IMPUTATION OF CONTRIBUTORY NEGLIGENCE BETWEEN SPOUSES TO BAR RECOVERY FOR PERSONAL INJURY

On the evening of July 11, 1950, while attempting to cross Bayshore Highway at Cypress Avenue in San Mateo County, Mr. and Mrs. Walter Kesler were injured through the collision of their automobile with an auto driven by Mr. Fred Pabst.[1] The causes of action arising from this occurrence gave rise to litigation of unusual significance in the field of imputation of negligence between the spouses in California.

Mr. and Mrs. Kesler brought action for damages for their personal injuries. In answer the defendant denied negligence and pleaded contributory negligence of Mr. Kesler. The jury returned a verdict for the defendant after being instructed that Mr. Kesler's negligence, if such were found, would bar not only his recovery, but Mrs. Kesler's as well.[2] The contention that this charge was error formed the basis of Mrs. Kesler's appeal.[3]

In California imputation of the driving spouse's negligence to the passenger spouse to bar recovery for the latter's personal injury is typically accomplished because of the character of the cause of action and the recovery, both of which have been established by a long line of decisions to be community property.[4] Since the negligent spouse would receive a half interest in the recovery of the non-negligent spouse, he would, if recovery were allowed, profit by his own wrong.[5] The "evil" of such a result has been thought by the courts to be greater than the parallel "evil" of allowing the defendant tortfeasor to escape liability for his negligence.[6]

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[1] Kesler v. Pabst, 43 A.C. 256, 257, 273 P.2d 257, 258 (1954).

[2] *Id.* at 257, 258, 273 P.2d at 258.

[3] *Ibid.*

[4] The leading case holding the cause of action and recovery to be community property is McFadden v. Santa Ana etc. R'y Co., 87 Cal. 464, 25 Pac. 681 (1891). Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73 (1949) reaffirmed the principle that the cause of action as well as the recovery was community property, disapproving language to the contrary in Franklin v. Franklin, 67 Cal.App.2d 717, 155 P.2d 637 (1945).

Imputation of contributory negligence between the spouses in California on other bases is difficult to find. Imputation as a result of an agency arising solely because of a passenger-driver relationship has been rejected in California, Campagna v. Market St. Ry. Co., 24 Cal.2d 304, 149 P.2d 281 (1944); Parmenter v. McDougall, 172 Cal. 306, 156 Pac. 460 (1916); as it has in all other jurisdictions in the United States. See PROSSER, TORTS 418 (1941); Note, 44 MICH. L. REV. 1156 (1946).

Imputation of negligence through the joint enterprise formula is usually thwarted in California because in the typical situation the husband is driving a community automobile. Management and control of such community property being vested in the husband (CAL. CIV. CODE § 172), no joint enterprise, the requisite of joint control lacking, can exist. Pacific Tel. & Tel. Co. v. Wellman, 98 Cal.App.2d 151, 219 P.2d 506 (1950); Cox v. Kaufman, 77 Cal.App.2d 449, 175 P.2d 260 (1946). See Comment, 42 CALIF. L. REV. 486 (1954).

Another requisite of joint enterprise is a common purpose of the participants. Mere family purpose of the trip has, however, been rejected as a basis for finding a joint enterprise. Flores v. Brown, 39 Cal.2d 622, 248 P.2d 922 (1952); Campagna v. Market St. Ry. Co., 24 Cal.2d 304, 149 P.2d 281 (1944); Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 164 Pac. 385 (1917); Cox v. Kaufman, 77 Cal.App.2d 449, 175 P.2d 260 (1946); Moore v. Franchetti, 22 Cal.App.2d 75, 70 P.2d 492 (1937).

[5] Basler v. Sacramento Gas & Elec. Co., 158 Cal. 514, 111 Pac. 530 (1910); Dicken v. Souther, 59 Cal.App.2d 203, 138 P.2d 408 (1943); Dunbar v. San Fancisco-Oakland T. Rys., 54 Cal.App. 15, 201 Pac. 330 (1921).

[6] Flores v. Brown, 39 Cal.2d 622, 632, 248 P.2d 922, 927 (1952).

But another well established legal principle in California regarding community property is that husbands and wives may at any time by formal or informal agreement change the status of their community property or any part of it into the separate property of either spouse.[7] It was this latter principle which the Keslers hoped to use to Mrs. Kesler's advantage in avoiding the consequences of imputed negligence. After the occurrence of the accident, Mr. and Mrs. Kesler entered into a written property agreement by which Mr. Kesler relinquished all interest in his wife's cause of action. Since the cause of action then became Mrs. Kesler's separate property, Mr. Kesler having no legal right to any of the proceeds, it was reasoned that he could not in any way profit by his own negligence. Therefore, the imputation of negligence should not be made and, following the same reasoning, the instructions to the jury were error.

The California Supreme Court, in approving the instruction of the trial court, refuted this line of reasoning.[8] Assuming as valid the general proposition that after relinquishment the negligent husband could no longer share in his wife's recovery, the court fixed its attention upon the power exercised by the husband in the act of relinquishment. The cause of action being designated as property,[9] it is clear that when the husband disposes of his share in the property to his wife's benefit he is exercising dominion over the property. "The right to dispose of property . . . constitutes a major interest of the owner therein."[10] Should legal effect be given to this attempted disposal of a property right, it would in effect be granting to the husband a valuable power over the cause of action which, in the face of his contributory negligence, would enable him to profit by his own wrong. "Accordingly," reasons the court, "the objective of preventing unjust enrichment cannot be accomplished by a voluntary relinquishment of the negligent husband's interest to his wife."[11]

The logic of the court seems unassailable. An attack upon its opinion appears tenable only by one who would attack the underlying rule which classifies the recovery for personal injuries as community property. Justice Carter in his dissent,[12] although quite vague as to the precise elements of the recovery which he would classify as separate property, makes such an attack. He reiterates the views he expressed in his dissent in *Zaragosa v. Craven*,[13] to the effect that the recovery of a married woman for personal

[7] CAL. CIV. CODE § 158; Odone v. Marzocchi, 34 Cal.2d 431, 211 P.2d 297 (1949); Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003 (1932); Wren v. Wren, 100 Cal. 276, 34 Pac. 775 (1893).

[8] Kesler v. Pabst, 43 A.C. 256, 273 P.2d 257 (1954).

[9] *Id.* at 259, 273 P.2d at 258. In McFadden v. Santa Ana etc. R'y Co., 87 Cal. 464, 25 Pac. 681 (1891) it was determined that the right to recover damages for personal injury was property. This determination has never been questioned by the California courts. For criticism of the doctrine see MCKAY, COMMUNITY PROPERTY § 182 (2d ed. 1925) and MCMURRAY, COMMUNITY PROPERTY, CALIFORNIA JURISPRUDENCE 1930, SUPPLEMENT § 42 (1930).

[10] Kesler v. Pabst, 43 A.C. 256, 259, 273 P.2d 257, 258 (1954). See 73 C.J.S. 143: "[I]t is generally recognized that property includes the right of acquisition, the right of use and enjoyment, the right of exclusion, and the right of disposition."

[11] Kesler v. Pabst, 43 A.C. 256, 259, 273 P.2d 257, 259 (1954).

[12] *Id.* at 261, 273 P.2d at 260.

[13] 33 Cal.2d 315, 322, 202 P.2d 73, 77 (1949).

injury, since she may sue without her husband being joined, should be her separate property. The general tenor of his argument is that a spouse's body, since it was separate property when brought into the marriage, remains separate after marriage. Recovery for injury to the body, being recompense for damage done to separate property, should also be separate. Authority for this proposition can be found in courts outside California[14] and it has been advocated by many legal commentators.[15]

Although Justice Carter recognizes some elements of damage flowing from the injury to be community property ("medical expenses, loss of services to the community, [and] loss of earnings, if any"),[16] he would classify "pain, suffering, disfigurement and temporary and future disability"[17] as separate property. His analysis might seem proper in regard to pain and suffering, the recovery for which is considered a community asset only through what has been termed by some as a too literal interpretation of Civil Code Sections 162 and 163.[18] But what do the terms "disfigurement . . . temporary and future disability" mean? If they refer only to the personal discomfort and mental disturbance that result from a permanent injury they could as well be embraced within the definition of "pain and suffering." If they refer to the pecuniary loss which results from disfigurement and "future" disability through a diminished earning capacity, their

[14] *E.g.*, Fredrickson & Watson Const. Co. v. Boyd, 60 Nev. 117, 102 P.2d 627 (1940); Soto v. Vandeventer, 56 N.M. 483, 245 P.2d 826 (1952). Recovery for personal injury to the wife is separate property by statute in Louisiana [LA. CIV. CODE art. 2402 (1947)]; Vitale v. Checker Cab Co., 166 La. 527, 117 So. 579 (1928). Similar statutes have been repealed in Oklahoma [OKLA. STAT. ANN. tit. 32, § 55 (1941) (covering both the husband's and wife's causes), repealed in 1945] and in Texas have been declared unconstitutional [TEX. REV. CIV. STAT. ANN. art. 4615 (1948) (covering only the wife's cause)] in Northern Texas Traction Co. v. Hill, 297 S.W. 778 (Tex. 1927). The Texas constitution, unlike that of California, enumerates the various means by which a wife can obtain separate property. Causes of action for her personal injury not being mentioned as the wife's separate property, a prohibition against the legislature's designation of them as such was implied. In Arizona although damages recovered for personal injury are community property, Dawson v. McNaney, 71 Ariz. 79, 223 P.2d 907 (1951), the cause of action has been said to belong only to the injured wife. Fox Tucson Theatres Corp. v. Lindsay, 47 Ariz. 388, 56 P.2d 183 (1936).

[15] *E.g.*, 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 82 (1943); MCKAY, COMMUNITY PROPERTY § 378, 379 (2d ed. 1925); Notes, 33 CALIF. L. REV. 627, 632 (1945), 28 CALIF. L. REV. 211, 216 (1940), 24 CALIF. L. REV. 739, 742 (1936), 2 CALIF. L. REV. 161, 162 (1913), 1 CALIF. L. REV. 296, 297 (1912).

[16] This language from Soto v. Vandeventer, 56 N.M. 483, 245 P.2d 826 (1952) was quoted with approval. Kesler v. Pabst, 43 A.C. 256, 265, 273 P.2d 257, 263 (1954).

[17] Kesler v. Pabst, 43 A.C. 256, 262, 273 P.2d 257, 261 (1954).

[18] Civil Code Sections 162 and 163 define the separate property of the spouses to be that "owned by [the spouse] before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof . . . ." Section 164 then allocates all other property acquired by either spouse to the community. By use of strictly literal interpretation it is reasoned that recovery for pain suffered because of personal injury, not being a gift, etc., must be community property. Professor de Funiak contends that, "Except for gifts clearly made to the marital community, community property only consists of that which is acquired by onerous title, that is, by labor or industry of the spouses, or which is acquired in exchange for community property . . . ." 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 225 (1943). It is plain that pain and suffering cannot in any sense come within this definition of community property. California having traditionally and consistently followed a strict residual definition of community property, however, it is doubted that at this late date much consideration will be given to this argument.

classification as separate property not only would duplicate what Justice Carter has conceded to be properly community property, but also on principle would seem inadvisable.

Although Justice Carter frames his two dissents in terms only of imputation of a husband's negligence to bar his wife's recovery, his arguments must be considered to apply equally to the converse situation—imputation of a wife's negligence to bar the husband's recovery. Taking into consideration the fact that recovery for loss of earning power is the major part of most large verdicts,[19] and that the earnings of the wage earning spouse are often the major if not the sole source of the community property, it would appear very inequitable to allow such recovery to be classified as separate property, forever beyond the ownership or control of the other spouse. It must not be forgotten that the rule Justice Carter advocates would apply to all personal injury actions, not solely those involving imputation of negligence.

Addendum to Flores v. Brown

Justice Carter asserts[20] that the majority opinion is illogical when compared with the opinion in *Flores v. Brown*.[21] But the majority opinion takes great pains to distinguish the holding in *Flores v. Brown*, doing so upon a theory of law not expounded in the *Flores* case. In *Flores v. Brown* the negligent husband died in the same accident which resulted in the death of two of his passengers and the injury to three others, including his wife. In discussion of the wife's cause of action the supreme court decided that the marriage being dissolved by the death of the husband, the cause of action became the separate property of the wife, "the objective of preventing unjust enrichment [being] accomplished by barring only the interest of the negligent spouse or his estate."[22] The opinion left many questions unanswered concerning the logic and mechanics by which the entire cause of action, originally community property, vested in the wife on the death of her husband.[23] These questions were answered by the court in *Kesler v. Pabst*.[24]

The key to an understanding of the result in *Flores v. Brown* is found in the adoption by California at an early date of the common law rule that the wife must join with her husband when he brings a cause of action for her personal injury.[25] The reason for the rule at common law was to prevent

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[19] See Daniels, *Measure of Damages in Personal Injury Cases*, 7 MIAMI L. Q. 171 (1953). Note that the loss of earning power of a housewife, although once considered too speculative for recognition, 4 SUTHERLAND, DAMAGES 4700 (4th ed. 1916), has been adopted in California as an element of damages. Davis v. Renton, 113 Cal. App. 561, 298 Pac. 834 (1931).

[20] Kesler v. Pabst, 43 A.C. 256, 263, 273 P.2d 257, 261 (1954).

[21] 39 Cal.2d 622, 248 P.2d 922 (1952).

[22] *Id.* at 631, 248 P.2d at 926.

[23] See Comment, 42 CALIF. L. REV. 486, 490 (1954).

[24] 43 A.C. 256, 259, 273 P.2d 257, 259 (1954).

[25] Sheldon v. Steamship Uncle Sam, 18 Cal. 526 (1861).

the abatement of the cause of action upon the death of the husband.[26] In *Moody v. Southern Pacific Co.*[27] it was established that the adoption of the rule in California was productive of the same result—"survival" of the cause of action, entire, to the wife upon her husband's death. The theory behind both applications of the rule is that the wife is the party with the "meritorious cause" who, upon the dissolution of marriage by the death of her husband, should be vested with the entire cause of action. At common law this produced a somewhat anomalous situation in that the wife had an unusual expectancy in a cause of action, the recovery of which, if made before the husband's death, was completely his own separate property.[28] It was thought no more illogical that a similar unusual incident of "survival" should be attached to the cause of action when it was, before the husband's death, community property.[29]

> Although at common law the cause of action for the wife's suffering was the separate property of the husband, it was settled that the wife was a necessary party to the suit, the reason being that, as the authorities express it, she was the "meritorious cause of action," and that in case of his death pending suit the cause of action would survive to her. . . . The proposition that, although the right of action is community property, yet the wife is a necessary party in this particular class of cases, is no more illogical than the rule at common law that a wife must join though the right was the separate property of the husband. The reasons for the decisions under the common law are applicable to the case where the right is community property, as fully and completely as to the case where it is the husband's separate property.

It was decided by the court in *Zaragosa v. Craven*[30] that the amendment in 1913 of Section 370 of the Code of Civil Procedure, allowing the wife to bring her action alone, was a mere procedural change and did not affect the community property character of her cause of action for personal injury. The court in *Kesler v. Pabst*, recognizing the same principle, therefore held that even though joinder of the husband is no longer necessary the action continues to be the wife's "meritorious cause." On the husband's death, then, the cause of action remains entire to the wife and does not follow the general community property rule of being subject in part to the husband's testamentary power.

"Survival" to the wife of the cause of action defeats the defense of imputed negligence because no unjust enrichment of the negligent husband can be found. Survival being by operation of law, the husband is precluded from exercising any power, testamentary or otherwise, over the cause of action.[31]

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[26] In addition to authority cited in Kesler v. Pabst, 43 A.C. 256, 259, 273 P.2d 257, 259 (1954), see 1 CHITTY, PLEADING 108 (16th American ed. 1892) and REEVE, DOMESTIC RELATIONS 126 (1816).

[27] 167 Cal. 786, 141 Pac. 388 (1914).

[28] 1 SCHOULER, DOMESTIC RELATIONS 127 (5th ed. 1895).

[29] Moody v. Southern Pacific Co., 167 Cal. 786, 791, 141 Pac. 388, 391 (1914), quoted with approval in Kesler v. Pabst, 43 A.C. 256, 260, 273 P.2d 257, 259 (1954).

[30] 33 Cal.2d 315, 202 P.2d 73 (1949).

[31] Kesler v. Pabst, 43 A.C. 256, 260, 273 P.2d 257, 259 (1954).

The consequences of the reaffirmation of the doctrine of survival of the wife's cause of action are not clear. The limits of the theory are not set forth in *Kesler v. Pabst.* At common law only a wife's cause of action "survived." If the court intends to adhere to a literal construction of the common law rule, it must hold that although the death of a negligent husband frees the wife's cause of action, a husband's cause of action remains encumbered by imputed negligence even after the death of his negligent wife.

It is submitted, however, that another construction is more logical. The common law rule upon which the *Kesler* case rests the *Flores v. Brown* decision would seem to be based on a principle that whenever one spouse has a property right in the "meritorious" cause of action of the other, the entire cause of action "remains" to the surviver when the spouse with the mere property interest dies. At common law only the cause of action for a wife's personal injuries was said to "survive" in such a way because only in the wife's case did anyone other than the spouse with the meritorious cause have a property interest. A husband's cause of action, being entirely his own property, was completely unaffected by the death of his wife. But where the cause of action is community property, the non-injured spouse, whether husband or wife, will always have a half interest in the meritorious cause of action of the injured spouse. Therefore, by analogy, the entire cause of action should always "survive" as the property of the spouse with the meritorious cause when the uninjured spouse dies, whether it is a case of "survival" to the wife or to the husband.

The foundation of the community property system is the concept of partnership between the spouses.[32] Equality in treatment, although perhaps not always attained, is the goal of the law. Both public policy and logic would lead to the assumption, therefore, that the rule of the *Flores* case is the *principle* underlying common law survival of the wife's cause of action, rather than a literal adoption of the letter of that rule.

Extensions of Kesler v. Pabst: Dissolution of the Community by Means Other than Death

The marriage and the community property can be dissolved involuntarily by means other than death. It may be profitable to speculate upon the implications of *Kesler v. Pabst* in regard to the status of a cause of action for personal injury after the community has undergone a dissolution by divorce or by decree of separate maintenance.

Assuming that the cause of action for personal injury arose prior to the interlocutory decree of divorce,[33] it would seem proper on either of two

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[32] 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 2 (1943).

[33] Where the cause of action for personal injury arises after the interlocutory decree, it can be assumed that the parties are living separately. *Cf.* Stauter v. Carithers, 185 Cal. 160, 196 Pac. 37 (1921). Civil Code Section 169 would probably control the status of the wife's cause of action. It provides that "The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife." In Christiana v. Rose, 100 Cal. App.2d 46, 222 P.2d 891 (1950) recovery for the wrongful death of a child in the custody of a wife living separately

grounds to allow the cause of action, or at least half of it, to be vested in the injured party unencumbered by imputed negligence.

First, it would appear not impossible for the court to again draw upon the common law survival principle for a rationalization of the vesting of the cause of action in the injured party, independent of the disposition of other community property. As before mentioned, the common law rule which has been followed in the *Kesler* explanation of the *Flores* case can be said to provide that upon dissolution of marriage the cause of action "survives" entire to the party with the "meritorious cause." At common law there was only one occasion for such a transferral of the cause of action because only one method of dissolution of the marriage was possible—death of one of the spouses. Divorce was unknown.[34] Today, of course, marriage is terminated by divorce as well as by the death of one of the parties. Why, therefore, should not the rule of transferral of the entire cause of action be applied in cases of divorce as well as death? On principle the reasons compelling a vesting of the cause of action in the injured party on the death of his spouse apply equally to the case of dissolution of the marriage by divorce.[35]

Should the cause of action in this way be vested in the injured party, it would be "by operation of law"[36] rather than by the voluntary act of the

was held to be an accumulation under the meaning of Section 169. It would seem only logical that injury to the wife would also be an "accumulation." This was the holding in Lorang v. Hays, 69 Idaho 440, 209 P.2d 733 (1950) where the precise situation in question came up under a statute similar to Section 169.

Where the injury is to the husband living separately the cause of action must be presumed to be community property, there being no statute in his behalf corresponding to Section 169. The interlocutory decree could, of course, make provision for property acquired between the interlocutory and final decrees, in which case problems of imputed negligence resulting from community status of the cause of action will not appear. Assuming, however, that no provision has been made for such a contingency, the cause of action becomes, on the final decree, the separate property of both spouses, each holding a part as tenant in common. Brown v. Brown, 170 Cal. 1, 147 Pac. 1168 (1915); Biggi v. Biggi, 98 Cal. 35, 32 Pac. 803 (1893). Theoretically imputed negligence could be applied to prevent recovery by the negligent spouse while allowing recovery by the injured spouse. But see the problems outlined in note 44 *infra*. Should the parties attempt to classify the cause of action before the final decree, substantially the same problems which are presented in the text would appear.

[34] 1 NELSON, DIVORCE AND ANNULMENT § 1.01 (2d ed. 1945).

[35] The common law requirement of the joinder of the wife in the action for her personal injury brought by her husband was made necessary because otherwise the cause of action would terminate with the husband's death, leaving the wife both uncompensated and unmarried. If the wife's cause of action cannot be given to her on divorce, the result will be identical. Though unmarried her recovery will be prevented by a rule of law arising only by reason of her previous marital relationship.

[36] The "survival" of the cause of action to the injured party on the death of his spouse as adopted in the *Kesler* case demonstrates the cause of action for personal injury to be community property with very special characteristics. Should the "survival" theory be carried over to the situation of dissolution of the marriage on divorce it would be a recognition that in that case, too, the cause of action for personal injury has special properties. It would be necessary to exclude it from the balance of the community property in cases in which an equal division of the community property was required. It would also seem necessary that the award to the injured spouse should be non-discretionary on the part of the court, even in cases in which the injured spouse is the defendant in a divorce action on grounds which would normally allow the divorce court to award all of the community property to the complaining spouse. See CAL. CIV. CODE § 146.

parties.[37] Following the *Kesler* case, the result should be an elimination of imputed negligence, the unjust enrichment of the negligent party being effectively prevented.

The extension of the "survival" rule to the divorce situation would be indeed a major readjustment of concepts in this area of our law. There is no doubt that a cause of action for personal injury is and will remain classified as community property.[38] Civil Code Section 146 makes provision for the allocation of community property upon divorce, and no special mention is made of the property in a cause of action for personal injury. It is to be remembered, however, that the cause of action in *Flores v. Brown* also arose as community property[39] and was similarly governed by a statute (Probate Code Section 201) which made no special provision for this type of community property. Statutes and definitions dealing with ordinary community property cannot, then, be deemed completely controlling.

Should the court not be disposed to extend the "survival" theory of the "meritorious" cause to the situation of divorce, the *Kesler* case indicates another rationale upon which the injured spouse can, in certain types of divorce decrees, defeat imputed negligence. The opinion emphasizes the importance of the involuntary character of the vesting of the cause of action in the injured spouse if imputed negligence is to be avoided. At least in the ordinary situation, the allocation of the action to the injured spouse by the divorce court in its property decree would be a result not dependent upon the volition of the negligent spouse.[40] Therefore, there being no enrichment through the exercise of a power by the negligent spouse, if the decree can in other respects be made so as not to afford benefit to that spouse, the cause of action should be received by the injured spouse unencumbered, the "objective of preventing unjust enrichment" being accomplished.

Where the injured spouse sues for divorce upon a cause of action allowing an unequal division of the community property in the discretion of the court,[41] the entire cause of action could be given to him without any necessity of making an offsetting award to the negligent spouse.[42] Since such a decree would result in no enrichment of the negligent spouse, it seems clear

[37] Even should the divorce be initiated by the negligent spouse, it is submitted that the resultant disposition of the cause of action could not be said to be upon his volition. Although it would be by his initiative that the dissolution was brought about, the actual vesting of the property would be by order of the court. If, for instance, the negligent spouse should commit suicide, it is presumed that the rule of the *Flores* case would apply as fully as it did where the death of the negligent spouse was accidental.

[38] Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73 (1949).

[39] Flores v. Brown, 39 Cal.2d 622, 630, 631, 248 P.2d 922, 926 (1952).

[40] See note 36 *supra.*

[41] CAL. CIV. CODE § 146 provides for division of the community property in equal shares unless the divorce or separate maintenance decree has been rendered on the ground of adultery, incurable insanity, or extreme cruelty, in which case the property "shall be assigned . . . in such proportions as the court . . . may deem just."

[42] Not only may the court make an unequal division of the community property, but in its discretion may give all the community property to the plaintiff spouse. Marshall v. Marshall, 196 Cal. 761, 239 Pac. 36 (1935).

that the injured spouse should receive the cause of action free of the defense of imputed negligence.

On the other hand, where the cause of action for divorce requires an equal division of the community property,[43] should the cause of action be given, entire, to the injured spouse, it would be necessary to allocate to the negligent spouse an offsetting award of other community property. Such a decree would not accomplish "the objective of preventing unjust enrichment" and would therefore fail to nullify the defense of imputed negligence. It is at least within the realm of possibility, however, that the injured spouse could be given one-half of the cause of action sans the defense of imputed negligence, the other half replete with the encumbrance being given to the negligent spouse. Should it be found feasible to split the cause of action in this way,[44] the injured spouse could be allowed recovery of his half of the cause of action without unjustly enriching the negligent spouse. It would follow that the third party tortfeasor should be allowed his plea of contributory negligence in defense of the negligent spouse's half of the cause of action only.[45]

The next step in extension of the *Kesler* theory of prevention of imputed negligence by involuntary dissolution of the community property would be to apply it to the case of dissolution of the community property by a decree of separate maintenance. If the cause of action for personal

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[43] Equal division of the community property is required when the ground for the divorce is wilful desertion, wilful neglect, habitual intemperance, or convicition of a felony. CAL. CIV. CODE §§ 92, 146.

[44] The problems involved in such a division of the cause of action can be appreciated by reading Franklin v. Franklin, 67 Cal.App.2d 717, 155 P.2d 637 (1945). Difficulties arise because of the characteristics peculiar to a cause of action in tort for personal injuries. "The claim . . . belongs exclusively to the person injured and it does not survive him [citation omitted]; it is not subject to transfer by agreement [citations omitted] or by operation of law, even though it becomes assignable when reduced to judgment [citation omitted]. *Id.* at 726, 155 P.2d at 642.

[45] A practical problem will be encountered in any case in which the cause of action is awarded to the injured spouse by the interlocutory decree of divorce. The proper practice in the interlocutory decree is to provide that the property division shall take effect only upon the entry of the final decree. Pereira v. Pereira, 156 Cal. 1, 10, 11, 103 Pac. 488, 492 (1909). The statute of limitations for personal injury actions being only one year in California (CAL. CODE CIV. PROC. § 340), it is obvious that the cause of action will be barred, if proper steps are not taken, before it can be brought to trial, the property rights in the cause of action being inchoate until the final decree. *Cf.* People v. Baender, 68 Cal.App. 49, 228 Pac. 536 (1924).

One solution to the problem would be achieved by the filing of a timely complaint against the third party tortfeasor by the injured spouse, thereby commencing the action (CAL. CODE CIV. PROC. § 405) and tolling the statute of limitations (CAL. CODE CIV. PROC. § 335). Should it then appear that the case will come to trial before the entering of the final decree of divorce, it would seem to be abuse of the trial court's discretion to refuse postponement of the trial, a material element of the litigation (the ownership of the cause of action) remaining unsettled until the final decree of divorce.

Another solution of the problem would be to obtain immediate disposition of the community property by the interlocutory decree. While open to direct attack by the parties to the divorce, Gudelj v. Gudelj, 41 Cal.2d 202, 259 P.2d 656 (1953), such a decree has been held to be within the power of the court. Leupe v. Leupe, 21 Cal.2d 145, 130 P.2d 697 (1942). See discussion in 1 ARMSTRONG, CALIFORNIA FAMILY LAW 840-842 (1953).

injury arose before the decree of separate maintenance was achieved,[46] could it be effectively awarded to the injured spouse?

Since separate maintenance in California cannot properly be termed a dissolution of the marriage,[47] an analogy to the common law "survival" of the cause of action to the party of meritorious interest would be more difficult than in the case of divorce. Insofar as the community property aspects of the decree are concerned, however, since the statutory change in 1927[48] the dissolution is in most respects similar to that effected by divorce.[49] Identical problems in making the mechanical allocation of the cause of action, or in dividing it, would be presented.[50] It would seem, then, that should it be decided that a proper allocation of the cause of action to the injured party on divorce prevents the imputation of negligence, a similar allocation by a decree of separate maintenance, rendered under corresponding circumstances, should also prevent the imputation of negligence.

Division of Property Upon Annulment or Decree of Nullity of the Marriage

Where an annulment of decree of nullity is granted to putative spouses, the decree is a determination that no valid marriage ever existed.[51] Logically speaking, in the absence of a valid marriage there can be no community property. The California courts, however, in an exercise of equitable discretion, have granted a division of the acquisitions of the parties as if the property had been in fact community property.[52] The predilection of the

[46] If the cause of action arose after the decree of separate maintenance had been entered, the "earnings and accumulations" of both the husband and wife are by statute their separate property. CAL. CIV. CODE §§ 169, 169.1. It is submitted that a cause of action for personal injury must be considered an "accumulation," in which case it would arise as separate property. See note 33 *supra*.

[47] CAL. CIV. CODE § 90; Monroe v. Superior Court, 28 Cal.2d 427, 170 P.2d 473 (1946).

[48] Prior to 1927 there was no provision for the division by the court of the community property upon decree of separate maintenance. Johnson v. Johnson, 33 Cal.App. 93, 164 Pac. 421 (1917). By the terms of Civil Code Section 137, adopted in 1927, the court was given the power to grant by its decree of separate maintenance " . . . the same disposition of the community property . . . as would have been made if the marriage had been dissolved . . . ." This provision was consolidated with the provisions for dissolution of the community property on divorce in Civil Code Section 146 in 1951.

[49] A primary property distinction between the dissolution of the community property upon a final decree of divorce and that effected by separate maintenance decree is that a property settlement agreement in a decree of separate maintenance, as on mere separation, in the absence of proof of an intention by the parties to the contrary, can be revoked by the reconciliation of the parties. See 1 ARMSTRONG, CALIFORNIA FAMILY LAW 583 (1953); *cf.* Finnegan v. Finnegan, 42 Cal.2d 762, 269 P.2d 873 (1954). Whether the same rule would apply to the court's division of the community property independent of an agreement of the parties does not seem to have been settled. *Cf.* Leupe v. Leupe, 21 Cal.2d 145, 150, 130 P.2d 697, 700 (1942) (reserving the question as to the effect of reconciliation during the interlocutory year on the court's division of the community property in the interlocutory decree even when such division has been carried out).

[50] Identical provisions are made for the division of the community property upon divorce and separate maintenance. CAL. CIV. CODE § 146.

[51] CAL. CIV. CODE § 59 (void marriages); Estate of Eichhoff, 101 Cal. 600, 36 Pac. 11 (1894) (voidable marriages). Estate of Gregorson, 160 Cal. 21, 24–27, 116 Pac. 60, 62, 63 (1911) contains a good discussion of the distinction between void and voidable marriages.

[52] *E.g.*, Figoni v. Figoni, 211 Cal. 354, 295 Pac. 339 (1931); Schneider v. Schneider, 183 Cal. 335, 191 Pac. 533 (1920).

court is to protect the property rights of the spouse who innocently believed himself to be validly married.[53] But if a cause of action arising during the putative marriage is also treated as if it were community property, to the effect of barring its recovery where if it were treated as separate property recovery could be attained, the interests of the innocent spouse will be defeated. It would not seem that such action would be warranted when, by literal interpretation of the decree of nullity, the injured party was, at the time of the accident, unmarried. It is submitted, therefore, that when an annulment or decree of nullity precedes the bringing of the cause of action to trial, the action should be considered the separate property of the injured putative spouse.

If the injured party is not a putative spouse (that is, one who honestly believes his marriage to be valid) but one who knows of the invalidity of his marriage, the court will have little interest in protecting his property rights.[54] Nevertheless, although it can be argued that a fraudulent spouse should be made to take the bitter with the sweet, there would seem to be little logic behind a decision vesting a portion of his cause of action for personal injury in his innocent but negligent partner in the putative marriage. The innocent "spouse" being prevented, because of his contributory negligence, from making recovery of any interest in the cause of action, the only beneficiary of such action by the court would be the third party tortfeasor.

Effect of Civil Code Section 171c

The majority opinion makes reference[55] to Civil Code Section 171c, adopted in 1951, refusing to discuss any effect it might have upon the *Kesler* situation because the cause of action in *Kesler* arose before the adoption of the section. Section 171c gives to the wife qualified control[56] of money damages received by her for her personal injury, until it is commingled with other community property. Justice Carter remarks,[57] "It will be interesting indeed to see how Section 171c will be interpreted by this court when the occasion arises!" In view of the clear statutory mandate of Section 171c, "This section shall not be construed as making such money the separate property of the wife, nor as changing the respective interests of the husband

[53] Turknette v. Turknette, 100 Cal.App.2d 271, 274, 223 P.2d 495, 498 (1950): "... the courts of this state, independent of statutory authority, in the exercise of their broad equitable powers, have held that, where an unmarried couple live together as husband and wife, and where one, at least, honestly and in good faith believes he or she is married, he or she is a putative spouse and his or her property rights will be protected."

[54] *Cf.* Vallera v. Vallera, 21 Cal.2d 681, 134 P.2d 761 (1943); Flanagen v. Capital Nat. Bank, 213 Cal. 664, 3 P.2d 307 (1931).

[55] Kesler v. Pabst, 43 A.C. 256, 261, 273 P.2d 257, 260 (1954).

[56] The wife may not "make a gift thereof, or dispose of [the property] without a valuable consideration, without written consent of the husband." Also, the husband has control of damages recovered for a wife's personal injury to the extent necessary to pay for expenses incurred by reason of the injury. CAL. CIV. CODE § 171c.

[57] Kesler v. Pabst, 43 A.C. 256, 266, 273 P.2d 257, 263 (1954).

and wife in such money, . . . " it is difficult to see what effect the section could have upon imputation of negligence.[58]

Can it be argued that since the husband has no control of the funds recovered and no right to force a commingling, he is not enriched by their acquisition? Civil Code Section 161a, defining the husband's interest in community property as "present, existing and equal," is expressly made applicable to the wife's recovery by Section 171c. Even though the husband has been deprived of his right of control, he retains essentially all the rights in the property that the wife ordinarily enjoys in community property acquired by the husband. These rights include the right of testamentary disposition,[59] the right to prevent disposal of the property by the wife without valuable consideration,[60] the right to use the recovery to the extent necessary to pay for expenses incurred by reason of the wife's personal injury[61] and the right to a division of the property upon divorce or decree of separate maintenance.[62] Surely it cannot be asserted that the acquisition of all these rights in property involves no enrichment.

Pre-Accident Property Agreements

The holding of the *Kesler* case is that post-accident property agreements desigued to avoid interspouse imputation of negligence will not be given that effect. The case leaves undecided the question of the efficacy of pre-accident agreements in this respect. The landmark case in California dealing with pre-accident agreements is *Perkins v. Sunset Tel. & Tel. Co.*,[63] where the agreement made prior to the wife's injury transferred all community property, presently existing and that to be acquired in the future, to the separate ownership of the wife. The agreement was held valid, the wife's cause of action for personal injuries being declared her separate property.[64] The rule against assignability of personal injury tort claims was avoided by terming the husband's act not an assignment, but a relinquishment. The *Perkins* case has never been overruled,[65] but language in two recent supreme court opinions casts doubt upon the legal force of the holding. In *Zaragosa v. Craven,* where the plaintiff belatedly raised the possibility of a pre-accident agreement, the court said, "Assuming in plaintiff's favor, *without here passing upon,* the correctness of the suggested proposition of law . . . ."[66]

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[58] 2 ARMSTRONG, CALIFORNIA FAMILY LAW 1512 (1953): "[I]t would not seem that CC § 171c . . . would alter the *Zaragosa* rule that contributory negligence bars the wife's recovery. The damages collected by the wife still are community property by the terms of the section and the husband has a vested one-half interest therein."

[59] CAL. PROB. CODE § 201.

[60] CAL. CIV. CODE § 171c.

[61] *Ibid.*

[62] CAL. CIV. CODE § 146.

[63] 155 Cal. 712, 103 Pac. 190 (1909).

[64] It should be noted that the *Perkins* case involved no question of imputed negligence.

[65] *Perkins* has been cited with approval in many cases. *E.g.,* Roy v. Salisbury, 21 Cal.2d 176, 185, 130 P.2d 706, 711 (1942); Siberell v. Siberell, 214 Cal. 767, 770, 7 P.2d 1003, 1004 (1932).

[66] 33 Cal.2d 315, 322, 202 P.2d 73, 77 (1949) (emphasis added).

> It is unnecessary to determine whether the general rule of nonassignability of causes of action for personal injuries renders ineffective a purported relinquishment of an interest in such a cause of action. . . . Even if it is assumed that such a relinquishment is effective. . . .

From the quoted passages, an unwillingness to grant the status of settled law to the *Perkins* rule is apparent. No reason is perceived why, in the absence of problems of imputed negligence, the rule of the *Perkins* case should be questioned.[68] Broad powers are given to the spouses by Civil Code Sections 158 and 159 to make any contract between themselves respecting property "which either might if unmarried," and to "alter their legal relations . . . as to property." Contracts releasing to a spouse his future earnings as his separate property have been held valid.[69] This is true even though the agreement is applicable only to earnings, making no alteration of the community status of other property. Why should the same rule not govern a spouse's future cause of action for personal injury? The only limitations imposed to date on the parties' contractual powers are those specified by Section 158[70] and those required by considerations of public policy.[71] Agreements concerning tort causes of action fall within neither of these classifications.

Property agreements[72] changing the status of after-acquired causes of

[68] Authority from other community property states is of little assistance in deciding what effect should be given to an interspouse contract changing the status of property to be acquired in the future. In Texas the status of after-acquired property cannot be changed by agreement between the spouses. Frame v. Frame, 120 Tex. 61, 36 S.W.2d 152 (1931); Davis v. Davis, 108 S.W.2d 681 (Tex. 1937). The Texas decisions being based upon a constitutional provision unique to Texas, however, no valid application of the rule can be made to California law.

In Louisiana the spouses are allowed to change the status of their after-acquired property by pre-nuptial agreement, Clay v. United States, 161 F.2d 607 (1947), but are restricted by statute in certain respects in their property transactions after marriage. Succession of Tullier, 53 So.2d 455 (La. 1951). Again, however, the Louisiana decisions are of no help in deciding California cases because of the dissimilarity between Louisiana and California statutory law.

Basically different statutes are also to be found in Idaho and Washington, under which no adjudications of the right of the spouses to change the status of their after-acquired property have been found.

In Nevada and New Mexico statutes identical to Section 158 of our Civil Code are to be found, but no statute approximating Section 159 exists. No cases, therefore, have been found in these jurisdictions allowing the spouses to "alter their legal relations . . . as to property." CIV. CODE § 159.

[69] Kaltschmidt v. Weber, 145 Cal. 596, 79 Pac. 272 (1904); Wren v. Wren, 100 Cal. 276, 34 Pac. 775 (1893); Balkema v. Deiches, 90 Cal. App.2d 427, 202 P.2d 1068 (1949).

[70] Contracts made between the spouses are subject " . . . to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts."

[71] *E.g.*, Rottman v. Rottman, 55 Cal. App. 624, 204 Pac. 46 (1921) (contractual relinquishment by wife of husband's support obligations invalidated).

[72] Mention should be made of the differences between various types of possible agreements and the resultant probable success. An agreement of the *Perkins* type, where all community property is allocated to one spouse, would obviously involve no "fraud." The considerations involved in the relinquishment of a party's total community property interests far outweigh any thought of intent to defeat the defense of a future tortfeasor. Where the agreement concerns ouly the cause of action for a spouse's personal injury, however, the court might be more likely to find "fraud." Going still further, it can perhaps be said that a court would be very likely to find "fraud" in an agreement which pertained only to causes of action for personal injuries which were created through the concurring negligence of one of the spouses.

action for personal injury to the separate property of the injured spouse should, therefore, be given effect. A necessary result of the establishment of such a cause of action as separate property is to make impossible any imputation of negligence upon theories of law which arose solely because of, and are applicable only to, community property.[73]

CONCLUSION

Kesler v. Pabst forecloses consideration of the post-accident property agreement as a method of avoiding imputation of negligence between the spouses in causes of action for their personal injury. This is accomplished by a theory of law inapplicable to the case of a pre-accident property agreement. The pre-accident agreement should not, therefore, be discounted as a means of preventing the imputation of negligence.

A substantial contribution to California law was provided by *Kesler v. Pabst* in its explanation of the holding in *Flores v. Brown*. By adopting the common law "survival" of the cause of action to the wife after the husband's death, the court has recognized the cause of action to be community property with unique characteristics. It seems not unreasonable to expect that the recognition of this principle will be extended to other situations of marital dissolution where logically applicable. Such a result, in this era of disparagement of the defense of contributory negligence in general, would seem desirable.[74]

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[73] The argument will probably be made that the negligent spouse, although on paper having no interest in the recovery, will in fact profit by it; that the only practical way of accomplishing the objective of prevention of unjust enrichment is to prevent its acquisition by the household of the negligent spouse. It is a sufficient answer to point out that this argument bas not been deemed worthy of consideration where the family relationship between the negligent member and the injured member was other than that of husband and wife. *E.g.*, Campagna v. Market St. Ry. Co., 24 Cal.2d 304, 149 P.2d 281 (1944) (son injured through the concurrence of father's negligence); Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 164 Pac. 385 (1917) (father injured through the concurrence of son's negligence); Moore v. Franchetti, 22 Cal. App.2d 75, 70 P.2d 492 (1937) (sister injured through sister's concurring negligence).

[74] See *e.g.*, Prosser, *Comparative Negligence*, 41 CALIF. L. REV. 1 (1953); James, *Contributory Negligence*, 62 YALE L.J. 691 (1953); Tooze, *Contributory Negligence versus Comparative Negligence—A Judge Expresses His View*, 12 N.A.C.C.A. L.J. 211 (1953).

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