	959.15 (11)
975.12	959.15 (12)
975.13	959.15 (13)
975.14	959.15 (14)
975.15	959.15 (15)
975.16	959.15 (16)
975.17	959.15 (17)
975.18	None
976.01	885.32
976.02	885.33
976.03	964.01 to 964.29
976.04	964.30
976.05	None

On criminal prosecutions for libel see notes to sec. 3, art. I; on excessive bail see notes to sec. 6, art. I; on rights of accused see notes to sec. 7, art. I; on criminal prosecutions see notes to sec. 8, art. I; on searches and seizures see notes to sec. 11, art. I; on writs of error see notes to sec. 21, art. I; on appellate jurisdiction of the supreme court see notes to sec. 3, art. VII, and notes to 251.08; on jurisdiction of circuit courts see notes to sec. 8, art. VII, and notes to 252.03; on prisons see notes to various sections of ch. 53; on paroles and pardons see notes to various sections of ch. 57; on discretionary reversal see notes to 251.09; on proceedings in criminal cases on reversal see notes to 251.17; on criminal trial jurisdiction of county courts see notes to 253.12; on jurors see notes to various sections of ch. 255; on reversible errors in criminal actions see notes to 274.37; on habeas corpus see notes to various sections of ch. 292; on witnesses and oral testimony see notes to various sections of ch. 885; on depositions, oaths and affidavits see notes to various sections of ch. 887; on documents and record evidence see notes to various sections of ch. 889; on presumptions and judicial notices see notes to various sections of ch. 891; on the criminal code (general provisions) see notes to various sections of ch. 939; and on effect of repeal of statute on actions pending see notes to 990.04.

A review of Wisconsin criminal procedure. 1966 WLR 430.

CHAPTER 967.

General Provisions.

967.01 History: 1969 c. 255; Stats. 1969 s. 967.01.

967.02 History: 1969 c. 255; Stats. 1969 s. 967.02.

967.03 History: 1969 c. 255; Stats. 1969 s. 967.03.

Comment of Judicial Council, 1969: This section is consistent with the authority found in s. 59.45 for counties other than Milwaukee county. The limitations in s. 59.46 as to the powers of assistant district attorneys in Milwaukee county should be eliminated and all assistant district attorneys in the state should have the same powers. With reference to the duties of district attorneys, see s. 59.47. [Bill 603-A]

967.04 History: 1969 c. 255; Stats. 1969 s. 967.04.

Editor's Note: This section replaced sec. 887.06, Stats. 1967, which was repealed by sec. 52, ch. 255, Laws 1969. For the history of the repealed section see Wis. Annotations, 1960, and Wis. Statutes, 1967.

On rights of accused (meet the witnesses) see notes to sec. 7, art. I.

967.05 History: 1969 c. 255; Stats. 1969 s. 967.05.

Comment of Judicial Council, 1969: This section restates existing procedural law and practice. While the Fifth amendment of the United States constitution provides, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . .," ". . . the law is well settled that the presentment or indictment requirements of the Fifth amendment are not made applicable to the states by the Fourteenth amendment". Goyer v. State, 26 Wis. 2d 244, 246, 131 NW 2d 888 citing Kennedy v. Walker (1948), 135 Conn. 262, 63 A 2d 589, affirmed, 337 U.S. 901, 69 Sup. Ct. 1047, 93 L.Ed. 1715, rehearing denied, 337 U.S. 934, 69 Sup. Ct. 1491, 93 L.Ed. 1740. [Bill 603-A]

On rights of accused (nature of accusation) see notes to sec. 7, art. I.

967.06 History: 1969 c. 255; Stats. 1969 s. 967.06.

Comment of Judicial Council, 1969: Present s. 957.26 (3), (4), (5) and (6). [Bill 603-A]

The practice in the supreme court is that in the absence of the chief justice the powers conferred on him may be exercised by the justice who has been longest a continuous member of the court, who is present and available; and application for appointment of counsel for an indigent defendant under 357.26, Stats. 1941, should be made accordingly. State v. Tyler, 238 W 589, 300 NW 754.

Before counsel can be appointed by the supreme court under 357.26, Stats. 1943, to prosecute an appeal or writ of error it must appear that there are reasonable grounds for seeking a review. Cundy v. State, 244 W 506, 12 NW (2d) 681.

A lawyer's charge for services even when based on the recommended schedule of the state bar, is always subject to the courts' determination of reasonableness. Conway v. Sauk County, 19 W (2d) 599, 120 NW (2d) 671.

Appellate counsel for the indigent in Wisconsin. Evans, 41 WBB, No. 5.

Attorney compensation on court appointments. 1964 WLR 507.

CHAPTER 968.

Commencement of Criminal Proceedings.

968.01 History: 1969 c. 255; Stats. 1969 s. 968.01.

Comment of Judicial Council, 1969: Restatement of present s. 954.02 (1) with the additional authorization for a complaint to be sworn to before a district attorney. [Bill 603-A]

Editor's Note: On the history of sec. 4776,

R. S. 1878, governing complaints and warrants in the administration of criminal justice, see State ex rel. Long v. Keyes, 75 W 288, 44 NW 13.

A complaint which contains a substantial statement of the offense in positive terms is good. If the warrant does not mention the town, village, city or county in which the alleged offense was committed or the proceeding instituted it is defective. State ex rel. De Puy v. Evans, 88 W 255, 60 NW 433.

A complaint alleging in the language of the statute that the defendant did wilfully, feloniously and with malice aforethought kill and murder a certain person is sufficient to give the justice jurisdiction upon the preliminary examination. Butler v. State, 102 W 364, 78 NW 590.

The formal written complaint may be upon information and belief, even when the offense charged therein is a felony. Murphy v. State, 124 W 635, 102 NW 1087.

A warrant may issue under sec. 4776, Stats. 1917, upon a sworn complaint in writing. The record need not show that complainant was orally examined under oath. Bianchi v. State, 169 W 75, 171 NW 639.

Where a complaint and warrant contain several counts, the warrant is sufficient to sustain defendant's arrest and detention if one count properly charges an offense. On collateral attack a complaint should be liberally construed in favor of jurisdiction. Wolke v. Fleming, 24 W (2d) 606, 129 NW (2d) 841.

A warrant need not be issued for a defendant already properly arrested and he can be brought before a magistrate who then acquires jurisdiction over his person. Pillsbury v. State, 31 W (2d) 87, 142 NW (2d) 187.

Objection to a complaint because not made by an authorized person is waived if not made before pleading to the information. A defect in the issuance of a complaint concerns jurisdiction over the person, not the subject matter. Galloway v. State, 32 W (2d) 414, 145 NW (2d) 761, 147 NW (2d) 542.

A complaint charging a defendant with rendering false and fraudulent income tax returns did not show probable cause sufficient to support issuance of a warrant of arrest where executed by an unidentified person who predicating his charge (allegedly based on personal knowledge) that the taxpayer reported less income than he actually received during designated years merely averred that he, the complainant, acquired such information as a result of investigating the taxpayer's records—but was patently deficient in (1) failing to identify the complainant as a person qualified to make the investigation or form the opinion expressed therein; (2) failed to establish that a sufficiently thorough investigation was made to permit anyone, no matter how qualified, to form a meaningful opinion; and (3) failed to establish under what circumstances the investigation was made. State ex rel. Pflanz v. County Court, 36 W (2d) 550, 153 NW (2d) 559.

When a complaint in a criminal prosecution is challenged as inadequate, the test of sufficiency under 954.02, Stats. 1967, is: Does it meet the test of minimal adequacy, not in a hypertechnical but in a common-sense evaluation, in setting forth the essential facts establishing probable cause. The requirement of 954.02, that a criminal complaint shall set forth the "essential facts" constituting the offense charged, does not entitle an accused to some encyclopedic listing of all evidentiary facts upon which the state intends to rely for its conviction, but only that essential facts be set forth, preferably concisely and certainly clearly. State ex rel. Evanow v. Seraphim, 40 W (2d) 223, 161 NW (2d) 369.

Under the terms of 954.02 (2), Stats. 1965, a complaint for the issuance of a summons by a magistrate must meet the same standard of probable cause as that required for issuance of an arrest warrant. A complaint which is the basis for the issuance of a summons by a district attorney, pursuant to 954.02 (3), must also meet the probable cause standard if it is to withstand timely attack by the defendant when he appears before the county judge to whom the summons is returnable. State v. V-Systems of Wisconsin, Inc. 41 W (2d) 141, 163 NW (2d) 4.

968.02 History: 1969 c. 255; Stats. 1969 s. 968.02.

Comment of Judicial Council, 1969: This is a change from the present law designed to give the district attorney a greater voice in the initiating of criminal proceedings. Since his is the obligation of conducting the prosecution it is believed that he should have a voice in the screening out of unfounded complaints and in determining if there was sufficient evidence to warrant prosecution.

Sub. (3) provides a check upon the district attorney who fails to authorize the issuance of a complaint, when one should have been issued, by providing for a judge to authorize its issuance.

Sub. (3) also provides a vehicle for the issuance of complaints when the district attorney is unavailable.

The section is based upon s. 601 of the A. L. I. Model Code of Pre-Arraignment Procedure. [Bill 603-A]

Proceedings for the arrest and examination of offenders and commitment for trial, under 954.01 et seq., Stats. 1949, are not proceedings in any court but are proceedings before certain officers known to the law as magistrates. State v. Friedl, 259 W 110, 47 NW (2d) 306.

968.03 History: 1969 c. 255; Stats. 1969 s. 968.03.

968.04 History: 1969 c. 255; Stats. 1969 s. 968.04.

Comment of Judicial Council, 1969: Sub. (1) is a modification of the present s. 954.02 (2) with additional language designed to conform with White v. Simpson, 28 Wis. 2d 590; 137 N.W. 2d 391.

Par. (b) permits warrants or summonses to be issued by a judge in another county when there is no judge available in the county where the crime is alleged to have been committed.

Sub. (2) retains present language in s. 954.02 (4) and in addition adopts s. 604 of the Model Code of Pre-Arraignment Procedure designed to encourage greater usages of summonses in

misdemeanors. Studies have shown that in most misdemeanors, defendants are subsequently released prior to trial without bail and it would seem that arresting them when such release is likely is an unnecessary waste of police manpower.

Sub. (3) permits a simplification of the present form for warrants and complaints. Both documents may be contained on a single form. [Bill 603-A]

On searches and seizures see notes to sec. 11, art. I.

"A warrant is a written order on behalf of the state based upon a complaint issued pursuant to 954.02, Stats., commanding a law-enforcement officer to arrest a person and bring him before the magistrate. The purpose of the warrant is to give the accused person notice that he is charged with an offense and to bring him before the magistrate so that he acquires jurisdiction over the person of the accused. Jurisdiction does not depend upon the warrant but upon the accused's physical presence before the magistrate. This jurisdiction over the accused may be obtained by his voluntary appearance or by use of a summons as well as by a warrant." Pillsbury v. State, 31 W (2d) 87, 92, 142 NW (2d) 187, 190.

No statutory or constitutional infirmity develops by reason of the time lag between the conduct complained of and the application for a criminal warrant based on such conduct. State v. Christopher, 44 W (2d) 120, 170 NW (2d) 803.

The probable cause needed to be shown to issue a criminal warrant is less than the probable cause needed to be shown to bind over a defendant for trial after a preliminary hearing, and both of these are less than the burden to prove guilt beyond a reasonable doubt necessary for a criminal conviction. State v. Knoblock, 44 W (2d) 130, 170 NW (2d) 781.

A contention made for the first time on appeal from a conviction of armed robbery that the complaint and warrant were defective was patently without merit, where aside from constructive waiver by entering a plea, demanding a jury, and proceeding to trial, the record disclosed that defendant, present in court with his counsel at arraignment, through the latter expressly waived any defect in the issuance of the warrant. Hundhauser v. State, 44 W (2d) 447, 171 NW (2d) 397.

968.05 History: 1969 c. 255; Stats. 1969 s. 968.05.

Comment of Judicial Council, 1969: This section enlarges the scope of present s. 954.017 to include felonies. The method of commencing actions against corporations should be uniform in both misdemeanors and felonies. [Bill 603-A]

Editor's Note: Questions concerning procedures to be followed in criminal actions involving corporations were considered in 4 Atty. Gen. 240 and 10 Atty. Gen. 47.

968.06 History: 1969 c. 255; Stats. 1969 s. 968.06.

968.07 History: 1969 c. 255; Stats. 1969 s. 968.07.

Comment of Judicial Council, 1969: Sub. (1) increases the power of a law enforcement officer to arrest for all crimes when he has reasonable grounds to believe that a person has committed a crime. Present s. 954.03 (1) refers only to misdemeanors and contains limitations which this section has abolished. At present, arrest powers in felonies are not codified.

Sub. (2) is a new provision designed to clarify a law enforcement officer's power to seek the aid of a citizen in making an arrest. [Bill 603-A]

On searches and seizures see notes to sec. 11, art. I.

An officer making an arrest without a warrant is under a duty to take the person arrested before a magistrate without unreasonable delay; the reasonableness of the period of detention must be determined by the circumstances in each case. Peloquin v. Hibner, 231 W 77, 285 NW 380.

Information which police officers possessed as to 2 men of a certain description having taken clothing from a store in October, 1948, and as to these same 2 men having been in such store on January 13, 1950, acting in the same manner as previously, would have justified the arrest of the 2 men without a warrant for the 1948 shoplifting; where the officers on January 13 saw the defendant driving a foreign-licensed automobile with the 2 men in it, and followed the car, and saw through the window thereof a pair of unfinished trousers and considerable other clothing in the back thereof, the officers had probable cause to believe that the car contained stolen clothing and that the defendant was acting in concert with and for the benefit of the 2 men whom the officers were seeking, so that the arrest of the defendant then without a warrant, and the search of the car incidental thereto, were lawful, and the evidence thus obtained was admissible in the prosecution of the defendant for receiving stolen property and aiding in concealing stolen property. State v. Cox, 258 W 162, 45 NW (2d) 100.

Where the instant arrest was for a criminal offense, and was made under the provisions of ch. 954, Stats. 1949, it was sufficient, in respect to the time when the defendant was entitled to be informed of the nature of the offense, that she was informed thereof when the complaint was read to her in court and before she pleaded guilty. State v. Harrison, 260 W 89, 50 NW (2d) 38.

Where 2 police detectives knew personally that a burglary attempt had been made, that shortly prior thereto the defendant and 2 companions had been driving around the scene of the burglary in the defendant's automobile in an unusual and suspicious manner, and that a pair of shoes carried by one of the companions when both of them were arrested, had been worn by someone concerned in the burglary, the officers had sufficient grounds to make a valid arrest of the defendant at his home without a warrant, about an hour after the burglary. After an officer had validly arrested the defendant at his home, it was the officer's duty not to permit the defendant to escape or to obtain weapons or to destroy or dispose of incriminating evidence, and where the officer followed the defendant to a closet

in the performance of his duty, and observed the defendant's effort to conceal garments which the officer had seen him wearing a few hours previously, and the officer thereupon took possession thereof, the search or seizure, if it was such under the circumstances, was not unreasonable, and the evidence so obtained was admissible on the trial. A search may be made as an incident to a valid arrest, and when the arrest is valid and the search is an incident thereto, the search may extend beyond the person of the arrested individual to property within his immediate presence, control and surroundings. State v. Phillips, 262 W 303, 55 NW (2d) 384.

The fact that officers, when they arrested the defendant without a warrant, said to the defendant that he was under arrest for "suspicion of burglary," instead of saying that he was under arrest for burglary, did not render the arrest invalid. State v. Phillips, 262 W 303, 55 NW (2d) 384.

The term "reasonable grounds to believe" means a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused guilty, but the word "suspicion" does not mean mere suspicion; "probable cause," or "reasonable cause to believe," does not depend on the outcome of the arrest. There exists a privilege based on public policy on behalf of the government not to disclose the names of the informers in a criminal case, but the privilege is not absolute and has limitations. Stelloh v. Liban, 21 W (2d) 119, 124 NW (2d) 101.

Probable cause to arrest exists if the facts and circumstances known to the police officer warrant a prudent man in believing an offense has been committed, and refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. State v. Camara, 28 W (2d) 365, 137 NW (2d) 1. See also Kluck v. State, 37 W (2d) 378, 155 NW (2d) 26.

Admissions by a woman, in answer to police inquiries concerning visible fresh needle marks upon her forearms, that she, her companion, and another used heroin by injection the preceding day, constituted probable cause for her arrest, since such observation by the officers of the needle marks and their inquiry with respect thereto was reasonable conduct in line of duty, and the admissions elicited justified the woman's arrest for illegal use of narcotics. Jackson v. State, 29 W (2d) 225, 138 NW (2d) 260.

An officer may temporarily stop a person and ask for information or ask him to appear at a police station without having this constitute an arrest, unless there is an intent to take into custody and the person so understands. Huebner v. State, 33 W (2d) 505, 147 NW (2d) 646.

Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime, and the quantum of evidence required to establish probable cause is less than that which would justify conviction. State v. Herrington, 41 W (2d) 757, 165 NW (2d) 120.

Arrest without warrant in Wisconsin. Brodhead and LaFave, 1959 WLR 489.

968.08 History: 1969 c. 255; Stats. 1969 s. 968.08.

Comment of Judicial Council, 1969: At present there is no statute authorizing a release by a law enforcement officer of a person arrested without taking that person to court. Everyone recognizes, however, that many people are so released and that this authority should be codified. (See Ill. Rev. Stat. Ch. 38 S 107-6 and s. 309 (2) of the A. L. I. Model Code of Pre-Arraignment Procedure.) [Bill 603-A]

968.10 History: 1969 c. 255; Stats. 1969 s. 968.10.

Comment of Judicial Council, 1969: This section codifies existing law. Sub. (4) recognizes authority for constitutionally authorized inspections such as public health, livestock and building equipment. (See Camera v. Municipal Court, 387 U.S. 523, 87 Sup. Ct. 1727, 18 L. Ed. 2d 930 (1967).) [Bill 603-A]

On searches and seizures see notes to sec. 11, art. I.

968.11 History: 1969 c. 255; Stats. 1969 s. 968.11.

Comment of Judicial Council, 1969: This section codifies existing case law and is patterned after Ch. 38 s. 108-1 Ill. Rev. Code. [Bill 603-A]

A defendant lawfully arrested for one violation could be searched and checking his waistband for weapons was reasonable. When marijuana was found there he could be searched further for additional contraband. Ervin v. State, 41 W (2d) 194, 163 NW (2d) 207.

968.12 History: 1969 c. 255; Stats. 1969 s. 968.12.

Comment of Judicial Council, 1969: Sub. (1) is a restatement of existing case law which codifies the decision in State v. Beal, 40 Wis. 2d 607, 162 N.W. 2d 640 (1968) which permits search warrants to be based upon testimony given on information and belief.

Sub. (2) authorizes a search warrant to be issued by any judge in the state and to be executed in any county. Currently only employes of the Attorney General may obtain warrants in counties other than those in which they are to be executed. No valid reason appears to exist for this distinction. Factors which led to the decision to permit warrants to be issued in any county are: the need, on occasion, for speed in obtaining a search warrant; the advisability of secrecy in certain cases; and, the fact that the witnesses whose testimony is necessary are frequently more readily available in another county.

It should be noted that sub. (1) provides that a warrant shall designate the clerk to whom property seized under the warrant is to be returned. Normally this will be the court where the criminal action is pending or where it is contemplated that one will be brought. [Bill 603-A]

Editor's Notes: (1) In the following decisions (among others) the supreme court considered search warrants supported in whole or in part by complainants' averments "on in-

formation and belief": State v. Baltes, 183 W 545, 198 NW 282; Davis v. State, 187 W 115, 203 NW 760; Frihart v. State, 189 W 622, 208 NW 469; Glodowski v. State, 196 W 265, 220 NW 227; Mularkey v. State, 196 W 400, 220 NW 234; O'Leary v. State, 196 W 442, 220 NW 231; and Bach v. State, 206 W 143, 238 NW 816. On requirements as to recording of testimony and making of affidavits prior to enactment of this section see State v. Baltes, 183 W 545, 198 NW 282, and Bergman v. State, 189 W 615, 208 NW 470.

(2) In State v. Beal, 40 W (2d) 607, 162 NW (2d) 640, the supreme court enunciated the rule that a complaint for the issuance of a search warrant may be based on hearsay information and need not reflect the direct personal observations of the complainant as long as the magistrate is informed in the manner provided by statute (963.02, Stats. 1967) of the underlying circumstances supporting the complainant's averment on information and belief that the informant, whose identity by name need not be disclosed, was credible or his information reliable.

See note to sec. 2, art. VII, on judicial power generally, citing Hoyer v. State, 180 W 407, 193 NW 89.

A search warrant is executed by making a search of the premises. Lehrer v. State, 183 W 339, 197 NW (2d) 729.

"Cause" means the "probable cause" specified by sec. 11, art. I, that is, the existence of such evidence as justifies an honest belief in a reasonable mind that the charge in the complaint is true. The proofs need not be positive or absolute, but may be circumstantial. The applicant by merely filling a blank and swearing to it cannot secure a valid search warrant. The proceedings will generally be presumed to have been regular; but where it is made to appear that no sworn testimony was adduced, the evidence secured by the use of the warrant will be suppressed. State v. Baltes, 183 W 545, 198 NW 282.

Whether a search warrant was valid or not is immaterial where the defendant invited the officer to search. Welch v. State, 184 W 296, 199 NW 71.

Goods obtained by officers upon a search made without consent of a tenant in possession were lawfully obtained and were competent evidence against the lessors of the premises. Vejih v. State, 185 W 21, 200 NW 659.

Where a justice of the peace failed to reduce to writing testimony showing probable cause, compliance with the constitutional and statutory requisites could be proved by parol testimony in a prosecution involving the validity of the search warrant. A recital in a search warrant that the justice was "satisfied that there was reasonable cause for" the belief that defendant was violating the law is a sufficient finding of probable cause; but independent of such recital issuance of the warrant is equivalent to a formal adjudication of probable cause. State v. Blumenstein, 186 W 428, 202 NW 684.

One who admits ownership of liquor found on the premises of another cannot claim that a search of the premises upon which it was found was unlawful, or that the premises were inaccurately described in the search warrant. Hansen v. State, 188 W 266, 205 NW 813.

Arrest without warrant of a defendant who was observed by a police officer to hand to another person 2 bottles which were handed back is illegal where the officer knew nothing of their contents; and the evidence thus obtained is inadmissible on the trial of defendant for possessing intoxicating liquors. Testolin v. State, 188 W 275, 205 NW 825.

A search warrant issued for the search of a place does not confer authority for the search of a person, even though he be in charge of the place authorized to be searched. Facts disclosed in the evidence that defendant, in compliance with the order of the officers, laid down on a stove a package which he had under his arm, and that the officers opened it and found intoxicating liquor, are construed to constitute a search of the person. State v. Wuest, 190 W 251, 208 NW 899; State v. Kollat, 190 W 255, 208 NW 900.

Where an officer, approaching to search a dwelling, saw the wife of the accused disappear from the door, leaving it fastened, and the officer pulled off a hook from the screen door and entered, he was justified in using such force without asking permission to enter. A search warrant in the sheriff's coat on the premises a few feet from the house being searched by him was sufficiently in his possession, and was ample authority for the search. Hiller v. State, 190 W 369, 208 NW 260.

Where the district attorney and the justice of the peace who issued a search warrant agreed that not all of the statement made by the district attorney in applying for the warrant was reduced to writing, and neither contradicted the record as made, they were properly allowed to supplement the written record by testimony. Hiller v. State, 190 W 369, 208 NW 260.

A search warrant authorizing the search of the store of a suspected receiver of stolen property, authorized the officers to search a suit case of the defendant which was found in the store; and when the suit case and its contents had been delivered to the defendant upon his demand and the state was therefore not able to offer them in evidence at the trial, parol evidence as to the contents was admissible. McDonald v. State, 193 W 204, 212 NW 635.

Proof that a private dwelling was used for illicit traffic in liquor 30 days before the issuance of a search warrant, when not supplemented by any evidence tending to show that such violations of law have continued during such 30-day period, does not establish that the dwelling was used for that purpose at the time the warrant was issued and is therefore insufficient to authorize the issuance of the search warrant. State v. Jaeger, 196 W 99, 219 NW 281.

Before a search warrant can be issued for the search of a home to obtain evidence of violation of the prohibition act the magistrate must find that the premises are being used for the "unlawful manufacture for sale, unlawful sale, or possession for sale, of liquor" at the

time the warrant is issued. Glodowski v. State, 196 W 265, 220 NW 227.

Where neither the sworn testimony taken on the application for a search warrant, as the same has been preserved, nor the affidavit upon which the warrant was issued, contains a statement of any fact upon which the magistrate could find probable cause, further evidence is not admissible on a motion to suppress, to show that the magistrate who issued the warrant had before him evidence not preserved. State v. Ripley, 196 W 288, 220 NW 235.

Testimony of a chief of police that he had sent an officer and an under-cover man to the residence of the defendant, and that the officer reported that the under-cover man entered the house and upon his return said that the defendant had offered to sell him alcohol, did not authorize the issuance of a search warrant. Hessian v. State, 196 W 435, 220 NW 232.

A nice or technical description in a search warrant of the property to be searched is not required, a description pointing out a definitely ascertainable place in terms of reasonable certainty being sufficient. Chruscicki v. Hinrichs, 197 W 78, 221 NW 394.

The officer to whom a search warrant is given is not charged with the duty of passing upon its sufficiency, the warrant constituting a complete protection to the officer executing it, provided the officer has no knowledge of such want of jurisdiction. Chruscicki v. Hinrichs, 197 W 78, 221 NW 394.

The statute relating to the issuing of search warrants (363.02, Stats. 1927) does not suspend the duty of a sheriff lawfully present to arrest offenders selling and possessing liquor or to prevent commission of crime. Hoch v. State, 199 W 63, 225 NW 191.

Evidence obtained by searching an automobile which officers have reasonable cause to believe contained moonshine was admissible in a liquor law prosecution. Halbach v. State, 200 W 145, 227 NW 306.

The evidence on which a magistrate may act in issuing a search warrant may be circumstantial and be based on information and belief, but the evidence must be sufficiently detailed and of such a character as to permit the magistrate to come to his own conclusion whether probable cause exists, and it must not be so meager as to constitute merely the conclusions of the applicant and an invasion of the judicial function of the magistrate to determine the existence of probable cause. Kraus v. State, 226 W 383, 276 NW 303.

Evidence that an applicant for a search warrant, who was a trained enforcement officer, had detected the odor of fermenting mash coming from the premises was sufficient to support the magistrate's finding of probable cause and justified the issuance of the search warrant so that the search was not "unreasonable," and hence the evidence obtained on the search was properly admitted in a prosecution for the unlawful manufacture and sale of intoxicating liquors without the permit required by 176.051, Stats. 1935. State v. Brockman, 231 W 634, 283 NW 338.

Evidence of a police officer applying for a search warrant that, while engaged 2 days previously in a concededly legal search of the premises for gambling devices, he had there discovered by sight, smell and taste a quantity of whiskey and alcohol in unstamped containers, was sufficient to support the magistrate's finding of probable cause justifying the issuance of the search warrant, and the search was not unreasonable, and the illicit unstamped alcoholic liquor obtained on the search was competent evidence in a prosecution for the unlawful possession of unstamped intoxicating liquor contrary to 139.03 (8), Stats. 1937. State v. Hunter, 235 W 188, 292 NW 609.

Testimony of a police officer that he saw known "policy" players resort to certain premises, and that as they entered they dropped slips bearing "policy" numbers, showed a state of facts sufficient to arouse in the mind of any prudent man a strong belief that the premises were resorted to for the purpose of gambling and constituted a sufficient showing of probable cause to justify the issuance of a search warrant covering such premises. Mannery v. State, 236 W 575, 295 NW 683.

In determining the sufficiency of the evidence to constitute probable cause for the issuance of a search warrant, the supreme court must assume that magistrates are familiar with the meaning of terms usually used by persons engaged in the violation of criminal laws. State v. Mier, 252 W 221, 31 NW (2d) 148.

An affidavit and testimony of a police officer, applying for a search warrant, as to his observation of a series of contacts between named known policy gamblers, policy writers and pickup agents for various policy wheels including one E, and as to E's entering certain premises at certain times, and that such contacts were made for the purpose of turning over policy paraphernalia to E, and that based on the officer's experience in the investigation of policy-gambling activities he knew that policy gambling was being conducted and that policy paraphernalia was being concealed on the premises, together with the submitted criminal record of E, which the magistrate was entitled to consider although it did not show a conviction for policy gambling, were sufficient to sustain a finding of probable cause for the issuance of a search warrant. The experience and special knowledge of police officers, applying for a search warrant, are among the facts which may be considered. A trained, experienced police officer, applying for a search warrant, may state his conclusions from what he saw, heard and smelled. State v. Harris, 256 W 93, 39 NW (2d) 912.

The finding of probable cause for issuance of a search warrant must stand unless the proof is clearly insufficient to excite an honest belief in reasonable minds; hence in challenging the sufficiency of evidence to substantiate a magistrate's finding of probable cause, the burden is on the defendant to establish that such evidence was clearly insufficient. Morales v. State, 44 W (2d) 96, 170 NW (2d) 684.

The description in a search warrant need not be as specific as that in a deed to property,

but need only be sufficiently specific to designate the premises definitely and with certainty. Morales v. State, 44 W (2d) 96, 170 NW (2d) 684.

968.13 History: 1969 c. 255; Stats. 1969 s. 968.13.

Comment of Judicial Council, 1969: This is basically a restatement of existing case law including a recent U.S. Supreme Court decision in Warden v. Hayden (1967) 87 Sup. Ct. 1642 which provides for the right of a law enforcement officer to search for "mere evidence." [Bill 603-A]

Editor's Note: On the seizure of contraband articles see 5 Atty. Gen. 823, 16 Atty. Gen. 71, 26 Atty. Gen. 441, 27 Atty. Gen. 669, 29 Atty. Gen. 45, and 30 Atty. Gen. 289.

968.14 History: 1969 c. 255; Stats. 1969 s. 968.14.

Comment of Judicial Council, 1969: New. Codifies existing case law. See Ch. 38 s. 108-8 Ill. Rev. Code. [Bill 603-A]

968.15 History: 1969 c. 255; Stats. 1969 s. 968.15.

Comment of Judicial Council, 1969: Current law has no provision on the execution of a search warrant. It is believed that there should be some reasonable period in which a warrant should be executed and returned. Experience teaches that normally search warrants have little effect if they are not promptly served. They should not be held by an officer and served at his whim. Various states have adopted times different than the federal requirement in F. R. Cr. P. 41 (d) which has a 10-day limitation. The Council, after consultation with law enforcement authorities, felt 5 days was a reasonable period. [Bill 603-A]

A search warrant issued on the morning of August 26, and executed at 6 o'clock p.m. on August 29, was valid as there was no unreasonable delay and it did not appear that the warrant was held back by the officer as a menace to the defendant. Hiller v. State, 190 W 369, 208 NW 260.

968.16 History: 1969 c. 255; Stats. 1969 s. 968.16.

Comment of Judicial Council, 1969: The forms for search warrants currently found in s. 963.05 appear to confer the powers contained in this section, but aside from case law there is no current statutory authority. If this power is not given, the effectiveness of a search warrant may be thwarted by a person or persons on the premises searched by concealing, on their person, the items subject to seizure. Obviously an officer would also want to ascertain if there are any weapons which would endanger his safety. [Bill 603-A]

968.17 History: 1969 c. 255; Stats. 1969 s. 968.17.

Comment of Judicial Council, 1969: This section requires a return to the clerk, and in addition, provides that a copy of the inventory of items seized be given to the deprived possessor. This provision is for the protection of both the party whose property was seized and the officer making the seizure. (See Ch. 38 Ill. Rev. Code s. 108-10 and Mont. Rev. Code 95-712.) [Bill 603-A]

968.18 History: 1969 c. 255; Stats. 1969 s. 968.18.

Comment of Judicial Council, 1969: This is a new provision which guarantees the same rights of persons whose property is seized without a warrant as those whose property is taken with a search warrant. (See s. 968.17.) [Bill 603-A]

968.19 History: 1969 c. 255; Stats. 1969 s. 968.19.

Comment of Judicial Council, 1969: Present s. 963.04. [Bill 603-A]

963.04, Stats. 1961, not replevin, provides the remedy for recovery of personal property held by enforcement officers attendant upon criminal proceedings. State v. Gipson, 22 W (2d) 469, 126 NW (2d) 57.

968.20 History: 1969 c. 255; Stats. 1969 s. 968.20.

Comment of Judicial Council, 1969: This section is a new provision which establishes a simplified procedure for obtaining the return of property seized with or without a warrant. Obviously if such property is needed for use as evidence, it need not be returned unless arrangements can be made for its subsequent use as evidence. Contraband need never be returned.

Sub. (2) authorizes the officer to return property not needed for evidence or investigation without a formal court proceeding. [Bill 603-A]

968.21 History: 1969 c. 255; Stats. 1969 s. 968.21.

Comment of Judicial Council, 1969: Present s. 963.07. The criminal penalties found in the current section have been transferred to the Criminal Code as s. 946.76. [Bill 603-A]

968.22 History: 1969 c. 255; Stats. 1969 s. 968.22.

Comment of Judicial Council, 1969: Present s. 963.08. [Bill 603-A]

968.23 History: 1969 c. 255; Stats. 1969 s. 968.23.

Editor's Note: This section superseded section 963.05, Stats. 1967, which was derived from sec. 234, ch. 631, Laws 1949, and later legislation.

968.24 History: 1969 c. 255; Stats. 1969 s. 968.24.

Comment of Judicial Council, 1969: See comment under s. 968.25. [Bill 603-A]

968.25 History: 1969 c. 255; Stats. 1969 s. 968.25.

Comment of Judicial Council, 1969: Ss. 968.24 and 968.25 are called "stop and frisk" laws. They give additional powers to law enforcement officers to conduct brief questioning and investigation on the street without the formal requirements necessary for an arrest. They also provide for the safety of the officer by permitting a search for weapons. The Wisconsin Supreme Court has recognized the com-

mon law right to "stop and frisk" in Huebner v. State, 33 Wis. 2d 505, 147 N. W. 2d 646. (These sections are taken from New York Criminal Code s. 180-a.) It should be noted that "stop and frisk" rights of law enforcement officers were approved by the U.S. Supreme Court in Sibron v. New York and Peters v. New York, 392 U.S. 40, 88 Sup. Ct. 1889, 20 L. Ed. 2d 917 (1968) and Terry v. Ohio, 392 U.S. 1, 88 Sup. Ct. 1868, 20 L. Ed. 2d 889 (1968). While Sibron and Peters were decided on other grounds, both were New York cases and the U.S. Supreme Court did not use those cases to disapprove of language which is substantially the same as is found in these sections. [Bill 603-A]

968.26 History: 1969 c. 255; Stats. 1969 s. 968.26.

Comment of Judicial Council, 1969: Present s. 954.025. [Bill 603-A]

Editor's Note: Citations of prior statutes governing John Doe proceedings are: sec. 2, ch. 145, R. S. 1849; sec. 2, ch. 176, R. S. 1858; sec. 4776, R. S. 1878; sec. 4776, Stats. 1898; sec. 361.02, Stats. 1925; and sec. 354.025, Stats. 1949. See also: State ex rel. Long v. Keyes, 75 W 288, 44 NW 13, and State ex rel. Schroeder v. Page, 206 W 611, 240 NW 173.

In a prosecution for criminal libel for stating that the chief of police was one of the organizers of an attack by underworld elements who kidnaped defendant, defendant's motion for an order for inspection of the district attorney's transcript of testimony in a John Doe proceeding with respect to defendant's assailants was properly denied. State v. Herman, 219 W 267, 262 NW 718.

Where a town chairman had been arrested on a complaint charging him with the acceptance of a bribe in his official capacity, the judge of the district court of Milwaukee county, before whom such charge was pending for preliminary examination, could conduct a separate investigation or John Doe proceeding under 361.02, Stats. 1947, based on a complaint filed by the district attorney which, although naming the town chairman and titled the same as the pending charge, alleged on information and belief that the town chairman had been guilty of other offenses in his official capacity in violation of 346.06, and that it was essential that the persons concerning whom the district attorney had information be subpoenaed to give evidence to ascertain whether such offenses had been committed. A person named as a defendant in a complaint for a John Doe proceeding has no legal right to attend such proceeding, and has no right, in a prosecution growing out of such proceeding, to inspect the district attorney's transcript of the testimony taken at the John Doe hearing. 354.025 does not prohibit a complaint for a John Doe proceeding, or the issuance of subpoenas in such a proceeding, with the defendant named instead of "John Doe." State ex rel. Kowaleski v. District Court, 254 W 363, 36 NW (2d) 419.

Hearings under the John Doe statute (361.02, Stats. 1947) frequently are in secret, and the better rule is that evidence taken at a secret John Doe hearing is not to be made public and may be used only under suggested circumstances. A witness who has testified in a John Doe proceeding on the promise of secrecy had no cause of action for invasion of the right of privacy against parties presenting, in a liquor-license hearing before the common council of a city, evidence taken in the John Doe proceeding. State ex rel. Distenfeld v. Neelen, 255 W 214, 38 NW (2d) 703.

A witness in a John Doe proceeding need not be informed of the substance of the complaint or of the extent of the inquiry intended. A requirement by the magistrate that the witness not discuss the proceeding with anyone but his attorney does not violate constitutional guaranties of free speech. State ex rel. Jackson v. Coffey, 18 W (2d) 529, 118 NW (2d) 939.

A secrecy order is binding on the magistrate as well as the witnesses and he will be restrained from improper disclosures. State ex rel. Niedziejko v. Coffey, 22 W (2d) 392, 126 NW (2d) 96, 127 NW (2d) 14.

The validity of a John Doe proceeding does not depend on a written or oral complaint naming someone; the statute requires only that the person making the complaint have reason to believe a crime has been committed within the magistrate's jurisdiction; it does not require that person to know who committed the crime. Wolke v. Fleming, 24 W (2d) 606, 129 NW (2d) 841.

The John Doe proceeding outlined in 954.025, Stats. 1967, is primarily an investigative device, out of which can come either an exoneration, by implication at least, or a formal charge of a crime, but under the statute can be initiated only by complaint of the petitioner to the magistrate that he has reason to believe a crime has been committed. State ex rel. Kurkierewicz v. Cannon, 42 W (2d) 368, 166 NW (2d) 655.

In a proceeding under sec. 4776, Stats. 1913, a physician cannot legally be permitted to testify the facts ascertained by him in his professional capacity, except in those prosecutions specifically referred to in secs. 4075 and 4078d. 3 Atty. Gen. 214.

In a proceeding under 361.02, Stats. 1939, it is improper for a magistrate to issue a warrant for apprehension of John Doe and then take evidence, but such evidence should be taken without issuing any warrant. For this purpose the magistrate may subpoena witnesses and may continue the hearing from time to time until the identity of the offender has been discovered. 29 Atty. Gen. 400.

John Doe proceeding contrasted with grand jury proceeding. 33 MLR 121.

968.27 History: 1969 c. 427 ss. 3, 5 (2); Stats. 1969 s. 968.27.

968.28 History: 1969 c. 427; Stats. 1969 s. 968.28.

968.29 History: 1969 c. 427 ss. 3, 5 (2); Stats. 1969 s. 968.29.

968.30 History: 1969 c. 427 ss. 3, 5 (2); Stats. 1969 s. 968.30.

968.31 History: 1969 c. 427 ss. 3, 5 (2); Stats. 1969 s. 968.31.

968.32 History: 1969 c. 427; Stats. 1969 s. 968.32.

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