Evidence—Expert Witnesses—Hypothetical Question—Model
Expert Testimony Act

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In equitable actions to quiet title or *quia timet* any claim or assertion casting doubt upon the plaintiff's rights, sufficiently damages his material interests to present a condition of justiciability.24 Logically, it would seem to follow that where differences between parties have reached a point where future litigation is inevitable, a sufficient controversy, justifying invoking the declaratory procedure, is present.25

While it is yet too early to predict with assurance what scope the courts will give to declaratory actions, an encouraging trend is discernible.26 It is submitted that the instant case unnecessarily curtails the use of the declaratory actions. It is definitely "out-of-line" with the more acceptable decisions.27

W. F.

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24. Guthery v. Ball, 206 Mo. App. 570, 228 S. W. 887 (1921); Walsh, *On Equity* (1930) 541 et seq.


27. In a recent case almost identical with the facts of the instant case the judge said, "... remedy by declaratory judgment seems to be of ideal application to such a case." Travelers Ins. Co. v. Helmer, 15 F. Supp. 355, 356 (D. C. D. Ga., 1936).


examination will not remedy the deception because it is difficult to erase entirely the impression created by the first opinion, and because an expert, once he has given an opinion bearing upon the case, is not likely to change it to fit hypothetical variations. In all fairness to the expert it might be added that such a procedure whereby he is expected to give an opinion to each hypothetical variation becomes ridiculous where the facts are numerous and complicated, as in insanity cases.

Because of these abuses, a few states, including Missouri and Arkansas, require that the hypothetical question contain all undisputed facts material to the issue. But this rule, while it is better than the general rule, does not afford a remedy. Where all the facts are undisputed the only possibility of abuse is in framing a very long question which may confuse the jury. But where the facts are disputed, the party asking the question need include only those facts which the evidence on his side tends to prove.

Here again cross examination will be an inadequate corrective. Furthermore, the hypothetical question is not limited to facts actually proven or directly testified to, but may assume facts which there is fair reason to believe the evidence will produce. Consequently, the court, in determining whether a question is competent, must rely to a great extent upon the good faith of counsel as to what he expects the evidence will be.

The Model Expert Testimony Act, based upon Professor Wigmore's suggestions, proposes 1) that the expert witness be permitted to give his opinion, with its basis, without hypothetical questions and that cross examination be employed to bring out further the facts upon which it rests, and 2) that when a hypothetical question is asked it must first be submitted in writing to the opposite party and approved by the court. In some situations it may be necessary, or more helpful to the jury, to ask a hypothetical question, and for such situations the second provision brings the hypothetical question to its best possible form. Such is the practice in

6. One of bases of general rule is that opposing counsel can correct any misapprehensions by cross-examination. See Herpolsheimer v. Funke, 95 N. W. 688 (Neb., 1901).
8. People v. Vanderhoof, 71 Mich. 158, 39 N. W. 28 (1888). See 32 Am. L. Rev. 851, 855 to effect that expert will not change his opinion because it puts him in position of disagreeing with the general drift of his own testimony and thereby of impeaching himself.
14. Ibid.
15. 1 Wigmore, Evidence (2d ed. 1923) sec. 686.
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