

of those amounts by plaintiff was an acquiescence and confirmation of the discharge.

The Court held that according to the proof the consent of plaintiff was extorted by violence and fear; and as to the question whether "the payments received by plaintiff constituted a legal confirmation of the voidable acts," made the following observations:—"The payments made are established by the plaintiff when examined as a witness by defendant. He is asked, when did defendant make the first payment of tubs on the obligation impugned. 'Answer. In the month of November, 1879.' This was subsequent to the bringing of the suit, and there are payments made afterwards and accepted by plaintiff. I do not examine closely the extent of the proof of the sums set up in compensation, for compensation cannot have the effect of acquiescence which in certain circumstances payment has. An entire payment, of course, would extinguish plaintiff's interest and the suit; but it is not contended in the pleadings that the entire amount is extinguished, for by his plea the defendant says that he is ready and willing to continue his payments, clearly negating the idea that the plaintiff was without interest in the suit as having been paid. Did the acceptance of those payments cover the nullity in the obligation and confirm it? By Art. 1214 of our Code it is said the act of ratification or confirmation of an obligation which is voidable does not make proof unless it expresses the substance of the obligation, the cause of its being voidable and the intention to cover the nullity. This evidently contemplates written proof, and says nothing as to acts done from which ratification might be implied. The absence of legislation on that point is to be noticed when we consider this article in connection with Art. 1338 of the Code Napoléon and which is referred to by the codifiers in Art. 1214. The article of the Code Napoléon reads as follows: "L'acte de confirmation ou ratification d'une obligation contre laquelle la loi admet l'action en nullité ou en rescision, n'est valable que lorsqu'on y trouve la substance de cette obligation, la mention du motif de l'action en rescision et l'intention de réparer le vice sur lequel cette action est fondée.

A défaut d'acte de confirmation ou ratification il suffit que l'obligation soit exécutée volontairement après l'époque à laquelle l'obliga-

tion pouvait être valablement confirmée ou ratifiée." This last paragraph has not been adopted in our Code.

Pothier on Obligations, Vol. 1, No. 21, says: "Que si, depuis que la violence a cessé, il a approuvé le contrat soit expressément soit tacitement en laissant passer le temps de la restitution qui est de dix ans depuis que la violence a cessé, le vice du contrat est purgé." So that under this authority there must be express recognition to be valid.

Story on Contracts at Sec. 404, says, "a contract made under duress may be ratified either by an express confirmation or by acts from which a ratification will be *distinctly* implied," the word "distinctly" evidently showing that the recognition must, to some extent, be express, and thus agreeing with our law on the subject.

The payments accepted of by plaintiff cannot be said in any sense to mean *expressly* or *distinctly* that the plaintiff ratified the impugned acts and intended to renounce what he was actually carrying on at the time, his action *en nullité*. These acts certainly must have the qualities and character required by Art. 1214 in a written act, and must, as therein is required, be express or lead to the absolute presumption of the intention to cover the nullity. These payments when received were not accompanied by any declaration by plaintiff of such intention, and there is no absolute presumption leading that way, the presumption in fact being that he was only taking what was owing to him. See Laurent, Vol. 18, p. 633. The contract here may have been in part materially executed by the payments, but I see no facts revealing any certain or express intention to cover the nullities, and the reception of the partial payments is not in any manner inconsistent with or destructive of the plaintiff's persistence in his right of rescission. I have, therefore, come to the conclusion that plaintiff's action should be maintained.

Judgment for plaintiff.

T. Amyrauld, for plaintiff.

Jno. P. Noyes, for defendant.