Marquette Law Review

Volume 30
Issue 1 *May 1946*

Article 2

Tender of Defense

Merriem D. Luck

Marvin E. Klitsner

MARQUETTE LAW REVIEW

Vol. 30 MAY, 1946 No. 1

TENDER OF DEFENSE

MERRIEM D. LUCK
MARVIN E. KLITSNER

The development of the doctrine known as "tender of defense" rests upon the axiom "that it is for the interests of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination."[1]

A generally accepted statement of the doctrine is that found in the case of *Littleton v. Richardson*:[2]

> "When a person is responsible over to another, either by operation of law or by express contract . . . and he is duly notified of the pendency of the suit and requested to take upon him the defense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he was the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion . . . will be conclusive against him, whether he has appeared or not."

In some states the matter is covered by statute, ordinarily merely a statement of the common law.[3]

The designation of the procedure as a tender of defense is not strictly accurate since it is available to a plaintiff in some cases,[4] but the nature of the fact situations under which a right to indemnity arises is such that the doctrine is more generally applied by an individual who has been sued. The procedure has also been termed "vouching in", an expression which originated in connection with notifying a warrantor of title to appear and defend an attack upon

---

[1] Robbins v. Chicago City, 4 Wallace 657, 672; 71 U.S. 657, 18 L.Ed. 427 (1866).
[2] 34 N.H. 179, 187; 66 Am. Dec. 759 (1856).
[3] Freeman on Judgments, Fifth Edition Sec. 447, Vol. 1, p. 979, citing Charleston & W. C. R. Co. v. Union Warehouse & Compress Co., 139 Ga. 20, 76 S.E. 360 (1912); Western Surety Co. v. Kelley, 27 S.D. 465, 131 N.W. 808 (1911), and Ashburn v. Watson, 8 Ga. App. 566, 70 S.E. 19 (1911).
[4] For example, when one to whom title is warranted begins an action for eviction against a claimant of title in possession and seeks to conclude the warrantor of title by serving upon him notice of the action of eviction and an opportunity to defend. Wolfe v. Barataria Land Co., 255 Fed. 503 (C.C.A. 8th. 1919). See also Freeman on Judgments, Fifth Edition, Sec. 448, Vol. 1, p. 983.

the title,[5] and the individual to whom such notice is given is called the "vouchee", the person giving the notice being the "voucher".[6]

The purpose of this article is not to present an exhaustive collection of the case material on this doctrine, but to point up for the practicing attorney some of the situations in which the doctrine is applicable, the extent of its function, and the requisites for an effective tender of defense. Because of the great disparity in the cases on the question of what is required for an effective tender, it is considered worth while to discuss the heretofore neglected question of Conflict of Laws in connection therewith.

Fields in Which Doctrine is Applicable

The doctrine is applicable in cases where a party to a suit has a right to indemnity, either by operation of law or by express contract.[7] Some of the fields in which a tender of defense has been made are as follows: liability insurance, as where a defendant-insured tenders defense of a suit by the injured claimant to the insurer;[8] covenants and warranties, as where a vendee defending his right to title tenders the defense to his vendor-warrantor;[9] and suits by parties to commercial paper, as where an endorsee of a note brings an action against the maker to which the defense of usury is interposed and the endorsee vouches in his endorser.[10]

A right to indemnity between tort feasors exists when tort feasors are not as between themselves *in pari delicto*.[11] Defense of an action

---

[5] 140 A.L.R. 1121 citing 15 R.C.L. 1020, Judgments Sec. 492.

[6] The words indemnitee and indemnitor will be used generally in this article to describe the individual who has a right over, and the person against whom such right is had.

[7] Cases in which the indemnitor agrees to indemnify against the results of litigation to which he is not a party are not within the scope of this article.

[8] 140 A.L.R. 1121, citing Miller v. United States Fidelity & Casualty Co., 291 Mass. 445, 197 N.E. 75 (1935), and Edinger & Co. v. Southwestern Surety Ins. Co., 182 Ky. 340, 206 S.W. 465 (1918).

[9] 140 A.L.R. 1122, citing Fitzpatrick v. Hoffman, 104 Mich. 228, 62 N.W. 349 (1895), and Knapp v. Marlboro, 34 Vt. 235. See also Wolfe v. Barataria Land Co., *supra*, note 4.

[10] Drennan v. Bunn, 124 Ill. 175, 16 N.E. 100, 7 Am. St. Rep. 354 (1888). See 34 A.L.R. 157, Hagertley v. Bradford, 9 Ala. 567 (1846). (In this situation it is the plaintiff who avails himself of the doctrine.)

[11] Where the person seeking indemnity is concurrently negligent, no right to indemnity arises because no contract for contribution or indemnity can be implied between wrong doers, since an implied promise rests upon equitable grounds. 9 Cyc. 805. See Union Stockyards Co. v. Chicago, Burlington & Quincy R. Co., 196 U.S. 217, 25, S.Ct. 226, 49 L.Ed. 453 (1905). The exception to the rule is that where one tort feasor has been guilty of no actual wrong and the other tort feasor has been the active participant in the tort, the former may recover over against the active perpetrator. The basis of the exception is that tort feasors are not as between themselves *in pari delicto*. Baltimore & O. R. Co. v. Howard County, 111 Md. 176, 73 Atl. 656, 40 L.R.A. (N.S.) 1172 (1909), Southwestern Bell Telephone Company v. East Texas Public Service Company, 48 Fed. (2nd) 23 (C.C.A. 6th, 1931). Cf. London Guaranty and Accident Company v. Strait Scale Company, 322 Mo. 502, 15 S.W. (2nd)

may be tendered by a constructive tort feasor to one whose active negligence has caused the damage for which the constructive tort feasor is being sued.[12] For example, a municipality sued for breach of its duty to keep the streets free from defects may tender the defense of the action to the person responsible for causing the defect.[13]

Freeman states that a third party cannot be called upon to defend an action if the establishment of his freedom from liability will not necessarily result in a judgment in favor of the party asking him to defend.[14] That statement of the rule is not consistent with the cases which hold that a tender of defense may be made by one tort feasor to another, and the question of which of the tort feasors is primarily liable may be litigated in a second suit[15] in which the defendant may show that the plaintiff was actively negligent.[16] Were the alleged indemnitor in the second suit to accept the tender and show that he was not liable, such showing would not necessarily result in a judgment in favor of the voucher, and under the rule as stated by *Freeman,* the tender of defense would not be valid.

Freeman cites as authority for the rule the case of *Raleigh & Gaston R. Co. v. Western & Atlantic R. Co.*[17] The facts in that case are briefly as follows: the Raleigh & Gaston R. Co. contracted with the Pullman Co. to make all necessary repairs on the latter's cars damaged while in the possession of Raleigh, no matter from what cause the damage occurred. The Western & Atlantic R. Co. damaged a car belonging to Pullman while said car was in the possession of Raleigh. In a suit by Pullman against Raleigh for breach of contract, the latter tendered the defense to Western, which did not accept, and Pullman recovered a judgment against Raleigh. Raleigh claimed that the judgment against it was conclusive on Western. It was held that the liability of Raleigh was independent of the liability of Western and that before there can be a tender of defense, the action between the injured party and the voucher must be such that the vouchee could set up therein any defense which he could set up if the suit were proceeding against him directly. The facts did not require the court

766, 64 A.L.R. 936 (1929), in which a buyer of strait scales recovered over against the seller for damages paid to an individual injured by reason of a defect in the scale. Since recovery was based on breach of implied warranty of fitness, it was held immaterial whether the buyer was an active tort feasor. See also Restatement of the Law of Restitution, Sec. 93 and Sec. 94.

[12] Standard Oil Co. v. Robins Dry Dock & Repair Co., 32 F. (2d) 182 (C.C.A. 2nd, 1929), Washington Gas Light Co. v. Dist. of Columbia, 161 U.S. 316, 16 S.Ct. 564, 40 L. Ed. 712 (1895).

[13] Robbins v. Chicago City, fn. 1, *supra.*

[14] Freeman on Judgments, Fifth Edition, Sec. 448, Vol. 1 p. 982.

[15] Oceanic Steam Nav. Co. v. Compana Transatlantica Espanola, 134 N.Y. 461, 31 N.E. 987, 30 Am. St. Rep. 685 (1892).

[16] Boston & M. R. Co. v. Sargent, 72 N.H. 455, 57 Atl. 688 (1904).

[17] 6 Ga. App. 616, 65 S.E. 586 (1909). See note.

to go that far. On the facts, the case merely stands for the rule that in order for a tender of defense to be effective, some of the issues in the suit against the indemnitee must be such as will necessarily be litigated in the suit against the indemnitor. In the *Raleigh* case it was no part of Pullman's case to prove Western's negligence, and the finding of fact as to the amount of damage could not be conclusive on Western since it was no part of the plaintiff's case to show what part of the damage was caused by Western.

If the rule as set forth by *Freeman* were to be more generally applied, the doctrine of tender of defense would, from a practical standpoint, be greatly limited in its application to tort cases involving indemnity between constructive tort feasor and an active tort feasor since there are few such cases in which it is clear that there is no active negligence on the part of the constructive tort feasor.

FUNCTION OF DOCTRINE[18]

Upon an effective tender of defense in a pending suit the party to whom the defense is tendered is concluded by the judgment in that suit on all the matters necessarily included in the adjudication.[19] Thus, for example where a constructive tort feasor vouches in the active tort feasor whom he believes to be primarily responsible for the injury, the judgment against the constructive tort feasor is conclusive that the injury occurred as the result of the negligent act or negligent creation or maintenance of the condition alleged;[20] that it was not caused either by the intervening act of a stranger[21] or by the contributory negligence of the person injured,[22] and that the damages suffered were those awarded by said judgment.[23] In addition the indemnitor is estopped to deny that he was negligent where, because he has direct control of the premises or condition, the negligence which the former action established was necessarily his negligence.[24] The indemnitor is not only concluded on the issues actually raised in the litigation, but he is also concluded as to any defenses the original defendant might have employed.[25] In the action for indemnity, however, the defendant may show that he is not under a

[18] 40 L.R.A. (N.S.) 1172. Freeman on Judgments, Fifth Edition, Sec. 450, Vol. 1, p. 991.
[19] Washington Gas Light Co. v. District of Columbia, fn. 12, *supra;* Todd v. Chicago, 18 Ill. App. 565 (1886).
[20] Fn. 16, *supra.*
[21] Byne v. Americus, 6 Ga. App. 48, 64 S.E. 285 (1909).
[22] McNaughton v. Elkhardt, 86 Ind. 384.
[23] Oceanic Steam Nav. Co. v. Campania Transatlantica Espanola, fn. 15, *supra.*
[24] Washington Gas Light Co. v. District of Columbia, fn. 12, *supra.*
[25] Rochester v. Montgomery, 72 N.Y. 65 (1878).

duty to indemnify.[26] Thus, in a tort case, he may show the intervening active negligence of the defendant in the first suit.[27]

It should be noted that the indemnitee as well as the indemnitor is concluded by the adjudication. The estoppel must be mutual.[28] In *American Candy Company v. Aetna Life Insurance Company*[29] it was stated that where the defense in an action is duly tendered to one who may under any aspect of the case be liable over to the party sued, and the person to whom the defense is tendered becomes thereby in legal effect a party to the action and is bound by the judgment, the estoppel of the judgment is mutual. In that case, a minor who was employed in violation of the law, recovered a judgment against his employer for an injury suffered during the course of employment. The employer tendered the defense of the action to the insurance company. In the action against the employer, it was found that the minor was employed contrary to law. The policy exempted the insurance company from liability for injury received by any person employed in violation of the law. In the action by the employer against the insurance company, it was held that the employer was concluded by the judgment on the issue of whether the employee was employed contrary to law.

A question may be raised as to whether the judgment is conclusive upon the vouchee where the voucher fails to make a defense. In Restatement of the Law of Judgments it is stated that if the indemnitor has knowledge of the proceeding and has reasonable notice to defend, the indemnitee is not bound to make a defense except where the relation between them is such that the indemnitee has a duty to protect the indemnitor's interests, as it may be in the case of principal and agent. Thus, in the absence of fraud or collusion, the indemnitor is concluded by the judgment against the indemnitee even if the judgment is by default or although the indemnitee does not carefully defend the action.[30] It has been held that the vouchee is concluded by a judgment although the case is tried on agreed facts,[31] and that it is no objection to use of a judgment as a bar that the issues were referred to the court though triable by a jury.[32] The Restatement of

[26] Inashima v. Wardall, 128 Wash. 617, 224 P. 379 (1924), later appeal in 145 Wash. 77, 258 P. 839 (1927).
[27] See fn. 15 and 16, *supra*.
[28] Freeman on Judgments, Fifth Edition, Sec. 450, Vol. 1, p. 993; Restatement of the Law of Judgments Sec. 107b.
[29] 164 Wis. 266, 159 N.W. 917 (1916).
[30] Sec. 107 f.
[31] First Nat. Bank of Minneapolis v. City Nat. Bank of Holyoke, 182 Mass. 130, 65 N.E. 24, 94 Am. S.R. 637 (1902).
[32] Prescott v. Le Conte, 83 App. Div. 482, 82 N. Y. Supp. 441 (1903), affirmed per curiam 178 N.Y.S. 85, 70 N.E. 1108 (1904).

the Law of Judgments[33] indicates, however, that the vouchee is not concluded by a judgment by confession.

It should be noted that where the vouchee is refused the right to aid in the defense, he is not concluded by the judgment;[34] and it has been held that a vouchee is not bound by a judgment where he offers a good defense which the voucher refuses to plead.[35]

WHAT CONSTITUTES AN EFFECTIVE TENDER OF DEFENSE

Requirements of the various courts for an effective tender of defense range from the statement that the notice must be clear and explicit with an offer to surrender control of the defense and an expression of the consequences that will follow recovery by the claimant[36] to the statement that mere knowledge of the pendency of the suit is sufficient to constitute a valid tender.[37]

All courts require the notice to be timely.[38] The test of timeliness is that the notice be given in sufficient time under the facts and circumstances to afford to the vouchee an opportunity to attend the trial and make a defense.[39] A Wisconsin case indicates that a tender should be made before the expiration of the time to answer.[40]

It is generally required that the notice and tender must be given by the one seeking indemnity.[41] In *Burchett v. Blackburn*[42] it was stated that since the notice for all practicable purposes takes the place of judicial process, it should at least purport to emanate from the one who seeks to benefit by it. In that case the covenantor had knowledge of the suit, but no express notice from the covenantee, and the court held the notice insufficient. The case of *Lebanon v. Meade* held that notice from a disinterested party was insufficient.[43]

An oral notice has generally been held sufficient,[44] although several courts, including the Wisconsin court, uphold the rule with reluctance, reasoning that a notice which takes the place of judicial process should rest in higher proof.[45] The Michigan courts do not recognize an oral tender of defense.[46]

---

[33] Sec. 107 f.
[34] City of Lewiston v. Isaman, 19 Idaho 653, 115 Pac. 494 (1911).
[35] City of Seattle v. Northern Pac. Ry. Co., 47 Wash. 552, 92 Pac. 411 (1907); subsequent appeal. 62 Wash. 129, 114 Pac. 1038 (1911).
[36] Hersey v. Long, 30 Minn. 114, 14 N.W. 508 (1883).
[37] Robbins v. Chicago City, fn. 1, *supra.*
[38] A.L.R. 1440: Saveland v. Green, 36 Wis. 612 (1875); Somers v. Schmidt, 24 Wis. 417 (1869).
[39] Saveland v. Green, fn. 38, *supra.*
[40] Somers v. Schmidt, fn. 38, *supra.*
[41] Somers v. Schmidt, fn. 38, *supra;* see 123 A.L.R. 1153.
[42] 198 Ky. 304, 248 S.W. 853 (1923).
[43] 64 N.H. 8, 4 Atl. 392 (1885).
[44] Cummings v. Harrison, 57 Miss. 275 (1879); Miner v. Clark, 15 Wend. 425 (New York, 1836).
[45] Somers v. Schmidt, fn. 38, *supra;* Burchett v. Blackburn, fn. 42, *supra.*
[46] Mason v. Kellog, 38 Mich. 132 (1878).

The sufficiency of the notice may depend to some extent upon the basis of the liability over.[47] In *Missouri P. R. Co. v. Twiss*[48] the court stated that especially where a party knows that the injury was caused by himself and no one else, and that if a recovery is had, it will be because of his neglect and wrong, requirements of notice and tender are satisfied when he has knowledge of the pendency of the suit and can defend it if he wishes, indicating that where there is no doubt about the right to indemnity, the notice can be less express than where indemnity is debatable.[49]

What the notice must contain is a matter on which there is little agreement. Although the cases are in accord that there must be an opportunity to defend,[50] there is conflict as to what is required to give that opportunity. The United States Supreme Court, in the leading case of *Robbins v. Chicago City*,[51] recognized as a tender of defense mere knowledge of the nature of a suit and the fact that it was pending. A suit had been begun against the City of Chicago for personal injury caused by a defect in the street in front of Robbin's premises. Robbins was responsible for the defect. The City was held liable to the person injured because of the breach of its duty to keep the streets free from defects, and in the case of *Robbins v. Chicago City,* Robbins was held responsible over to the City, and it was held that he was concluded by the judgment against the City. No written notice was given to Robbins of the pendency of the suit, and he was not told that he could defend the action against the City. He knew of the pendency of the suit because the city attorney had applied to him to assist in procuring testimony. The day of the trial or the day previous to it, the city attorney, casually meeting Robbins at the foot of the stairway to the courthouse, remarked to him that the suit was coming on, but he did not tell him in what court the suit was pending and he did not give him notice that the City would look to him for indemnity. The city attorney did not tell Robbins of the nature of his office, presuming that Robbins knew that fact. The Supreme Court held that there was a sufficient tender of defense, the legal presumption being that Robbins knew he was answerable to the City and that it must also be presumed that Robbins knew he had a right to defend the suit.

In marked contrast to the *Robbins* case[52] are the cases holding that the notice must apprise the party whose rights are to be affected

[47] 34 A.L.R. 1443.
[48] 35 Neb. 267, 53 N.W. 76, 37 Am. St. Rep. 437 (1892).
[49] See dissenting opinion in Wolfe v. Barataria Land Co., fn. 4, *supra;* See also Somers v. Schmidt, fn. 38, at page 420.
[50] Grafton v. Hinkley, 111 Wis. 46 (1901); Seattle v. Northern P. R. Co., fn. 35, *supra.*
[51] Fn. 1, *supra.*
[52] Fn. 1, *supra.*

of what is required of him and of the consequences that will follow neglect;[53] that the indemnitor must be expressly notified by the indemnitee in order that he know the indemnitee intends to make him liable,[54] and that the notice must contain a request to appear and defend.[55]

In the *Robbins* case[56] the court merely stated that Robbins could have defended the suit. The Wisconsin Court raises the question of whether one not a party has an opportunity to defend without the express request of the defendant. In *Saveland v. Green,*[57] the court in discussing the *Robbins* case, says that the defendant in an action has an absolute right to control the defense thereto and no one not a party can be permitted to interfere therewith without the consent of the defendant. "It is absurd to say, therefore, that the mere fact that one not a party but who may be liable over to the defendant had notice of the pendency of the action, raises a presumption that he had the right to defend it."[58]

Among those cases holding that the notice must include a request to appear and defend, there is conflict as to whether the indemnitee must surrender control of the defense to the indemnitor, or whether a mere request to assist in the defense is sufficient. In *Consolidated Hand Method Lasting Machine Co. v. Bradley,*[59] the following notice was held insufficient as a tender of defense:

> "In case, however, we should be beaten, we shall look to you to recompense the machinery company; and we shall expect you to assist in the conduct of the defense."

The court held that the notice given implied that the counsel of the defendant-indemnitee intended to take control of the defense of the suit, and that a voucher cannot insist upon retaining control of the defense and yet hold the party notified bound by the result of the suit. In *Oceanic Steam Nav. Co. Ltd. v. Compania Transatlantica Espanola,*[60] the statement, "we would be glad of your assistance in obtaining testimony for the defense" was held an adequate tender. The court stated that the indemnitee had been sued and had the right to defend according to the judgment and advice of its own counsel; and that it was not bound to abandon its interests to the care of a stranger whose interests were not necessarily identical, but in some cases were even hostile. The court concluded as follows:

---

[53] Hersey v. Long, fn. 36, *supra;* Sampson v. Ohleyer, 22 Cal. 200 (1863).
[54] Oskaloosa v. Pinkerton, 51 Iowa 697, 1 N.W. 689 (1879); See also Somers v. Schmidt, fn. 38, *supra.*
[55] Adams v. Filer, 7 Wis. 306 (1858), Saveland v. Green, fn. 38, *supra.*
[56] Fn. 1, *supra.*
[57] Fn. 38, *supra.*
[58] Saveland v. Green, fn. 38, *supra,* at p. 625.
[59] 171 Mass. 125, 50 N.E 464, 68 Am. St. Rep. 409 (1898).
[60] Fn. 15, *supra.*

> "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 codefendant."[61]

It has been held that in order that there be a valid tender, the indemnitor must be notified of the pendency of an action, it being insufficient that he be notified of an intention to sue;[62] and that a notice to come in and assume the defense is insufficient where it does not state the cause or nature of the action, or show in what way the person notified may be interested.[63]

The Wisconsin Court has held that where a party seeks to bind another by a judgment on the ground that a valid tender of defense was made, he must in his pleadings allege that a tender of defense was made and that such tender was timely.[64]

Conflict of Laws

With the amount of disparity there is in the decisions concerning what constitutes an effective tender of defense, it is especially important to decide by what law the matter will be governed. An attorney representing an indemnitor to whom a so-called tender of defense is made is faced with the problem of deciding for his client whether the tender is valid. Should he decide the matter on the basis of the law of the court in which the action is pending, or should he decide the problem on the basis of the law of the courts in which the indemnitee may later seek to bind his client? On the other hand, if an attorney represents an indemnitee who is being sued he must decide which law shall govern in determining what procedure to follow in making a tender.

The question must be considered with cognizance of the fact that it has been held that an indemnitor can be vouched in to defend an action in another state.[65] Although there is little or no authority directly on this problem, it would seem that useful analogies might be drawn from the authorities on the general problem of what law governs the question of who are privies to an action. Where the defense is tendered to a party over whom the court has no jurisdiction, the effect of such tender is similar to the acquisition of jurisdiction.

---

[61] 39 N.E. 360 at page 361. In accord, Restatement of Law of Judgments, Sec. 107g; Freeman on Judgments, Fifth Edition, Sec. 449, Vol. 1, p. 985.
[62] Dalton v. Bowken, 8 Nev. 190 (1873).
[63] 64 N.H. 8, 4 Atl. 392 (1886).
[64] Saveland v. Green, fn. 38, *supra.*
[65] Fn. 31, *supra.*

In the case of *Old Dominion Min. & S. Co. v. Bigelow*[66] it was ruled that the underlying question of who are privies to a suit is that of jurisdiction and should, therefore, be determined by the state in which an adjudication is urged as an estoppel. The court stated as follows:

> "The law of the state whose courts entered the judgment does not control. Where it is not contended that one was a party, it is equally an inquiry as to jurisdiction to determine whether he was a privy to one who was a party. By parity of reasoning, whether one is a privy to a judgment rendered in a sister or foreign state must also be determined by the law of the sovereignty where the question arises. Privity was not a matter in issue in the suit, judgment in which is pleaded, nor can it be determined by an inspection of the judgment roll. It must be decided by evidence outside the record. It is not to be settled according to the law of the state where the judgment is rendered."[67]

Freeman on Judgments[68] adopts the rule of the *Bigelow* case, stating that the question of who are privies to a judgment is not one which is adjudicated by the judgment itself, and as to a foreign or sister state judgments should be determined in accordance with the law of the state where the adjudication is urged as an estoppel. *Freeman* states that the full faith and credit provision of the federal constitution does not require that the law of the state rendering the judgment should be followed on the question since it really goes to the jurisdiction over the person.

The exception set forth by *Freeman* is that if the relation between the parties is created by and depends upon the law of the state where the judgment was rendered, and the nature of that relation, as fixed by that law, determines whether one may be deemed the representative of the other in litigation which may affect the latter's personal liability, the conclusiveness of the judgment must in this respect be governed by the law of the state where it was rendered. This raises a question as to whether there is not some basis for a contention that the law of the state governing the relationship between the parties should govern the matter of what constitutes a valid tender.

In *Wolfe v. Barataria Land Co.*[69] the court recognized a federal rule on tender of defense holding that the rule of *Robbins v. Chicago City*[70] prevails in federal jurisdiction. In that case the plaintiff urged as an estoppel the judgment of a court of Louisiana. There was no discussion of the question of whether Louisiana law should govern

---

[66] 302 Mass. 159, 89 N.E. 193, 40 L.R.A. (N.S.) 314 (1909), affirmed in 225 U.S. 111, 56 L.Ed. 1009, 32 Sup. Ct. Rep. 641 (1912).
[67] 40 L.R.A. (N.S.) 314, at page 344.
[68] Fifth Edition, Sec. 1393, Vol. 3, p. 2876.
[69] Fn. 4, *supra.*
[70] Fn. 1, *supra.*

the determination of whether the tender of defense was valid, it being held that the rule of *Robbins v. Chicago City* governed. This case, if still good law, supports the theory that the law of the state in which the adjudication is urged as an estoppel should prevail.

A different position is taken in the *Restatement of the Law of Conflict of Laws*[71] where the general rule concerning the effect of a judgment is set forth as follows:

> "The effect of a valid judgment upon the rights or other interests of the parties and persons in privity with them is determined by the law of the state where the judgment was rendered."

In the comment on that rule it is stated that a judgment is valid only as against parties who are subject to the jurisdiction of the court which rendered the judgment and persons in privity with them; that the law of the state where a valid judgment is rendered determines who are in privity with the parties to the judgment, and that if by the law of the state privity is imposed upon persons over whom the state has no jurisdiction, the judgment is to that extent invalid.[72]

Categorizing the problem as procedural or substantive would merely state the conclusion rather than furnish a sound rational basis for a ruling of first instance. If a federal court sitting in Wisconsin were to consider the adequacy of a tender of defense of an action in a Wisconsin court, the underlying policy of the *Erie v. Tompkins* doctrine[73] and subsequent developments of that doctrine[74] would dictate that the Wisconsin rule of the *Green* case[75] rather than the federal rule of the *Robbins* case,[76] govern. If the question arises in this setting first, it is very apt to be labeled one of "substance". If this much be conceded, it would follow that the federal court sitting in Wisconsin would look to the Wisconsin rule of conflicts if the sufficiency of a tender made in connection with a suit in another state were in issue.[77]

The basic rationale of the *Erie v. Tompkins* doctrine, that the outcome of litigation should not depend upon the accident of diversity of citizenship (or selection of forum) unless some more vital policy, such as the necessity for a feasible court procedure, must prevail, also furnishes a sane guide for determining first instance cases in the field of conflicts. Therefore, in the situation last referred to above,

---

[71] Sec. 450 (1).
[72] Sec. 450, Comment d.
[73] 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 (1938).
[74] See American Jurisprudence, Vol. 54, p. 979, United States Courts Sec. 356, Sec. 358.
[75] Fn. 38, *supra.*
[76] Fn. 1, *supra.*
[77] Griffin v. McCoach, 313 U.S. 498, 61 S.Ct. 1023, 85 L.Ed. 1481 (1941).

the federal court lacking a Wisconsin decision on the problem, or the Wisconsin court facing the issue for the first time might carry the substantive label a step further and look to the requirements of the court in which the original judgment was rendered — this unless the rule of the foreign jurisdiction contravened a strong Wisconsin policy by imposing upon its citizens an unreasonable hardship such as being concluded by litigation of which they had inadequate notice. This exception might be expressed in terms of jurisdiction, thus amounting to a position similar to that taken on the question of privity by the Restatement committee.[78] It is submitted that this would furnish a sounder pattern than the view adopted by *Freeman*.[79]

An additional argument for adopting a conflicts rule which would normally require following the tender of defense requisites of the jurisdiction in which the first action is brought can be found in the general agreement that if the vouchee "could have defended" he should be bound.[80] Whether or not he could have defended depends upon the view of the court in which the original suit was tried, and the view on this will correspond with that court's requirement for valid tender of defense.

However, until the conflicts question is squarely decided in the federal courts as well as relevant state courts, attorneys wishing to bind indemnitors by tendering defense will be wise to be guided by the requirements of jurisdictions asking for the most complete notice; and conversely persons who might be held as indemnitors will be obliged to consider cases like the *Robbins* case.

---

[78] Fn. 71 and 72, *supra*.
[79] Fn. 68, *supra*.
[80] Fn. 50, *supra*.