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

him, therefore, was subject to the same objection as the other: that the company was acting as the partisan of a particular stockholder. *Secondly.* Davis and his friends owned a majority of the stock, and were in possession of the control, rightfully so. It belonged to the directory, acting by its own majority and under its responsibility, in this matter as in others, to determine where the best interest of the company lay, and to shape its corporate part in the litigation accordingly. This discretion belonged to it under the charter, and the courts cannot control it or supervise it. 3 Pom. Eq. §§ 1088–1097, and notes. Surely, not in this suit and on the issues we have here could we be required to exercise that function if it exists anywhere. *Lastly.* We have nothing to do with the test suggested. We cannot be required to overhaul the record in that acrimonious and immense litigation, so important in its character to all concerned, to determine whether the corporate action should have allied the corporation with the one faction or the other. Naturally, that alliance would go to the majority rather than the minority; and, now that the control has changed, we cannot go back and undertake to determine whether it should not have been made with the rival faction in the interest of the entire company. If so, the entire company must suffer for the error in judgment of the directory. It is useless to argue now that the minority were right in the litigation and the majority wrong. It has been ended, and the parties have compromised it. It may have been better, as is now argued, to have had a receiver, as the minority wanted, and to have sustained the injunction against the directory, as the minority wished it, but the able chancellor did not think so, and, if we were willing to review his action, we have not the power, under the circumstances, to do it. The creditors are the only parties who would have a right to complain, and now that the stockholders *inter sese* have compromised that litigation, they, being able to take care of themselves, are not here making complaint, if indeed they could make it anywhere.

It has constantly suggested itself to the court, since this question was first agitated in the case, that the last consideration was an end of this branch of the defense, and that the compromise between the stock-holders, after Chancellor MORGAN's opinion, closed all questions arising out of the controversy, and that the company's liability to pay its share of the attorney's fees could be no longer mooted; yet the court submitted the question to the jury as if that compromise had never been made, in deference to the very cogent reasoning of the defendant's counsel that Davis' whole conduct about this business was open to investigation in this suit for his salary. But the only proper question was that submitted to the jury; and, inasmuch as it abundantly appeared from the proof that the minority had not confined themselves, in their litigation, to seeking a personal liability from the directors for maladministration, but had gone further and involved the company itself, by enjoining the management from issuing bonds

to pay its debts, and for other purposes of corporate enterprise, and by applying for a receiver to oust that management entirely, there could be no doubt of the company's liability to pay the lawyers for preventing those things, useful though we may now think them to have been if we think with the then minority, or disastrous as they would have been if we think with the then majority.

It was their own fault thus to involve the company in the litigation, and the minority cannot complain at the payment of the fees. True, the company was a necessary party in any view, but would have been only nominally a party if the litigation had been confined to its personal features against the directors, and in that event, of course, Davis would not have been authorized to pay counsel fees on its account. But it was not so confined, and the jury decided correctly. A question has been made that the company already had counsel in its regular employment; but that was also submitted to the jury, whether under the circumstances of the magnitude of the case and its character, it was reasonable to associate counsel with the regular attorneys. The jury approved it, and so does the court. Again, the whole body of directors were defendants, and must have known of this employment of additional counsel, and who were representing the company. A few weeks after the suit was brought, there were some changes in the directory, and two of the new directors testified they knew of the employment of Humes & Poston,—one that he advised it, and the other that he approved it. This was acquiescence and ratification, and now, the fact that there has been an entire change in the control of the company does not confer the right to revoke that corporate action by disapproval and refusal to pay the compensation of the counsel.

The motion for a new trial must be overruled, and a judgment entered on the special verdict for the plaintiff. So ordered.

MILLER and others *v.* RIDGELY.

(Circuit Court, W. D. Tennessee. February 6, 1885.)

NEGOTIABLE INSTRUMENTS—PROMISSORY NOTES—IRREGULAR INDORSEMENTS.

A blank indorsement, by a stranger to the note, made before delivery to the payee, to secure to him a pre-existing debt of the maker, and extend the time of payment, binds the indorser as a joint maker under the rule of the supreme court of the United States, and as a guarantor under the rule in Tennessee and Texas, where the parties respectively resided. The perplexities of the law on this subject considered, and the opinion expressed that the confusion would have been avoided by adherence to the common and commercial law of England, by which the indorser would be held liable as between him and one subsequently taking the note from the payee, but as between the original parties, only as a guarantor, which latter liability would fail because of the statute of frauds.

FINDING OF FACTS BY JUDGE HAMMOND.

This case is submitted without a jury, under the statute. The criticisms of some of the proof by counsel of both parties is plausible enough, but it is unnecessary to consider the evidence with any detail in reference to that criticism. Probably each party has stated his testimony, as is usual with interested witnesses, in the most favorable light possible for his side. But, after all, there is no conflict of *evidence* in the testimony of the parties themselves, though there is a very radical conflict of *theory*, which at last is only the troublesome one of *law* that always arises in cases like this, be the facts what they may. Neither Miller nor Ridgely testifies to any fact within the knowledge of the other, for they were separated many hundreds of miles, and the transaction between them was a very simple one, had through an interested intermediary whose testimony was impeached, not by direct proof of untruthful character, but by evidence to contradict his statements of the facts, and was supported by evidence of his good character, taken subject to exception. Whatever may be the rule elsewhere, I am inclined to think that in Tennessee the evidence is admissible. *Richmond* v. *Richmond*, 10 Yerg. 343; Stevens, Dig. "Evidence," 189, and notes. But it is immaterial here, for reasons that will presently appear, to decide this point.

The testimony of this witness corroborates that of the defendant, and, if he tells the truth, the plaintiff's statement of the facts is contradicted. But the plaintiff and defendant can be perfectly reconciled in their respective statements on the theory that this doubtful witness has deceived them both, which I believe to be the fact. This accounts for the peculiarities of the case, and in no other way can the conviction be escaped that either the plaintiff has sworn falsely, or both the defendant and this witness have done so.

The defendant is known to the court, trying this case without a jury, as he would be to any jury of this county, and possibly of the district, as a man of such character that he is not likely to swear falsely, and the court assumes that the plaintiff is of the same standing where he lives. His statement, so far as it relates to the intention *he* had that the defendant should pay this note at maturity, if not then paid by Bond, is consistent with the ordinary course of business in such transactions as this, and with his actions in relation to the note. Long before it became due, he wrote to the defendant, asking him to pay it at a discount; and he sent it forward for collection *of the defendant*, at maturity, having been informed by letter from Bond that he could not himself pay it. It is true that a thoroughly dishonest man, under the obligations of a contract such as Ridgely intended to make and supposed he was undertaking, might take advantage of the fact that the contract was not in writing, and of the implications of law in favor of blank indorsements, and act as the plaintiff did, notwithstanding the true nature of the contract; and if

Bond tells the truth, this is what the plaintiff has done, and there are some slight circumstances tending to corroborate this view, if it be assumed in advance that the plaintiff was dishonest enough to adopt that scheme. But these circumstances are also reconcilable with an honest purpose. Thus, if it be true that the plaintiff supposed Ridgely was liable as maker, or guarantor or "surety," on the note, as he puts it, there was no reason for proceeding to protest it as if Ridgely was an indorser. He speaks of it in his two letters to Ridgely as an *indorsement,* and it is so termed in correspondence with the bank at Memphis; and he evidently thought of and treated the liability as that of an indorser. Again, if the plaintiff intended, as he testifies, that Ridgely should sign the note on the face as maker jointly with Bond, and with that intention used the pronoun "we" in the note, it is somewhat singular that, when it was delivered to him with only Ridgely's indorsement thereon, he did not return it to be properly signed according to his contract with Bond, and, being a banker, the plaintiff might be supposed to know of the difficulties attending such irregular indorsements. And the suspicion here is somewhat strengthened by the fact that Bond kept his account with him as "C. H. Bond & Co.," and the pronoun "we" would be grammatically as necessary in a note to be given in that name as it would be if Ridgely were also expected to sign it as maker.

But it must be remembered in this connection that mere prudence might dictate to a banker, holding such an irregular indorsement, to fix the liability in that capacity by demand and notice of protest, even if he knew or believed that the liability was a fixed one without such protest. Again, the use of the pronoun "we" is not inconsistent with an intention that Ridgely should be maker; and the most that can be said is that the force suggested by its use in establishing the intention to which the plaintiff swears, is broken by the fact that without such intention he would also have used that pronoun. Moreover, Miller does not swear that it was agreed by Bond and himself that Ridgely would sign on the face of the note as maker, but only that such was his own intention; the understanding between him and Bond being that Bond's uncle "would go on the note to secure us." He nowhere says that there was any distinct agreement between them as to the character of the liability.

The truth is, I have no doubt, that no one of the parties to this transaction had the least conception of the difficulties arising out of irregular indorsements, or intended this to be of irregular character. Ridgely, no doubt, intended to *indorse* the note, as perhaps with the rarest exceptions—as when a maker for want of room on the face writes his name on the back—almost every man does who writes his name in blank on the back of a note; and Miller, who had an old debt on an insolvent man which he was anxious to secure in any form, was not particular as to the precise character of that security. He no doubt expected, after the usual custom with country banks, to have

the "surety" sign the note jointly with the maker, but was glad enough to get the signature in any form, and hence did not return it to have his own intention complied with, supposing that by regular demand and notice of protest he could fix the liability as indorser and save his debt, not knowing till the matter came into the hands of the lawyers that there was difficulty in that treatment of the transaction. On the other hand, Ridgely was just as ignorant as Miller of the true legal effect of what he was actually doing. He does not pretend that he did anything but indorse the note, and nothing was further from his intention than becoming a maker jointly with Bond. He had been informed by Bond that Miller had agreed to extend further banking facilities for a year to enable him to pay the note, and that Miller had promised not to call on him for payment unless Bond should die without paying it. He indorsed in the belief that he had made that contract; an anomalous one, to be sure, but the defendant is just the man to make it and to refuse any other. The mistake he made was in not writing it over his signature.

The suspicions urged against this testimony, like those against the plaintiff's, may be disposed of in the same way. It is unfortunate that the correspondence between Ridgely and his nephew, by which this transaction was carried on, is not produced. But the defendant accounts quite satisfactorily for the loss of the letters he received. He is one of a firm of merchant tailors; these letters did not go upon the files of the firm, for they had no business there. His habit was to place his individual letters in the "button-drawer" of the table at which he worked, and in cleaning up they were thrown into the fire, the importance of keeping them not occurring to him; and Bond, in his numerous removals, since he left Texas, has lost or mislaid the letters to him. He fully corroborates his uncle as to the contents of the letters, but as to negotiations with Miller, he is contradicted by wholly disinterested witnesses, who heard what occurred. He seems to have produced at the bank one of the letters from his uncle, and to have stated its contents. It was not read by Miller, or those present, and only in part by Bond. These witnesses testify that neither in the negotiations between Miller and Bond about the note, nor in his report about his uncle's letters, was anything said of Ridgely's not being liable, except in case of Bond's death, or about an extension of bank facilities for another year, but only, in a general way, that his uncle would "go security" on his note. None of the other witnesses in this case is contradicted, or otherwise impeached; and, while those offered to support his character all swear it was good, and that they would believe him on oath, there are indications that before this transaction, and while he lived in this city, his reliability as a witness was talked about, if not questioned, by those who had occasion to speak of it. At the time this note was given, he was in very straitened circumstances, caused by speculations in cotton futures, some of which were concealed from his bankers, and was very anxious