person is not at liberty to say, 'I have made two contracts, and if one of them is avoided by its fraud, then I will set up the other.'" And Parke, B., added: "If the plaintiff chooses to treat the defendant as a party who has contracted with him, he must be bound by the only contract made between them."

Counsel for the plaintiff attempted to distinguish Selway v. Fogg from the present case by saying there was a special contract in Selway v. Fogg, though it was avoided by fraud, but here there was no special contract at all. On the facts I do not see any valid distinction, but even assuming that there was no contract or agreement here because such agreement as there was was unenforceable, there was at least conduct, such conduct as prevents plaintiff setting up an implied contract. In Harrison v. James, 7 H. & N. 804, the defendant, being desirous of apprenticing his son to the plaintiff, it was verbally agreed between them that the son should go on trial for a month, and if the parties were satisfied, he should be bound apprentice for four years, the defendant to pay a premium by instalments. The son went on trial, and remained above sixteen months, when the defendant removed him. No deed of apprenticeship was executed, or any part of the premium paid. It was held that the plaintiff could not recover for the son's board and lodging during any part of the time he remained with him.

Nor are the text-books less positive than the cases. Chitty, 14th ed., p. 43, says: "With regard to all the above cases, however, this principle must be kept in view, namely, that promises in law exist only where there is no express promise between the parties. Expressum facit cessare tacitum. A party, therefore, cannot be bound by an implied contract when he has made an express contract as to the same subject matter, even though the latter be avoided by fraud. He may, it is true, repudiate the contract entirely on this ground, but if he sues the other party in contract at all, it must be on the express contract." And the American editor of Addison lays down the same doctrine, citing abundant American authorities for it.

Taking this view, I see no reason for exercising the power of opening up the judgment entered herein and vacating the order, assuming I have such power. The application is therefore dismissed with costs.

As I said at the trial, such sympathy as a Judge is permitted to have is with the plaintiff. I should have liked to