On this special verdict the judgment for the plaintiff would be $1,365, the issues all being found in his favor, except the set-off allowed by the jury to the extent of $285.

George Gillham, (*John D. Martin* with him,) for plaintiff.

Taylor & Carroll, for defendant.

HAMMOND, J. The only ground for a new trial, which is pressed with serious confidence by the counsel for the defendant, is the error assigned in charging the jury that the president of the company had authority to employ additional counsel in the litigation against the company, especially in the Bills case. It is frankly conceded, as it must be, that, as between the attorneys employed and the company, the president might bind the corporation to the employment without any contract under seal, or other formal action, by the directory. *Bank of Columbia* v. *Patterson*, 7 Cranch, 299; *Osborn* v. *Bank*, 9 Wheat. 738; *Alexandria Canal Co.* v. *Swann*, 5 How. 83, 89; Weeks, Attys. 333, § 190; Boone, Corp. § 144; *Memphis* v. *Adams*, 9 Heisk. 518.

But it is insisted that, as between the president himself and the company, in a suit for damages, or where his wrongful use of the money of the corporation is challenged, as by this plea of set-off, the rule of decision is different, and that his action must be measured alone by his powers under the charter and by-laws. It is argued that the charter and by-laws of the company provide a directory to manage its affairs, and an executive committee; that there were monthly meetings, and power in him, as president, to call special meetings when occasion required. Unquestionably, the plaintiff should have taken the course indicated by this argument, particularly under the circumstances of that Bills case, and it is never safe for a president or other officer of a corporation to assume the responsibility that he did, except in an emergency—which did not exist in this case—that renders it unwise to delay action until the corporate management can be consulted and its judgment invoked. He makes himself liable for damages if he does so act without corporate authority. *Stokes* v. *New Jersey Pottery Co.* 46 N. J. Law; S. C. 24 Amer. Law Reg. 75. He is not, however, liable, unless his action results in injury to the company; and the courts do not proceed upon any theory of punishment for not consulting the corporate management. When the question arises, either in an action for damages or by plea of set-off, the law will not mulct the president in damages or withhold what he has justly earned, simply because he has not pursued the charter and by-laws. If he did only what the directory might and should properly do, and his action has resulted beneficially and not injuriously, why should he be liable for damages? At most, the damage could be only nominal to vindicate the law, and certainly he should not be made to pay where there was no injury to the company. Now, this is precisely the question the court submitted to the jury, and it approves their verdict. They were told distinctly that, if Davis was using the money

for the fraudulent purpose of paying his own counsel, in a litigation in which the company had no interest, or if it was an unwise, wasteful, and unreasonable use of the money, the defendant's set-off should be allowed. It was a question alone for the jury, and their decision should be final.

On a motion for a new trial, the court cannot set aside the verdict of a jury because it does not like it, or would have found the facts differently. It will protect the parties against misconduct or prejudice on the part of the jury, but will not usurp its function, under the disguise of determining whether the verdict is against the weight of the testimony. *Kirkpatrick* v. *Adams*, 20 FED. REP. 287. But the court is satisfied with this verdict, and does not think it contrary to the evidence. There was a factional strife between the minority and majority stockholders. The minority sued the directory for damages for maladministration. One of the directors, Barrett, joined with the plaintiffs in that case against his co-directors. The Davis faction represented the majority; the Barrett faction, the minority. Davis bought the Bills' stock, and Barrett continued the litigation with a cross-bill. The learned chancellor decreed against the directors, including Barrett himself, for large personal liabilities, and thereupon the parties, as they had a right to do, representing the whole body of the stockholders, compromised that litigation without entering a decree. It may be very doubtful, since the parties to that suit represented the entire stock of the company, whether it is precisely correct to say that the company—that entity we call the corporation—had any further or separate interests in the controversy. Perhaps it did in the interest of creditors; but, at all events, in such a struggle it would have been wiser if the directory had employed counsel to represent the company who were wholly independent of either faction. Still, while this was not done, and both the regular and associate counsel seem to have also represented the Davis faction in the litigation, the court cannot see that, on the proof, this resulted in any injury to the creditors, the only outside parties to the contest, or to the corporation itself; and, doubtless, the jury took the same view of it. The argument that it did so result in its ultimate analysis comes to this: that the best interest of the company laid in the direction of an alliance with the Barrett faction, and not the Davis faction, and that it is by this test we must determine whether the money paid to Humes & Poston was paid in the interest of the company; and this is the contention actually made before the jury and on this motion for a new trial.

There are several answers to this: *First.* While it is true the chief object of that litigation was to hold the directors to a personal liability, it was not alone against Davis that this remedy was sought, but as much against Barrett himself. And, in fact, the chancellor's opinion held him to a large liability, and but for the compromise he would have had it to pay the same as the rest. An alliance with