

Albert Wiley

v

Error from Douglas County

Kentucky.

Affirmed

Syllabus

By the Court Kingman C.J.

1. A person who had served as a talesman in the trial of a cause at the same term of the court was placed on the regular panel in place of a juror excused. He was challenged by defendant because of his ~~having once~~ ~~seen~~ previous service as talesman. The court overruled the challenge, and he was then challenged peremptorily.

Held, That the court erred in overruling the challenge; but inasmuch as the record does not show that the defendant exhausted his peremptory challenges ~~as ^{the judgment} ~~was~~ ~~made~~~~ will not be ~~ordered for~~ reversed for an error which was cured by the action of the defendant.

2. It is not error to charge that an illegal act has been committed by the defendant, where the answer of defendant admits facts that show he did certain acts which must be held illegal.

3. It is not error to charge the jury that they are authorized to give exemplary damages when the elements of fraud, malice, gross negligence, or oppression mingle in and form

501

Alfred Pryke.

Re-o-Rick.

By Lakes.

Slide May 10th 1870

C. B. Norton,

Clark.

part of the cause of action

Safford J. concerning

Be it Remembered, THAT heretofore, to wit, on the 19th
day of ~~December~~ ^{Albert Wiley one of the Defendants in the case of} A. D. 1869, and at the ~~Keechuk~~
~~Chief of the~~ ^{Sac & Fox Indians - against}
~~Charles E. Mix et al~~ Term of the District Court, sitting in and for Douglas
County, State of Kansas, among others, the following proceedings were had, to wit:

filed in the Office of the Clerk of
the District Court of Douglas County
his certain ^{for the Supreme Court} Made Case, against ~~Keechuk~~
~~Wiley et al~~ which said ^{Made Case} is in words as follows
viz:

Keechuk chief of the
Sac & Fox Indians Plff }
against } Civil Action
Charles E. Mix, Thomas
Murphy, Albert Wiley }
Thomas Darwin & }
William D. Montgomery Defts }

In the District Court of Douglas Co. Kan.
The said plainiff on
the 19th day of December A. D. 1869
filed in office of the clerk of said
District Court his petition the body of
which is as follows.

The said Keechuk plainiff complains
of the said defendants Charles E. Mix
Thomas Murphy, Albert Wiley
Thomas Darwin and William D.
Montgomery for that the said defen-
dants on the 23rd day of November

A.D 1868 at Lawrence in the County
of Douglas unlawfully and with
force assaulted the said plaintiff
and beat bruised wounded and
ill treated him and then and there
imprisoned him and kept and
detained him in prison in the
County Jail of Douglas County amongst
a lot of thieves and other vile char-
acters without any reasonable or
probable cause whatever for the
space of one night and two days
next following and other things
then and there did to the said
plaintiff to the damage of the said
plaintiff Ten Thousand dollars
Wherefor the said plaintiff prays
judgment against the said defendants
for the sum of Ten Thousand dollars
(\$10,000), his damages so aforesaid
sustained.

On the 15th day of February A.D 1869
the defendant Albert Wiley filed
his answer in said case the body
of which answer is as follows.

1st def. And now comes the said Albert
Wiley one of said defendants and
for a separate answer to the

plaintiff's petition says that he denies each and every allegation therein contained.

2^d def. And the said defendant for a second defense to the plaintiff's petition says that on and prior to the 23^d day of November A.D. 1868 he was the United States Indian Agent for the Sac & Fox Indians in the State of Kansas and for a long time previous thereto he had acted as such; That the said plaintiff is one of the Indians of said tribes and pretends to be a chief of said Indians and on the 23^d day of November A.D. 1868 and for a long time previous thereto resided on the lands of said tribes in the County of Franklin in the State of Kansas. That on or about the 26th day of October A.D. 1868 this defendant as such Indian Agent received from the said Thomas Murphy who then was the United States Superintendent of Indian affairs in the State of Kansas an order of which a copy is hereto attached marked "A" and made a part of

this answer. This defendant further says that with said order he received a copy of an order given by Charles C. Mix who was then the acting Commissioner of Indian Affairs for the United States which order is dated October 16th A.D. 1868 a copy of said order is hereto attached marked "B" and made a part of this answer. That by the terms of said order this defendant as such Indian Agent was required to prevent any Indians of said Tribes visiting Washington D. C. and was required by the order of said Murphy to notify said Murphy if any Indians of said Tribes intended visiting said city of Washington. That on or about the 16th day of November A.D. 1868 this defendant caused the above mentioned orders to be read to the plaintiff and other Indians of said Tribes. That on or about the 19th day of November A.D. 1868 this defendant informed Thomas Murphy that said plaintiff with others contemplated visiting the city of Washington in violation

of the order of the said Charles C. Mize above mentioned, and the said Murphy then as such superintendent of Indian affairs did then order and require this defendant in case said plaintiff should leave the Reserve of said Indians in said county of Franklin for the purpose of going to Washington to cause him to be arrested and put in jail or returned to his Reservation.

That on or about the 22nd day of November A.D. 1868 this defendant was informed that said plaintiff with others had left said Reserve in said county of Franklin and was then in the city of Lawrence Douglas County Kansas on his way to the city of Washington D.C. in violation of said order above mentioned; That this defendant on said day went before Hon. William P. Montgomery who then was the United States commissioner for the District and State of Kansas and made an affidavit in writing a copy of which is hereto attached marked "C" and made a part of this answer and that on the same day he gave his testimony

as a witness on the hearing of said complaint before said Commission against the said plaintiff, That the above is a full statement of all that this defendant had to do with said plaintiff or the arrest assault or imprisonment of the said plaintiff. That this defendant did not arrest touch or imprison said plaintiff, or in any manner interfere with him, and all he did as in the premises was strictly in accordance with the instructions and orders he had received as above mentioned and which this defendant as an officer of the United States was bound by law to obey.

He therefore this defendant asks judgment against the said plaintiff for his costs and that said suit as against him may be dismissed.

Copy of Order mentioned in the aforesaid answer marked "A" and make a part of the same.

Office Supt Indian Affairs

Nebraska Kansas Oct 23^d 1868

Sir. I transmit herewith for

your information and Government
 a copy of a letter of the 16th inst. from
 Hon Charles C. Mix actg Commissioner.
 You will do all in your power to
 have the instructions of the actg
 Commissioner carried out and should
 any delegation from your tribe con-
 = template visiting Washington without
 special instructions from the Depart-
 = ment you will promptly advise
 this office. Very Respectfully

"Simonas Murphy"
 A. Wiley U. S. Indian Agent
 & for agency Kansas.

Copy of Order mentioned in said
 answer marked B and made a part
 thereof.

Department of the Interior, Office
 of Indian Affairs Washington D. C.
 Oct 16th 1868

Sir, I have to advise you that
 as Congress failed to make certain
 appropriations from which the
 expenses of delegations of Indians
 visiting this city have heretofore
 been paid. No delegation from
 any of the tribes in your super-

= interdependency will be allowed to visit this place during the present fiscal year unless specially directed to do so by this office for the reason that there are no funds at the disposal of the Department that can be used to defray their necessary expenses. You will inform the different Agents under you of the foregoing and take such other steps as prevent any Indians coming here as may be necessary to accomplish the object.

Very respectfully

Thomas Murphy (Charles C. Smith
Supt Ind affairs actg Commissioner
Atchison Kansas)

Copy of Affidavit mentioned in defendant's answer marked "C" and made a part thereof.

United States of America.

District of Kansas. S. D.

The complainant Albert Wiley of Franklin County who being duly sworn says that KesKuk a Sac & Fox Indian late of the Sac

& Fox Reserve in said District
heretofore to wit: on the 23rd day of
November A D 1868 at said Reserve
in said District did leave said
Sax & Fox Reserve and did disobey
the orders of the United States
Commission of Indian Affairs and
the orders of other agents of the
United States to him given contrary
to the laws of the United States in
such case made and provided.
Wherefor complainant prays that
the said Res Kuk may be apprehen-
= dered and dealt with according
to law. Albert Wiley

Taken Subscribed and sworn to
this 23rd day of November A D 1868
before me W. P. Montgomery
U. S. Commissioner for
the District of Kansas

On the 6th day of May A D 1869
the said plaintiff by his attorney
appeared in Open Court and
dismissed his suit without pre-
= judice as to the defendants Charles
C. Nix, Thomas Dorrin and W.
P. Montgomery and continued the

case as to Thomas Murphy
and the case against said Albert
Wiley came on to be tried on the
said petition of said plaintiff &
answer of the said defendant
Albert Wiley. Whereupon a jury
was called to try the issue in
this case and upon the trial of
this action and in the course of
the unpunishing of the jury one
Walter Willis was called as a
juror and was challenged by
the defendant's counsel for cause.
The cause of challenge given by
the defendant's counsel being that
the said Walter Willis had
served once already on a jury
as a talesman on the trial of
a cause in said court during
the term thereof then being holden
and the said Walter Willis on
being challenged as aforesaid
then and there stated in open
court that he had so served
as a talesman and which fact
was then and there proven by
the Record of the Court and
admitted by the court and the

Counsel for the plaintiff. It also appeared that at the same term of said Court and after said Walter Willis had served as a talesman as aforesaid that said Willis had been duly summoned as a juror upon a special venire to fill a vacancy in the regular panel of jurors for the term and that he was then in attendance as a regular juror. The Court thereupon decided that the said Walter Willis was a competent juror to try said cause and overruled the challenge of defendant's Counsel of the said juror for the cause aforesaid, to which decision and ruling of the Court the defendant by his counsel then and there duly excepted, at the time of said challenge by the defendant said defendant had not exhausted his peremptory challenge and that said Willis was after challenged peremptorily by defendant and did not sit as a juror.

A full jury was then impanelled in said action to try said case in said District Court and were

duly sworn to try said cause.
and on the said 6th day of May
A.D. 1869 said action came on for
trial before said court and jury.
Whereupon the plaintiff to main-
tain the issue on his part in-
troduced the following testimony.

Wilson Shannon was sworn and
testified as follows. The defendants
Albert Wiley came to me and said
that the Indians had counsel and
that he wanted counsel in the case
before the Commissioner Montgomery.
He wanted me to act as such
attorney in the case. When I went
to the office of the United States
Commissioner I found that the
case was up for hearing. Captain
Christian appeared for the
Indians and I appeared at the
instance of Wiley for the
Wiley told me that he was
acting as the agent of the Sac &
Fox Indians and claimed that
he was then acting as such
agent.

William P. Montgomery was

sworn and testified as follows.
I was present at the examination
of Keo Kuk and the other Indians
before the commission. The
examination was before me. There
was something said about the
Indians not giving bail and
Wiley the defendant said "then
they will have to go to jail" He
might have said "send them to
jail" Wiley had testified before
Captain Christian came in. I did
not discover any thing very
remarkable about Wiley's manner.
he may have been excited some-
what. Mr Christian came in
after the examination had pro-
ceeded some way and announ-
ced himself as attorney for the
Indians under arrest and as Keo
an interview with the Indians
and called Keo Kuk out of the
room. Mr Dorrin (United States
deputy Marshall) objected to
Keo Kuk and the other Indians
going with Mr Christian unless
he accompanied them I think
Mr Wiley also objected. I am
not positive as to Mr Wiley

objecting: ^x I told the Mar. hall
to let Mr Christian have a
private interview. he was permit-
= ted to have such interview.
When Mr Christian with his
clients the Indians came into
the room after the interview
mentioned I informed Mr Christian
that Mr Wiley had been sworn
and examined already and that
he could ask any question he
chose. I cannot now remember
whether Mr Christian asked any
question. my best recollection is that
he based his defence on the legal
question at issue and no witnesses
were examined after Gov Shannon
came in and after Mr Christian
for the Indians came into the case,
when I announced my decision
that the Indians would be bound
over to Court there was a good
deal of confusion in the room. Mr
Christian and Mr Powers the
interpreter advised the defendants
(the Indians) not to give Bail. Mr
Wiley said then they would have
to go to jail or some thing to that

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effect I issued no order then to send them to jail. I issued an order that the Marshall take charge of defendants the Indians and give them an opportunity to get bail if necessary allowing them to go to the Six & Fox Reserve. All the parties soon left my office. I afterwards reviewed the order I made to writing and delivered it to the Marshal Brown. During the progress of the examination of the Indians before me defendant Wiley bore an active part and was much in earnest:

Andrew Barnes was sworn and testified as follows. On the 23^d day of November A D 1868 I was keeping the jail for Sheriff Walker. I received Keokuk and the other Indians at the jail. There were at the time both white and colored prisoners at the jail. There was one confined for Burglary one for Robbery and some for city offences. The deputy Marshall brought the Indians to the jail about dark

and they remained there until 9 or 10 o'clock the next morning.

The prisoners had their supper and were locked up in the cells before the Indians came. I locked the Indians up in the hall of the jail and gave orders to the prisoners not to annoy or molest them. There was no obscene or offensive language or loud talk by the other prisoners while the Indians were in jail and nothing that would offend them or wound their feelings. Mr. Dornin brought the Indians to the jail and took them away again. They were not in jail more than twelve hours.

James Christian being sworn testified as follows. I was called upon on November 23rd A.D. 1868 by these Indians to act as their counsel. I went to the office of Mr. Montgomery and asked for a consultation with the Indians. Dornin and Wiley objected to their going out unless they went with them and heard what was said. Mr. Montgomery ordered

that they should have a chance to counsel with me. I did not see any one touch them except Dornin, Wiley did not touch them. I instructed them not to give bail, Wiley then said I want them put in jail. He insisted that they should go to jail, Wiley was very much excited I am the attorney for the plaintiff in this action.

Henry Jones being sworn testified as follows. There are about 700 Indians in our tribe (the Sac & Fox) Kes Kuk is the chief. He is the Government Chief our people think more of him than they do of a common Indian.

Kes Kuk plaintiff being sworn testified as follows. I was arrested about this time of day. I was going to Washington on business. I was going on my own business and expected to pay my own expenses, I am a chief of the Sac & Fox Indians. My business was to try to get the Indians to be like white men. I received pay from the government for my services as chief. I was going to Washington to see about

the trade and about other business for the Indians." The plaintiff then read as evidence for his part the following agreed statement of facts.

It is agreed and admitted on the part of the plaintiff that Albert Wiley the defendant sworn on the trial before W. C. Montgomery that he had verbal instructions from Superintendent Thomas Murphy to arrest Kes Kuck and party should they attempt to go to Washington and it is admitted that if put upon the stand as a witness he would swear so again and it is admitted for the purposes of this trial that he has so sworn and it may so go to the jury. It is also admitted that the letters offered in evidence purporting to be from Charles E. Mix acting Commissioner of Indian Affairs & from Thomas Murphy Superintendent of Indian Affairs are genuine and that they may be read in evidence to the jury as though properly authenticated. It is also admitted that Major

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Albert Wiley read said letters on the purport of them to Res KKK a few days previous to his departure for Washington - and told him that he would arrest him if he attempted to leave the Reserve and go to Washington and that in reply Res KKK told him that he had money to pay his own expenses that he did not ask the Government to pay his expenses and that he was going - and that he did start for Washington on the 23^d day of November 1868. It is admitted on the part of Albert Wiley that he came to Lawrence and made the affidavit on which Res KKK and his party were arrested. It is also admitted that he gave evidence on the trial before S. C. Montgomery U. S. Commissioner and Hon D M. Valentine District Judge and that he employed counsel to prosecute the same.

James Christian
Atty for Res KKK
Off

Riggs, Skerison & Foose
Atty's for Wiley a/c

The plaintiff then to the jury as evidence in the case an affidavit made by defendant Wiley in words and figures as follows.

United States of America.

District Of Kansas D. S. S.

The complainant Albert Wiley of Franklin County now being duly sworn says that Keskuk a Sar & Fox Indian late of the Sar & Fox Reserve in said District heretofore to wit. On the 28th day of November A D 1848 at said Reserve in said District did leave said Sar & Fox Reserve and did disobey the orders of the United States commission of Indian affairs and the orders of other agents of the United States to him given contrary to the laws of the United States in such case made and provided. Wherefor
x Complainant prays that the said Keskuk may be apprehended and dealt with according to law
Albert Wiley.

Taken subscribed and sworn to
this 23^d day of November A.D. 1868

W. P. Montgomery
U. S. Commissioner for
the District of Kansas

The plaintiff here rested his case.
The defendant Albert Wiley to
sustain the issue on his part in-
troduced the following testimony
The defendant read in evidence
to the jury a letter written by
Charles E. Mix to Thomas Murphy
which is in words and figures as
follows.

Department of the Interior, Office
of Indian Affairs Washington D.C.

Oct 16th 1868

Sir. I have to advise you
that as Congress failed to make
certain appropriations from which
the expenses of delegations of Indians
visiting this city have heretofore
been paid no delegation from any
of the tribes of your Superinten-
dency will be allowed to visit
this place during the present
fiscal year unless specially directed
to do so by this office for the

reason that there are no funds
at the disposal of the Department
that can be used to defray their
necessary expenses. You will inform
the different agents under you
of the foregoing and take such
other steps to prevent any Indian
coming here as may be necessary
to accomplish the object

Very Respectfully

Charles E. Stix

Act Commission

Thomas Murphy Esq

Supt Ind affairs

Atchison Kansas.

The defendants also read in
evidence to the jury a letter of
the contents and figures as follows.

Office Supt Indian Affairs

Atchison Kansas Oct 23rd 1868

Sir. I transmit herewith for
your information and Government
a copy of a letter of the 16th inst
from Hon Charles E. Stix Act
Commission. You will do all
in your power to have the ins-
tructions of the Act Commission
carried out. And should any

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delegation from your tribes is a
= plate is iting & as is, too without
special instructions from the Dept.

you will promptly advise this
office

A Wiley Esq
U. S. Indian Agent
Sac & Fox Agency
Kansas

Very Respectfully
your obedient

Thomas Murphy,
Super Indian Affairs
per A. C. Farnham clk

x The defendant then read to the jury
the agreed statement made between
the attorneys for the plaintiff and
the attorneys for said defendant,
being same as Read by plaintiff
in evidence in this trial copied
in his evidence.

The defendant then introduced as
a witness Thomas Dorwin who
being sworn testified as follows.
I was acting as deputy ^{united states} Marshall
at the time of the arrest of the
Indians Keskuk and others and
was present at the examination
by Judge Montgomery United States
Commissioner. I objected to the
Indians going out with Captain
Christian unless I went with them

because they were then under arrest. Wiley did not say they should not go out. Captain Christian advised them not to give bail. Wiley then said "then they will have to go to jail". Wiley may have been a little excited but he was no more excited than Captain Christian. Wiley did not say to me "then Mr Marshall I insist upon their going to jail". I stood within five feet of them and heard all that was said. I took them to jail by order of Commissioner Montgomery. The writtimus shown me signed by W. P. Montgomery was my authority for putting plaintiff in jail and I did so by the authority of said writtimus and not by the direction of Wiley. I took the plaintiff to jail about 5 or 6 o'clock P.M. of the 23^d of November A.D. 1868 and took him from the jail about 9 or 10 o'clock A.M. on the 24th of November 1868. I did not put my hand on plaintiff nor did any person in my presence. I used him as kindly as I knew how and I saw nothing

to the contrary on the part of any person in their conduct towards him. I offered them every chance to get bail but they would not do it.

The defendants then read to the jury as evidence in the case the indictment which is in the words and figures as follows.

The United States

vs

Kes Kulk, Man to war
Ma Co mo.

Ka Ka, sa pe guah

Whereas the defendants
Kes Kulk, Man to war; Ma, Co, mo;
Ka Ka sa pe guah; have been
arrested on a warrant by me issued
on the complaint of Albert Wiley
United States Indian Agent for the
Saw & Fox Indian tribe and said
defendants having been brought
before me and examination made
and said defendant said to appear
before the United States ^{District} Court for
the District of Kansas to be held
at Topeka in said District at the
next day of the next term of said
court to answer to a charge of

resisting the power and authority
of the United States. Each of
said defendants are required to
give bail in the sum of one
Thousand dollars. You are
hereby ordered to take and safely
keep said defendants and if desired
by them to accompany them to
their residence and afford them all
needful means and opportunity
to obtain bail; or bail when
obtained is to be subject to my
approval or rejection. Given
under my hand this 23^d day of
November A.D. 1868.

W. D. Montgomery
U. S. Commissioner
for the District of Kansas

The defendant then read in evidence
to the jury the Warrant for the
arrest of the plaintiff which is
in the words and figures as
follows to wit:

The President of the United States
of America,
To the Marshall of the District of Kansas

Grating:

Whereas Complaint upon the oath of Albert Wiley U. S. Indian Agent has this day been made before me charging that Keskuk a Saxe Fox Indian late of the Saxe Fox Reserve in said District heretofore to wit: on the 23^d day of November A D 1868 at the county of _____ in said District did leave the said Reserve and did disobey the orders of the Commissioners of the United States of Indian affairs and did disobey the orders of certain agents of the United States to him given contrary to the laws of the United States in such case made and provided a bill complaint is heron endorsed.

You are therefore hereby commanded that you take the said Keskuk if he shall be found in your district and him safely keep so that you may bring him forthwith before me a commission appointed by the United States Circuit Court for said District by virtue of the laws of the United States in such

cases enacted at my office in the
city of Lawrence in said District
to be dealt with according to law
you are also commanded in the
name of the President of the
United States to subpoena Albert
Wiley to appear before me at my
office aforesaid where you shall
have the said witness to testify
his knowledge on behalf of the
United States touching the matter
of said complaint and have you
then and there this warrant.

Hereof fail not, Witness my hand
and seal this 23^d day of November
A.D. 1868 W. P. Montgomery 
U. S. Com. for said District

District of Kansas, S. S.

I hereby certify and return that on
the 23^d day of November A.D. 1868
by virtue of the above warrant I
did arrest the above named Kes Kik
and now have him in my custody
and I did summon the above
named Albert Wiley witness as
commanded in said warrant,
C. C. Wainwright Marshall or Thomas
Downin Deputy Mar.

The defendant here rested his case and after the argument of counsel, the plaintiff counsel asked the Court to charge the jury as follows:

- 1 That the President of the United States the Chief officer of the Executive Department of this Government cannot control a Statute nor dis-
-pense with its execution nor can he authorize a person or officer to do what the law forbids.
- 2 That he cannot take upon himself nor authorize his clerk or secretaries to supersede a law or supply its deficiencies and that all instructions from the ^{ex}ecutive which are not authorized by law are illegal and void and no inferior officer is bound to obey them and if he does so he acts at his peril.
3. That when the President has done all the law requires of him he has done not only all that he ought to do but all that he can do as the depositary of the Executive power without transcending

the bounds of his lawful authority and if he does this thoughtlessly or intentionally his order affords no protection to the subordinate agent that he employs.

4. That any public officer obeying the President's instructions acts at his peril if those instructions are not warranted by law.

5. That instructions or orders from the heads of departments or bureaus not in accordance with law do not justify the illegal acts of the inferior agent to whom they are given.

6. That the letter of instructions of Commissioner Alix does not justify the illegal act of Agent Wiley. He is answerable in damages to the plaintiff for any illegal act.

7. That whenever the elements of fraud, malice, gross negligence or oppression mingle in the controversy, the law allows the jury to give what is termed exemplary or vindictive damages.

8. That in cases of torts and actions

for false imprisonment the jury are the only proper judges of how much the plaintiff ought to recover

The court accordingly charged the jury as the counsel for plaintiff asked, and instructed and charged the jury as above requested by the plaintiff counsel, to which charges and instructions then and there given as aforesaid by the court to the jury the defendant by his counsel then and there duly excepted, and asked that his said exceptions be noted, allowed, and made a part of the Records in the case which was accordingly done.

The defendant by his counsel then and there asked the court to charge the jury as follows viz:

- 1 The jury in arriving at their verdict can only give a judgment for such damages as the proof will show the plaintiff was actually sustained
- which charge and instructions to

the jury so asked by the counsel
for the defendant the Court then
and there refused to give to the
jury to which refusal of the
Court so to charge and instruct
the jury the defendant by his
counsel then and there duly excepted
and asked that his exceptions be
allowed, noted and made a part
of the Record of this case which
was accordingly done. And
thereupon the counsel for the
defendant then and there asked
the Court to charge and instruct
the jury as follows:

- 2 The jury in arriving at their
verdict can only give a judgment
for such damages as the proof
shall show the plaintiff was
sustained.

He then charge and instructions
to the jury so asked by the counsel
for the defendant the Court then
and there refused to give to the
jury, to which refusal of the Court
so to charge and instruct the
defendant by his counsel then and
there duly excepted and asked

that no exceptions be allowed noted and made a part of the Record of this case which was accordingly done.

The jury after hearing read the proofs adduced the arguments of counsel and the charge of the Court as above set forth retired to their room under charge of an officer to consider of their verdict.

Not soon thereafter said jury returned into open Court and returned their verdict in words and figures as follows to wit:

That the jury find for the plaintiff and assess his damages at one Thousand dollars.

A. S. Anderson foreman of jury

Thereupon the defendant by his counsel filed in said court there and there a motion for a new trial, which said motion was in writing and in the following words viz:

that no exceptions be allowed noted and made a part of the Record of this case which was accordingly done.

The jury after having heard the proofs adduced the arguments of counsel and the charge of the Court as above set forth retired to their room under charge of an officer to consider of their verdict.

I have soon thereafter said jury returned into open Court and returned their verdict in words and figures as follows to wit:

That the jury find for the plaintiff and assess his damages at one Thousand dollars.

A. S. Anderson foreman of jury

Thereupon the defendant by his counsel filed in said court there and there a motion for a new trial, which said motion was in writing and in the following words viz:

Respectful Chief of the
Law & Son Indians off

or

Albert Wiley Esq at dept

In the District Court of Douglas
County Kansas. Motion for new
trial.

And now comes the said Albert
Wiley by Riggs Merison & Son to
his attorneys and moves the court
to set aside the verdict heretofore
rendered in this case and to
grant a new trial in this action
for the following reasons to wit.

- 1st That the damages given by the
jury in this case are excessive.
- 2nd That the verdict of the jury given
in this case is not sustained by
the evidence nor by sufficient
evidence and is against and
contrary to the weight of the
evidence and is against and
contrary to the law of the case.
- 3rd That the proceedings of the
court were irregular in the im-
panelling of the jury in this
action to wit: That in
impanelling the jury one Walter

Willis was called as a juror and was challenged by the defendant counsel for cause.

- The cause of challenge given and assigned by the defendant counsel being that the said Walter Willis had served once already on a jury as a talsman on the trial of a cause in said court during the term thereof then being holden, and the said Walter Willis on being challenged as aforesaid then and there stated in open court that he had so served as a talsman and in such fact was also then and there proven by the Record of the court and admitted by the court and the counsel for the plaintiff. Wherefor the court erred & proceeding irregular whereby the defendant was injured.
- 4 That the court erred in its charge of the law to the jury, in this action.

- 5 That the court erred in refusing to charge the jury as requested by the defendant's counsel.

The court then rendered a judgment

in said action which upon the verdict
of said jury which was as follows.
It is therefore ordered and adjudged
by the court here that the said
plaintiff Kestuck do recover of and
from the said defendant Albert
Wiley the said sum of one thousand
dollars his damages assessed aforesaid
and that the said defendant pay
all costs in and about this suit
expended taxed at \$ and
hereof let execution issue.

It was afterwards to wit: On the
21st day of May A D 1869 and at
the same term of court at which
said suit was tried as aforesaid
said motion for a new trial came
on for hearing before said court
whereupon James Christian Esq
appeared as attorney for the plaintiff
and Regg. Newson & Spote for
the defendant Wiley and was
argued by counsel and after
hearing the arguments of counsel
the court then and there overruled
said motion for a new trial, to
which ruling of the court the said

defendant then and there duly
excepted, and on motion of the
plaintiff to the court to grant to

defendant then and there duly
accepted, and on motion of the
defendant the court granted to
said defendant until the 22nd day
of June A.D. 1869 to make and
file a made case for the Supreme
Court.

Now on the 22nd day of June A.D.
1869 the said parties appeared by
their respective attorneys in open
Court and by agreement of said
plaintiff and defendant by their
attorneys the Court then and there
extended the time in which the
defendant was to make and file
a made case for the Supreme
Court to the 2nd day of the next
term of said court.

We have examined the above
and find the case made correct
in every respect.

James Christian
Atty for Plff

Riggs Swinson & Foote

Atty for Albert Wiley dep

Allowed time having been extended
in open Court until this date

Aug 19 1869. C. W. Bassett
Judge