CHAPTER XI.

Of Pleas in Bar and Notice of Special Matter.

§ 188. Character of pleas in bar.—These pleas either deny that the plaintiff ever had the cause of action complained of, or they admit that he once had the cause of action, but insist that it no longer exists.[1]

"No special plea in bar shall be pleaded in any civil action hereafter to be commenced; but all matters of defense to any such action, may be given in evidence under the general issue."[2]

"In all civil actions hereafter to be commenced, the general issue shall consist of a demand by the defendant, of a trial of the matters set forth in the plaintiff's declaration."[3]

"* * * The plea of the general issue shall be in the same form as in those courts [circuit courts] and notice of any defense not admissible under the general issue, shall be given with such plea. * * * * "[4]

1—2 Saund. Pl. & Ev., Part I., p. 647.

2—C. L., § 10071. The statute abolishing special pleadings does not make special pleading void when the parties have voluntarily adopted it, joined issue, and proceeded to trial and judgment: Wales v. Lyon, 2 Mich., 276.

3—C. L., § 10072.

4—*The general issue*, in all civil actions, denies every material averment in the plaintiff's declaration which much be proved, whatever the nature or form of the action may be: Kinnie v. Owen, 1 Mich., 249. It denies every fact necessary to enable the plaintiff to recover: Young v. Stephens, 9 Mich., 502; Ingals v. Eaton, 25 Mich., 34-5. Thus, in assumpsit, as a general rule, it puts in issue, without further notice, every fact and combination of facts, necessary to constitute the plaintiff's cause of action. It denies the existence of any such state of facts as could constitute or establish the promise declared upon, or

"To entitle a defendant to avail himself of any matter of defense, which, according to the practice as it has heretofore existed, was required to be pleaded specially, or of which a

which would entitle the plaintiff to recover upon the cause of action alleged: Winslow v. Wager, 26 Mich., 455; see, Hill v. Callaghan, 31 Mich., 424; Child v. Detroit Mfg. Co., 72 Mich., 623; 40 N. W., 916; Denver v. Booming Co., 51 Mich., 472; 16 N. W., 817. It denies that the promise relied upon has any validity or legal force: Snyder v. Willey, 33 Mich., 483, 489. The defendant's ownership of a note sued upon may be contested under this plea: Reynolds v. Kent, 38 Mich., 246. When a written contract is declared upon, a variance in names may be taken advantage of under the general issue: Gilbert v. Hanford, 13 Mich., 40. And so, in actions upon contracts, the non-joinder of a co-contractor as plaintiff may be taken advantage of at the trial under this plea: 1 Saund. Pl. & Ev., 5 Am. ed., 10; Burgess v. Abbott, 1 Hill, 476. And evidence may be given under this plea to show that the instrument declared upon was void, for the reason that it was given in consideration of an illegal sale, as in case of sales made in violation of law: Myers v. Carr, 12 Mich., 63; Dean v. Chapin, 22 Mich., 275; and see, Hill v. Callaghan, 31 Mich., 424. *Payment* may be shown under the general issue: Olcott v. Hanson, 12 Mich., 454; Burt v. Olcott, 33 Mich., 179; Brennan v. Tietsort, 49 Mich., 398; 13 N. W., 790. So may a *subsequent agreement* destroying or modifying the old: Conkling v. Tuttle, 52 Mich., 630; 18 N. W., 391. So may non-compliance with *conditions*: Morley v. Insurance Co., 85 Mich., 217; 48 N. W., 502. So may a *rescission* of the contract for cause: Stahelin v. Sowle, 87 Mich., 124; 49 N. W., 520. In an action on a sealed instrument, by virtue of C. L., §§ 10185-6, the defense of want of consideration cannot be made under the general issue: Boyer v. Sowles, 109 Mich., 481; 67 N. W., 530; Robson v. Dayton, 111 Mich., 440; 69 N. W., 834.

And in an action of tort, everything which may properly be considered by the jury in mitigation of damages may be given in evidence under this plea: Delevan v. Bates, 1 Mich., 97; Osborn v. Lovell, 36 Mich., 246. Thus, in an action for treble damages for trespass in cutting timber, the defendant may show under the general issue without notice, that the trespass was involuntary and under a *bona fide* claim of right: *Ibid.* So in slander: Huson v. Dale, 19 Mich., 17. In trover defendant may show property in a third person: Stephenson v. Little, 10 Mich., 433. The general issue admits the jurisdiction of the court over the person of the defendant: Webb v. Mann, 3 Mich., 140; Gott v. Brigham, 41 Mich., 227; 2 N. W., 5; Grand Rapids, Newaygo & Lake Shore Ry. Co. v. Gray, 38 Mich., 461. It admits that a defendant sued by a corporate name is sued by the right name: Lake Superior Building Co. v. Thompson, 32 Mich., 293; see, C. L., § 10473; Grand Rapids & Ind. R. R. Co. v. Southwick, 30 Mich., 446; Johr v. St. Clair Supervisors, 38 Mich., 532, 535-6. And so, in a suit brought by a corporation organized under the laws of this state, the general issue admits its corporate name and existence: Wilson Sewing Machine Co. v. Spears, 50 Mich., 534; 15 N. W., 894; see, C. L., §§ 10471, 10473; Garton v. Union City Bank, 34 Mich., 279; Grand Rapids & I. Ry. Co. v. Southwick, 30 Mich., 444. Unless a notice is given under the plea, and duly verified, denying the existence of the corporation: § 10471, *supra*. And in a suit by an executor or administrator who has made profert of his letters, the general issue admits his official character: Vickery v. Bier, 16 Mich., 50.

The general issue also waives objections to process and service thereof: Campau v. Fairbanks, 1 Mich., 151; Crane v. Hardy, 1 Mich., 56; Pardee v. Smith, 27 Mich., 33, 388; Hart v. Blake, 31 Mich., 278; Manhard v. Schott, 37 Mich., 234; Grand Rapids, N. & L. S. R. R. Co. v. Gray, 38 Mich., 461; Gott v. Brigham, 41 Mich., 227; 2 N. W., 5; Gunn Hardware Co. v. Denison, 83 Mich., 40; 46 N. W., 940;

special notice was required to be given under the general issue or other general plea, such defendant shall annex to his plea of the general issue a notice to the plaintiff, briefly stating the precise nature of such matter of defense."[5]

Jacklin v. Soutier, 82 Mich., 648; 46 N. W., 1027; Dailey v. Kennedy, 64 Mich., 208; 31 N. W., 125; Taylor v. Adams, 58 Mich., 187; 24 N. W., 864. The general rule being, that a party who pleads the general issue and goes to trial on the merits, waives objections to the process unless he makes them known in some way: Maxwell v. Deens, 46 Mich., 37; 8 N. W., 561. But the plea of the general issue waives only such jurisdictional defects as appear on the face of the declaration: Segar v. Shingle and Lumber Co., 81 Mich., 344; 45 N. W., 982.

And so, the plea of the general issue, and going to trial on the merits, waives formal and technical defects to the declaration: Hurtford v. Holmes, 3 Mich., 460; Grand Rapids & I. Ry. Co. v. Southwick, 30 Mich., 466; and see, Grand Rapids, N. & L. S. R. R. Co. v. Gray, 38 Mich., 461; Jackson v. Collins, 39 Mich., 557; Reeder v. Moore, 95 Mich., 594; 55 N. W., 436; Campbell v. Kalamazoo, 80 Mich., 655; 45 N. W., 652; Fuller v. Jackson, 82 Mich., 480; 46 N. W., 721; Clark v. North Muskegon, 88 Mich., 308; 50 N. W., 254. But it does not waive an objection that the declaration fails to set forth the essential allegations necessary to show a cause of action: Stoffiet v. Marker, 34 Mich., 313; and see, Jennison v. Haire, 29 Mich., 207; Stange v. Clements, 17 Mich., 402. Pleadings in justices' courts are to be viewed with liberality, and are to be liberally construed, and technicalities are not favored: First National Bank v. Carson, 60 Mich., 432; 27 N. W., 589; Whittle v. Bailes, 65 Mich., 640; 32 N. W., 874. Still they must be sufficient to fairly show a cause of action and with sufficient certainty to obviate surprise on the part of the other side and to enable him to prepare to meet the proofs: Watkins v. Ford, 69 Mich., 357; 37 N. W., 300.

5—C. L., §§ 10073, 767.

The notice under the general issue.—The object of this notice is, to apprise the plaintiff of the nature of the defense relied upon, so that he may be prepared to meet it, and so that he may not be taken by surprise on the trial by a defense which he could not, with reasonable certainty, anticipate: Rosenbury v. Angell, 6 Mich., 508, 514. The office of the notice is to present tangible issues, and not to introduce matters which form no part of the issue. It cannot make such matters relevant or material: Proctor v. Houghtaling, 37 Mich., 45. And as to the general requisites of the notice, no distinction is made between one kind of action and another: Cresinger v. Reed, 25 Mich., 455; see, Bailey v. Kalamazoo Publishing Co., 40 Mich., 254; Brown v. Moore, 32 Mich., 257; Hale Mfg. Co. v. Amer. Saw Co., 43 Mich., 251; 5 N. W., 300. The notice is not properly a pleading, nor is it to be tested by the same rules applicable to a plea. No issue of fact or law can be founded upon it; the only issue in the case is the general issue. The *notice* is of matters of defense intended to be introduced in evidence under that issue: *Ibid.;* and McIlardy v. Wadsworth, 8 Mich., 349, 351; and see, Porter v. Kimball, 1 Mich., 239, 241; Myers v. Carr, 12 Mich., 70. To such a notice there can be no replication, nor any new assignment, but the plaintiff goes to trial on the declaration, plea and notice: McFarlane v. Ray *et al.*, 14 Mich., 460.

Although special pleas are not allowed (C. L., § 10073), yet where one is put in it is customary to allow it to stand as a notice of defense; nor is there any valid objection to this course. Special pleas were abolished to avoid technicality and prolixity, but notices containing the substance of special pleas are required where such pleas were formerly essential, and if one is put in where the other should have been, the difference being in matter of form only, may be disregarded, and the general purpose of the statute will be equally advanced by that course: Ben-

§ 189. "A failure or want of consideration in whole or in part, may be shown in defense, to any action or set-off, upon or arising out of any bond or promissory note or other instrument in writing, except negotiable notes, negotiated before falling due, to any person not having at the time it was negotiated, knowledge of such defense."[1]

A *total* failure, or want of consideration, was, in actions

edict v. Smith, 48 Mich., 593; 12 N. W., 866.

Notice of defense under the general issue, when sufficient: Whittle v. Bailes, 65 Mich., 640; 32 N. W. 874; see, Watkins v. Ford, 69 Mich., 357; 37 N. W., 300; Waldo v. Waldo, 52 Mich., 94; 17 N. W., 710.

The sole test of the sufficiency of a notice of special matter of defense is that it shall apprise the plaintiff of the nature of the defense relied on, so that he may be prepared to meet it and to avoid surprise on the trial. See cases last cited and Briesenmeister v. Supreme Lodge K. of P., 81 Mich., 525; 45 N. W., 977.

Among the defenses of which notice is required to be given, is discharge in bankruptcy: Parks v. Goodwin, 1 Mich., 25. In trespass for taking away goods and chattels, the defense that they were taken in attachment against a third person alleged to be the owner, requires notice: Rosenbury v. Angell, 6 Mich., 508, 513. And so, in trover, that the goods were taken in attachment: Fry v. Soper, 39 Mich., 727. So in replevin: Bateman v. Blake, 81 Mich., 227; 45 N. W., 831. And in trover by an assignee, that the property was seized on process in favor of the assignor's creditors, notice is required: Frankel v. Coots, 41 Mich., 75; 1 N. W., 940. In an action for trespass on lands, license can be shown only under notice: Senecal v. Labadie, 42 Mich., 127; 3 N. W., 296; Vanderkarr v. Thompson, 19 Mich., 87; Waldo v. Waldo, 52 Mich., 94; 17 N. W., 710. Defenses arising out of misrepresentation and fraud, require a special notice: Miller v. Finley, 26 Mich., 249; Wait v. Kellogg, 63 Mich., 144; 30 N. W., 80. And so, proof of the worthlessness of a patent right for which the note sued upon was given: *Ibid.* The defense of a former recovery is not admissible without notice: Achey v. Hull, 7 Mich., 430; Tabor v. Van Vranken, 39 Mich., 794. And in assumpsit, on a policy of insurance, a defense that the insurance was procured by fraud, requires notice: Fire Insurance Co. v. Hannowald, 37 Mich., 106. So, the statute of limitations: 111 Mich., 642; 70 N. W., 140; Whitworth v. Pelton, 81 Mich., 101; 45 N. W., 500. So, the release of a surety through unauthorized extension of time: Rawlings v. Cole, 67 Mich., 431; 35 N. W., 66. So, failure of consideration in action on bond: Boyer v. Sowles, 109 Mich., 481; 67 N. W., 530; Robson v. Dayton, 111 Mich., 440; 69 N. W., 834; Hollenbeck v. Breakey, 127 Mich., 555; 86 N. W., 1055. So, notice of non-tenantable condition of premises leased in action for rent: Holmes v. Wood, 88 Mich., 436; 50 N. W., 323.

These, C. L., §§ 10071, 10072, 10073, do not apply to pleas *puis darrein continuance*, nor to any matter which, if pleaded specially, would destroy the plea of the general issue: Johnson v. Kibbee, 36 Mich., 270.

Amendments to the notice attached to the plea, is in the discretion of the court: Brown v. Moore, 32 Mich., 254. Amendment of notice may be allowed after appeal: Hopkins v. Briggs, 41 Mich., 175; 2 N. W., 199. Such amendments are in the discretion of the court: Randall v. Baird, 66 Mich., 312; 33 N. W., 506; Deline v. Michigan F. & M. Ins. Co., 70 Mich., 435; 38 N. W., 298; Minnock v. Eureka F. & M. Ins. Co., 90 Mich., 236; 51 N. W., 367.

1—C. L., § 769. Parole evidence is competent to show a bill or note without consideration. So held where it was permitted to show an agreement that the note be used by the payee as collateral and he, the payee, to take

upon simple contracts, a defense as between the parties and required no notice.[2] This section allows a defense of *partial* failure, or want of consideration. The defense, in this section, is applied by the statutes to any sealed instrument.

"In any action upon a sealed instrument, and where a set-off is founded on any sealed instrument, the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner, and to the same extent, as if such instruments were not sealed."[3]

"The defense allowed by the last section shall not be made, unless the defendant shall have given notice thereof with his plea of the general issue."[4]

Notice must also be given in actions upon contracts, though not under seal, where there is only a *partial* failure or want of consideration.[5] If, however, the bond or other contract is offered as a set-off, notice is not necessary.

§ 190. Illegality of consideration.—In assumpsit, illegality of consideration, between the original parties to a promissory note, may be given in evidence under the general issue.[6]

§ 191. Written instruments, denial of execution of.—The general issue does not always operate as a denial of the execution of a written instrument.

"When any written instrument, purporting to be executed by one of the parties, is declared upon or set off, it may be used in evidence on the trial of the cause against such party, without proving its execution, unless its execution be denied by oath at the time of declaring, or pleading, or giving notice of

care of it so that the maker should not have to pay it; Brown v. Smedley, — Mich., ——; 98 N. W., 856 (March, 1904); see C. L., § 828.

2—Hill v. Callaghan, 31 Mich., 423.

3—C. L., § 10185; Case v. Boughton, 11 Wend., 106. A seal is presumptive evidence of consideration, and in the absence of any statute to the contrary, is conclusive: Lee v. Wisner, 38 Mich., 85. Seal is but presumptive evidence of consideration: Green v. Langdon, 28 Mich., 221; Hollenbeck v. Breakey, 127 Mich., 555; 86 N. W., 1055; Boyer v. Sowles, 109 Mich., 481; 67 N. W., 530. This statute applies to all sealed instruments between party and party: Hobbs v. Brush E. L. Co., 75 Mich., 550; 42 N. W., 965.

4—C. L., § 10186. See cases cited in note, p. 193.

5—C. L., § 828. Total failure of consideration may be shown under the general issue without notice: Hubbard v. Freiburger, — Mich., ——; 94 N. W., 727 (May, 1903). See cases cited in note, § 192.

6—Myers v. Carr, 12 Mich., 63, 70; see, Hill v. Callaghan, 31 Mich., 423. So it may be shown that money sued for was furnished to enable defendant to conduct a bawdy house: McDonald v. Born, — Mich., ——; 97 N. W., 693 (Dec., 1903).

set off, if such instrument shall be produced and filed with the justice.'[7]

Unless the parties seeking to recover on the written instrument produce the instrument, so that the opposite party shall

7—C. L., § 826. Thus, where a promissory note sued upon was filed with the justice at the time of declaring: *Held*, that the plaintiff was entitled to read the note in evidence on the trial, without proving its execution, unless the defendant denied its execution on oath, at the time of pleading: Burson v. Huntington, 21 Mich., 427. The execution of a bond sued upon need not be proved unless denied by affidavit: Lee v. Wisner, 38 Mich., 87. In an action upon a promissory note, against makers and indorsers, the general issue, unaccompanied by an affidavit denying the execution of the note, is an admission by each defendant that he signed the instrument as alleged in the declaration; also, that it was executed by the parties declared against; and is also an admission that the defendants executed the instrument by the name and description alleged in the declaration, and obviates the necessity of proving partnership between persons signing in a firm name and charged as partners: Lobdell v. Merchants' & Manufacturers Bank, 33 Mich., 408; see, also, Howry v. Eppinger, 34 Mich., 29; Anderson v. Walter, *Ibid.*, 113; Jennison v. Haire, 29 Mich., 207; Mills v. Bunce, *Ibid.*, 364; Curran v. Rogers, 35 Mich., 221; Towle v. Dunham, 76 Mich., 251; 42 N. W., 1117; Haight v. Arnold, 48 Mich., 512; 12 N. W., 680.

A denial under oath appended to the plea, merely puts the plaintiff to proof of the execution of the written instrument declared upon: Hunter v. Parsons, 22 Mich., 103; see, Polhemus v. Ann Arbor Savings Bank, 27 Mich., 44. But proof of the execution of a written instrument will not be dispensed with unless the paper is filed with the justice at or before the time when the opposite party is required to plead or give notice of his defense thereto: Colbath v. Jones, 28 Mich., 280; Newton v. Principaal, 82 Mich., 271; 46 N. W., 234; People v. Cotteral, 115 Mich., 43; 73 N. W., 9; 74 N. W., 183; Ryerson v. Tourcotte, 121 Mich., 78; 79 N. W., 933. It may be filed at any time previous thereto, and if it is on file with the justice at that time it will be sufficient: Smoke v. Jones., 35 Mich., 409.

A failure to deny, etc., only admits the execution of the instrument declared upon: Montross v. Roger Williams Ins. Co., 49 Mich., 477; 13 N. W., 823. An indorsement or assignment of the instrument by another person not a party to the suit by which the plaintiff claims title to the paper, is not thereby admitted. Such indorsement or assigment must still be proved in order to show the plaintiff's title to the instrument: Spicer v. Smith, 23 Mich., 96; Newton v. Principaal, 82 Mich., 271; 46 N. W., 234. It admits the execution and delivery of the instrument, but does not preclude the defendant from making any other defense to the paper on the merits which does not contradict its execution, such as, that it was procured of the defendant by fraud, or without consideration, etc.: Freeman v. Ellison, 37 Mich., 459; Ada Dairy Assn. v. Mears, 123 Mich., 470; 82 N. W., 258. Or that the defendant had no legal capacity to make the instrument: Kenton Ins. Co. v. McClellan, 43 Mich., 564; 6 N. W., 88. "The correct rule, we think, is, that the admission of the execution of the instrument, contemplated by the statute, is an admission that it was executed by the defendants by the name and description alleged in the declaration": Pegg v. Bidelman, 5 Mich., 26; Naptzker v. Lantz, — Mich., ——; 100 N. W., 601 (July, 1904).

A denial of delivery, merely, is not a denial of the execution of the instrument: Burson v. Huntington, 21 Mich., 415 The signature is admitted if delivery only is denied by the affidavit: McCormick v. McKee, 51 Mich., 426; 16 N. W., 796. So, in case of a partnership note, an affidavit by two out of three of the partners, denying, "each

have an opportunity of inspecting it before pleading to the declaration; or, if set off, to ascertain its genuineness, when the notice of set-off is given, the party of whom the amount due upon it is sought to be obtained is not bound to deny the execution under oath, and the plea of the general issue would not, in such case, excuse from proof of the execution. A failure to make a denial of the execution under oath only operates as an admission of the execution of the instrument, leaving the party at liberty to set up any defense other than that he did not execute it, which is admissible under his plea of the general issue or notice.

The affidavit of one of several defendants, denying the execution of the instrument sued on, renders it necessary, as to him, that proof of partnership or of the handwriting should be made. The implied admission, created by the statute, still exists as to the other defendant, who is not entitled to any benefit from the oath of his codefendant, except the incidental benefit which would result from the plaintiff failing to maintain the issue as to one of the joint defendants.[8]

for himself, that he ever executed or delivered," etc., is not a denial that it is a valid firm note, duly executed and delivered by the third partner as the note of the firm: Mills v. Bunce, 29 Mich., 364.

A plea of the general issue, without an affidavit of denial, would not admit the execution of an unsealed obligation when an instrument under seal had been declared on. The affidavit filed with the plea of the general issue denying the execution, should not be technically construed. If it is sufficient to show that the defendant means in good faith to contest the execution or delivery of the instrument sued on, he should be permitted to make his defense. It was not intended, in requiring such an affidavit, to compel a full statement of the facts but only to indicate the defense, or to make a plain denial. Nor will the admission resulting from a want of an affidavit of denial dispense with the production of the instrument in court: McCormick v. Bay City, 23 Mich., 457: Haight v. Arnold, 48 Mich., 512; 12 N. W., 680. A failure to deny admits the authority of an agent by whom the instrument purports to have been signed: Inglish v. Ayer, 92 Mich., 370; 52 N. W., 639. But see Dewey v. Toledo, A. A. & N. M. Ry. Co., 91 Mich., 351; 51 N. W., 1063. The statute (§ 1355) applies only to written instruments purporting to be executed by one of the parties to the suit, and not to instruments made by third person, not parties in the case. Thus, where a contract was assigned by writing indorsed upon the instrument, and the assignee sued the maker, who failed to deny the execution of the contract on oath: *Held*, that the maker did not thereby admit the making of the assignment nor the genuineness of the signature to the assignment: Hinckley v. Weatherwax, 35 Mich., 510; Spicer v. Smith, 23 Mich., 96.

8—Pegg v. Bidelman, 5 Mich., 26; Davis v. Scarritt, 17 Ill., 202; see Mills v. Bunce, 29 Mich., 364. When several persons are sued jointly as makers of a promissory note, an affidavit by one of them that he has neither executed the note nor authorized any one to execute it for him, is sufficient to put the execution and

If the written instrument declared on, or set off, is filed at the time of declaring or pleading, and giving notice of set-offs, its execution must be denied on oath *at the time of such filing, and not afterwards,* in order to put the party relying on it upon proof of its execution.[9]

§ 192. Effect of general issue in assumpsit.—In assumpsit, the general issue denies the making of the promise. Under this plea, any matter which shows that the plaintiff *never* had a cause of action, and also most matters in *discharge* of the action, are admissible. So, under this plea, evidence of the defendant's incapacity to contract, as that at the time the supposed contract was entered into the defendant was an infant, a lunatic, or a *feme-covert,* would be admissible. And so a release, arbitration, former recovery for the same cause, payment, alteration in the terms of the contract, and some others. Of some defenses in this action notice must be given with the general issue, as a tender, set-off, or the statute of limitations.[10]

validity of the note at issue, so far as he is concerned, even though his co-defendants do not join in the affidavit: Wren v. McLaren, 48 Mich., 197; 12 N. W., 41. And so, where such an affidavit was made when the defendants were partners: Haight v. Arnold, 48 Mich., 512; 12 N. W., 680.

9—Fish v. Hall, 4 Mich., 506; see, *ante,* § 191, note 7.

10—1 Chitty's Pl., 515; 1 Saund. Pl. & Ev., 226; Young v. Rummell, 2 Hill, 478.

Under the general issue the defendant may give in evidence nearly every defense which shows that there was not a subsisting cause of action at the time the suit was brought: Young v. Rummell, 2 Hill, 478; Boyd v. Weeks, 5 *Ibid.,* 393; Infancy, Darby v. Boucher, 1 Salk., 279; 1 Tidd's Pr., 646; Duress, *Ibid.,* 646; Payment, Drake v. Drake, 11 Johns. R., 531; Sheets v. Baldwin, 12 Ohio, 120; Fulton Bank v. Stafford, 2 Wend., 486; or its equivalent, Clark v. Yale, 12 Wend., 470; Performance of the Contract, Wilt v. Ogden, 13 Johns., 56; Accord and satisfaction, Cheriot v. Barker, 2 Johns., 346; Fulton Bank v. Stafford, 2 Wend., 486; Arbitrament and award, Martin v. Thornton, 4 Esp. R., 181; 1 Chitty's Pl., 478; a release, *Ibid.;* Fulton Bank v. Stafford, 2 Wend., 486; a former recovery for the same cause, M'Daniel v. Hughes, 3 East., 378; Young v. Rummell, 2 Hill, 478; Miller v. Manice, 6 *Ibid.,* 124; Prescott v. Hull, 17 Johns., 284; Wood v. Jackson, 8 Wend., 1; total failure of consideration of a note, People on rel, of Fleming v. Niagara C. P., 12 Wend., 246; Payne v. Cutler, 13 *Ibid.,* 605; C. L., § 769; or, that the note was obtained by fraud or given without consideration, Sill v. Rood, 15 Johns., 230; Hills v. Bannister, 8 Cow., 31. The rule being that where the defense goes to destroy the plaintiff's right of action entirely, it may be given in evidence under the general issue without notice; but if it goes merely to reduce or mitigate the damages, notice must be given: Gleason v. Clark, 9 Cow., 59; People on rel. of Fleming v. Niagara C. P., 12 Wend., 246. See, *ante,* p. 193, note 1.

§ 193. In debt.—In debt on a record, the general issue merely puts in issue the existence of the record as stated; of any matter in discharge of the action, notice must be given; as, payment or release; levy by execution, etc. In debt on a justice's judgment, the general issue would only put in issue the fact that such judgment was rendered. In debt on bond, it would be only a denial of the execution of it.

§ 194. In covenant.—In covenant, this plea only puts in issue the execution of the deed.[11]

§ 195. In trover and actions on the case.—In trover and actions on the case, the general issue allows any defense except the statute of limitations.[12]

§ 196. In trespass.—In trespass to real or personal property, or to the person, the general issue would not authorize the giving in evidence anything but what directly controverts the truth of any matter which the plaintiff would be bound to prove. Of any justification or matter in discharge of the cause of action, notice must be given with the general issue.[13]

§ 197. Pleas by several defendants.—Several defendants may join in the same plea, or each may plead separately; one may plead in abatement, another in bar, and a third may demur, except in actions against husband and wife, when the husband must join in the plea with his wife. But personal defenses, as coverture, infancy, etc., should be pleaded separately; and one of several defendants may justify by command of another defendant, who pleads the general issue, or confesses the action, for one defendant cannot, by pleading, take away

11—But under the general issue in covenant, the defendant may show that the deed is not his, by proving a lack of power in the agent who executed it on his behalf: Agent, etc., v. Lathrop, 1 Mich., 438.

12—Delavan v. Bates, 1 Mich., 97. As to when an officer who has levied on property must, in his defense in trover for taking, etc., give notice of the judgment under which the execution issued: See, Comstock v. Hollon, 2 Mich., 355; Thomas v. Watt, 104 Mich., 201; 62 N. W., 345. But see, Hine v. Commercial Bank, etc., 119 Mich., 448; 78 N. W., 471, where it is held that the general issue in trover will not permit the showing that the property for which suit is brought is held by virtue of an attachment, following Eureka I. & S. Works v. Bresnahan, 66 Mich., 489; 33 N. W., 834, and cases cited.

13—In trespass for taking goods, etc., the defense that the goods were taken under an attachment against a third person alleged to be the owner, is not admissible under the general issue without notice: Rosenburg v. Angell, 6 Mich., 508.

the ground of defense from the other. If two defendants join in a plea which is sufficient for one but not for the other, the plea is bad as to both, for the court cannot sever it and say that one is guilty and the other is not, when they all put themselves on the same terms.[14] But this rule would not apply to a joint plea of the general issue, as neither defendant could give in evidence a justification under that plea in any case.

14—1 Chitty's Pl., 10 Am. ed., 565-6-7.