CHAPTER IV

METHODS OF DISCOVERY IN DIFFERENT JURISDICTIONS

There are two basic methods of discovery of testimony which are being employed in the different jurisdictions. In addition there are several methods for discovery and inspection of documentary evidence. The two methods of discovery of testimony are written interrogatories and oral examination before trial. Under the former the party serves a series of written questions upon his adversary who is required to answer under oath. Under the latter the person from whom discovery is sought is subjected to an examination upon oral questions propounded by the applicant for discovery. The questions and answers are recorded in the form of a deposition.

The written interrogatory practice is modelled after the chancery procedure for discovery. Considerations of procedural policy, however, favor an oral examination. Ever since the time of Jeremy Bentham who pointed out the superiority of what he termed "confrontatory" to "epistolary" examinations¹ lawyers have increasingly recognized that an oral examination is the only efficient means of taking testimony. David Dudley Field, one of the draftsmen of the New York Code of Procedure, consistently urged the general adoption of this mode of taking testimony by all of the courts.² Accordingly the commissioners in their note to the sections of the New York Code of Procedure which provided for an oral examination before trial, said: "Two modes of examination have

been proposed, one oral, the other upon written interrogatories. The latter is the method of the civil law. We think the question is decided by the act of December, and if it were not we should still prefer the oral examination. A written deposition taken in private is not the best means of eliciting the truth; nor do we see why the law should be so tender of the consciences of parties when it is so hard with the consciences of witnesses. These are brought into court, are made to waste their time about a matter not their own, and when called to the stand, are subjected to the most searching and often offensive examination. Why should he who has brought them here be exempted from the same scrutiny?"³ The various jurisdictions have adopted one or the other of these two methods of discovery, either the oral examination or written interrogatories. In many states discovery and preservation of testimony have been combined so that an oral examination may be had under the ordinary deposition procedure.

The statutory provisions on discovery are set forth in the appendix at the back of this volume. The provisions in the United States federal courts are given first and thereafter the other jurisdictions are listed alphabetically. The statutes and rules of court in each state dealing with oral examinations for discovery and preservation of evidence before trial, written interrogatories and inspection of documents are set forth. The number and the elaborateness of the statutory provisions is no index to the effectiveness of the practice. New York has lengthy and detailed statutes and rules of court dealing with discovery, yet the actual practice is notoriously ineffective. Ohio, New Hampshire, Kentucky and other jurisdictions, on the other hand, have developed an extensive and effective discovery practice upon the basis of a short and simple statutory authorization.

³ First Report of the Commissioners on Practice and Pleading (1848) p. 244.