

intended to give him power to rescind all or any decisions or orders made prior to the final order for judgment. I am quite aware that sub-section 4 is strongly against this view, but almost identical language was in the old section (1889, c. 9, s. 46), and Mr. Justice Graham and the late Mr. Justice Ritchie in *Smith v. Horton*, supra, have both adopted it, and expressed their opinion that the statute gave a Judge no such power as to rescind an order for judgment. I would be quite content to shelter myself behind these eminent authorities if it were necessary and refuse this application for want of authority to make the order asked for. But it is not necessary, for I am strongly of the opinion that even if I had such authority, no proper reason has been shewn for exercising it. And this brings me to the discussion of the second question.

Let it not be forgotten that plaintiff claims upon an implied contract, and that only. An implied contract, as I understand it, is—to be brief—a contract arising from conduct. In this case the implied contract would have arisen if defendant's child, with his knowledge, had been supported by plaintiff, and nothing whatever said, but that is not what happened at all. How it can be contended there is implied contract when the conduct of the parties shews there was an express agreement (Mr. Fitzpatrick, the solicitor of the plaintiff, quarrels with the use of the word "agreement," to describe the arrangement entered into between the plaintiff and defendant, but I notice the reports use the word in describing similar arrangements), I cannot understand. Though the agreement is invalid and could not be enforced, it surely shews that the conduct of the parties was such that no contract by implication could arise. As Bramwell, B., says in *Roberts v. Smith*, 4 H. & N. 322, "All implication is at an end, because we have the real facts." In *Selway v. Fogg*, 5 M. & W. 83, the plaintiff sought to recover upon an *indebitatus assumpsit* for the value of the work actually done; to-day we would say upon an implied contract. Defendant set up a special contract to do the work at a specified sum, a contract though which was avoided by fraud. By a very strong Court it was unanimously held that the plaintiff could only recover according to the terms of the special contract. Lord Abinger said: "A party cannot be bound by an implied contract when he has made a specific contract which is avoided by fraud. A