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him. . . ."[60] In 1963, the Court of Appeals, in *Ross v. Pawtucket Mutual Insurance Co.*,[61] stated that the resolution of the issue of whether an insurer may implead the wrongdoing third party depended "upon the nature of the subrogation right and the terms of the policy itself."[62] The Court concluded that the attempt by the defendant insurance company to implead prior to payment of the claim to its insured was premature because of the contingent nature of the right of subrogation.[63] It is to be noted that, according to the insurance policy involved in the *Ross* decision, the insured's right was subrogated to the defendant only when payment for loss was made.

The appellate division, first department, in *Krause v. American Guarantee and Liability Insurance Co.*,[64] has recently held that, absent a covenant not to sue prior to payment, an insurance company may implead a negligent third party prior to payment on the policy to the insured.

Other decisions expounding this principle have been rendered since 1963,[65] and the *Krause* case seems to make it certain that the holding of the Court of Appeals in *Ross* will be limited to cases where a covenant not to sue prior to payment is contained in the insurance policy.

ARTICLE 22 — STAY, MOTIONS, ORDERS AND MANDATES

CPLR 2212: Motion returnable in adjoining county in another department referred back to county where action was commenced.

CPLR 2212(a) provides that "[a] motion on notice in an action in the supreme court shall be noticed to be heard in the judicial district where the action is triable or in a county adjoining the county where the action is triable. . . ."[66]

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[60] This section is based upon CPA § 193-a and RCP 54, and contemplates little change from prior law. 7B McKINNEY'S CPLR 1007, commentary 333 (1963). It corrects earlier defects in impleader practice. For example, that the main claim and the third-party claim must be the same or at least based on the same grounds, *see* Debby Junior Coat & Suit Co. v. Wollman Mills, Inc., 207 Misc. 330, 137 N.Y.S.2d 703 (Sup. Ct. N.Y. County 1955). is no longer the rule.

[61] 13 N.Y.2d 233, 195 N.E.2d 892, 246 N.Y.S.2d 213 (1963). For an analysis of the *Ross* decision, *see generally The Biannual Survey of New York Practice*, 38 ST. JOHN'S L. REV. 406, 422 (1964).

[62] 13 N.Y.2d at 234, 195 N.E.2d at 893, 246 N.Y.S.2d at 214.

[63] *Id.* at 235, 195 N.E.2d at 893, 246 N.Y.S.2d at 214.

[64] 27 App. Div. 2d 353, 279 N.Y.S.2d 235 (1st Dep't 1967).

[65] New Walden, Inc. v. Federal Ins. Co., 22 App. Div. 2d 4, 253 N.Y.S.2d 383 (4th Dep't 1964); Sol Lenzner Corp. v. Aetna Cas. & Sur. Co., 20 App. Div. 2d 305, 246 N.Y.S.2d 950 (4th Dep't 1964).

[66] CPLR 2212(a).

The appellate division, first department, in *Baker, Voorhis and Co. v. Heckman,*[67] held that it was not an abuse of discretion for the Special Term in Queens County to refer plaintiff's motion for summary judgment to New York County, where the action was initiated. Since plaintiff brought his action in New York County he could, pursuant to CPLR 2212, make a motion returnable in Queens County which adjoins New York County. However, the court stated:

> In the absence of special circumstances, it is considered proper for the Special Terms within the counties in the City of New York to give effect . . . to the prevailing practice in such counties of making motions returnable in the Judicial Department where the action or special proceeding is brought.[68]

Thus while New York and Queens counties are adjoining counties within the contemplation of CPLR 2212, the fact that New York is in the first department and Queens is in the second department was the pivotal factor which enabled the Queens County Court to properly refer plaintiff's motion back to New York County where the action was initiated.

Litigators should use caution in making motions returnable in adjoining counties, since the crossing of the boundaries of *judicial departments* may cause the motion to be referred to the county where the action was originally brought.

Article 23 — Subpoenas, Oaths and Affirmations

CPLR 2303: Limited by Judiciary Law—subpoena must be served on witness within the State.

CPLR 2303 which provides that a subpoena shall be served in the same manner as a summons effects a change from the CPA which required that a copy of a subpoena be personally served or delivered to the witness.[69] The CPLR apparently provides that all of the methods used to serve a summons are available for the service of a subpoena. It is, therefore, logical that a subpoena could be served by any of the means specified in CPLR 308 and by delivery to persons specified in CPLR sections 309 through 312.[70] These provisions have resulted in a major expansion of the means used to serve a subpoena. However, the apparent scope of CPLR 2303 has been severely narrowed by a recent decision.

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[67] 28 App. Div. 2d 673, 280 N.Y.S.2d 940 (1st Dep't 1967).

[68] *Id.*, 280 N.Y.S.2d at 941.

[69] 2 Weinstein, Korn & Miller, New York Civil Practice ¶ 2303.03 (1963).

[70] *Id. See also* 7B McKinney's CPLR 2303, commentary 76 (1963).