

with more or less brevity the reasons for such decision in each case. It is quite possible that in disposing of one or more of these assignments this court may have committed error; indeed, it may be wrong as to each and every one of them; but it is thought that the proper practice for the correction of such errors is by certiorari, and not by certificate.

Plaintiff in error asks to have the certificate amended by incorporating certain parts of the evidence which he has selected. Defendants in error insist that this selection is unfair, and ask that further quotations, to be selected by themselves, be added. It is quite apparent that no "selection" from the testimony would satisfy both parties; and neither the court below, nor the jury, nor this court passed on any such "selection," but on the body of proof. The foundation of the motion is the clause in rule 37 of the supreme court which provides that certificates "shall contain a proper statement of the facts on which such question or proposition of law arises." But the very phraseology of this clause indicates that it is the fundamental facts that are to be stated, not the evidential facts from which the fundamental facts are found. When the evidential facts are included as part of the problem submitted, it ceases to be a question of pure law, and becomes a "question of mixed law and fact," such as involves questions of judgment by the court upon the weight or effect of testimony, or facts adduced in the case. And it is certainly settled by authority that certification is not to be availed of to propound to the supreme court any such "question of mixed law and fact." *Jewell v. Knight*, 123 U. S. 426, 8 Sup. Ct. 193. We find no fundamental fact in the proposed amendment not already included in our statement; only evidential facts from which plaintiff in error may make some contention that the jury and this court erred in finding one or more of the fundamental facts against plaintiff in error, or that the verdict was excessive. For these reasons the motion is denied.

---

WESTERN UNION TEL. CO. v. BAKER.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1898.)

No. 391.

**APPEAL AND ERROR—EXCEPTIONS TO INSTRUCTIONS—TIME FOR TAKING.**

Exceptions to instructions taken after the jury had retired will not be considered, though it is shown by the record that by the practice and rulings of the trial court such exceptions were not allowed to be taken in the presence of the jury.

In Error to the Circuit Court of the United States for the Northern Division of the District of Washington.

George H. Fearons, L. D. McCutcheon, and R. B. Carpenter, for plaintiff in error.

Harold Preston, E. M. Carr, and L. C. Gilman, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The assignments of error in this case are confined to the rulings of the circuit court in giving and refusing instructions to the jury. The defendant in error raises the question of the power of this court to consider the alleged errors, upon the ground that it appears from the record that no exception was taken by the plaintiff in error to the instructions so given and refused until after the jury had retired to consider their verdict. It was held by this court in the case of *Bank v. McGraw*, 22 C. C. A. 622, 76 Fed. 930, that exceptions taken to the instructions given or refused to the jury could not be entertained upon a writ of error unless they were taken while the jury were at the bar and before they retired to deliberate upon their verdict. That position is sustained, we believe, by every court to which the question has been presented. *Railway Co. v. Spencer*, 18 C. C. A. 114, 71 Fed. 93; *Stone v. U. S.*, 12 C. C. A. 451, 64 Fed. 667; *Van Etten v. Town of Westport*, 60 Fed. 579, 585; *Bracken v. Railway Co.*, 5 C. C. A. 548, 56 Fed. 447, 450; *Sutherland v. Round*, 6 C. C. A. 428, 57 Fed. 467, 470; *Johnson v. Garber*, 19 C. C. A. 556, 73 Fed. 523; *Phelps v. Mayer*, 15 How. 160; *Turner v. Yates*, 16 How. 14, 29; *Stanton v. Embrey*, 93 U. S. 548, 555.

It is stated in the record that all the exceptions "were taken in writing after the jury had retired to deliberate upon their verdict, and before the rendition of their verdict, for the reason that this court refused in all cases to allow exceptions to be taken in the presence of the jury, and would not have allowed exceptions to be taken in this case had it been asked, but no request was made by either party to take such exceptions before the jury retired." In *Johnson v. Garber*, supra, it appeared that a similar practice was followed in the circuit court for the Western division of Tennessee. It is thus referred to in the opinion in that case:

"The trial judge states it to be the invariable practice of the court below—well known and acted upon by counsel, though no formal rule to this effect has been adopted by the court—not to require such specific objections to be so taken, but counsel on either side is understood always to have taken the objection to any instruction, or any part of the charge, so that, in subsequently making up the bill of exceptions, he may take any objection as if the rule of taking it at the time had been fully complied with."

The court proceeded to say:

"In view of the proper practice, defined in the decisions already referred to, the practice of the court below was improper; and the fact that such practice obtained cannot give this court power to consider an exception which was not reserved at the only time when, under the law, it could have been reserved, namely, at the trial, and while the jury were at the bar."

We think the language of the opinion in that case is applicable to this. The judgment of the court below must be affirmed.

REED v. ATLANTIC & P. R. CO.<sup>1</sup>

(Circuit Court, S. D. New York. August 27, 1884.)

## CIRCUIT COURTS—EFFECT OF DECISIONS IN OTHER CIRCUITS.

A decision in another circuit, in an action between two railroad companies, that the right of action for unpaid dividends due under a lease was in the lessor company, will be followed in an action by stockholders of that company against the lessee for an accounting of such dividends.

This was a suit by William Reed against the Atlantic & Pacific Railroad Company to recover dividends alleged to be due from the latter company to the plaintiff as a stockholder in the Pacific Railroad Company, under the terms of a lease made by the Pacific Company to the defendant.

Edward L. Andrews, for plaintiff.

John E. Burrill, for defendant.

WALLACE, Circuit Judge. I should incline to the opinion, were it not for the decision of the circuit court for the district of Massachusetts, that the plaintiff, as one of the stockholders of the Pacific Railroad, could maintain this action; and that its directors were not his agents, or the agents of the stockholders generally or of the corporation, in accepting a surrender of the lease made by the corporation to the defendant. It would seem that, by the lease of all its property to the defendant for 999 years, with a power to mortgage, the Pacific Railroad practically abdicated all its functions, dissolved its relations with its stockholders, and constituted its stockholders creditors of the defendant. By the terms of the lease, it was to maintain its corporate organization in the interests of the defendant, and was also to retain sufficient vitality to re-enter and take possession of the demised property, in case the interest to its bondholders, or dividends to its stockholders, were not paid by the defendant according to the covenants. For all practical purposes, the corporation was as defunct as anything short of a judgment of dissolution could make it, and this was the result contemplated by all the parties to the lease. If its directors had accepted a surrender under circumstances which, in any conceivable way, could have inured to the interests of its stockholders or creditors, their action might be deemed as equivalent to exercising the power of re-entry. But in the suit brought in the name of the corporation against the defendant to recover, among other things, the dividends due stockholders under the lease, it was decided, by a court of co-ordinate jurisdiction with this, that the cause of action was in the corporation, and not in the individual stockholders. *Pacific R. R. v. Atlantic & P. R. Co.*, 20 Fed. 277. That decision is entitled to great respect. Upon the case in the form in which it was there presented, the conclusion reached by the court

<sup>1</sup> This case has been heretofore reported in 22 Blatchf. 469, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.