

II.

Plaintiff's first cause of action is that it is inequitable for defendant to retain the transferred property because he obtained it by duress, "undue influence" and "abuse of confidence". This cause of action also alleges that defendant acquired said property by conduct which is characterized as fraud, more particularly: that defendant represented that he would hold the property in trust for plaintiff, paying over the income, dividends and interest for her shelter, protection, and welfare; further that this representation was false, that he knew it was false; further, he intended that plaintiff should act on it; and that plaintiff acted in reliance on defendant's representations, and has been injured by her reliance by the loss of her property, since defendant has now repudiated his past promises.

The allegations of this complaint are not entirely without merit, yet they are simply unsupported by the evidence. An agreement will be invalidated on the ground of duress if one party created fear in or intimidated the other to the extent that the latter's assent is compelled. There is nothing in the record to suggest that the conveyances were the product of fear or intimidation. Similarly, plaintiff fails to prove that the conveyances were the result of "undue influence". Undue influence is predicated on two things: an unequal bargaining situation and a destruction of free will. Brown v. Cobb, 53 N.M. 169, 204 P.2d 264 (1949). Without deciding whether there was inequality between the parties, the court is again convinced that plaintiff conveyed the property by her own free will. In fact, she acknowledges this in her January 23, 1981 letter to plaintiff.

The court is also unable to establish plaintiff's allegation of fraud. The essential element of scienter is absent from the record. Although it is questionable whether defendant was surprised when he found that plaintiff had undergone a gender change, it nonetheless appears that defendant fully intended to pay

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