A RESULT OF DIVIDING THE MISSOURI SUPREME COURT INTO DIVISION ONE AND DIVISION TWO

In Missouri the Supreme Court may sit *in banc* with its full force of seven judges or in *Division One* and *Division Two,* composed of four and three of these judges respectively.[1] This power of division was granted for the more speedy disposition of an overcrowded docket. The question then arises, to what extent is *Division One* or *Division Two* bound by a prior decision of the other division, or even of the court *in banc,* under the doctrine of *stare decisis?* While it would seem extremely improbable that either of the divisions should disregard a similar decision of the other division, it has happened in at least two specific instances. Cases of this kind are very difficult to find, as practically the only method of discovering them is a diligent study of the entire Supreme Court Reports since 1890, which would be an endless and unprofitable task if pursued for this purpose alone. While there may be a few more instances of this kind, the two cases of *Claxton v. Pool*[2] and *Chitty v. St. Louis & Southern Railroad Co.*[3] are the only ones known to the present writer. In *Claxton v. Pool,* decided by *Division Two,* that division refused to follow a long-adhered-to doctrine of the Supreme Court, namely, that nothwithstanding the so-called "married women's acts"[4] the personal vassalage of the wife to her husband still survives, and the latter is still responsible as at common law for the personal torts of his wife committed during coverture whether done in his presence or not. The decision in *Claxton v. Pool* has caused some comment, and a brief review of the cases prior to this decision is necessary to understand the situation.

At common law the husband was jointly liable for the torts of his wife committed either before or during coverture.[4] His liability for her ante-nuptial torts was then limited by statute in Missouri in 1881 by exempting the husband's property from all liability incurred by his wife before her marriage, except such property as may be acquired from the wife.[5] The last of the "married women's acts"[6] was passed in 1889, and under this section it has usually been attempted

[1] Constitution of Missouri—Amendment of 1890.
[2] 197 S. W. 349 (July, 1917).
[3] 166 Mo. 435, l. c. 445 (1902).
[4] R. S. Mo., 1909—secs. 8304-8309.
[4] *Knowing v. Manly,* 49 N. Y. 192; *Ferguson v. Collins,* 8 Ark. 241; *Carleton v. Haywood,* 49 N. H. 314.
[5] R. S. Mo., 1909, sec. 8310.
[6] R. S. Mo., 1909, sec. 8304—Wife deemed *femme sole,* for what purposes.

to relieve the husband from his remaining common law liability, that is, his liability for the torts of his wife committed during coverture. A short review of the Supreme Court cases on this subject, however, shows that it has been consistently held that the husband is still liable for the purely personal torts of his wife not arising out of the management of her separate estate. In *Nichols v. Nichols,*[7] decided in *Division One,* the court said that section 8310, *supra,* must be read in conjunction with the "married women's acts," and when so read, demonstrates that the legislature only relaxed the common law rule to the extent of limiting the husband's liability for his wife's ante-nuptial debts and torts to property received and acquired by him from his wife, and on the principle of *expressio unius exclusio alterius* left his liability for her torts committed during coverture just as they existed at common law. To quote from the opinion, "This basis, this reason, for the liability of the husband for the torts of the wife committed during coverture remain intact of legislative interference thus far in this state, and so long as it does remain, there is reason for the liability, whether sufficient or not it is for the legislature and not for the courts to say, and we can not assume that this liability for the protection of society has ceased because a reason therefor no longer exists." In *Taylor v. Pullen,*[8] decided in *Division Two,* the question again arose. This was an action against the defendants, who were husband and wife, for certain slanderous words spoken by the female defendant in the absence of her husband, and without his knowledge or consent. The court briefly reviews the decision of *Nichols v. Nichols, supra,* and concludes, "—we must answer that the husband in Missouri is still liable for the slanders and torts of his wife uttered and committed out of his presence." In *Boutell v. Shellaberger,*[9] decided in *Division One,* it was stated that "the courts of this state consistently hold that, despite our statutes affecting the status of married women, the husband is still liable for the wife's purely personal torts, as at common law." But these remarks were merely dicta, as the real question in this case was the husband's liability for the torts arising out of his management of the wife's separate estate. In *Miller v. Busey,*[10] the Court sitting in *Division Two,* the question came up again in an alienation suit. The decision of the *nisi prius* Court was reversed for several reasons, one of which was a wrong instruction to the jury as to the liability of the defendants, in pursuance of which the Court said that "the instructions should be recast upon another trial in the light of the rule that joint-

[7] 147 Mo. 387 (1898).
[8] 152 Mo. 434 (1899).
[9] 264 Mo. 70 (1915).
[10] 186 S. W. 983 (1916).

tort feasors are to be held liable or not, according as the proof may show them to be guilty or not, and that further but illogical rule that a husband is liable for his wife's torts whether committed in his presence or out of it."

Then the case of *Claxton v. Pool, supra,* was decided by *Division Two* in July, 1917, and overrules the doctrine as held in all of the cases briefly reviewed above.[11] The defendants, husband and wife, were sued for the alienation of the plaintiff's husband, and in the lower court the plaintiff received judgment against both defendants. Mr. Pool was held liable solely on the old common law liability of a husband for the personal torts of his wife. In the upper court, however, the decision was affirmed as to Mrs. Pool and reversed as to Mr. Pool, the latter being held not liable. It is stated in the opinion that the husband's common law liability for his wife's torts was unsuited to our present conditions and opposed to the principle underlying the "married women's acts," and the rule should no longer be recognized as in existence. The case of *Claxton v. Pool,* while it overrules a long line of Supreme Court decisions, does not, however, overrule directly any decision made by the Court sitting *in banc.* As can be seen, all the above cases cited were decided by the Court sitting in one of the Divisions, and the question has never been directly considered by the Court *in banc.* Furthermore, as there is now a statute settling the question and as this statute has been in force for three years, there will probably be no more difficulty.

But the second instance of one of the Divisions overruling a point decided by the Supreme Court is an example of one of the Divisions overruling the court *in banc.* This occurred in *Chitty v. The St. Louis, Iron Mountain, and Southern Railroad Co.*[12] The question was whether the Supreme Court had the power to order a remittitur where the verdict is excessive, as the condition upon which it will affirm a judgment. The question came up before the Court several times, and it is interesting to note that they were all cases of damages assessed against railroad companies. The older cases all hold that the court has the power to order a remittitur.[13] The first case upon this question decided after the court was granted the power to divide was the case

[11] The facts in both *Claxton v. Pool* and *Miller v. Busey* occurred before the Session Acts of 1915 went into effect, hence the statute releasing the husband from liability for his wife's torts unless he would have been liable if the marriage did not exist, had no effect on the decisions in these two cases. Session Acts of 1915, p. 269.

[12] 166 Mo. 445 (1902).

[13] *Loyd v. Hannibal & St. Joseph Railroad Co.,* 53 Mo. 509, l. c. 514; *Waldhier v. Hannibal & St. Joseph Railroad Co.,* 87 Mo. 37 (1885); *Smith v. Wabash, St. Louis & Pacific Railroad Co.,* 92 Mo. 599 (1887).

of *Gurley v. Missouri Pacific Railroad Co.*,[14] decided in *Division Two.* This case was reversed and remanded for a misinstruction to the jury in the *nisi prius* court, and the court added that while it deemed the damages excessive, it was not in favor of granting a remittitur, as the question of damages is wholly within the province of the jury, and that if the damages are too much the only logical course in such cases is to let the verdict stand or set it aside as an entirety. These remarks were, however, merely dicta, as the case was reversed for other reasons; and furthermore the judge did not express whether he considered the court had the power, but merely said that they would not exercise the power "speaking for themselves."

There are then two cases decided within less than a year of one another, the court sitting *in banc* in each case, the first of which holds that the court may order a remittitur and the other case holding otherwise. The first case is *Burdict v. Missouri Pacific Railroad Co.*[15] This was a suit for personal injuries sustained by the negligence of the defendant, and the Supreme Court decided that the damages awarded the plaintiff were excessive and ordered a remittitur by a vote of four to three. The other case is *Rodney v. St. Louis & Southern Railroad Co.*[16] The Supreme Court affirmed the judgment of the *nisi prius* court, and while it deemed the damages excessive, it decided by a vote of four to three that the court did not have the power to order a remittitur. The change in the decisions may be explained by the fact that between the time of trial of these two cases the term of Chief Justice Black had expired, and Judge Robinson, who in the meantime had ascended to the bench, disagreed with the view held by former Judge Black, the former deciding that the court did not have the power to order a remittitur, which changed the vote from four to three *pro* to four to three *contra.*

Finally, in the case of *Chitty v. St. Louis, Iron Mountain & Southern Railroad Co., supra,* decided by *Division One,* the court overruled the Rodney case, decided by the court *in banc,* and came to the conclusion by a vote of three to one that it could order a remittitur. In his discussion on this subject the writer of the court's opinion said, "the cases which deny the power, concede the right of this court to attain the same end by the indirect route of setting aside judgments on the ground that they are, on their face, the result of passion, prejudice or misconduct of the jury, until finally some jury is thus coerced into returning a verdict which this court does not think excessive. As

[14] 104 Mo. 211 (1891).
[15] 123 Mo. 221 (1894).
[16] 127 Mo. 676 (1895).

long as the power is conceded to set aside a verdict otherwise proper, solely on the ground that it is excessive, it must be acknowledged that the proper, expeditious and economical administration of the law requires the error to be corrected in a direct way by remittitur instead of the indirect way above pointed out. . . . For these reasons we hold that the power to order a remittitur in such and like proper cases exists." So, whereas *Claxton v. Pool* overrules decisions held by both divisions prior to that time, it does not overrule any decision of the court *in banc,* as the Chitty Case does. It may be further said, by way of speculation, that the Chitty Case would have been decided the same way if it had come before the court *in banc,* because the three judges of *Division Two* had already expressed their opinions as to remittitur in the Rodney Case. At that time two of them decided against the exercise of the power and one in favor of it; so provided the decisions of these judges would still have been the same, had the Chitty Case been tried before the court *in banc,* it may be said that the decision upon the point of remittitur would still have been the same by a vote of four to three. It is now generally regarded that the Chitty Case lays down the rule as to remittitur correctly.[17]

So, from the wording of the Amendment of 1890,[18] and from the decisions in the above cases, it seems that a division of the Supreme Court is not inferior to the court *in banc,* and that a division may overrule the court *in banc* as to certain rules of law. F. H. W.

[17] *Broyhill v. Norton* (*Division One*), 175 Mo. 190 (1903); *Barnes v. Columbia Lead Co.,* 107 Mo. App. 608 (1904).

[18] *State v. Duestrow* (*in banc*). (Hearing on motion to transfer to court *in banc*), 137 Mo. 44. Court says: "But a division can not be said to be inferior to the court. * * * The court, and the divisions therefore, have concurrent jurisdiction in civil matters."