

in excess of \$500 for the shares had not been accounted for by the defendant, his lordship reserved those points for the consideration of the Court. A rule granted to set aside the verdict as against law and evidence, and on the points thus reserved, was argued before us in this present term.

In the conflict of evidence reported as to the actual contract between the parties, it must be taken that the jury have shewn by their verdict that they adopted the defendant's statement, and concluded that the shares in question were sold to the plaintiff by the defendant in his private capacity, and not as a stock and share broker. That raises the primary question,—can the plaintiff under the facts rescind the actual contract by his own act without express repudiation or demand, and have recourse to his count for money had and received? I entertain no doubt that he can (notwithstanding the long interval between the contract and action brought), seeing that, while he has derived no benefit whatever from the contract, he has done nothing under it to the prejudice of the defendant, or to alter his position in relation to it from what it was when it was entered into.

The plaintiff's particulars, which may be applied to the money count, inform defendant that one branch of the plaintiff's claim is for \$550 cash paid by cheque. The third plea not only may be applied, but being a plea to the whole declaration, is necessarily applied to the money count, and says for answer to the plaintiff's allegation, "You, the defendant, have in your hands \$550 of my money;" "I received your money for shares in the particular company which I offered to you and you accepted, and I have duly transferred them to you in the books of the company, and you have since then treated them as your own, etc." The defensive allegation thus made cannot be separated into parts, but forms as a whole, the alleged matter of defence, and must be proved as a whole. It admits receipt of money and seeks to void it by the matter thus stated. Involved in it is an allegation that the shares offered and accepted were duly transferred. Among the documents produced at the trial and received without opposi-