

CPLR 2303: Subpoena Cannot Be Validly Served Outside the State

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ened petitioner's claim that his conviction under the federal statute was not a crime within the meaning of the Education Law.⁷⁸

The Court of Appeals concurred in the judgment of the Third Department, except with regard to the latter's interpretation of CPLR 2307. The Third Department read CPLR 2307(a) as circumscribing petitioner's right to have subpoenas issued by the subcommittee,⁷⁹ but the Court of Appeals concluded that said provision applies only to those subpoenas issued pursuant to CPLR 2302(a), which grants subpoena powers to those administrative agencies not granted specific subpoena powers. In light of the legislative purpose of article 23 — uniform treatment of the law of subpoenas⁸⁰ — and the CPLR drafters' criticism of the confusion inherent in dual sources of subpoena power,⁸¹ the Court determined that CPLR 2302 governs where the agency is not otherwise granted subpoena power and does not govern where said authority is derived from a specific statutory provision, and that CPLR 2307 operates only in conjunction with CPLR 2302.⁸² Thus, the Court's decision in *In re Irwin* resolves the apparent conflict between CPLR 2307 and various other statutes by furnishing a simple and sensible rule consistent with the purposes of the CPLR.

CPLR 2303: Subpoena cannot be validly served outside the state.

CPLR 2303 states that "[a] subpoena shall be served in the same manner as a summons."⁸³ CPLR 313 authorizes service of a summons without the state to obtain personal jurisdiction under certain circumstances. Is service of a subpoena without the state therefore valid in some instances?

The Supreme Court, New York County, confronted this question in *Israel Discount Bank Ltd. v. P. S. Products Corp.*⁸⁴ It concluded that neither CPLR 2303 nor any other statute authorizes service of a subpoena without the state,⁸⁵ even upon a defendant-judgment debtor who was validly served with a summons under CPLR 302 and 313.⁸⁶ If the Legislature had decided to confer upon the courts "long-arm" jurisdiction in the issuance of subpoenas, the court reasoned, it would have done so expressly.⁸⁷

78 27 N.Y.2d at 298-99, 265 N.E.2d at 755, 317 N.Y.S.2d at 336-37.

79 33 App. Div. 2d at 582, 304 N.Y.S.2d at 321.

80 27 N.Y.2d at 296, 265 N.E.2d at 754, 317 N.Y.S.2d at 335.

81 FIRST REP. 360.

82 27 N.Y.2d at 297, 265 N.E.2d at 754, 317 N.Y.S.2d at 336.

83 See 2A WK&M ¶ 2303.03; 6 WK&M ¶ 5224.05.

84 65 Misc. 2d 1002, 319 N.Y.S.2d 554 (Sup. Ct. N.Y. County 1971).

85 *Id.* at 1003, 319 N.Y.S.2d at 555.

86 *Id.* at 1004, 319 N.Y.S.2d at 556. *But see* 2A WK&M ¶ 2303.06.

87 *Id.*, citing *Beach v. Lost Mountain Manor, Inc.*, 53 Misc. 2d 563, 279 N.Y.S.2d 93 (Sup. Ct. Monroe County 1967).

Service of a subpoena outside the state certainly should be valid, especially where there was personal jurisdiction in the main action which gave rise to the judgment. In *Underwriters Trust Co. v. Scala*,⁸⁸ wherein a subpoena was purportedly served within the state pursuant to CPLR 308(3), the court declared the mode of service proper, it "being authorized . . . by statute. . . ."⁸⁹ If CPLR 2303 adopts the qualifications embodied in CPLR 313, as both the statutory language and perhaps *Scala* indicate, it should be interpreted to authorize all of the beneficial provisions of that section.⁹⁰

ARTICLE 31 — DISCLOSURE

CPLR 3101(a): Court refuses motion to take deposition despite satisfaction of distance criterion.

A motion under CPLR 3101(a)(3) to take deposition before trial of a witness who resides more than one hundred miles from the place of the trial is addressed to the discretion of the court. Although the Court of Appeals had indicated that this section should be liberally construed,⁹¹ the Court of Claims of New York denied such a motion in *Winter v. State*.⁹² Although the requirements of the statute were satisfied,⁹³ the court decided that the personal appearance of the witness, allegedly an eyewitness, was crucial to the orderly conduct of the trial and to a just decision. Otherwise, the trial judge could not observe or interrogate the witness.⁹⁴

The exercise of discretion in *Winter* is clearly improper. That the witness's testimony may be crucial is precisely the reason to allow the taking of a deposition. The defense should not be surprised by this witness's testimony.

CPLR 3104(a): Court declines to supervise disclosure proceeding.

CPLR 3104(a) enables the court in which an action is pending to supervise disclosure proceedings either by a judge or a referee, upon its own motion or the motion of any party or witness.⁹⁵ Unfortunately, practical problems prevent full utilization of this provision. Calendar congestion precludes frequent assignment of judges to preside at dis-

⁸⁸ 62 Misc.2d 877, 311 N.Y.S.2d 454 (N.Y.C. Civ. Ct. N.Y. County 1970).

⁸⁹ *Id.* at 878, 311 N.Y.S.2d 454.

⁹⁰ See *The Quarterly Survey*, 45 ST. JOHN'S L. REV. 354, 355 (1970).

⁹¹ *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 499 (1968); see 7B MCKINNEY'S CPLR 3101, commentary 21 at 24 (1970).

⁹² 65 Misc. 2d 587, 318 N.Y.S.2d 299 (Ct. Cl. 1971).

⁹³ *Id.*

⁹⁴ *Id.* at 588, 318 N.Y.S.2d at 230.

⁹⁵ See 3 WK&M ¶¶ 3104.01, 3104.03, 3104.04.