sion was, as matter of law, established by the judgment. One who is liable as indemnitor or guarantor for another is bound by the result of a suit against that other to establish the liability if he has been notified of the pendency of the suit, given opportunity to take charge of and defend it, and warned that he will he held responsible for the result if he does not defend it. . . . There is no force in the contention that the notice here given was insufficient, because it did not in terms state that the defendant would be held responsible if the result should be unfavorable. The notice would be ineffectual to charge the receiver with the result of the proceeding of which notice was given, unless it made evident that the giver intended to charge the receiver therewith, . . . but no particular form of words is necessary. The notice, taken with the words of the contract, here makes manifest the intent to charge the purchaser with the result of the action. The reason given for refusing to act shows that the defendant so understood it."

§ 13. Necessity of offer or request that indemnitor defend action.

[a] Generally.

The authorities are not in agreement as to whether, to be sufficient, a notice of an action brought by a third person against the indemnitee must contain an offer or request that the indemnitor defend the action,[3] some answering the question in the affirmative,[4] and others in the negative.[5] The answer may depend upon the circumstances of the individual case.

Cases in which the court, in holding a notice sufficient, merely noted that it contained a request that the indemnitor defend the action[6] do not neces-

3. For cases holding that notice must be such as to afford the indemnitor an opportunity to defend the action against the indemnitee, see § 4, supra, footnote 12.

4. See § 13[b], infra.

5. See § 13[c], infra.

6. For cases of this kind, see the following:

United States.—Imperial Ref. Co. v Kanotex Ref. Co. (1928, CA8 Kan) 29 F2d 193 (holding that where notice of a third person's suit against the indemnitee was given by the latter to the indemnitor and demand was made that the indemnitor come in and defend, the judgment obtained against the indemnitee in the former action was binding upon the indemnitor as to the questions necessarily determined thereby); Aetna L. Ins. Co. v Maxwell (1937, CA4 W Va) 89 F2d 988 (recognizing that when a person is responsible over to another, and is duly notified of the pendency of a suit and requested to assume the defense, he is no longer regarded as a stranger to that suit); American Surety Co. v Sandberg (1915, DC Wash) 225 F 150, affd (CA9) 244 F 701 (holding that, having had notice of the pendency of a former action against the indemnitee and having been called upon to defend, the indemnitor was estopped to deny, in the present action brought by the indemnitee against the indemnitor for reimbursement, the conclusiveness of a judgment rendered in the former action); New York & Porto Rico S.S. Co. v Lee's Lighters, Inc. (1930, DC NY) 48 F2d 372, infra, § 15[a]; Frank R. Jelleff, Inc. v Pollak Bros., Inc. (1957, DC Ind) 171 F Supp 467 (holding that the indemnitor had notice and a tender of the defense of the action against the indemnitee).

Georgia. — Brown v Chaney (1846) 1 Ga 410, infra.

Kansas.—Ft. Scott v Penn Lubric Oil Co. (1927) 122 Kan 369, 252 P 268, infra, § 15[a].

Louisiana.—New Orleans G. N. R. Co. v S. T. Alcus & Co. (1925) 159 La 35, 105 So 91, infra, § 15[a].

Maine.—Veazie v Penobscot R. Co. (1860) 49 Me 119, infra, § 17.

Massachusetts. — Inhabitants of Milford v Holbrook (1864) 91 Mass (9 Allen) 17, 85 Am Dec 735, supra, § 11[b]; Genard v Hosmer (1934) 285 Mass 259, 189 NE 46, 91 ALR 543 (holding that when a person is responsible over to another on some claim and is duly notified of the pendency of an action involving such claim, and requested to take the defense upon himself, he is bound by the judgment, because he has had the opportunity to appear and defend the action).

Montana. — Butte v Cook (1903) 29 Mont 88, 74 P 67 (holding that if the indemnitor had been requested to

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sarily signify that the notice must, in its terms, contain such a request.

[b] View that notice of action must contain offer or request to defend.

A number of cases support the proposition that, to be sufficient, a notice of an action brought by a third person against the indemnitee must contain an offer or request that the indemnitor defend the action.[7]

United States. — Crawford v Pope & Talbot, Inc. (1953, CA3 Pa) 206 F2d 784 (holding that where the indemnitor, being under a duty to defend an action brought by a third person against the indemnitee, was not given reasonable notice of the action and was not requested to defend, neither the indemnitor nor the indemnitee is bound in subsequent litigation between them by findings made in the action). But see the federal cases referred to in § 13[c], infra.

California. — Sampson v Ohleyer (1863) 22 Cal 200, supra, § 8[a] (stating, by way of dictum, that the indemnitee must inform the indemnitor as to what the former requires the latter to do in the suit).

Connecticut. — Waterbury v Waterbury Traction Co. (1901) 74 Conn 152, 50 A 3, infra, § 14[c].

Massachusetts. — Busell Trimmer Co. v Coburn (1905) 188 Mass 254, 74 NE 334, 69 LRA 821 (holding that a judgment in the former action brought by a third person against the indemnitee was not binding on the indemnitor, in the absence of a notice to come in and defend); C. & R. Constr. Co. v Boston (1930) 273 Mass 280, 173 NE 517, infra, § 15[a]. But see Boston v Worthington (1858) 76 Mass (10 Gray) 496, 71 Am Dec 678, infra, § 14[b], footnote 14.

defend an action brought by a third person against the indemnitee, and neglected to do so, the judgment is conclusive against him).

Nebraska.—Omaha v Philadelphia Mortg. & T. Co. (1911) 88 Neb 519, 129 NW 996 (in which the court, in its syllabus 4, ruled that if a city is compelled to pay a judgment for damages because of negligence of the owner of property in an action of which the owner has notice with the privilege to defend the same, the city may recover over from the owner of the property); Omaha v Yancey (1912) 91 Neb 261, 135 NW 1044, infra, § 15[a].

New Hampshire.—Littleton v Richardson (1856) 34 NH 179, 66 Am Dec 759, infra, § 15[a].

New York. — Vogemann v American Dock & Trust Co. (1909) 131 App Div 216, 115 NYS 741, affd without op 198 NY 586, 92 NE 1105, infra, § 15[a]; Thomas v Hubbell (1852) 18 Barb 9, revd on other grounds 15 NY 405, 69 Am Dec 619, infra, § 15[a].

Pennsylvania. — Brookville v Arthurs (1890) 130 Pa 501, 18 A 1076 (holding it sufficient for the indemnitee to notify the indemnitor that suit had been brought against the indemnitee and that the latter requested the indemnitor to defend it); Hollidaysburg v Snyder (1917) 258 Pa 206, 101 A 955, infra, § 15[a]; Fowler v Jersey Shore Borough (1901) 17 Pa Super 366, infra; Ingram v Hachmeister (1928) 94 Pa Super 25, infra.

Washington.—Cle Elum v Yeaman (1927) 145 Wash 157, 259 P 35, infra § 15[a].

In Brown v Chaney (1846) 1 Ga 410, the court, by way of dictum, stated that where a surety is being sued for the default of the principal, and gives him notice of the pendency of the suit, and requests him to defend it, a judgment adverse to the surety is conclusive evidence for him in a subsequent action against the principal for indemnity.

In Fowler v Jersey Shore (1901) 17 Pa Super 366, the court stated the rule that when a person is responsible over to another, either by operation of law or by express contract, and notice has been given him of the pendency of the suit with a request that he take the defense upon himself, he is no longer regarded as a stranger to the judgment that may be recovered, because he has the right to appear and defend the action equally as if he were a party to the record. To the same effect is Ingram v Hachmeister (1928) 94 Pa Super 25.

7. For cases holding that the notice must contain an offer to surrender the control and entire defense of the action against the indemnitee, see § 14 [b], infra.

PCB-ARCH-EXT0377885

[§ 13]

Minnesota. — Henderson v Eckern (1911) 115 Minn 410, 132 NW 715, Ann Cas 1912D 989, infra; State Bank of New Prague v American Surety Co. (1939) 206 Minn 137, 288 NW 7, infra.

Tennessee. — Jones v Bozeman (1958) — Tenn App —, 321 SW2d 832, infra.

In State Bank of New Prague v American Surety Co. (1939) 206 Minn 137, 288 NW 7, the court, without further discussion, held that a judgment recovered against an indemnitee upon an obligation covered by a contract of indemnity is conclusive against the indemnitor in an action by the indemnitee to recover indemnity, if the indemnitee gave the indemnitor notice of the pendency of the action in which the judgment was recovered "and requested him to assume the defense." Notwithstanding the quoted language used, it cannot be assumed, in the absence of a specific holding of the court to that effect, that the court intended to rule that the notice must contain an offer to surrender the whole control of the defense to the indemnitor.[8] This understanding of the State Bank Case is also supported by Henderson v Eckern (1911) 115 Minn 410, 132 NW 715, Ann Cas 1912D 989, in which the court ruled that it is only when the indemnitor has been notified "and has had an opportunity to defend an action against the indemnitee" that he will be concluded by the judgment against the indemnitee (as to all questions determined therein which are material to a recovery against him by the indemnitee).

Although the surety of two deputy sheriffs had full and complete notice of the pendency of suits brought against the sheriff and the surety on the sheriff's official bond to hold him liable for unlawful acts of the deputies, it was held in Jones v Bozeman (1958) — Tenn App —, 321 SW2d 832, an action by the sheriff against his deputies and their surety to recover the amounts paid under the judgments rendered against the sheriff and his surety in the former suits, that these judgments were not conclusive in the present action against the present defendants, where these defendants were never asked, nor offered permission, to defend the former suits, and no notice was ever given to them that any judgments rendered against the sheriff and his surety in the former suits would be conclusive as against them.

[c] View that notice of action need not contain offer or request to defend.

On the other hand, there are cases in which it has been held that, at least under the circumstances involved, a notice, to be sufficient, need not specifically inform the indemnitor of his right to defend the suit against the indemnitee.

United States. — Chicago v Robbins (1863) 2 Black 418, 17 L ed 298, followed in later app 4 Wall 657, 18 L ed 427, infra, § 15[a]; Bedal v Hallack & H. Lumber Co. (1955, CA9 Idaho) 226 F2d 526, infra. But see Crawford v Pope & Talbot, Inc. (1953, CA3 Pa) 206 F2d 784, supra, § 13[b].

Illinois. — Drennan v Bunn (1888) 124 Ill 175, 16 NE 100, 7 Am St Rep 354, infra.

Maine. — Davis v Smith (1887) 79 Me 351, 10 A 55, infra, § 14[c].

Massachusetts. — Boston v Worthington (1853) 76 Mass (10 Gray) 496, 71 Am Dec 678, infra, § 14[b], footnote 14. But see the Massachusetts cases cited in § 13[b], supra.

Michigan. — Lansing v Detroit, L. & N. R. Co. (1902) 129 Mich 403, 89 NW 54, infra, § 15[a].

Nebraska. — Missouri P. R. Co. v Twiss (1892) 35 Neb 267, 53 NW 76, 37 Am St Rep 437.

New York. — Prescott v Le Conte (1903) 83 App Div 482, 82 NYS 411, affd without op 178 NY 585, 70 NE 1108 (holding that even without any express notice to defend notice of the commencement of the action and an opportunity to defend it is sufficient, so far as notice is concerned, to make

8. As to whether the notice must contain an offer or request that the indemnitor assume sole control of the defense, see § 14, infra.

PCB-ARCH-EXT0377886

the judgment binding upon the indemnitors); Seneca Falls v Zalinski (1876) 8 Hun 571 (holding that notice of the pendency of an action against the indemnitee is sufficient to charge the indemnitor with a duty to defend the action).

Oregon. — Carroll v Nodine (1902) 41 Or 412, 69 P 51, 93 Am St Rep 743, infra, § 14[c].

Washington. — Spokane v Crane Co. (1917) 98 Wash 49, 167 P 63, infra.

Assuming that parties in the present action stood in the relation of indemnitor and indemnitee, the court in Bedal v Hallack & H. Lumber Co. (1955, CA9 Idaho) 226 F2d 526, held that a notice given by the indemnitee to the indemnitor some 47 days before trial, stating the claim of a third party against the indemnitee and the latter's intention to hold the indemnitor responsible, was sufficient even though it contained no express request that the indemnitor assume the defense. Relying upon Comment e of § 107 in the Restatement of Law of Judgments, which is quoted infra, § 14, the court pointed out that, assuming a duty of indemnity must be implied from the circumstances in the present case, it would be clear that the indemnitee's payment of judgment rendered in the former action would result in the requirement that the indemnitor pay indemnity; that it could not be said that 47 days before trial was less than a reasonable time; and that the indemnitor could fairly understand that "the notice he received was to give him the opportunity to offer to participate in the defense." The court noted that the indemnitor, in arguing the insufficiency of the notice, relied upon Crawford v Pope & Talbot, Inc. (1953, CA3 Pa) 206 F2d 784, supra, § 13[b], but did not follow the ruling of that case.

Rejecting the view that the indemnitor should, in addition to having notice of the pendency of the litigation, be requested to take charge of it, and notified that if he fails he would be held responsible, the court in Drennan v Bunn (1888) 124 Ill 175, 16 NE 100, 7 Am St Rep 354, said the following:

"An obligation to indemnify against the result of a particular suit necessarily assumes that, as between the party obligated to indemnify and the party to be indemnified, the entire burden of the suit should fall on the former, and that the latter should be entirely free of it, and, therefore, that, as between them, the former, and not the latter, should be the real party to the suit, and prosecute or defend it. But, since the latter may sue or be sued without the knowledge of the former, he might not know of the existence of the suit, and therefore could not prosecute or defend it; but, if notified of the existence of the suit in apt time, he could prosecute or defend it, and, it being his duty to do so, his failure to do so successfully would be conclusive against him that he was unable to do so, and that the judgment was right. In such case the obligation to indemnify operates, from the making of the contract, as to every burden or loss within its contemplation, and, although no suit could be maintained until after loss, the recovery would be because it was the duty of the indemnifying party to have prevented loss; and it is absolute, and not conditioned upon request. We are unable to perceive why, in this case, more than in any other, a party shall have been requested to do that which it was his duty to do without request, or how a notice that he will be held responsible can be necessary, where he is, by contract, already legally responsible. The notice was not insufficient because in it the town did not offer to surrender the entire defense of the case to the defendant. The traction company was not entitled to assume the defense to the exclusion of the town from the case. To render the judgment binding upon the company, it was only necessary to show that it had received fair notice and information of the pendency of the suit and of its claimed liability, and been offered such an opportunity to participate in the defense for the protection of its interests as it would have had if it had been a party of record. The notice which was given almost imme-

PCB-ARCH-EXT0377887

diately after suit was brought by Ashborn, and long before the trial of that case, informed the defendant of the pendency and character of the action, of the reason why it was claimed to be ultimately liable, and in effect requested it to take part in the defense."

The defendant's contention, in an action brought by a city against the defendant to recover the amount of a judgment for personal injuries obtained by a third person against the city and paid by the latter, that defendant had no sufficient notice to defend the former action and hence was not bound by the judgment rendered therein, was rejected in Spokane v Crane Co. (1917) 98 Wash 49, 167 P 63. The court noted that when the city caused to be served upon appellant the notice of claim against the city and the summons and complaint in the former action it did not in so many words formally tender the present defendant the defense of that action, but held that it was not essential that the defendant (the person responsible over) be requested to assume the defense, since the service of notice could have been for no other purpose than to notify the present defendant of the fact and nature of the claim in order that it might participate in the defense.

§ 14. Necessity of offer to surrender control of defense.

[a] Generally.

The annotation at this point takes up the following questions: (1) whether, to be sufficient, the notice of an action against the indemnitee must offer to surrender to the indemnitor the whole control and entire defense of the action, an offer of mere participation in the defense being insufficient; and (2) if the answer is in the affirmative, whether such offer must be specifically stated in the terms of the notice.

As to question (1) the authorities are divided;[9] in some jurisdictions the question is answered in the affirmative,[10] in others in the negative.[11]

As to question (2), one would assume that in those jurisdictions in which surrender of control of the defense is necessary, the notice must offer such surrender by its terms. In at least one case it has been specifically so held.[12]

On the other hand, the Restatement of the Law of Judgments § 107, Comment e, contains the following statement: "Where the relation between the indemnitee and the indemnitor is such that it is clear that indemnity would necessarily result from the payment of the claim by the indemnitee, a request to defend and a tender of control can normally be inferred upon a seasonable notification of the pendency of the action, since such notification would obviously be only for the purpose of inviting in the indemnitor."

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A tender of defense has been held not defective merely because it was not specifically grounded upon the indemnity contract. Thus, where the indemnitee, when sued by a third person for damages, served the indemnitors with a tender of defense, demanding that they defend the action and save the indemnitee harmless from any loss or damage directly or indirectly arising out of matters alleged in the complaint, it was held in Hartford Acci. & Indem. Co. v Worden-Allen Co. (1941) 238 Wis 124, 297 NW 436, that the tender was not defective because not specifically grounded upon the indemnity contract.

9. Cases which, in holding the notice involved sufficient, merely note that it contained an offer by the indemnitee to surrender control of the defense to the indemnitor do not necessarily signify that such an offer is necessary to make the notice sufficient. For such a case see Bremen Elevator Co. v Farmers & M. Bank (1927) 56 ND 110, 216 NW 203, infra, § 14[b].

10. See § 14[b], infra.

11. See § 14[c], infra.

12. Hartford Acci. & Indem. Co. v First Nat. Bank & Trust Co. (1937) 162 Misc 348, 294 NYS 522, revd 256 App Div 30, 9 NYS2d 590, which in turn was revd 281 NY 162, 22 NE2d 324, 123 ALR 1149, infra, § 15[b].

See also the Massachusetts cases cited in § 13[b], supra.

PCB-ARCH-EXT0377888

[b] View that notice of action must contain offer to surrender control.

In a number of cases it has been held that the notice must contain an offer to surrender to the indemnitor the control and entire defense of the action brought against the indemnitee by a third person.[13]

California. — Lamb v Belt Casualty Co. (1935) 3 Cal App 2d 624, 40 P2d 311 (holding that where one is bound either by law or agreement to protect another from liability, he is bound by the result of a litigation to which such other is a party, provided he had notice of the suit and an opportunity to control and manage it).

Massachusetts.[14] — Consolidated Hand-Method Lasting Mach. Co. v Bradley (1898) 171 Mass 127, 50 NE 464, 68 Am St Rep 409, infra; Bowditch v E. T. Slattery Co. (1928) 263 Mass 496, 161 NE 878, supra, § 12 [c]; C. & R. Constr. Co. v Boston (1930) 273 Mass 280, 173 NE 517, infra, § 15[a]; Keljikian v Star Brewing Co. (1939) 303 Mass 53, 20 NE2d 465 (an action by the indemnitee to recover from the indemnitor the amount of a judgment rendered in an action against the indemnitee and paid by the latter, in which it was held that the complaint was defective in that it did not allege that the plaintiffs notified the defendant to undertake the defense of the former action); Buhl v Viera (1952) 328 Mass 201, 102 NE2d 774 (recognizing rule). See Levinton v Poorvu (1936) 293 Mass 338, 200 NE 9 (recognizing that when one is liable over to another on some claim and is duly notified of the pendency of an action involving such claim, and requested to take upon himself the defense of it, he is bound by the judgment).

Missouri.[15] — Strong v Phoenix Ins. Co. (1876) 62 Mo 289, 21 Am Rep 417;

13. In some cases it has been held that the indemnitee's offer to surrender control to the indemnitor of a suit brought against the indemnitee meets the requirements in respect to notice, the court, however, not ruling on the question whether such offer was an indispensable prerequisite of notice. For a case of this kind see Bremen Elevator Co. v Farmers & M. Bank (1927) 56 ND 110, 216 NW 203, infra.

14. Upon the face of the language used in the opinion, Boston v Worthington (1858) 76 Mass (10 Gray) 496, 71 Am Dec 678, is inconsistent with the rule stated in the text. In the Worthington Case the court, in determining whether the indemnitors had such notice of the pendency of an action against the indemnitee as rendered the judgment recovered therein conclusive against the indemnitors, held that a notice was sufficient, where it informed the indemnitors when the third person's writ (against the indemnitee) was returnable; that such person had sued for an injury received on a day named, by a defect in the highway, called Congress Square, in a place occupied by the indemnitors; that they were directed to take notice that the indemnitees would hold them responsible as being in charge and custody of the place of the accident; and that they were required to govern themselves accordingly. The court held it not necessary that the indemnitors were, in terms, requested to take upon themselves the defense of the action against the indemnitee, and that this was not necessary in order to render the judgment conclusive against them as to the facts thereby established. However, the court also adverted to the fact that the indemnitors, by the notice given to them of the pending action, had an opportunity to defend it, and that they were present at the trial and testified therein. The latter fact was said sufficient "to show such notice as to render the judgment conclusive against the indemnitors." In Consolidated Hand-Method Lasting Mach. Co. v Bradley (1898) 171 Mass 127, 50 NE 464, 68 Am St Rep 409, infra, this fact of participation was relied upon to distinguish Boston v Worthington, supra. It was also stated that the latter case went "to the very verge of the law."

15. The Missouri rule supported by the cases cited in the text is that where one is bound to protect another from a liability, he is bound by the result of a litigation to which such other is a party, provided he had notice of the litigation, "and opportunity to control and manage it."

PCB-ARCH-EXT0377889

[§ 14]

Garrison v Babbage Transp. Co. (1887) 94 Mo 130, 6 SW 701; St. Joseph v Union R. Co. (1893) 116 Mo 636, 22 SW 794, 38 Am St Rep 626; Kansas City, M. B. R. Co. v Southern R. News Co. (1899) 151 Mo 373, 52 SW 205, 45 LRA 380, 74 Am St Rep 545; Missouri Dist. Tel. Co. v Southwestern Bell Tel. Co. (1935) 336 Mo 453, 79 SW2d 257; Whitaker v McCormick (1878) 6 Mo App 114; Columbia v Malo (1920, Mo App) 217 SW 625 (in which it was also pointed out that it was not sufficient for the indemnitee to tell the indemnitor that the latter was expected to render all the assistance possible in the suit).

New York. — Hartford Acci. & Indem. Co. v First Nat. Bank & Trust Co. (1937) 162 Misc 348, 294 NYS 522, revd 256 App Div 30, 9 NYS2d 590, which in turn was revd 281 NY 162, 22 NE2d 324, 123 ALR 1149, infra, § 15[b]. See Municipal Service Real Estate Co. v D. B. & M. Holding Corp. (1931) 257 NY 423, 178 NE 745, 78 ALR 323 (recognizing that the defendant may, by appropriate notice to its indemnitor offer to the latter control of the defense of the action, and that any judgment rendered in that action will be binding upon the indemnitor when call is made upon him for indemnification), and Hartford Acci. & Indem. Co. v First Nat. Bank & Trust Co. (1939) 281 NY 162, 22 NE2d 324, 123 ALR 1149 (recognizing that "a named defendant who would have another (not yet a party) bound by judgment in an action must by proper notice offer to him control of the defense of the litigation"). But see the New York cases cited in § 14[c], infra.

Oklahoma. — See Missouri, K. & T. R. Co. v Ellis (1920) 78 Okla 150, 189 P 363, and United States Fidelity & Guaranty Co. v Dawson Produce Co. (1937) 180 Okla 119, 68 P2d 105 (the court, in its syllabus 1 in both of these cases, ruling that one who is required either by law or contract to protect another from liability is bound by the result of the litigation to which such other is a party, provided the former had notice of such litigation and "an opportunity to control its proceedings").

Although the notice of the pendency of an action by a third person against the indemnitee, after specifically describing the nature of the action, stated that, in case of defeat, the indemnitee would look to the indemnitor for recompense and that the indemnitee expected the indemnitor's assistance in the conduct of the defense, the notice was held in Consolidated Hand-Method Lasting Mach. Co. v Bradley (1898) 171 Mass 127, 50 NE 464, 68 Am St Rep 409, insufficient to make the judgment in the original suit conclusive (as to the amount to be recovered) upon the indemnitor in the present suit for compensation, since the notice did not offer to surrender the control of the defense to the indemnitor. The court said: "Whatever may be the form of such a notice, under the circumstances in which it is given we think it should call upon the person notified to come in and defend the suit, or should offer him an opportunity of doing so. The party notifying cannot insist upon retaining control of the defense, and yet hold the party notified bound by the result of the suit. The decisions of different courts in this county are not uniform upon the requirements of such a notice, but the weight of authority in this commonwealth requires that the notice must be such as to give the person notified information that he is called upon to come in and defend the suit, or be held responsible for the result."

Recognizing that the authorities are not agreed as to the sort of notice requisite to bind the indemnitor, nor as to the degree of participation to be enjoyed by, or offered to, the indemnitor in order to make a judgment against the indemnitee binding upon the indemnitor, the court in Bremen Elevator Co. v Farmers & M. Bank (1927) 56 ND 110, 216 NW 203, held that all reasonable requirements in that respect were satisfied where the indemnitor had knowledge of the pendency of the action against the

indemnitee for a sufficient length of time to have permitted the indemnitor to participate fully in the defense of that action and he was, immediately before the trial, given an opportunity to assume complete control.

[c] View that notice of action need not contain offer to surrender control.

On the other hand, there are cases in which it has been held that the notice need not contain an offer by the indemnitee to surrender to the indemnitor the control and entire defense of the action brought against the indemnitee by a third person.

United States. — Washington Gaslight Co. v District of Columbia (1896) 161 US 316, 40 L ed 712, 16 S Ct 564 (in which the sufficiency of the notice was not questioned).

Connecticut. — Waterbury v Waterbury Traction Co. (1901) 74 Conn 152, 50 A 3, infra.

Illinois.—Drennan v Bunn (1888) 124 Ill 175, 16 NE 100, 7 Am St Rep 354, supra, § 13[c].

Montana.—See Butte v Cook (1903) 29 Mont 88, 74 P 67 (in which the indemnitor, when sued by the indemnitee, contended that the former judgment obtained by a third person against the indemnitee was not binding upon him because he was not allowed to control the defense in the former action, and the court, without specifically discussing the necessity of the indemnitee's offering the indemnitor the control of such defense, rejected the contention).

New York.—Heiser v Hatch (1881) 86 NY 614, infra, § 15[a] (by implication); Oceanic Steam Nav. Co. v Compania Transatlantica Espanola (1895) 144 NY 663, 39 NE 360, infra, § 15[a]. But see the New York cases cited in § 14[b], supra.

Oregon.—Carroll v Nodine (1902) 41 Or 412, 69 P 61, 93 Am St Rep 743, infra.

The Restatement of the Law of Judgments § 107, Comment e, contains the following statement: "There must also be a tender of control either joint or full. In order to bind the indemnitor in a subsequent action against him, the indemnitee is not obliged necessarily to surrender the entire control of the defense; he must, however, request the indemnitor to participate, and if judgment is given against the indemnitee he must permit the indemnitor to take appellate proceedings. Such tender is not essential if the indemnitor indicates that he would not participate and on the other hand it is not essential if in fact the indemnitor does participate."

Even though not containing an offer by the indemnitee to surrender the entire defense of the case to the indemnitor, a written notice by a town to a traction company notifying the latter of the pendency of a suit brought against the town by one (Ashborn) traveling upon a highway for injuries received as a result of the company's taking down a railing, transmitting a copy of the complaint, and stating that if the traction company should desire to be represented by counsel in the pending case, the town would be glad of such assistance, was held in Waterbury v Waterbury Traction Co. (1901) 74 Conn 152, 50 A 3, sufficient to make the judgment rendered in the former action conclusive (as to the question of the town's liability to Ashborn) in the present action brought by the town against the traction company for reimbursement of the amounts paid in satisfaction of the judgment rendered in the former action. The court said: "The notice was not insufficient because in it the town did not offer to surrender the entire defense of the case to the defendant. The traction company was not entitled to assume the defense to the exclusion of the town from the case. To render the judgment binding upon the company, it was only necessary to show that it had received fair notice and information of the pendency of the suit and of its claimed liability, and been offered such an opportunity to participate in the defense for the protection of its interests as it would have had if it had been a party of record. The notice which was given almost im-

mediately after suit was brought by Ashborn, and long before the trial of that case, informed the defendant of the pendency and character of the action, of the reason why it was claimed to be ultimately liable, and in effect requested it to take part in the defense."

In Davis v Smith (1887) 79 Me 351, 10 A 55, in which the conclusiveness, in the present action brought by the indemnitee against the indemnitor, of a judgment rendered against the indemnitee in an action brought against him by a third person could have been rested solely on the ground that the indemnitor participated in the former action, the court, dealing with the sufficiency of the notice given by the indemnitee to the indemnitor of the pendency of the former action, stated that it was not necessary for the indemnitee to request, in terms, the indemnitor to take upon herself the defense of the action. It was also ruled that notice in writing, or even express notice, is unnecessary, but that notice may be implied from the indemnitor's knowledge of the pendency of the action, and participation in its defense.

While notice of the pendency of the action against the indemnitee is always necessary to make the judgment rendered therein binding upon the indemnitor, the better reason and the weight of authority dispense with any request to take charge of or assume the responsibility of the defense. Carroll v Nodine (1902) 41 Or 412, 69 P 51, 93 Am St Rep 743. In support of the rule stated above, it was said that, having notice, the indemnitor may, as it is his right, interpose and make such defense as to him might seem most expedient and effective; and if he did nothing in that direction it must be considered a matter of his own volition, and a request for him, coupled with a warning of consequences, to do that which duty and interest require him to do, would seem superfluous, and the law, which is founded upon reason, does not require a vain thing.

§ 15. Illustrative cases.

[a] Holding notice sufficient.

The following cases are illustrative of situations in which the notice given by the indemnitee to the indemnitor as to an action brought by a third person against the indemnitee has been held sufficient.

Whether the owner of a city lot was concluded, in an action brought against him by the city for reimbursement, by a judgment rendered against the city in an action brought against it by a pedestrian who had been injured by a fall into an excavation in the sidewalk, was one of the issues involved in Chicago v Robbins (1863, US) 2 Black 418, 17 L ed 298, and on a later appeal in 4 Wall 657, 18 L ed 427, and the determination of this question depended upon whether the owner had notice of the suit in which the judgment was rendered. When the case first came before the Supreme Court of the United States, it was held that an express notice to the owner to defend the suit was not necessary "in order to charge his liability," since he knew that the case was in court, was told of the day of trial, was "applied to assist in procuring testimony," and wrote to a witness. Under these circumstances he was held "as much chargeable with notice" as if he had been directly told that he could contest the pedestrian's right to recover, and that the city would look to him for indemnity. Upon remand the trial court instructed the jury to the effect that if the owner knew that the former suit was pending and could have defended it, and it was through his fault that the pedestrian was injured, he was concluded by the judgment recovered against the city. Express notice, said the presiding justice, was not required, nor was it necessary that the officers of the corporation should have notified the owner that they would look to him for indemnity. Upon the owner's writ of error from an adverse judgment, the United States Supreme Court held that just exception could not be taken to those instructions, since they were in precise accordance with the former

holding of the court in the same case. In addition to the facts stated in the former opinion, the court noted that testimony of an attorney showed that he called upon the owner, soon after the personal injury suit was commenced, for the purpose of finding out whether he knew anything about the case which would be for the benefit of the city in preparing the defense, and made inquiries of him to that effect; and that, responsive to those inquiries, the defendant mentioned the name of a person who was boarding at the same place with the injured party, and whose testimony, the owner thought, would be of benefit to the city. The Supreme Court also rejected objections against the further instruction that if the attorney of the city informed the owner of the suit and its nature, and of the day of the trial, and conversed with him about the testimony for the defense, the owner was as much chargeable with notice as if he had been directly told that he could contest the right of the injured party to recover, and that the corporation would look to him for indemnity in the case of an adverse result. The court rejected defendant's argument that the notice was defective because the attorney did not specify in what court the suit was pending, and noted that the presiding justice had instructed the jury that when the owner was told that the pedestrian had sued the corporation for the injuries, it was the owner's duty to inquire and ascertain in what court the action was tried. It was further pointed out that knowledge of the pendency of the suit in the most authentic form was brought home to the owner, and that the legal presumption was that he knew he was answerable over to the corporation, and that, if so, it must also be presumed that he knew he had a right to defend the suit. The court finally stated that, being in the courthouse on the day the trial commenced, or the day before, and having been informed by the city attorney that the case was about to be heard, the defendant could not evade the effect of the judgment upon the ground that he did not know in which court the case was pending; that persons notified of the pendency of a suit in which they are directly interested must exercise reasonable diligence in protecting their interests, and if instead of doing so they wilfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efficiently, they cannot subsequently be allowed to "turn round" and evade the consequences which their own conduct and negligence have superinduced.

Notice by the indemnitee to the indemnitor of a former suit brought by a stevedore against the indemnitee in a state court to recover for injuries sustained in the course of his employment was held sufficient in New York & Porto Rico S.S. Co. v Lee's Lighters, Inc. (1950, DC NY) 48 F2d 372, where it appeared that prior to the trial of the personal injury action the indemnitee gave to the indemnitor written notice that the case would be tried in the near future, that the indemnitor should come in and defend the suit, and that, in the event of its failure to do so, the indemnitee would hold it responsible for the cost and expenses of the action, together with any judgment the indemnitee was compelled to pay therein, which notice was totally disregarded by the indemnitor. Consequently, in the present action brought by the indemnitee against the indemnitor to recover the money paid in satisfaction of the judgment obtained against the indemnitee in the former action, this judgment was held conclusive as to the liability of the indemnitee in the former action.

Notice given by a surety (on a supersedeas bond to stay execution on a judgment) to the judgment debtor, who had signed an indemnity bond keeping the surety harmless from all expenses arising from the surety's having executed the supersedeas bond, of an action contemplated and instituted by the judgment creditor against the surety on the supersedeas bond, was held in South Bend Pulley Co. v

[§ 15]

Fidelity & D. Co. (1903) 32 Ind App 255, 67 NE 269, 68 NE 688, sufficient to make the judgment rendered in the former action on the supersedeas bond conclusive in the present action brought by the surety against the judgment debtor on the indemnity bond, where it appeared that the judgment debtor (indemnitor) was repeatedly urged by the surety (indemnitee) to settle the original judgment, and was told of the apprehension of the surety's agent that suit would be brought on the supersedeas bond, and that the judgment, the surety being a nonresident, would be against the surety; that the judgment debtor, in answer to one of these letters, asked to be informed of the institution of a suit on the supersedeas bond; that the judgment debtor was informed that the surety had no defense against a suit on the supersedeas bond and would be compelled to look to the judgment debtor for such a defense; and finally that the surety's general agent wrote the judgment debtor that he had ascertained that the attorney for the judgment creditor the day before had filed suit against the surety on the supersedeas bond.

An Iowa statute providing as to "notice to person liable over" that in an action against a city for injury caused by its negligence the city may notify in writing any person claimed to be liable over to the city "of the pendency of said suit, the name of the plaintiff and where pending, and the general nature of the claim, and that the city claims that the person or corporation so notified is liable to said city for any judgment obtained against said city, and asking such person or corporation to appear and defend," and that thereupon a judgment obtained in such suit shall be conclusive (to the extent described in the statute) in an action by the city against the person so notified, was applied in Des Moines v Barnes (1947) 238 Iowa 1192, 30 NW2d 170, the court holding that the notice involved conformed strictly to the statute.

Under a later version of the Iowa statute quoted in the preceding case, providing that "said notice shall state the pendency of said action, the name of the plaintiff, the name and location of the court where the action is pending, a brief statement of the alleged facts from which the cause arose, that said municipal corporation believes that the person or corporation so notified is liable to it for any judgment rendered against said municipal corporation, and asking such person or corporation to appear and defend," it was held in Franzen v Dimock Gould & Co. (1960) — Iowa —, 101 NW2d 4, that a notice stating that "under and by virtue of Section 368-.33 of the Iowa Code [I. C. A.], you are liable to the City of Bettendorf in the event that any verdict should be rendered against said City in [sic] this notice is being served in accordance with Section 368.34 of the Iowa Code [I. C. A.]" was sufficient. The court recognized that the statement, "under and by virtue of Section 368-.33 . . . you are liable," was incorrect, since that section created no liability in favor of the city, but ruled that "taking the notice as a whole it was sufficient."

A finding of the court below that a notice given by a city (indemnitee) to an oil company (indemnitor) of an action brought by one injured through the company's negligence was sufficient was held in Ft. Scott v Penn Lubric Oil Co. (1927) 122 Kan 369, 252 P 268, sustained by evidence showing that the company had notice of the former action, the communication containing a request that it aid in making the defense and at the same time informing it that the city would look to it for reimbursement of any damages recovered in the former suit.

Although not specifically dealing with the sufficiency of notice, Katterjohn v Nahm (1908) 32 Ky LR 727, 106 SW 1179, should be noted. The case involved an action brought by an indemnitee against the indemnitor upon an indemnity bond to recover the payments made by the indemnitee under a judgment recovered against the

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Where the indemnitor was notified of the pendency of a suit against the indemnitee and the date fixed for the trial, was furnished with a copy of the declaration, and was called upon to defend the suit under its contract of indemnity, but refused to do so, it was held in New Orleans G. N. R. Co. v S. T. Alcus & Co. (1925) 159 La 35, 105 So 91, that the indemnitor was bound by the judgment in the former action as to all questions determined therein material to a recovery against it, since it had timely notice of the pendency of the action "and was given full and fair opportunity to defend the suit." The court did not discuss in terms whether the notification was sufficient, but this seems to be a fair inference from the holding.

Notice given to the indemnitor by the attorney of the indemnitee notifying the indemnitor of the pendency of a third person's action against the indemnitee was held sufficient in Train v Gold (1827) 22 Mass (5 Pick) 380, where it appeared that the indemnitor, upon receipt of the notice, requested the indemnitee's attorney to procure a continuance of the case so as to enable the indemnitor to prepare for trial, and there was evidence that the indemnitor had engaged the same attorney to defend the suit.

In C. & R. Constr. Co. v Boston (1930) 273 Mass 280, 173 NE 517, an action brought by a contractor against a city to recover a balance due under the contract, the city declared in setoff for the amount paid in settlement of an execution issued upon a judgment obtained by a third person against the city for damages sustained by him in the course of the construction work. The city's claim was rested on a contract which provided that the contractor would indemnify and hol dthe city harmless against all claims of the kind asserted in the action in which the judgment was rendered. The trial judge admitted a notice from the city to the contractor that an action was pending against the city, brought by the third person, claiming damage from a defect in a public street caused by the contractor's improper refilling of an excavation. The notice charged the contractor with responsibility and called upon it to assume defense of the action. On the contractor's exceptions to a verdict directed by the trial judge in favor of the city's claim of setoff, it was held that the ruling admitting the notice was right, since it was material to show that the contractor had been notified of the third person's claim against the city and requested to defend against it, if the city wished to establish that the contractor was bound by the verdict.

Evidence—in an action by a city against railroad companies to recover the payment made by the city in satisfaction of a judgment recovered against it by one injured on a sidewalk opposite premises owned by the companies—that the city attorney informed in writing each of the agents of the companies of the fact that the suit had been brought, and that thereupon the attorney for the companies stated to the city attorney that he wished it distinctly understood that the companies were not to be bound by his action in any way, yet, if the city attorney wished him to sit in the case, he would be glad to do so, was held in Lansing v Detroit, L. & N. R. Co. (1902) 129 Mich 403, 89 NW 54, sufficient to charge the companies with notice of the existence of the suit

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[§ 15]

against the city, the court merely citing Robbins v Chicago (1867, US) 4 Wall 657, 18 L ed 427, supra.

Where a city attorney served upon contractors personal notice advising them of an action brought by a third person against the city, of the nature of the suit, of the court and docket number, of their right to make a defense, and of their liability for the payment of any judgment which might be rendered against the city, it was held in Omaha v Yancey (1912) 91 Neb 261, 135 NW 1044, an action to recover from the contractors the amount paid by the city to satisfy the judgment rendered in the earlier suit, that the notice was sufficient to show that the amount of damages fixed by the former judgment was binding on the contractors. One of the justices dissented without opinion. It may be noted that the decision as to the conclusiveness of the former judgment was also rested on the ground that the traction company participated in the former trial.

A notice by a town (the indemnitee) to the indemnitor of the pendency of an action by a third person against the indemnitee was held sufficient in Littleton v Richardson (1856) 34 NH 179, 66 Am Dec 759, where it stated the pendency of the action of the third person against the town, that it was for damages sustained by the third person by reason of a stone placed in the highway by such person, and that the town would hold him responsible for the damages recovered, and requested him to appear at court and defend the action, and save the town harmless.

Where, in an action brought to recover back moneys paid by plaintiffs to defendants on the purchase of United States notes which plaintiffs alleged were counterfeits, the only evidence of the spurious character of the notes was a record of a judgment in an action brought by the United States against plaintiffs, and plaintiffs' evidence tended to show that defendants were notified of the claim of the government that the notes were forged, and also were notified that plaintiffs had been sued and would look to the defendants for repayment for indemnity in case judgment should be rendered in favor of the government, it was held in Heiser v Hatch (1881) 86 NY 614, that the facts, if found, would make the judgment conclusive against the defendants in the present action as to the genuineness of the notes. It will be observed that the notice did not contain a request that the indemnitor assume the defense.

In Oceanic Steam Nav. Co. v Compania Transatlantica Espanola (1895) 144 NY 663, 39 NE 360 (in which a majority of the court did not concur in the prevailing opinion, but simply in the result), the lessee of a public pier sued its sublessee to recover amounts which it paid in satisfaction of a judgment obtained by a third party against the plaintiff for injuries resulting from the sublessee's negligence. While the former action against the present plaintiff was pending, its attorneys of record in that action addressed a letter to the sublessee's agents, under the date of May 31, 1888, in which these agents were notified that an action to recover damages for injuries had been commenced on a specified date and was pending; that the present plaintiff was sued for the reason that it was the lessee of the pier where the injury occurred; that the attorneys advised their client that the sublessee was liable for the accident, in the event of there being any liability; that these attorneys would be glad of the sublessee's assistance in obtaining testimony for the defense; and that the cause was on the day calendar, and would probably be tried within about 10 days. The cause was actually tried on the 8th of June following the date of the letter. In the present suit the defendant contended that the notice was not sufficient, and, in effect, that the defendant had no notice of the pendency of the action or any opportunity to participate in the defense. In support of its holding that the notice was sufficient in substance, the court, after noting that the notice was im-

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portant only for the purpose of binding the defendant by the former adjudication to which it was not otherwise a party, said: "No particular form of words is necessary in order to constitute notice in such cases, nor is it even necessary to give a written notice. It is sufficient that the party against whom ultimate liability is claimed is fully and fairly informed of the claim and that the action is pending with full opportunity to defend or to participate in the defense. If he then neglects or refuses to make any defense he may have, the judgment will bind him in the same way and to the same extent as if he had been made a party to the record. When a party has been served with such a notice the law entitles him to come in as a party upon the record or to be heard at the trial, and it is not necessary that he should be required in terms to do what the law will permit him to do. I do not think that the proposition that the plaintiff was bound to offer in the notice to surrender to the defendant the sole control and management of the litigation, is sanctioned by reason or authority. The plaintiff had been sued and it had the right to defend according to the judgment and advice of its own counsel. It was not bound to abandon, or offer to abandon, its interests to the care of a stranger whose interests were not necessarily identical but in some respects were even hostile. The plaintiff found itself involved in a litigation in which it had two chances. It might, if possible, defeat Cleary's action, or, failing in that, could resort to its remedy over against the defendant. It could not be compelled to relinquish either of these methods of protecting itself from loss, but could at the same time and in its own way, pursue such a course as to retain both. All that the defendant was entitled to was the opportunity to defend and to protect its own interests in the same way and to the same extent as if it had been sued jointly with the plaintiff in the first instance, and this would not give to it any right to manage or control the proceedings so far as concerned its co-defendant."

Notice by the charterers of a steamship (indemnitees) to the owner of a pier (indemnitor) of actions brought against the charterers by the owners of a cargo alleged to have been damaged when a section of the pier collapsed was held in Vogemann v American Dock & Trust Co. (1909) 131 App Div 216, 115 NYS 741, affd without op 198 NY 586, 92 NE 1105, sufficient, so as to render the judgment rendered in that action conclusive in a subsequent action brought by the charterers against the owner of the pier, where there was proof of a letter written by the charterers' attorney to the owner of the pier, which notified it of the suits, invited it to co-operate in the defense thereof, and gave notice of an intention to hold it liable for any judgment recovered.

Where a sheriff, when sued by a judgment creditor for the negligence of his deputy in permitting property of the judgment debtor to be used up or squandered by the debtor, notified the deputy of the commencement of the suit against him, and requested the deputy to come and advise as to the defense, or to take charge of the defense if he so desired, it was held in Thomas v Hubbell (1852, NY) 18 Barb 9, revd on other grounds 15 NY 405, 69 Am Dec 619, that the notice was sufficient so as to make the judgment rendered in the former action against the sheriff conclusive in his present action brought against the deputy and his sureties upon the bond given to the sheriff by the deputy. It was also held that the notice given to the deputy sheriff was sufficient notice to his sureties.

Where the indemnitee's solicitor testified that when the case against the indemnitee was fixed on the trial list he went to the indemnitor and told him that it was highly important for the latter to take some interest in the case, since, in the event of the indemnitee being held responsible, it might be possible that the indemnitor in turn would be made liable, it was held in Hollidaysburg v Snyder (1917)

[§ 15]

258 Pa 206, 101 A 955, that there was sufficient evidence of an adequate notice to submit to the jury, in the present action for indemnification, a question of fact, and that their finding that the indemnitor had due notice of the former proceeding was supported by the evidence. However, the court also noted that the indemnitor was actually present at the former trial and testified in it as a witness.

Although unsuccessful, a city's attempt to join its indemnitor (the owner of property in front of which a pedestrian sustained injury) as party defendant in the pedestrian's action against the city was held in Erie v Stickle (1946, Pa) 35 Erie Co LJ 80, amply and adequately to fulfil the office of notice, so as to render the judgment obtained against the city in the former action conclusive in the city's present action against the owner to obtain indemnification. Noting that the owner's present counsel entered a special appearance for him in the former action against the city and successfully contested the city's right to join him as an additional defendant, the court sustained the city's contention that the service of notice upon the owner of the joinder proceedings, together with notice to appear and defend (as the rules then provided), constituted actual and definite notice not only of the suit, but of the city's expectation that defendant would be held primarily liable. The court rejected the owner's position, accepted by the trial judge, that once the owner was eliminated as a party defendant in the former suit, the notice to appear and defend had no binding effect upon him and that it was incumbent upon the city to give him additional notice of the action and of its intent to look to him as the person ultimately liable. The requirement of notice, it was said, is not a technical device created for the express purpose of enabling an indemnitor to escape a just obligation, but is merely to supply him with knowledge that his rights may be in jeopardy. The court also pointed out that the law does not require any particular form of notice.

A contractor engaged in the erection of a building under a building permit by the terms of which he was "responsible for any one being injured" was held in Cle Elum v Yeaman (1927) 145 Wash 157, 259 P 35, sufficiently notified of a suit brought against the city by a pedestrian injured in the course of the erection of the building, where copies of the summons and complaint were given to the contractor a few days after the commencement of the suit; the only response made to the tendered defense was an offer on the part of his bonding company to employ attorneys to represent the city; the contractor knew of the pendency of the action, the issues involved, and the time and place of trial; and he and his employees participated as witnesses for the city, and had an opportunity to present to the jury any facts constituting a defense. Consequently it was held that the contractor could not, in an action brought by the city against him to recover the amount of the judgment entered in the former proceeding, urge that this judgment was not conclusive against him.

For cases, discussed in other contexts, which hold the notice involved sufficient, see the following:

United States.—Bedal v Hallack & H. Lumber Co. (1955, CA9 Idaho) 226 F2d 526, supra, § 13[c].

Connecticut.—Waterbury v Waterbury Traction Co. (1901) 74 Conn 152, 50 A 3, supra, § 14[c].

Illinois.—Drennan v Bunn (1888) 124 Ill 175, 16 NE 100, 7 Am St Rep 354, supra, § 13[c].

Maine.—Davis v Smith (1887) 79 Me 351, 10 A 3, supra, § 14[c].

Massachusetts.—Boston v Worthington (1858) 76 Mass (10 Gray) 496, 71 Am Dec 678, supra, § 14[b], footnote 14; Inhabitants of Milford v Holbrook (1864) 91 Mass (9 Allen) 17, 85 Am Dec 735, supra § 11[b]; Inhabitants of Westfield v Mayo (1877) 122 Mass 100, 23 Am Rep 292, supra, § 11[b]; Bowditch v E. T. Slattery Co. (1928) 263 Mass 496, 161 NE 878, supra, § 14[b].

Tennessee.—Jones v Bozeman (1958) — Tenn App —, 321 SW2d 832, supra, § 13[b].

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Washington.—Spokane v Crane Co. (1917) 98 Wash 49, 167 P 63, supra, § 13[c].

[b] Holding notice insufficient.

The following cases are illustrative of situations in which the notice given by the indemnitee to the indemnitor as to an action brought by a third person against the indemnitee has been held insufficient.

The sufficiency of the notice was denied in Hartford Acci. & Indem. Co. v First Nat. Bank & Trust Co. (1937) 162 Misc 348, 294 NYS 522, revd 256 App Div 30, 9 NYS2d 590, which in turn was revd 281 NY 162, 22 NE2d 324, 123 ALR 1149, under the following circumstances: A savings bank drew to the order of a depositor its draft for $5,000 on the First National Bank and debited her savings account in that sum. This draft, indorsed in the name of the depositor, was placed by the indorsee in his account in the Farmers National Bank, and was by that bank indorsed and collected from the First National Bank. In a former action thereafter brought by the depositor against the savings bank, she recovered judgment for the full amount of her savings account on a finding that the indorsement of her name on the $5,000 draft was a forgery. This judgment was paid by an insurer of the savings bank. The present action was brought by the insurer (as subrogee of the savings bank) against the First National Bank for reimbursement of the payment of the judgment rendered in the former action. The First National Bank brought in the Farmers National Bank as a party and demanded judgment over against it. The insurer recovered a judgment on the pleadings against the First National Bank (which was not challenged by appeal). However, the trial court denied a motion by the First National Bank for a summary judgment in its cross action against the Farmers National Bank. The trial court recognized that a judgment in the present action against the First National Bank would be binding and conclusive upon the Farmers Bank in respect of the forged indorsement upon the check if the Farmers Bank as a party defendant had been given an opportunity fully and actually to litigate the question, but held that no such opportunity had been afforded. In that respect the trial court pointed out that the letter of notice relied upon merely stated that a claim was made by the original depositor that she did not indorse the draft; that this was before the complaint was served; that the complaint itself, a copy of which was forwarded to the Farmers National Bank, contained no suggestion of forgery in it; and that the notice was conditioned by the pleadings referred to therein and subsequently forwarded to the Farmers Bank, and those pleadings again contained no suggestion of forgery. Under these circumstances, and in view of the additional fact that no express invitation to assume the management of the defense was shown, the notice was held inadequate. Upon appeal by the First National Bank, the Appellate Division reversed the trial court and granted the motion of the First National Bank for summary judgment. One of the judges dissented on the ground, among others, that for the reasons stated by the trial court the notice by which the Savings Bank sought to vouch in the Farmers Bank was wholly inadequate. On further appeal by the Farmers Bank, the Court of Appeals reversed the judgment of the Appellate Division and affirmed the order of the trial court. As to the adequacy of the notice the court said: "A named defendant who would have another (not yet a party) bound by judgment in an action must by proper notice offer to him control of the defense of the litigation. . . . The essential factors of this process of "vouching in" are hard to define. Resort to them has often provoked a new controversy as to the adequacy of notice and opportunity to defend. Vexations inherent in the practice are exhibited once more in the present case. Much may be said for the view of the dissenting opinion below that Farmers National Bank was not sufficiently informed that the