

liability coextensive with that in tort. The directed verdict¹⁰ and the statutory necessity for the jury to find "culpable"¹¹ negligence would afford sufficient safeguards against any extreme applications,¹² whatever meaning may be given "culpable."

Declaratory Judgment—Alternative or Exclusive Remedy—[Ohio].—The plaintiff lessor, having given due notice of default in payment of rent and taxes on the part of the defendant lessee, served him with notices of intention to terminate their ninety-nine year lease and to reenter the premises as stipulated in the forfeiture clause. Demand for possession not being complied with, the lessor brought an action under authority of the Uniform Declaratory Judgment Act¹ asking the court to declare, (a) the lease terminated, (b) that the lessor had the right to reenter the premises, and (c) that the lessee be ordered to surrender possession thereof. The lower court refused a declaration on the ground that the plaintiff has full and complete remedies in either statutory action of forcible entry and detainer or an action of ejectment. The plaintiff appeals. *Held*, judgment affirmed. Proceeding for declaratory judgment is not substitute or alternative for common-law actions. *Eiffel Realty & Investment Co. v. Ohio Citizens Trust Co. et al.*²

The majority opinion seems to have lost sight of the purpose and intent underlying the Uniform Declaratory Judgment Act. The requirements of modern practice demand a liberal interpretation of the Act. The declaratory judgment includes, but is not to be confined to, cases which are justiciable but which are not yet ripe for coercive relief. In this type of case declaratory judgment is exclusive. However, there is another type of case which was meant to be included under the Uniform Declaratory Judgment Act, namely, that in which the plaintiff has a right to ask for consequential relief, but, because of a desire to maintain relations with the defendant or a belief that a mere declaration of rights would suffice, he does not wish to demand the exacting and final results of ordinary coercive relief. English practice,³ the terms of the Uniform Declaratory Judgment Act,⁴ and the majority of the American state decisions⁵ affirm this option of declaratory or coercive relief. To the contrary are New York decisions on which the Ohio court heavily relied. However, while broad discretion is granted New York courts by the New York Civil Practice Act,⁶ in Ohio discretion of the court is restricted to refusing a declaratory judgment only when it will not terminate the controversy or remove uncertainty.⁷

¹⁰ 1 Wharton's Criminal Law § 397 (12th ed. 1932).

¹¹ See Cahill's Consol. Laws of N.Y. 1930, c. 41 § 1052 (3).

¹² Note possible application by analogy to doctrine of *MacPherson v. The Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

¹ Throckmorton's Ohio Code 1936, § 12102-1 to 12102-16.

² 8 N.E. (2d) 470 (1937). *Contra*, *Stephenson v. Equitable Life Assurance Soc.* 5 U.S. Law Wk. 141 (U.S.C.C.A. 4th 1937).

³ English Order XXV, Rule 5 of Supreme Court Rules of 1883, Statutory Rules and Orders 110.

⁴ Throckmorton's Ohio Code 1936, § 12102-1, 12102-5, 12102-6, 12102-8, 12102-12, 12102-15.

⁵ For full citation of cases see Borchard, *Declaratory Judgment* 151-153 (1934).

⁶ N.Y.C.P.A. 1931, § 473, Rules of Practice 212.

⁷ Throckmorton's Ohio Code 1936, § 12102-6.

Even were the court correct in refusing declaratory relief, nevertheless it should have given the plaintiff some relief. Under the codes the old forms of action have been abolished,⁸ and it is the general rule that where facts stated show some right of recovery the litigant should not be thrown out of court merely because he may have misconceived the form of relief to which he is entitled.⁹ In *Lisbon Village Dist. v. Town of Lisbon*,¹⁰ wherein the Supreme Court of New Hampshire deemed the declaratory judgment statute inapplicable, the court stated that "The proceeding otherwise properly brought is not to be dismissed because erroneously entitled."¹¹ and then went on to give the proper relief. In the instant case, since the court stated that an action of ejectment would lie, it is difficult to see why the case was not remanded. By rendering a final judgment the court not only caused a great deal of unnecessary expense in time and money for all parties concerned,¹² but seems to have established, in direct contravention of the code principles, new "forms of action."

Fraudulent Conveyance—Community Property—Future Interests—[Federal].—The plaintiff held an unsatisfied judgment against a wife who had an interest in community property. The plaintiff sued unsuccessfully to reach the community property.¹ The husband, suffering from an incurable disease, then joined the wife in a voluntary conveyance of the community property to their son. One year later the husband died. The plaintiff then sued to have the conveyance set aside alleging a secret trust. On appeal from a dismissal of the complaint, *held*, affirmed. Since the wife's interest in the community property was not subject to the plaintiff's claim at the time of the conveyance, the conveyance irrespective of the intention of the parties cannot be set aside. *Citizens Nat'l Bank at Brownwood, Texas v. Turner et al.*²

The various rights of the spouses in community property, an estate created solely by statute,³ are difficult to classify. But the court's classification of the wife's future interest as one not subject to creditors' claims presently is by no means a necessary

⁸ See Ohio Const. art. 14, § 2; Throckmorton's Ohio Code 1926, § 11238; also Phillips, Code Pleading § 172 (2d ed. 1932).

⁹ *Nelson v. Fry*, 16 Ohio St. 553 (1866); *Jones v. Timmons*, 21 Ohio St. 596 (1871); *Railway Co. v. Kessler*, 84 Ohio St. 74, 95 N.E. 509 (1911); *Schwenker v. Bekkedal*, 204 Wis. 546, 236 N.W. 581 (1931); *Markham v. Fralick*, 2 Cal. (2d) 221, 39 P. (2d) 804 (1934); see also Phillips, Code Pleading § 171 (2d ed. 1932).

¹⁰ 85 N.H. 173, 155 Atl. 252 (1931).

¹¹ *Id.* at 253; see also *Faulkner v. Keene*, 85 N.H. 147, 155 Atl. 195 (1931).

¹² Note *Green v. Inter Ocean Casualty Co.*, 203 N.C. 767, 167 S.E. 38 (1932) where the court granted a declaration but suggested that the action should not have been brought under the Declaratory Judgment Act.

¹ *Best v. Turner*, 67 F. (2d) 786 (C.C.A. 5th 1933).

² 89 F. (2d) 600 (C.C.A. 5th 1937).

³ Community property consists of all property acquired by either the husband or the wife during marriage except property so acquired as to refute the presumption that they intended joint ownership. Community property statutes exist in the following states: Dart. La. Civil Code 1932, § 2399; Deering, Civil Code of Calif. 1931, § 687; Idaho Code 1932, § 31-907; Struckmeyer, Revised Code of Arizona 1928, § 2172; New Mexico Stats. 1929, § 68-401; 2 Hillyer, Nevada Comp. Laws. 1929, § 3356; 8 Remington's Revised Stats. of Wash. 1931, § 6892; 13 Vernon's Ann. Tex. Stats. 1925, art. 4619.