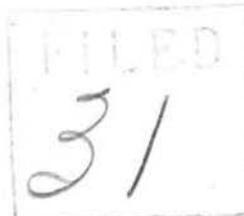


BAIL BONDS: The clerk of the circuit court may fix bail and take a bond or recognizance where the defendant is under arrest or in custody after an information or indictment has been filed, and when court is not in session.

March 3, 1948.



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Honorable Robert C. Frith
Prosecuting Attorney
Livingston County
Chillicothe, Missouri.

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Our attention has been called to Section 3885 and 3962 of the Revised Statutes of Missouri, 1939, as amended and there seems to be some difficulty as to whether the Clerk of the Court can take a bond and under what circumstances. I would appreciate it if you would give me an opinion on this point."

Section 3885, R. S. Mo., 1939, as amended, Laws 1945, p. 841, reads as follows:

"Whenever any person shall be committed to jail on a warrant of commitment by any magistrate for aailable offense, the recognizance, with proper security, may be taken by the court or judge of the court having criminal jurisdiction, and in case of the absence of the judge of such court having criminal jurisdiction from the county, such recognizance may be taken by any judge of a court of record, except a judge of the probate court."

Section 3962, R. S. Mo., 1939, reads as follows:

"When the defendant is in custody or under arrest for a bailable offense, the court in which the indictment or information is pending may let him to bail and take his bond or recognizance, or, if the court is not in session, the clerk of the court may fix the amount of such bail and take his bond or recognizance."

Your attention is called to the fact that these two sections are by their terms applicable in two separate situations. Sec. 3885 is applicable whenever a person has been committed to jail on a warrant of commitment by a magistrate, and Sec. 3962 is applicable when a person is under arrest or in custody at the time of the filing of an indictment or information.

Section 3893, R. S. Mo. 1939, requires that a preliminary hearing be held before a magistrate prior to the filing of an information charging a felony.

Section 3876 provides for the magistrate's taking a recognizance, if the offense charged is a bailable one.

Section 3877 provides that if sufficient bail is not offered, the person shall be committed to the county jail to await trial.

Section 3878 requires the magistrate, whenever a person is committed to jail for a bailable offense, to endorse on the warrant of commitment, the sum in which bail was required.

Thereafter, and prior to the time an information is filed, where the person charged has not previously been able to offer sufficient bail, the recognizance must be taken in accordance with Section 3885. That section specifies the officers who may take a recognizance under the circumstances. No mention is made of the clerk's taking a recognizance, and he is, therefore, without authority to do so, and any recognizance which he might purport to take would be void. *State v. Caldwell*, 124 Mo. 509, 28 S.W. 4; *State ex rel. v. Fraser*, 165 Mo. 242, 65 S.W. 569.

The sheriff is authorized under Section 3965 to take bail when the amount has been fixed by the magistrate and endorsed on the warrant of commitment. (See *State v. Holt*, 234 Mo. 598, 137 S.W. 877), but no provision has been made for the clerk's doing so. - Once, however, the information has been

Hon. Robert C. Frith,

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filed where the person is in custody or under arrest, Section 3962 becomes applicable. Under that section the clerk is authorized to fix amount of bail and to take the bond or recognizance, if the court is not in session. The clerk's authority is limited to cases where the court is not in session, and the record of his action must show that such was the case. State v. Woodward, 159 Mo. 680, 60 S.W. 1042.

CONCLUSION.

The clerk of the circuit court may fix bail and take a bond or recognizance where the defendant is under arrest or in custody after an information or indictment has been filed, and when court is not in session.

Respectfully submitted

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APPROVED:

J. E. TAYLOR
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RRW/LD