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.

one. The criteria for determining whether future interests should be subject to creditors are somewhat tenuous. But the law requires at least a certain minimum of probability that a future interest will vest before it allows it to be transferred or reached. A contingent remainder is generally held to have the requisite probability; an expectancy not. The distinction in fact between the two is that the contingency upon which an expectancy depends is simply a change of mind on the part of the ancestor; while the vesting of a contingent remainder is more independent of a human whim.[4] Hence, the latter is more likely to vest. The future interest in a case of community property is the right of the surviving spouse to one-half the estate.[5] Thus, the vesting depends upon which spouse dies first and hence the future interests of the spouses seem most like cross contingent remainders. There is no direct holding in Texas on the accessibility of contingent remainders to creditors.[6] Yet it has been held that a possibility of a reverter[7] can be sold and it is arguable that what can be sold can be attached.[8] It is true that there is a practical difficulty in allowing creditors to reach future interests. A forced sale is unsatisfactory. But the device of *Mears v. Lamona*[9] giving the creditor a lien which attaches when the interest vests affords a practical solution to the problem.

But assuming that there is no interest the creditor can reach presently, it does not follow that there could be no fraudulent conveyance. It is true that traditionally the conveyance must be by the debtor. A conveyance by a third party regardless of the extent to which it defeats the grantee's creditors is generally valid. In fact this is the precise effect of the spendthrift trust.[10] The instant case then can be viewed as one in which the husband and wife as a separate entity convey to defeat not their creditors but the creditors of the wife who may be compared to an expectant and disappointed heir. This view has a certain plausibility since the only possible way in which the property can be conveyed is by both.[11] However, it would seem artificial to argue that because the wife alone cannot convey, she has not conveyed at all when she joins with the husband. And thus the wife has much more control over the destiny of the property than has the heir.

But granting that the debtor in the instant case really made a conveyance, some difficulties remain. Although there was a conveyance of a fee simple in the instant case it was a conveyance of the sum, so to speak, of the present and future rights of the spouses. But since the present rights of the spouses never could be reached by creditors,[12] the transaction from the creditor's viewpoint is identical with the transfer sim-

[4] 1 Simes, Law of Future Interests § 241–2 (1936).

[5] 8 Vernon's Ann. Tex. Stats. 1925, art 2578.

[6] But see dictum in Caples v. Ward, 107 Tex. 341, 179 S.W. 856 (1915) holding that contingent interests are not subject to sale on execution.

[7] Skipper v. Davis, 59 S.W. (2d) 454 (Tex. App. 1932).

[8] See generally, 3 Simes, Law of Future Interests § 727 *et seq.* (1936).

[9] 17 Wash. 148, 49 Pac. 251 (1897).

[10] See generally Griswold, Spendthrift Trusts, c. IX (1936); the classic preface to Gray, Restraints on the Alienation of Property (2d ed. 1895) still has relevance. It should be noted that even today a settlor cannot set up a spendthrift trust for his own benefit. Griswold, *op. cit. supra* at p. 402 ff.

[11] 13 Vernon's Ann. Tex. Stats. 1925, art. 4618. [12] *Id.* at art. 4621.

ply of a future interest. Since it is assumed that the creditor cannot reach the future interest presently, the conveyance can operate to hinder him only in the future. It is true that time is not the determining factor in a fraudulent conveyance. Thus, a conveyance in anticipation of future obligations can be set aside.[13] However, in such a case there is a transfer of a present interest to the defeat of future creditors; but in the instant case there is the "transfer" of a future interest to the defeat of present creditors. Further, there are bankruptcy precedents permitting a debtor to be discharged through bankruptcy when the vesting of a future interest not reachable by creditors is imminent.[14] On the other hand, a court of equity has refused to uphold a transfer of an expectancy by an insolvent heir to defeat any creditors who became so prior to the vesting.[15]

But it should be noted that there are two kinds of fraudulent conveyances: those in which there is a retention of dominion by the debtor and those in which there is simply an outright gift while insolvent. The former is much more deserving of the opprobrium of fraud. Regardless of the solution of the case of a gift of a future interest which cannot be reached by creditors, it seems clear that where there is retention of dominion in the future when the interest vests the conveyance should be set aside. If retention of dominion is to be pivotal, actual intent again becomes relevant. The necessity for finding a joint intent is not a serious problem although in *Winchester-Simmons & Co. v. Cutler*[16] it was held that there was not a fraudulent conveyance where a husband and wife made a voluntary conveyance of an estate by entirety to defeat a creditor of the husband since the joinder in the conveyance by the wife was in good faith. But the present case is distinguishable evidentially since a husband would presumably know more about his wife's business affairs than she about his, since he had an incurable disease and did in fact die a year later, and since he was a party to this prior litigation it must have made him conscious of plaintiff as a creditor. But more fundamentally the *Cutler* case involved an outright gift. In fact it would seem arguable that neither spouse could be in good faith if the conveyance is made with a view toward retaining dominion. Thus, the court by refusing to pass on plaintiff's claim of secret trust would seem to have deprived themselves of a very useful *rationale* for their decision.

Husband and Wife—Enforcement of Void Separation Agreements—[Illinois].—The husband, under a separation agreement, paid his wife $5,000 for a release of her rights in his property and of his obligation to support her. In a suit by the wife to have the agreement declared null and void and to have separate maintenance decreed in her favor, the husband filed an answer conceding the illegality of the agreement, and a counterclaim asking that restitution of the $5000 be required from the wife before she be allowed relief. *Held*, that although the contract was against public policy and void, the wife was not entitled to separate maintenance because she voluntarily consented to the separation and was not, therefore, living separate and apart from her husband without her fault, as required by statute. *Held*, furthermore, that the husband could

[13] Glenn, Creditors' Rights and Remedies § 169 (1915); 1 Moore, Fraudulent Conveyances 188, n. 19 (1908).

[14] *In re* Swift, 259 Fed. 612 (D.C. Ga. 1919).

[15] Read v. Mosby, 97 Tenn. 759, 11 S.W. 940 (1889).

[16] 199 N.C. 709, 155 S.E. 611, criticized in 29 Mich. L. Rev. 788 (1930).