

being such graduate, shall be deemed guilty of a misdemeanor, and shall be liable to the same penalty as provided in section VI of this act.

Approved, March 9, 1885.

Depositions.

IN CRIMINAL CASES.

CHAPTER 44.

AN ACT to Provide for Taking Depositions in Criminal Cases.

Be it enacted by the Legislative Assembly of the Territory of Dakota :

CHAPTER I.

§ 1. RIGHT OF DEFENDANT.] When a defendant has been held to answer a charge for a public offense, he may either before or after indictment or information, have witnesses examined conditionally on his behalf as prescribed in this chapter, and not otherwise.

§ 2. IN CASE OF SICK WITNESS.] When a material witness for the defendant is about to leave the Territory, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial, the defendant may apply for an order that the witness be examined conditionally.

§ 3. AFFIDAVIT, WHAT TO CONTAIN.] The application must be made upon affidavit, stating :

1. The nature of the offense charged.
2. The state of the proceedings in the action.
3. The name and residence of the witness, and that his testimony is material to the defense of the action.
4. That the witness is about to leave the Territory, or is so sick or infirm as to afford reasonable grounds for apprehending that he will not be able to attend the trial.

§ 4. APPLICATION.] The application may be made to the court or to a judge thereof, and must be made upon five days' notice to the district attorney.

§ 5. ORDER OF COURT.] If the court or judge is satisfied that the examination of the witness is necessary, an order must be made that the witness be examined conditionally at a specified time and place, and that a copy of the order be served on the district attorney within a specified time before that fixed for the examination.

§ 6. ORDER TO DIRECT.] The order must direct that the examination be taken before a magistrate named therein, and on proof being furnished to such magistrate of service upon the district attorney of a copy of the order. If no counsel appear on the part of the people the examination must proceed.

§ 7. WHEN EXAMINATION NOT TO PROCEED.] If the district attorney or other counsel appear on behalf of the people, and it is shown to the satisfaction of the magistrate by affidavit or other proof, or on the examination of the witness that he is not about to leave the Territory, or is not sick or infirm, or that the application was made to avoid the examination of the witness on the trial, the examination cannot take place, otherwise it must proceed.

§ 8. ATTENDANCE ENFORCED.] The attendance of the witness may be enforced by a subpoena issued by the magistrate before whom the examination is to be taken, or from the court where the trial is to be had.

§ 9. TESTIMONY MUST BE WRITTEN—AUTHENTICATION.] The testimony given by the witness must be reduced to writing. The magistrate before whom the examination is had may, in his discretion, order the testimony and proceedings to be taken down in short hand, and for that purpose he may appoint a short-hand reporter. The deposition or testimony of the witness must be authenticated in the following form :

1. It must state the name of the witness, his place of residence and his business or profession

2. It must contain the questions put to the witness and his answer thereto. Each answer being distinctly read to him as it is taken down, and being corrected or added to until it conforms to what he declares is the truth ; except in cases where the testimony is taken down in short hand, the answer or answers of the witness need not be read to him.

3. If a question be objected to on either side and overruled, or the witness declines answering it, that fact with the ground on which the question was overruled, or the answer derived, must be stated.

4. The deposition must be signed by the witness, or if he refuses to sign it his reason for refusing must be stated in writing as he gives it ; except in cases where the deposition is taken down in short hand it must not be signed by the witness.

5. It must be signed and certified by the magistrate when reduced to writing by him or under his direction, and when taken

down in short hand the manuscript of the reporter, appointed as aforesaid, when written out in long-hand writing, and certified as being a correct statement of such testimony and proceedings in the case, shall be *prima facie* a correct statement of such testimony and proceedings. The reporter shall within five days after the close of such examination transcribe into long-hand writing his said short-hand notes, and certify and deliver the same to the magistrate who shall also certify the same and transmit such testimony and proceedings, carefully sealed up, to the clerk of the court in which the action is pending or may come for trial.

§ 9. DEPOSITION READ IN EVIDENCE.] The deposition or certified copy thereof may be read in evidence by either party on the trial upon its appearing that the witness is unable to attend by reason of his death, insanity, sickness, or infirmity, or of his continued absence from the Territory. Upon reading the depositions in evidence the same objections may be taken to a question or answer contained therein as if the witness had been examined orally in court.

§ 10. WHEN WITNESS IS A PRISONER.] When a material witness for a defendant under a criminal charge, is a prisoner in a territorial prison or in a county jail of a county other than that in which the defendant is to be tried, his deposition may be taken on behalf of the defendant in the manner provided for in the case of a witness who is sick; and the foregoing provisions of this chapter so far as they are applicable, govern in the application for, and in the taking and use of such deposition; such deposition may be taken before any magistrate or notary public of the county in which the jail or prison is situated; or in case the witness is confined in a territorial prison, and the defendant is unable to pay for taking the deposition, before the warden or clerk of the board of trustees of the prisoner, whose duty it shall be to act without compensation. Every officer before whom testimony shall be taken by virtue hereof, shall have authority to administer, and shall administer an oath to the witness, that his testimony shall be the truth, the whole truth and nothing but the truth.

CHAPTER II.

§ 1. WHEN WITNESS NOT IN TERRITORY.] When an issue of fact is joined upon an indictment or information, the defendant may have any material witness, residing out of the Territory, examined in his behalf as prescribed in this chapter, and not otherwise.

§ 2. COMMISSION TO TAKE TESTIMONY.] When a material witness for the defendant resides out of the Territory, the defendant may apply for an order that the witness be examined on a commission, to be issued under the seal of the Court, and the signature of the Clerk, directed to some party designated as commissioner authorizing him to examine the witness upon oath or interrogatories annexed thereto, and to take and certify the deposition of the witness and return it according to the instructions given with the commission.

§ 3. AFFIDAVIT MUST STATE.] Application must be made upon affidavit stating

- 1, The nature of the offense charged ;
- 2, The state of the proceedings in the action and that an issue of the fact has been joined therein ;
- 3, The name of the witness, and that his testimony is material to the defense of the action ;
- 4, That the witness resides out of the Territory.

§ 4. NOTICE.] The application may be made to the court or judge himself, and must be upon five days notice to the District Attorney.

§ 5. ORDER OF COURT.] If the court or judge, to whom the application is made, is satisfied of the truth of the facts stated and that the examination of the witness is necessary to the attainment of justice, an order must be made that a commission be issued to take his testimony, and the court or judge may insert in the order a direction, that the trial be stayed for a specified time reasonably sufficient for the execution of the commission and return thereof, or the case may be continued.

§ 6. INTERROGATIONS TO BE SERVED.] When the commission is ordered the defendant must serve upon the District attorney, without delay, a copy of the interrogatories to be annexed thereto, within three days notice of the time at which they will be presented to the court or judge. The District attorney may in like manner serve upon the defendant or his counsel cross interrogatories, to be annexed to the commission, with like notice. In the interrogatories, either party may insert any question pertinent to the issue. When the interrogatories and cross interrogatories are presented to the court or judge according to the notice, the court or judge must modify the questions, so as to conform them to the rules of evidence, and must endorse upon them his alterations, and annex them to the commission.

§ 7. COURT TO DIRECT.] Unless the parties otherwise consent by an endorsement upon the commission the court or judge must endorse thereon the direction and manner in which it must be returned, and may in his *direction* (discretion) direct that it be returned by mail or otherwise, addressed to the Clerk of the Court

in which the action is pending, designating his name, and the place where his office is kept.

§ 8. EXECUTING COMMISSION.] The commissioner, unless otherwise specially directed may execute the commission as follows :

1, He must administer an oath to the witness that his answers given to the interrogatories, shall be the truth, the whole truth and nothing but the truth :

2, He must cause the examination of the witness to be reduced to writing and subscribed by him ;

3, He must write the answers of the witness as nearly as possible in the language in which he gives them, and read to him each answer so taken down, and correct or add to it until it conforms to what he declares is the truth.

4, If the witness declines to answer a question, that fact with the reason assigned by him for declining must be stated.

5, If any papers or documents are produced before him, and proved by the witness, they, or copies of them, must be annexed to the deposition, subscribed by the witness, and certified by the commissioner.

6, The commissioner must subscribe his name to each sheet of the deposition, with the papers and documents proved by the witness, or copies thereof, to the commissioner, and must close it up under seal, and address it as directed by the endorsement thereon.

7, If there be direction on the commission to return it by mail, the commissioner must immediately deposit it in the nearest post office. If any other direction be made by the written consent of the parties, or by the court or judge, or the commissioner as to its return, the commissioner must comply with the directions.

A copy of this section must be annexed to the commission.

§ 9. WHEN COMMISSION DELIVERED TO AN AGENT.] If the commission and return be delivered by the commissioner to an agent, he must deliver the same to the clerk, to whom it is directed, or to the judge of the court in which the action is pending, by whom it may be received and opened upon the agent making affidavit that he received it from the hands of the commissioner, and that it has not been opened or altered since he received it.

§ 10. WHERE AGENT IS INCAPACITATED.] If the agent is dead, or from sickness or other cause, is unable personally to deliver the commission and return, as prescribed in the last section, it may be received by the clerk or judge from any other person, upon his making an affidavit that he received it from the agent ; that the agent is dead, or from sickness or other casualty, unable to deliver it, and it has not been opened or altered since the person

making the affidavit received it, and that he believes it has not been opened or altered since it came from the hands of the commissioner.

§ 11. COMMISSION TO BE FILED.] The clerk or judge receiving and opening the commission and return must immediately file it, with the affidavit mentioned in the last two sections, in the office of the clerk of the court in which the indictment or information is pending. If the commission and return is transmitted by mail, the clerk to whom it is addressed must receive it from the postoffice, and open and file it in his office, where it must remain unless otherwise directed by the court.

§ 12. PUBLIC RECORD.] The commission and return must at all times be open to the inspection of all persons who must be furnished a copy of the same, or any part thereof, on payment of his fees.

§ 13. DEPOSITIONS, ON TRIAL.] Depositions, taken under a commission, may be read in evidence by either party on the trial, upon it being shown that the witness is unable to attend from any cause whatever ; and the same objections may be taken to a question in the interrogatories, or to the answers in the deposition, as if the witness had been examined orally in court.

§ 14. That this act shall be in force and take effect from and after its passage and approval.

Approved, March 13, 1885.

District Attorneys.

CHAPTER 45.

AN ACT to Amend an Act, entitled "An Act to Create the Office of District Attorney for the Several Counties of Dakota Territory," and for other purposes. Approved March 7, 1883

Be it enacted by the Legislative Assembly of Dakota Territory :

§ 1 SALARY.] That Section Five of an Act entitled "An act to create the office of District Attorney for the several Counties of Dakota Territory," and for other purposes : Approved, March 7th 1883, be and the same is hereby amended as follows :