Syllabus.

PACKET COMPANY *v.* CLOUGH.

1. Under the act of Congress of July 6th, 1862, enacting that "the laws of the State in which the court shall be held, shall be the rule of decision as to the competency of witnesses in the courts of the United States," and under the acts of the legislature of Wisconsin, passed in 1863 and 1868, one of which says that "a party to a civil action . . . may be examined as a witness in his or her behalf on the trial; . . . *and in case of an action for damages for personal injury to a married woman, this section shall be so construed as to allow such married woman to be a witness on her own behalf, in the same manner as if she was single;*" and another of which says that "a party to any civil action . . . may be examined as a witness in his own behalf or *in behalf of any other party,*" a married woman may in the Circuit Court for Wisconsin, in an action on the case by her husband and herself, for injuries done to her person, be examined as a witness for the plaintiffs. It is unimportant whose will be the damages—whether the husband's or wife's—if recovered. The competency of the witness must be determined by the statutes.
2. In an action on the case by a husband and wife, with the regular common-law declaration, for injuries done to the wife's person, and a plea of the general issue, after direct proof has been given of the marriage, the defendants cannot prove either by way of disproving the fact of marriage alleged in the declaration or in mitigation of damages, that the plaintiffs had not lived together and cohabited as husband and wife since a time named (many years before); that it was commonly reputed that they had not lived together, and that there was a common reputation that the alleged husband was living and cohabiting with another woman.
3. When a woman has been severely injured in getting aboard a steamer, by the alleged carelessness of the servants of the boat, in putting out an improper sort of gang-plank, the fact that she is unwilling to pay fare for her passage, and that the captain makes no demand of fare from her, is no release of her right of action against the owners of the boat for the injuries done to her, unless she at the time understands it to be so and consents that it shall be so. This is true even though the passage be one two days and a half long.
4. The conversations of a captain of a steamer with a party injured in getting on his boat, made two days and a half after the accident occurred, in which he attributed the accident to the carelessness of the servants of the boat in putting out the plank, is not evidence to charge the owners of the boat with fault, and this though made while the boat was still on its voyage and before the voyage upon which the injured party had entered was completed.
5. A party who complains of the rejection of evidence must make it appear by his bill of exceptions that if the evidence had been admitted it might

have led the jury to a different result, and that accordingly he has been injured by the rejection. He must therefore have properly before this court the evidence rejected, or some statement of what it tended to prove.

ERROR to the Circuit Court for the Eastern District of Wisconsin.

In January, 1870, Carlos Clough and Sarah, his wife, in right of the wife, sued the Union Packet Company, in an action on the case to recover damages for personal injuries sustained by the wife in consequence of alleged negligence of the company's servants. The declaration was in the regular common-law form: *Plea:* The general issue.

The company, at the time of the injury, was owner of a steamboat employed by it in carrying passengers and freight on the Mississippi River, between St. Paul, in the State of Minnesota, and St. Louis, in the State of Missouri. During the passage downward, the boat arrived at Read's Landing, in Minnesota, at about two o'clock on the afternoon of September 30th, 1869, where she stopped to receive passengers. At that place Mrs. Clough (who was about to go to Davenport, in Iowa, at which place the boat was in the habit of touching), in attempting to go on board, fell from the gangway provided for entrance to the boat, and received the injury for which the suit was brought. Whether the company was guilty of negligence in having failed to provide a proper gangway, or in having failed to keep it in position, was, of course, an important question in the case, and on the trial the deposition of Mrs. Clough was admitted in support of her claim. Exception was taken to its admission.

Whether this exception could be sustained depended upon certain statutes of the United States and of Wisconsin.

Thus, an act of Congress of July 6th, 1862,* enacts that—

"The laws of the State in which the court shall be held shall be the rules of decision as to the competency of witnesses in the courts of the United States, in trials at common law, in equity, and admiralty."

* 12 Stat. at Large, 588.

And a statute of Wisconsin, passed in 1863,* enacts that—

"A party to a civil action or proceeding may be examined as a witness in his or her behalf, on the trial, except in actions in which the opposite party sues, or defends as administrator, or legal representative of any deceased person. *And in case of an action for damages for personal injury to a married woman this section shall be so construed as to allow such married woman to be a witness on her own behalf, in the same manner as if she were not married.*"

Another statute, also passed in 1868,† enacts that—

"A party to any civil action or special proceeding in any and all courts, and before any and all tribunals, and before any and all officers acting judicially, may be examined as a witness in his own behalf, *or in behalf of any other party,* in the same manner and subject to the same rules of examination as any other witness."

After direct testimony had been given by Mrs. Clough that the plaintiffs were married on the 24th day of December, 1845, the defendants proposed to prove by other witnesses that the plaintiffs had not lived together and cohabited as husband and wife since December, 1869;‡ that it was commonly reputed that they had not so lived together, and that there was a common reputation that Carlos Clough was living and cohabiting with another woman. This proof was offered, as alleged, for two purposes,—one, to disprove the fact alleged in the declaration, that the plaintiffs were husband and wife, and the other in mitigation of damages. The court refused to receive it for either purpose, asserting, in regard to the first alleged purpose, that the question of the plaintiffs' relation to each other was not in issue by the pleadings; and, in regard to the second, that the evidence was not admissible in mitigation of damages: that the marriage of the plaintiffs had been proved without objection, and was not controverted by the defendant.

It appeared by the statements of Mrs. Clough that she

* Taylor's Statutes, 1599, § 73.

† Id. 1600, § 74.

‡ The trial was had in April, 1872.

went to Davenport, arriving there in the evening; that she was on the boat two days and a half; that on account of the injury received by her she had been unwilling to pay fare, that the captain demanded none of her, and that she thanked him for the free passage.

In the course of the trial the plaintiffs' counsel asked Mrs. Clough this question:

"What conversation, if any, did you have with the captain *after* the accident, on her trip down to Davenport?"

The question was objected to by the defendant's counsel, but the court overruled the objection, and the answer to the objection was read as follows:

"He said it was through the carelessness of the hands in putting out the plank that I fell; that they did not put out the regular plank, but loose planks. *It was in the evening, before we got into Davenport, that I had the conversation with the captain.*"

The defendant then offered in evidence the *ex parte* deposition of one Turner, taken in Memphis, Tennessee, under the thirtieth section of the Judiciary Act.

The court rejected the deposition because it conceived it not to be properly certified by the magistrate taking it. This rejection made another exception. Neither the bill of exceptions nor anything else contained the deposition, nor any statement of what it tended to prove.

The twenty-first rule of this court, in that part of it relating to "briefs" and "specifications of error," says:

"When error alleged is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, *or copy the offer as stated in the bill of exceptions;* any alleged error not in accordance with these rules will be disregarded."

The judge charged—

"That the consent of the captain not to charge any fare, as testified to by Mrs. Clough, was not a settlement or release of Mrs. Clough's right of action in this case, and would not prevent a recovery unless she so understood it and so agreed at the time."

To which charge the defendant excepted.

Verdict and judgment having been given for the plaintiffs in $6000, the company brought the case here, assigning for error—

1st. The admission of the deposition of Mrs. Clough.

2d. The rejection of the evidence to prove that plaintiffs did not live and cohabit together.

3d. The holding that the marriage of the plaintiff was not in issue under the pleadings.

4th. The holding, because Mrs. Clough had testified that the plaintiffs were married, that the defendant could not disprove the fact by such testimony as was offered.

5th. The charging that the demand of Mrs. Clough, that she should not pay fare in consequence of the injury received in going on to the boat, and the assent thereto of the captain, did not amount to a settlement of her claim for the injury done to her unless she so understood it.

6th. The allowing Mrs. Clough to state, as she did, what the captain had said to her *after* the accident, and on the trip down to Davenport and just before arriving at that place, in regard to the cause of the injury.

7th. The rejection of the deposition of Turner.

Mr. J. W. Cary, for the plaintiff in error:

1. *The court erred in admitting the deposition of Mrs. Clough, if she was the wife of Carlos Clough.*

The judgment in this action, when recovered, would belong to Carlos Clough. The wife, in such cases, is joined as a formal party, but the husband would be entitled to the judgment.* The case, therefore, presents the question, can a wife be a witness for her husband? The question is not whether she is interested in the event, the suit, but as to the policy of the law. If she can be a witness for her husband, she must be competent as a witness against him, and in that case a wife may be called in a suit against the husband and compelled to disclose all the domestic and marital secrets of

* Shaddock and Wife *v.* Clifton, 22 Wisconsin, 114.

the household. We acknowledge the force of the statutes relied on, but these results are so alarming as perhaps to control their interpretation.

2. *The court erred in rejecting the evidence to prove that the plaintiffs did not live and cohabit together as husband and wife.*

(*a*) It was competent evidence, tending to show that such relation did not at the time of the injury or trial exist between the parties. The fact that two persons live and cohabit together as husband and wife is some proof that such relation exists between them. On the other hand, the fact that two persons do not live and cohabit together as husband and wife is some evidence that the relation does not exist. The only evidence in this case that this relation did or ever had existed between the plaintiffs was by one of the plaintiffs. She produced no certificate or record evidence of marriage, but simply her verbal statement that they had been married many years previously. The defendants offered proof by persons who had known them, that they did not and had not lived or cohabited together as husband and wife since they had known them. This tended to prove the absence of a marriage.

(*b*) It was competent evidence to mitigate the damages. As already said this prosecution was for the sole benefit of Carlos Clough. He alone was entitled to the judgment and to the money sought to be collected. The loss and damage which he sustained by the injury was what the jury were to find in that case. Would not this loss be much greater to him if she was a wife with whom he was living and cohabiting, one whom he loved and cherished, than it would be if she was one with whom he had no intercourse or society?

3 and 4. *The court erred in holding that the marriage of plaintiffs was not in issue by the pleadings; and that the defendant could not disprove the fact by such testimony as was offered.*

Their right to join in this action depended wholly upon the question as to whether they were husband and wife. It was necessary for them to allege that fact, otherwise their declaration would have been demurrable. The defendant

pleaded the general issue, which was a denial of every material fact in the declaration; therefore this question was in issue by the pleadings, and was necessary to be proved. If necessary to be proved it was competent for the defendant to adduce evidence to disprove it. It was, therefore, error to hold that it was a fact not in issue.

5. *The court erred in charging the jury that the demand of Mrs. Clough, that she should not pay fare in consequence of the injury, and the assent thereto of the captain, did not amount to a settlement of the claim now set up unless she so understood it.*

Mrs. Clough paid no fare. When called upon for fare she was unwilling to pay, because she met with an accident in coming on board the boat; and her view was assented to. On what principle? Simply as a settlement of her claim for the injury against the company. She used that claim against the company to excuse herself from paying the fare which the captain of the boat had a right to collect. He yielded to her claim and received the consideration claimed. Is she not estopped further to assert it?

6. *The conversation testified to by Mrs. Clough with the captain should have been excluded.*

On this exception we rely confidently.

The accident occurred on the 30th of September, 1869, at about two o'clock P.M. Two and a half days afterwards, just as the boat was nearing Davenport, the alleged conversation with the captain in regard to the accident took place. In the *Milwaukee and Mississippi Railroad Company* v. *Finney*,* a suit against a railroad company, the court below allowed the plaintiff to give in evidence the declarations of the defendant's ticket agent, made after the transaction of selling the ticket was closed. The court held it clearly erroneous, and reversed the judgment, and Dixon, C. J., in disposing of it, quotes Story, J., as follows:

"Where the acts of the agent will bind the principal, then his representations, declarations, and admissions respecting the

* 10 Wisconsin, 388.

subject-matter, will also bind him, *if made at the time*, and *constituting* a part of the *res gestæ*."

7. *The court erred in rejecting the deposition of Turner.*

Messrs. W. P. Bartlett and M. H. Carpenter, contra:

1. *The act of Congress and the statutes of Wisconsin* (*stated, supra, p.* 530) *settle the first assignment of error.*

The court cannot look at those statutes and have doubt as to their potential operation. The courts of Wisconsin apply them to just such cases as this case.* Indeed, this first exception is hardly pressed. The whole force of the opposite argument lies in an assumption, not true, that the husband alone was the party suing. Now, Mrs. Clough was a *necessary* and proper party plaintiff. The injury was to her person. With, in, and by her, the cause of action existed. Without her there was no right of action. She and the meritorious cause coexisted. She was *the* party seeking to enforce her legal remedy for the actual injury practiced upon *her* body. The joining of the husband as a coplaintiff was a nominal thing, to answer a technical requirement of the law. The death of the husband, at any time, could not have defeated the right of action. If it is argued, that in case of a judgment for the plaintiff, Carlos Clough could control the judgment, the answer to that is, that the court, on a proper application, in behalf of Mrs. Clough, would control him, and would see that the proceeds of the judgment were properly applied for the use of the injured person.

2, 3, and 4. *The second, third, and fourth assignments may be treated together and are equally unfounded.*

The action was a common-law "action on the case," for consequential damages—tortious, in form, *ex delicto*. The cause of action is set forth in and by a common-law declaration. The plea is not guilty. That plea puts in issue the *gravamen* of the complaint, the fault or guilty negligence and carelessness of the defendant, and not the relationship

* Barns *v.* Martin, 15 Wisconsin, 246; Shaddock *v.* Town of Clifton, 22 Id. 114.

of the plaintiffs, or the corporate existence of the defendant, or citizenship of the parties. All of these matters however essential are impliedly admitted by the plea of *not guilty*. The existence of the defendant as a corporation might have been put in issue, but it was not; so might the citizenship of the respective parties, but was not; so might the relationship of the plaintiffs, but was not. Had issues on these several subjects been formed, they would have been issues in abatement of the action and not to the *merits*. The defendants elected to plead to the merits, *not guilty*, thereby waiving all formal objections or dilatory pleas. The court well said, that the plaintiffs' relation to each other was not in issue by the pleadings, though to avoid controversy or argument the marriage of the plaintiffs was proved, and that too without any objection.

5. *The attempt to set up the non-payment of fare as a release for the injury.*

The verdict and judgment was for $6000. The injury was of course great. The attempt to release a claim for such injury by non-payment of a few dollars passage-money is hard to support. No captain in common decency could have extorted fare in such a case. The clearest proof of intention to release should have been given if such a pretension was to be supported. The charge was right.

6. *The statement made by the captain in conversation with Mrs. Clough was evidence.*

It was made while Mrs. Clough was still a passenger upon the boat, not having reached her destination. It was competent as a part of the *res gestæ*, and independent of the question whether the admission was a part of the *res gestæ* or not, it was made during the time that the plaintiff was on her journey, and before its termination, and is competent evidence in that view alone. In *The Enterprise*,* Curtis, J., says:

"I am quite sure the practice has been to admit declarations made by the master while in command concerning any matters

* 2 Curtis, 321.

which came under his authority as master, though not part of any *res gestæ* strictly speaking."

In *Burnside* v. *Grand Trunk Railway Company*,* it was held by the court that the statements of the general freight agent of the railway company as to the condition of goods delivered to him for transportation, made while the goods were *in transit*, were admissible in evidence against the company, *although made eight months after the goods were delivered*, and the court says that the only question is,

"Whether at the time these statements were made the contract with the railroad was still in the course of execution, and we think it must be so considered."†

7. *Whether the ex parte deposition of Turner was rightly ruled out this court will not inquire.*

The record nowhere shows to this court what the testimony was which was excluded, nor what it proved or if it tended to prove anything. This omission in the record is of itself fatal under the twenty-first rule, and independently of it. The counsel should show that the deposition contained testimony competent in itself, and which *had it not been ruled out by the court*, would or might have prevented a verdict against the packet company.‡

Mr. Justice STRONG delivered the opinion of the court.

In considering the first assignment of error—that is to say, the question whether on the trial the deposition of Mrs. Clough was rightly admitted in support of her claim, it is unnecessary to inquire whose will be the damages, if any, which may be recovered—whether they will belong to the husband or to the wife. The competency of the witness, or her incompetency, must be determined by the statutes of Wisconsin, where the case was tried. The act of Congress

* 47 New Hampshire, 554.

† To the same effect see Demeritt *v.* Meserite, 39 New Hampshire, 521; Morse *v.* Connecticut Railroad Co., 6 Gray, 450; Burgess *v.* Wareham, 7 Id. 345.

‡ Sewell *v.* Eaton, 6 Wisconsin, 494.

of July 6th, 1862, has enacted that "the laws of the State in which the court shall be held shall be the rules of decision as to the competency of witnesses in the courts of the United States, in trials at common law, in equity, and admiralty." And the statutes of Wisconsin* very plainly declare that the wife is a competent witness for herself in such a case as this. The first assignment of error cannot, therefore, be sustained.

The second, third, and fourth assignments present substantially the same question, and they may be considered together. After direct testimony had been given by Mrs. Clough that the plaintiffs were married on the 24th day of December, 1845, the defendants proposed to prove by other witnesses that the plaintiffs had not lived and cohabited together as husband and wife since December, 1869; that it was commonly reputed that they had not so lived together, and that there was a common reputation that Carlos Clough was living and cohabiting with another woman. This proof the court refused to receive. It was offered for two avowed purposes—one in mitigation of damages, and the other to disprove the fact alleged in the declaration that the plaintiffs were husband and wife. But how, if received, it could have tended to mitigate damages has not been made plain to us. The suit, as the case shows, was for an injury inflicted upon the wife. Surely the injury was the same whether the husband lived with her or not. And the evidence was inadmissible for the other purpose for which it was offered. It is true, ordinarily, the general issue in an action of trespass on the case imposes upon the plaintiff the necessity of proving all the material facts averred in the declaration, but the ability of the plaintiffs to sue is not a fact directly averred, and, therefore, it cannot be disproved under a plea of not guilty. In fact it is not put in issue by such a plea. The defence that the plaintiffs suing as husband and wife are not married goes to the form of the writ, rather than to the

* See statutes of 1863 and 1868, quoted *supra*.—REP.

cause of action, and it should, therefore, be pleaded in abatement, and not in bar. Thus, in Chitty's Pleadings* it is laid down as a proper plea in abatement to the form of the writ that the plaintiffs or defendants suing, or being sued, as husband and wife, are not married. And in Stephens on Pleading,† it is said "the plea of not guilty in trespass on the case operates as a denial of the breach of duty, or wrongful act alleged to have been committed by the defendant. . . . But not guilty will apply to no other defence than a denial of the wrongful act." The general issue at length is that the defendant is not guilty of the grievances laid to his charge, in manner and form as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country, &c.‡ While, since the time of Lord Mansfield, the scope of this issue has been much enlarged, it has not been supposed to extend to a denial of the ability of the plaintiff to sue. In *Combs* v. *Williams*,§ it was ruled that in the trial of an action upon a promise to a feme sole, brought by her husband and herself after marriage, it is not competent for the defendant under the general issue to prove the illegality of the marriage, such matter being wholly in abatement. True, this was in an action of assumpsit, but the general issue is as broad, in such a case, as it is in case for a tort. And if this were not so, even if in the state of the pleadings the defendants were at liberty to prove that the plaintiffs were not husband and wife, they could not prove it by such evidence as that which they offered. Cohabitation as husband and wife may tend to prove marriage, but non-cohabitation has not been accepted as disproving the existence of the marital relation in face of uncontradicted evidence that a marriage in fact had taken place.

The fifth assignment of error is without any foundation. It would be very extraordinary were we to hold that the plaintiff had settled and discharged her claim upon the de-

* Vol. i, page 392.
† Page 160.
‡ 1 Chitty's Pleading, 432.
§ 15 Massachusetts, 243.

fendants without any intention or understanding on her part to give it up.

The next assignment is more important. The accident by which the plaintiff was injured occurred at Read's Landing, in Minnesota, on the 30th day of September, 1869, about two o'clock in the afternoon. Two days afterwards, as the boat approached Davenport, in the State of Iowa, Mrs. Clough, the witness, had a conversation with the captain, in which he made some statements respecting the accident, and these statements the court allowed to be given in evidence against the defendants. In this we think there was error. Declarations of an agent are, doubtless, in some cases, admissible against his principal, but only so far as he had authority to make them, and authority to make them is not necessarily to be inferred from power given to do certain acts. A captain of a passenger steamer is empowered to receive passengers on board, but it is not necessary to this power that he be authorized to admit that either his principal, or any servant of his principal, has been guilty of negligence in receiving passengers. There is no necessary connection between the admission and the act. It is not needful the captain should have such power to enable him to conduct the business intrusted to him, to wit, the reception of passengers, and, hence, his possession of the power to make such admissions affecting his principals is not to be inferred from his employment.* It is true that whatever the agent does in the lawful prosecution of the business intrusted to him, is the act of the principal, and the rule is well stated by Mr. Justice Story,† that "where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, *if made at the same time, and constituting part of the res gestæ.*" A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified, or

* 1 Taylor on Evidence, § 541.

† Story on Agency, § 134.

explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done at a later period.* The reason is that the agent to do the act is not authorized to narrate what he had done or how he had done it, and his declaration is no part of the "*res gestæ.*"

Applying this rule to the present case, how does it stand? The thing of which the plaintiffs complain was negligence, on the 30th of September—a fault in providing for Mrs. Clough's embarkation on the steamer. That, and that alone, caused the injury she sustained. That and nothing else was the "*res gestæ.*" What the captain of the boat said of the transaction two days afterwards was, therefore, but a narrative of a past occurrence, and for that reason it could not affect his principals. It had no tendency to determine the nature, quality, or character of the act done, or left undone, and it is not, therefore, within the rule stated by Judge Story. That rule has been recognized "*in totidem verbis*" in Wisconsin by Chief Justice Dixon, in delivering the opinion of the court in *The Milwaukee and Mississippi Railroad Company* v. *Finney*.† And there is nothing in any of the decisions cited by the defendants in error inconsistent with such a rule. The case of *The Enterprise*, cited from 2d Curtis, was a suit in admiralty for subtraction of wages, and the declarations of the master respecting the contract with the seamen were admitted, though not a part of the *res gestæ*. But the decision was rested upon the ground that the admiralty rule is different from the rule at common law. The case of *Burnside* v. *The Grand Trunk Railroad Company*, cited from 47 New Hampshire, simply decides that the statements of the general freight agent as to the condition of goods delivered to him for transportation made while the goods are still in transit, or while the duty of the carrier continues, are admissible in evidence against the company. This was a case of contract not executed, and, while it remained unexecuted, the agent had power to vary it; had, in fact, com-

* 1 Taylor on Evidence, § 526.

† 10 Wisconsin, 388.

plete control over it. The transaction was still depending, and the agent was still in the execution of an act which was within the scope of his authority. But in the present case the declarations admitted were not made in the transaction of which the plaintiffs complain, or while it was pending. They refer to nothing present. They are only a history of the past.

It is argued they were made before the voyage upon which Mrs. Clough entered was completed. True, they were, but they were not the less mere narration. The accident was past. The injury to Mrs. Clough was complete. The only wrong she sustained, if any, had been consummated two days before. We cannot think the fact that she had not arrived at her port of destination is at all material. If she had left the steamer before the declarations were made it is not claimed, as certainly it could not be, that they were admissible. Now, suppose two persons were injured by the negligence which the plaintiffs assert, and one of them had left the boat before the captain's declarations were made, clearly they would have been inadmissible in favor of the person whose voyage had been completed. This is not denied. Yet the connection between them and the accident would be as close in that case as in this. Can they be admissible in the one case and not in the other? Assuredly not. We must hold, therefore, that there was error in admitting in evidence the statement of the captain of the steamboat made two days after the wrong was done of which the plaintiffs complain.

The last assignment of error is the rejection of the deposition of Turner. Of this it is sufficient to say that we have not before us either the deposition or any statement of what it tended to prove. We cannot know, therefore, that it was of any importance, or that, if it had been admitted, it could have had any influence upon the verdict. A party who complains of the rejection of evidence must show that he was injured by the rejection. His bill of exceptions must make it appear that if it had been admitted it might have led the

jury to a different verdict. This must be understood as the practice in this court, and such is the requirement of our twenty-first rule. By that rule it is ordered that when the error assigned is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions. This is to enable the court to see whether the evidence offered was material, for it would be idle to reverse a judgment for the admission or rejection of evidence, that could have had no effect upon the verdict.

But for the reception of the statement made by the captain, shortly before the arrival of the boat at Davenport, the judgment must be reversed.

JUDGMENT REVERSED, and a

VENIRE DE NOVO AWARDED.

EXPRESS COMPANY *v.* WARE.

1. This court will not examine evidence to ascertain whether a jury was justified in finding, as it has done, on an issue of fact.
2. Where a statute of limitation enacts that a defendant's absence from the State will prevent its running, but that "in the case of a foreign corporation, if it has a managing agent in the State, service of the writ may be made on *him*," on a question of fact arising in a suit brought more than five years after the cause of action had accrued, whether the defendant did or did not have a managing agent for the State prior to the time when the suit was brought, it is proper to charge that the time during which the plaintiff was disabled from suing by reason of defendant having no managing agent in this State is not to be counted as part of the five years' limitation period.

ERROR to the Circuit Court for the District of Nebraska; the case being thus:

The Code of Nebraska bars actions upon contract in five years. The defendant's absence from the State is not, how-