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.

and S.S. 37 W (2d) 713, 155 NW (2d) 549, the supreme court adopted and announced the rule, for prospective application only, that counsel will be appointed at public expense, for an indigent charged with a misdemeanor, (a) when the indigent faces a maximum penalty of imprisonment exceeding six months, and (b) in such other misdemeanor cases where the trial court in the exercise of its sound discretion deems it necessary and desirable in order to attain the best interests of justice.

(3) In State v. Bond, 41 W (2d) 219, 163 NW (2d) 601, the supreme court declined to lay down guidelines of hardship and standards of financial worth in relation to the right to have counsel appointed at state expense.

(4) A predecessor statute, 957.26, on counsel for indigent defendants charged with felonies, was construed in the following cases (among others): James v. State, 24 W (2d) 467, 129 NW (2d) 227, and Van Voorhis v. State, 26 W (2d) 217, 131 NW (2d) 833.

On rights of the accused see notes to sec. 7, art. VII.

See note to 971.05, citing Eskra v. State, 29 W (2d) 212, 138 NW (2d) 73.

970.03 History: 1969 c. 255; Stats. 1969 s. 970.03.

Comment of Judicial Council, 1969: Sub. (3) is a restatement of present law.

Sub. (4) is the present s. 954.10.

Sub. (6) is the present s. 954.08 (2).

Sub. (7) is a restatement of s. 954.13 (1).

Sub. (8) is a simplification of the present s. 954.13 (2).

Sub. (10) is a new provision requiring a finding of probable cause as to each count in a multiple count complaint. If such a finding is not made as to any count, it shall be dismissed. This reverses the rule in Hobbins v. State, 214 Wis. 496, 253 NW 570. [Bill 603-A]

It is not required that there shall be a formal adjudication by the magistrate that the alleged offense has been committed and that there is probable cause to believe the accused guilty. The fact that the magistrate holds to bail or commits to jail is equivalent to such adjudication. State v. Leicham, 41 W 565, 573.

The custody of a prisoner on commitment is not illegal because the magistrate failed to make the same docket entries during the preliminary examination that he would be required to make upon the trial of a cause. State ex rel. Brown v. Stewart, 60 W 587, 19 NW 429.

Public policy does not permit the employment by private persons of counsel to assist the district attorney in the preliminary examination of persons accused of crime, and a contract therefor is void. Rock v. Ekern, 162 W 291, 156 NW 197.

A plea of guilty renders further preliminary examination unnecessary. Belter v. State, 178 W 57, 189 NW 270.

"The object or purpose of the preliminary investigation is to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based." Thies v. State, 178 W 98, 103, 189 NW 539, 541.

If it appears that any offense has been committed and that the defendant is probably guilty thereof the examining magistrate must hold the defendant for trial; but the magistrate is not authorized to restrict the action of the district attorney in filing an information or to limit the action of the circuit court in determining for what offense or upon what specific charges the defendant shall be tried. Hobbins v. State, 214 W 496, 253 NW 570.

The testimony of a prosecutrix who was unable to understand questions or to communicate intelligent answers, or to give a consistent series of affirmative and negative answers to leading questions, and who did not appear to have an appreciation of an obligation to testify truthfully, was insufficient on which to bind defendant over on a charge of rape. Hancock v. Hallmann, 229 W 127, 281 NW 703.

The evidence on the preliminary examination warranted the magistrate's conclusion that the defendant was one of the men who participated in the burglary. Chambers v. State, 235 W 7, 291 NW 772.

If it appears on preliminary examination that a crime has been committed and there is probable cause to believe the defendant guilty, he is to be committed for trial, and it is not necessary to establish the guilt of the defendant beyond a reasonable doubt, but the test is whether the evidence brings the charge against the defendant within the reasonable probabilities. State ex rel. Wojtycski v. Hanley, 248 W 108, 20 NW (2d) 719.

If it appears from the evidence on a preliminary examination that any offense has been committed, even though not the one charged in the complaint, and that the defendant is probably guilty, the examining magistrate must hold the defendant for trial; and a finding as to any specific offense is not required. State ex rel. Kowaleski v. Kubiak, 256 W 518, 41 NW (2d) 605.

See note to 943.02, citing State v. Janasky, 258 W 182, 45 NW (2d) 78.

On a preliminary examination of the president and principal stockholder of a corporation who devoted his full time to its affairs and was assisted by relatives and who was charged with making a false and fraudulent tax return of corporate income, testimony of a former cashier as to falsifying figures so as to show less than the true amount of sales and withdrawing a balancing amount of cash and placing it in a drawer in a desk which she used, and evidence as to the disappearance of certain records from which a tax auditor had computed that $41,800 was withdrawn and not accounted for in the tax return, and the failure to prosecute the former cashier for embezzlement on the discovery of $9,600 in the desk once occupied by her, and the full release of all claims against her while employed in the corporate store, were sufficient to warrant the magistrate's finding of probable cause to believe that the defendant knew the tax return to be false and was guilty of the offense charged. State ex rel. Marachowski v. Kerl, 258 W 309, 45 NW (2d) 668.

See note to 974.05, citing State v. Friedl, 259 W 110, 47 NW (2d) 306.

On a preliminary examination, the state is not required to produce all of its evidence, or its best evidence, but only that which is sufficient to provide a substantial ground for the exercise of judgment by the committing magistrate. State ex rel. Brill v. Spieker, 271 W 237, 72 NW (2d) 906.

253.12 and 954.13 (1), Stats. 1961, are in direct conflict with respect to the jurisdiction of the county court of Milwaukee county, but 954.13 (1) is deemed the controlling one where the defendant requests a preliminary hearing, and thereunder a defendant in such court on a charge of committing the felony of fraud on a hotel or restaurant keeper should have been granted a preliminary hearing on his request therefor. State ex rel. Sucher v. County Court, 16 W (2d) 565, 115 NW (2d) 611.

Where a preliminary hearing on criminal charges was held in county court, and the accused was bound over for trial to the circuit court, and thereafter moved the circuit court to dismiss the action on the ground of insufficiency of the evidence adduced at the preliminary hearing, the accused thereby submitted to the jurisdiction of the circuit court, and hence could no longer seek habeas corpus to test the sufficiency of the evidence at the preliminary examination, and the order denying such motion for dismissal was a nonappealable order. State ex rel. Offerdahl v. State, 17 W (2d) 334, 116 NW (2d) 809.

A discharge on a preliminary examination under 954.12, Stats. 1959, or a discharge under, 955.17 (2), where the district attorney determines that no information should be filed after a preliminary hearing, does not bar further prosecution. State v. Fish, 20 W (2d) 431, 122 NW (2d) 381.

The right to a preliminary hearing rests upon statute and is not a constitutional requirement. Therefore, the supreme court will not set aside a judgment of conviction and permit a withdrawal of a plea of guilty because of a claimed denial of a preliminary hearing, absent some showing of prejudice. State v. Strickland, 27 W (2d) 623, 135 NW (2d) 295. See also State v. Watkins, 40 W (2d) 398, 162 NW (2d) 348.

A delay of 27 days before a preliminary examination is held is not ground for dismissal where the delay was caused by defendant's request for assigned counsel and special Milwaukee procedures as a result. Wolke v. Rudd, 32 W (2d) 516, 145 NW (2d) 786.

Where, before a preliminary examination the magistrate is informed that the defendant may not be mentally capable of standing trial, the magistrate, without requiring a plea, should bind him over to the court for determination of the sanity issue. The court should hold a hearing to determine probable guilt; if found, the court should proceed under 957.13; if not found, he should be detained for civil proceedings under ch. 51 to determine mental competency. State v. McCredden, 33 W (2d) 661, 148 NW (2d) 33.

The purpose of a preliminary examination is to protect the accused from hasty, improvident, or malicious prosecution and to discover whether there is a substantial basis for bringing the prosecution and further denying the accused his right to liberty. Whitty v. State, 34 W (2d) 278, 149 NW (2d) 577.

"A preliminary examination since 1849 in this state has been considered an essential step in the criminal process involving felonies. The purpose of the preliminary examination is to provide an expeditious means for the discharge of an accused if it does not appear probable that he has committed the crime or crimes for which he is being held. The right to such an examination stems purely from statute and is not considered a constitutional right." State ex rel. Klinkiewicz v. Duffy, 35 W (2d) 369, 373, 151 NW (2d) 63, 66.

A committing magistrate before whom an accused was brought charged with attempted murder who, over the objection of the latter's counsel, adjourned the preliminary hearing from time to time for periods exceeding 10 days, lost jurisdiction of both the subject matter and person of the accused. The magistrate's loss of jurisdiction did not preclude the state from initiating a new prosecution for the same offense, absent a running of the statute of limitations. State ex rel. Klinkiewicz v. Duffy, 35 W (2d) 369, 151 NW (2d) 63.

At a preliminary examination the defendant should have been allowed to call as a witness a person present in court even though not under subpoena, where there was no indication that he was only attempting pretrial discovery of the state's evidence. State v. McCarter, 36 W (2d) 608, 153 NW (2d) 527.

If there is not an objection to the omission to hold a preliminary examination within the time required by statute (954.05 (1), Stats. 1965), prior to arraignment, the state may, in the exercise of jurisdiction over both the person of the defendant and the subject matter of the offense, proceed to trial and ultimate judgment. Logan v. State, 43 W (2d) 128, 168 NW (2d) 171.

970.04 History: 1969 c. 255; Stats. 1969 s. 970.04.

Comment of Judicial Council, 1969: Restatement of s. 955.20. [Bill 603-A]

The fact that the magistrate determined on the first examination that there was no good reason to believe the offense stated in the complaint had been committed was not a final adjudication and a bar to further examination under sec. 4656, Stats. 1898. Campbell v. State, 111 W 152, 86 NW 855.

An accused may be bound over for trial notwithstanding previous discharge, since the district attorney may hold a second preliminary examination if he "shall afterwards discover admissible evidence, sufficient, in his judgment, to convict the person discharged." The judgment of the district attorney is not open to review upon objection at the trial to legality of the second examination; nor is it jurisdictional that he should recite in the proceedings that he has discovered additional evidence. Dreps v. State ex rel. Kaiser, 219 W 279, 262 NW 700.

After the discharge of the defendant at a preliminary examination for want of evidence, the district attorney was not limited to the remedy of an appeal if an appeal would lie; he could cause another complaint to be made, and where he in good faith did so, his conclu-

sion is not open to review, and the second preliminary examination, at which further admissible evidence was introduced, is deemed properly held. State ex rel. Tessler v. Kubiak, 257 W 159, 42 NW (2d) 496.

955.20 is directory only and relates solely to the duty of district attorneys, and it does not provide the accused with a defense or operate as a bar to subsequent proceedings involving the same offense. It does not cover cases where, after the first preliminary hearing, evidence still exists, whether because of improper exclusion on the first hearing or of failure to adduce it or of being unknown to the district attorney; nor does the statute prohibit the making of a second complaint for the same charge. Tell v. Wolke, 21 W (2d) 613, 124 NW (2d) 655. See also State ex rel. Beck v. Duffy, 38 W (2d) 159, 156 NW (2d) 368.

970.05 History: 1969 c. 255; Stats. 1969 s. 970.05.

Comment of Judicial Council, 1969: This section retains the existing requirement that a record be made of the testimony at all preliminary examinations. However, the Judicial Council has found that transcripts often are not used by the parties or the court especially where a defendant enters a plea of guilty. In such cases the preliminary examination transcript is often not even on file until after the defendant has been sentenced. This section preserves the right of any party or the court to order the testimony to be transcribed if it is felt there is a need for such testimony. It is believed that in most cases this will not be done since an overwhelming number of cases are disposed of by guilty pleas. This provision should relieve the burden on court reporters, speed the preparation of needed transcripts and result in reducing the expenses attendant to criminal trial, all without prejudice to the administration of criminal justice. [Bill 603-A]

361.27, Stats. 1931, does not require the evidence in a John Doe proceeding under 361.02 to be returned, since such evidence is not required by that section to be reduced to writing. State ex rel. Schroeder v. Page, 206 W 611, 240 NW 173.

CHAPTER 971.

Proceedings Before and at Trial.

971.01 History: 1969 c. 255; Stats. 1969 s. 971.01.

Comment of Judicial Council, 1969: Sub. (1) restates s. 955.17 (1).

Under present s. 955.01 if an information is not filed within 6 months after a preliminary examination, a defendant is entitled to be released without bail. The Council feels a shorter period is adequate.

Sub. (2) adopts 30 days as the standard but permits an extension of time upon application of the district attorney. The penalty for failure to file within the time limitation is a dismissal without prejudice, which will permit a second charge being brought. [Bill 603-A]

Editor's Note: Sec. 955.01 was derived from sec. 355.01, and the latter section was construed in State v. Brill, 1 W (2d) 288, 83 NW (2d) 721, but this was prior to enactment of the amendatory legislation of 1955 and 1961.

Where a preliminary examination has been waived, the district attorney may file an information for any offense included or attempted to be stated in the complaint. Thies v. State, 178 W 98, 189 NW 539.

A district attorney in filing an information is not restricted to the crime stated in the complaint before the examining magistrate, but may file an information setting forth the crime committed according to the facts ascertained on such examination; consequently the evidence on the preliminary examination must be deemed sufficient to warrant holding the defendants for trial if it admits of finding the existence of the essential facts to constitute any criminal offense, although it was not charged in the complaint. The evidence submitted on the preliminary examination must be construed favorably to determine whether there was any substantial basis for the exercise of the judgment of the committing magistrate. State ex rel. Kropf v. Gilbert, 213 W 196, 251 NW 478.

The information should set forth the crime committed according to the facts ascertained upon the examination and from the written testimony taken thereon, whether or not it be the offense charged in the complaint on which examination was held. Mark v. State, 228 W 377, 280 NW 299.

A district attorney in filing an information is not restricted to the crime stated in the complaint made before the examining magistrate, but may file an information setting forth the crime committed according to the facts ascertained on such examination. Johnson v. State, 254 W 320, 36 NW (2d) 86.

See note to 970.03, citing State v. Fish, 20 W (2d) 431, 122 NW (2d) 381.

In felony cases the information is the accusatory pleading under our criminal procedure and its filing is not jurisdictionally dependent upon a valid complaint. State v. Midell, 40 W (2d) 516, 162 NW (2d) 54.

A district attorney possesses quasi-judicial power to decline to prosecute a person regularly accused; but his decision and action in every such case is subject to the approval of the court having jurisdiction of the case. 1902 Atty. Gen. 90.

When a defendant has waived preliminary examination, no information should be filed against him charging a higher crime than that charged in the complaint. The correct procedure is to dismiss and charge a higher crime in the new complaint, if warranted. 12 Atty. Gen. 284.

A district attorney must produce at the preliminary examination enough evidence to satisfy the magistrate that a crime has been committed and that there is probable cause to believe defendant guilty; he need not produce all evidence in his possession. 24 Atty. Gen. 258.

971.02 History: 1969 c. 255; Stats. 1969 s. 971.02.

Comment of Judicial Council, 1969: Present s. 955.18. [Bill 603-A]

Where the complaint charged that perjury