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# The Expert Witness and the Hypothetical Question

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to the trustee might not have rendered the trust taxable under the powers-considered-as-a-whole doctrine of the *State Street Trust* case had the grantor been a trustee.

The question posed by the *State Street Trust* case of whether the emphasis will now shift from a consideration of the adequacy of the imposed external standard to the reality of the discretion actually conferred upon the trustee in determining the estate tax under section 2038 of the Code has not yet been answered.<sup>88</sup>

#### CONCLUSION

In summary, it might be stated that the existence of certain powers affecting enjoyment held by the decedent-transferor will render the property transferred includible in the gross estate: the power to revest himself with beneficial ownership, the power to shift interests among designated beneficiaries, and the power to change beneficiaries. Section 2038 law is well defined regarding these transfers. The last of this broad classification of transfer powers, that is, the power to accelerate beneficial interests by invasion of either income or corpus, is less well defined. The *Jennings-State Street Trust* controversy is yet emerging. Whether the adequate external standard will be sustained as a principle of taxability or be discarded in favor of some test which will measure taxation on the basis of the actual amount of discretion retained by the decedent-trustee instead cannot yet be known. In the meantime, planners had best keep their standards external and adequate and see to it that the administrative and management powers reserved do not aggregate too much.

FRANK BERNDT

### ***The Expert Witness and the Hypothetical Question***

The use of an expert witness during the course of a trial may be necessary when the issue or fact in question requires testimony which cannot be supplied by a lay witness due to the complicated or scientific nature of the subject. In today's world of science and mechanization the use of an expert witness is an important aspect of numerous cases, and every attorney should be well educated regarding the proper use of such a witness.

This article will deal with the use of the hypothetical question on

88. In this connection see also *Michigan Trust Co. v. Kavanagh*, 284 F.2d 502 (6th Cir. 1960), in which the "absolute discretion" given the trustee rendered the estate includible for tax purposes even though this discretion was to be exercised in cases of "special emergency."

*direct examination* of an expert witness. The rules which must be followed and the problems which arise out of them will be discussed. For example, what problems are involved when there are no eyewitnesses to an occurrence and there is a missing fact in the chain of causation? Can the opinion of an expert witness, in reply to a hypothetical question concerning ultimate causation, supply the missing fact in the chain of causation, or must there be additional evidence to support his opinion as to the missing fact? Further, what is the effect of expert testimony in relation to the ultimate issue in a case?

The use of the hypothetical question is an important and effective weapon in the arsenal of an attorney. However, an attorney must use care to insure that he is not misusing the hypothetical question for this may result in grounds for reversible error.

### BASIC CONSIDERATIONS

Before a hypothetical question can be propounded to an expert witness, it must be established that the witness is an expert in the field upon which he is to be examined.<sup>1</sup> The decision of who is and who is not an expert properly rests with the discretion of the trial court.<sup>2</sup> Once the witness has been established as an expert, it must be recognized that the purpose of expert testimony is to aid the court and jury in determining issues in areas where the expert has special knowledge or experience which the average man does not possess.<sup>3</sup> Such would be the case where testimony involves the specialized treatment of the human eye.<sup>4</sup> Without the testimony of an eye specialist or a similar expert, a lay jury and even the court would be practically helpless in arriving at an intelligent and reasonable decision as to any technical issue involved.

With this in mind, it should be noted that there are two methods which may be used to elicit expert testimony. An expert may be examined directly with regard to his personal knowledge of a subject, or he can be examined through the use of the hypothetical question.<sup>5</sup>

#### *Questions Based on Assumed Facts*

If the hypothetical question is used, it must be based on facts assumed to be true for the purpose of obtaining the opinion of the expert on the

1. *Donaldson v. Maffucci*, 397 Pa. 548, 156 A.2d 835 (1959); WIGMORE, EVIDENCE § 560 (3 ed. 1940).

2. *Donaldson v. Maffucci*, *supra* note 1; WIGMORE, EVIDENCE § 561 (3 ed. 1940).

3. *Mahlstedt v. Ideal Lighting Co.*, 271 Ill. 154, 110 N.E. 795 (1915).

4. *Ewing v. Goode*, 78 Fed. 442 (6th Cir. 1897); see Annot., 13 A.L.R.2d 31 (1950), which deals with proximate cause in malpractice cases.

5. *Temple v. Continental Oil Co.*, 182 Kan. 213, 320 P.2d 1039 (1958).

assumed facts involved.<sup>6</sup> In addition, the general rule is that the hypothetical question must be based on the *material facts* in the record if the expert's opinion is to be given any probative value.<sup>7</sup> In *O'Donnell v. John Hancock Mutual Life Insurance Company*<sup>8</sup> a hypothetical question was asked of an expert witness. The witness was to assume that the deceased was found dead in a bathtub, his face immersed in water, and that an autopsy showed that the deceased had drowned. The court determined that the question was improper because it assumed as a fact that there had been an autopsy when in fact there had been no evidence offered to establish the fact of an autopsy. For this reason, the court upheld the lower court's decision in sustaining an objection to the hypothetical question. This case clearly points out the necessity that the question be based on the material facts in the record.

However, it appears that in certain instances it is not objectionable, or at least not reversible error, to include *harmless facts* in a hypothetical question even where the facts are not established by evidence in the record.<sup>9</sup> This is the proper approach, especially in cases where the factual situations are often complex and confusing. In most instances the expert should be able to distinguish between the crucial facts and merely subsidiary facts when answering the question. This is a matter that should be left to the sole discretion of the trial judge in order to eliminate unnecessary appeals which are time consuming and costly to all parties involved, as well as the public as a whole.

It is further incumbent on the party propounding the hypothetical question that the material facts assumed be established by a preponder-

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6. A workable definition of a hypothetical question is to be found in BLACK, LAW DICTIONARY (4th ed. 1951), where it is defined as "A combination of assumed or proved facts and circumstances, stated in such form as to constitute a coherent and specific situation or state of facts, upon which the opinion of an expert is asked, by way of evidence on a trial."

7. In *Lynn v. Estadt*, 118 N.E.2d 699, 700 (Ohio C.P. 1953), the court stated, "... an expert opinion can be no better than the evidence to support the hypothetical question that invokes it and that when any one of the material facts contained in such question as an assumption of fact is successfully contradicted by the manifest weight of the evidence it then follows that the opinion itself is thereby rendered valueless as inconsequential and as irrelevant to the issue. . . ." See also *Viant v. Town of Lowell*, 177 Ind. App. 354, 72 N.E.2d 239 (1947); *Slamey v. Rizzo*, 146 N.E.2d 466 (Ohio Ct. App. 1957); *Spidel v. Warrick* 83 Ohio App. 332, 78 N.E.2d 746 (1948); *Hudson v. Hoster*, 47 N.E.2d 895 (Ohio Ct. App. 1943).

8. 189 Pa. Super. 377, 150 A.2d 146 (1959). For an earlier, but an excellent case in this area, see *Dougherty v. Milliken*, 163 N.Y. 527, 57 N.E. 757 (1900).

9. In *Baldwin v. Gaines*, 92 Vt. 61, 102 Atl. 338 (1917), a hypothetical question was propounded to a medical expert which included as an assumed fact the presence of a bandage outside of a plaster cast. The court stated that although there was no evidence of such a bandage the inclusion of that fact in the hypothetical question was harmless. The court pointed out that the expert's testimony was in no way based on the presence of the bandage but was completely based on the presence of the plaster cast alone. See *Mahone v. Birmingham Electric Co.*, 261 Ala. 697, 73 So. 2d 378 (1954). In this case plaintiff's own subsequent testimony rendered harmless a possible objectionable hypothetical question propounded by defendant to a expert witness and thus removed the question from the area of reversible error.

ance of the evidence.<sup>10</sup> However, this rule appears to be directed toward the weight to be given to the opinion of the expert and not to the determination of whether the hypothetical question is objectionable on the ground of not being based upon facts in the record.<sup>11</sup> In the case of *In re Jacobson's Guardianship*<sup>12</sup> the California Supreme Court stated that the facts assumed could be disputed facts and that a hypothetical question was proper as long as it was based upon facts within the "... possible or probable range of the evidence and if it is not unfair or misleading."<sup>13</sup> As a result of these decisions, it appears that a court should not take it upon itself to refuse to allow a hypothetical question solely on the ground that it believes that the facts upon which the question is based are not established by a preponderance of the evidence.<sup>14</sup> This is appropriately a matter for the jury to determine in considering how much weight to give to the expert's opinion.

### *Omission of a Material Fact*

Another ground for sustaining an objection to a hypothetical question occurs when a material fact is omitted from the question asked of an expert witness. In *Chapman v. Industrial Commission*<sup>15</sup> the decedent died of tuberculosis. Plaintiff propounded a hypothetical question to two medical experts to obtain their respective opinions regarding the question of causal connection between the decedent's death and his work. The nature of the decedent's work subjected him to a considerable amount of dust. The only evidence in the record showed that the decedent wore a mask to protect himself from the dust. However, included in the hypothetical question in relation to the wearing of a mask was the statement: "So many of the workers wore masks and others did not." The court stated:

... the omission of a circumstance which would vitally affect the conclusion of the witness makes such question objectionable. To say that 'some of the workers wore masks and others did not,' when the only

10. In *Kavas v. Barry*, 134 N.E.2d 737, 741 (Ohio Ct. App. 1956), the court was of the opinion: "We observe further, that the court in its charge omitted to instruct the jury that it was incumbent on plaintiff to establish the premise included in the hypothetical question by a preponderance of the evidence. . . ." See also *Haas v. Kundz*, 94 Ohio St. 238, 113 N.E. 826 (1916).

11. In *Haddad v. Jahn*, 174 N.E.2d 136, 139 (Ohio Ct. App. 1960), the court stated: "The facts may be in dispute and, if so, it is the function of the jury to determine where the truth lies. If the jury finds that the facts stated in the hypothetical question are not supported by a preponderance of the evidence, the opinion of the expert is of no value and may be disregarded by the jury. The court determines the competency of the evidence but the jury determines the weight and value to be given to such testimony. . . ."

12. 30 Cal. 2d 312, 182 P.2d 537 (1947).

13. *Id.* at 324, 182 P.2d 544.

14. See *Lyon v. Dr. Scholl's Foot Comfort Shops*, 251 Minn. 285, 87 N.W.2d 651 (1958).

15. 81 N.E.2d 626 (Ohio Ct. App. 1948).

evidence in the record as to the conduct of the deceased is that he was one who did wear a mask, makes the hypothetical question subject to objection and to overrule such objection constitutes prejudicial error.<sup>16</sup>

Thus, the omission of a material fact in this case made the experts' testimony worthless.<sup>17</sup>

However, it must be noted that where the hypothetical question omits material facts that are disputed by the party propounding the question, the question will not be objectionable on the ground of omission of a material fact.<sup>18</sup> This rule is reasonable when it is recognized that additional facts or theories supported by the opposition can be brought out on cross-examination of the same expert witness.<sup>19</sup> Thus, each party is provided the opportunity to examine an expert witness on a reasonable theory most favorable to himself. As a result, the jury has an equal opportunity to compare and decide which set of facts have been established by a preponderance of the evidence in determining the weight to be given to the expert's testimony.

Some courts have gone even further in liberalizing the rules dealing with hypothetical questions. These courts hold that it is not objectionable to omit even a *material fact* provided such omission does not mislead the jury to the prejudice of the opposing party.<sup>20</sup> Under this rule both parties are allowed complete freedom in stating their theory of the case since the omitted fact does not even have to be a disputed fact. Each party may formulate hypothetical questions and elicit opinions on any possible set of facts as long as the facts are based on evidence in the record, reasonably state the party's theory of the case, and are an aid to

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16. *Id.* at 630.

17. In *Storbakken v. Soderberg*, 246 Minn. 434, 75 N.W.2d 496 (1956), a hypothetical question was asked of an expert in which the expert was to give his opinion as to the rate of speed various vehicles had approached an intersection. One of the vehicles was towing an Auger and this fact was omitted from the question. It was held that the answers of the expert were not inadmissible because such an omission could only have been favorable to the party objecting.

18. *Dickerson v. Shepard Warner Elevator Co.*, 287 F.2d 255, 260 (6th Cir. 1961). The court said: "Where . . . the party propounding such question disputes the truth of the so-called *qualifying fact*, or it cannot be said that the omitted fact was an integral or necessary part of the factual premise to the expert's conclusion, it is not essential that such fact be included in the question." (Emphasis added.) See also *Cook v. Coleman*, 90 W. Va. 748, 111 S.E. 750 (1922), where the court held it was not necessary for a plaintiff to include inconsistent and contradictory contentions of facts submitted by the opposition.

19. *Ranger v. Equitable Life Assur. Soc. of United States*, 196 F.2d 968 (6th Cir. 1952).

20. *Briggs v. Chicago Great Western Ry. Co.*, 248 Minn. 418, 429, 80 N.W.2d 625, 634-35 (1957). The court stated: "Long ago this court pointed out that the technical rules as to hypothetical questions are relaxing and this is a step in the right direction. Although the hypothetical question must embody substantially all admitted or undisputed facts relating to the ultimate issue, and should also include facts which the jury might reasonably find to be true, it does not follow that the failure to include all pertinent or material facts is a basis for a reversal as long as the jury was not misled to the prejudice of the adverse party. . . ."

the jury in determining the issues in question.<sup>21</sup> This would appear to be the proper approach.

It is important to note that material facts brought out in a trial subsequent to the framing of a hypothetical question are not to be considered as material facts, the absence of which renders the question objectionable at a later date.<sup>22</sup> The logical reason for this is that the question would be based on facts assumed to be true for which there is evidence in the record at the time the question was asked. If certain material facts are brought out subsequent to the question, it would be impossible to assume them to be true before they are even brought to light. While a hypothetical question is not objectionable because it did not include material facts subsequently brought out during a case, the same facts when finally brought out may greatly affect or destroy the *weight of the expert's opinion*.<sup>23</sup> In such a case the jury still has the right to consider the expert's testimony. However, it is suggested that an alert counsel should call to the jury's attention the possible effect of the subsequent facts when the same seriously alter the probative value of the expert's opinion.

However, this is not the complete picture, for under certain circumstances it is not objectionable to base a hypothetical question upon evidence which has not yet been offered to the court.<sup>24</sup> This is permissible where the party framing the question assures the court that he will produce such evidence at a later time and substantially keeps his promise to the satisfaction of the court. This technique is often a risky undertaking and should be granted by a court only in instances where counsel can adequately show urgent necessity. This is advisable because once the expert states his opinion to the jury it can never actually be recalled even though the judge may grant a motion to strike and instruct the jury not to consider the testimony for a lack of subsequent supporting evidence.

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21. In *Sneed v. Goldsmith*, 343 S.W.2d 345 (Mo. Ct. App. 1961), the plaintiff was injured in an automobile collision and subsequently had a miscarriage. Plaintiff's counsel propounded a hypothetical question to a medical expert who had examined plaintiff twenty-five days after the collision. The question included the facts, assumed as true, that plaintiff had experienced pain in various parts of her body including the abdomen. Over defendant's objection that the question omitted various material facts dealing with the nature of plaintiff's injuries and assumed the fact that plaintiff had received blows to her stomach, the trial court permitted the expert to testify that in his opinion the miscarriage was caused by the accident.

In sustaining the trial court's position the Missouri Court of Appeals stated: "Under the law the questioner may frame his hypothetical question on his own theory and may not include all the material facts in evidence. He may elicit an opinion on any combination or set of facts he may choose, if the question propounded fairly hypothesizes facts the evidence tends to prove and fairly presents the questioner's theory so that the answer will be of assistance to the jury on the issue." *Id.* at 351.

22. *In re Telsrow's Estate*, 237 Iowa 672, 22 N.W.2d 792 (1946).

23. *Gleba v. City of New Britain*, 133 Conn. 85, 48 A.2d 227 (1946).

24. *Sanchez v. Board of County Comm'rs*, 63 N.M. 85, 313 P.2d 1055 (1957).

*Additional Factors*

In addition to the factors previously set forth, there are further considerations which should be taken into account when formulating a hypothetical question to an expert witness. One of these concerns the problem of whether to allow an expert to give an opinion which is founded upon evidence derived from another expert's opinion.

The Ohio Supreme Court has taken a reasonable position on this problem. In *Zelenka v. Industrial Commission*<sup>25</sup> the defendant propounded to medical experts a hypothetical question which was founded upon the assumption that all the facts were true in twenty-three exhibits. These exhibits included medical and hospital records, various X-rays, and other doctors' interpretations of the X-rays. The experts had never seen or treated the deceased party in question, and all of the facts were presented by *reference to records* rather than by *actual recitation in the question*. On the basis of this the experts answered that in their opinion there was no causal connection between the injury that the deceased had received and his subsequent death. The Ohio Supreme Court in deciding that the opinions of these experts were without probative value stated in the syllabus of the court<sup>26</sup> the following:

An expert witness may not express his opinion based upon evidence which he has heard or read on the assumption that the facts supported thereby are true, where such evidence is voluminous, complicated or conflicting or consists of the opinions, inferences and conclusions of other witnesses.<sup>27</sup>

This position appears to be sound especially when the expert must base his opinion on hospital records which are for the most part merely opinions of other doctors. Here there is no opportunity to cross-examine the doctor who wrote his opinion in the hospital record, and it is impossible to tell if his opinion was a guess, was based on the past history of the patient, or was based on the opinions of other doctors.<sup>28</sup> Although it will result in hardship in some cases, Ohio seems to be committed to the position of requiring that specific facts be assumed as true and that they be specially recited in the hypothetical question when those facts are part of a voluminous hospital record or another expert's opinion.<sup>29</sup>

25. 165 Ohio St. 587, 138 N.E.2d 667 (1956).

26. In Ohio the syllabus of the court is written by the supreme court of the state. The syllabus is the controlling law of the case, but it must be read in light of the facts and issues of the case. See *Perkins v. Benquet Consol. Mining Co.*, 342 U.S. 437 (1952).

27. *Zelenka v. Industrial Comm'n.*, 165 Ohio St. 587, 587, 138 N.E.2d 667, 668 (1956).

28. See *Estes v. Goodyear Tire & Rubber Co.*, 99 N.E.2d 619 (Ohio C.P. 1951), for an excellent discussion on the dangers in allowing expert testimony to be founded on the opinion of another expert.

29. However, in *Zelenka v. Industrial Comm'n.*, 165 Ohio St. 587, 593, 138 N.E.2d 667, 671 (1956), the court did say that the trial court has discretion ". . . to permit an expert witness to give an opinion based upon the assumption of the truth of testimony which he has

It is also important to note that where physical facts clash with the testimony of an expert witness the physical facts must prevail. In such a case neither the court nor the jury are permitted to grant any probative value to an expert's opinion so contradicted.<sup>30</sup>

#### EXPERT WITNESS SUPPLYING A MISSING FACT

An area which is often the breeding ground of considerable trouble both to courts and counsel is the area dealing with the assumption of facts in a hypothetical question propounded to an expert witness. As was stated earlier, the facts which are assumed in a hypothetical question are facts which the expert is required to accept as true for the purposes of the question. When counsel erroneously includes a fact which is not based on evidence in the record, the question generally will not go to the jury for consideration.<sup>31</sup> Likewise, courts are not hesitant in exercising their judicial discretion in sustaining objections to hypothetical questions when the expert himself assumes additional facts not based on evidence in the record.<sup>32</sup>

However, questions do arise when a trial court permits an expert witness to testify, over the objection of the opposition, in relation to the issue of causation when one of the material facts relating to causation is absent. The issue in the appellate court generally narrows down to whether or not an expert witness should be permitted to *supply the missing fact* in the chain of causation by means of his opinion regarding the ultimate cause, when that same fact is necessary to support such an opinion<sup>2</sup> regarding causation. This problem is especially acute when there are no eyewitnesses to an occurrence.

At first glance, it would seem to be the better rule to permit an expert witness to supply a missing fact through his opinion testimony alone. An injured party may go without compensation for a wrong when it is nearly impossible to establish a fact by a preponderance of evidence. As a result, it would seem logical to accept the opinion of an expert stating that the missing fact did exist because the expert should possess greater knowledge than anyone else (except another expert) about his field. An argument can be made that the right decision will be reached in the great majority of cases where an expert is allowed to

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heard given by other witnesses without a hypothetical statement of the facts, where the witnesses are few and the testimony is not voluminous, complicated, or conflicting."

30. *Differential Steel Car Co. v. MacDonald*, 180 F.2d 260 (6th Cir. 1950).

31. *Minnick v. Industrial Comm'n*, 102 Ohio App. 525, 144 N.E.2d 227 (1956); *DeHaan v. Winter*, 258 Mich. 283, 241 N.W. 923 (1932).

32. See *Hulsizer v. Johnson-Brennan Constr. Co.*, 339 S.W.2d 116, 119 (Ark. Sup. Ct. 1960), where the court stated: "Superior knowledge is a wonderful attribute; but an expert in answering a hypothetical question must base the answer on admitted facts and cannot assume facts contrary to or in addition to the admitted facts. . . ."

supply a missing fact through his opinion alone, since it is presumed that a jury will use prudence in finally determining the issue. Possibly the question should be left up to the discretion of the trial judge. He could make exceptions in cases where a fact is almost impossible to prove, as where there are no eyewitnesses, while refusing to allow an expert to supply a missing fact where it could possibly be established through other means.

On the other hand, serious problems may result if experts are allowed to supply missing facts. For example, would it take one or twelve experts to testify that in their opinion a certain fact was present in the chain of causation? It is very possible that any given number of experts will disagree as to the existence of the fact in question. Others may qualify their opinions which would further confuse the issue. Further, the missing fact could be one of several different factors which might result in a mere guess from the expert. Probably the main objection to this idea would be that even if a court should allow an expert's opinion to supply one fact, where would this stop? Should a court permit the opinion of an expert or experts to supply two or three missing facts? If this were to be permitted the courts would soon have to abandon altogether the principle of requiring the facts to be established by a preponderance of the evidence.

This is a policy decision, and the choice seems to have been made in favor of requiring the party propounding the question to establish the fact by other means than an expert's opinion. In *Dreher v. Order of United Commercial Travelers of America*<sup>33</sup> plaintiff's husband was found dead in the garage with the car engine running. There was a reddish spot on his right temple. There was no evidence as to what caused the spot or that he was struck by anything, and there were no eyewitnesses to the death of the deceased. A medical expert, in response to a hypothetical question propounded by plaintiff, testified that in his opinion the deceased died as a result of some external violence as shown by the mark on the deceased's temple. The trial court directed a verdict for defendant which was affirmed by the Supreme Court of Wisconsin. The court stated:

The only evidence . . . from which it may be inferred that external injury caused the death is the evidence of the doctor that a blow which caused the mark on his temple might have caused death, and that because he was dead it was his opinion that he died as the result of such a blow. The opinion of the physician as to the cause of death is invoked to supply the substantive facts necessary to support his conclusion. This cannot be done. . . . The basis of the conclusion cannot be deduced or inferred from the conclusion itself. In other words, the opinion of the

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33. 173 Wis. 178, 180 N.W. 815 (1921).

expert does not constitute proof of the existence of the facts necessary to support the opinion.<sup>34</sup>

In *Steckman v. Silver Moon*<sup>35</sup> the deceased sustained a skull fracture when he hit his head on the sidewalk during a fight with defendant. Plaintiff charged that defendant and others took the deceased to his room (while he was still alive) and failed to get medical attention for him. Plaintiff further charged that the deceased's injuries were aggravated when he fell while trying to get out of bed. There was no evidence in the record that deceased had fallen from his bed, especially with such force as to result in additional brain injury. Yet, this fact was assumed as true in a hypothetical question propounded by plaintiff to a medical expert in order to obtain his opinion regarding the probability that such an aggravation of head injuries resulted in death. The court stated:

The opinion of the physician as to the cause of death could not be invoked to supply a fact necessary to support his conclusion. The sustaining of objections to these hypothetical questions was not error.<sup>36</sup>

This reasoning appears to be sound in light of the fact that there were no eyewitnesses to establish that the deceased actually fell from bed and, if so, with what force.

The Ohio position on this problem appears to have been definitely settled by two decisions handed down by the Ohio Supreme Court in 1955.<sup>37</sup> These decisions leave little room to debate the fact that Ohio also refuses to allow an expert to supply a missing fact in the chain of causation solely through his opinion as to the ultimate cause. Similar decisions are to be found in Idaho,<sup>38</sup> Wisconsin,<sup>39</sup> Connecticut,<sup>40</sup> and New Jersey.<sup>41</sup>

#### OPINION OF AN EXPERT REGARDING THE ULTIMATE ISSUE

A question which frequently arises when dealing with expert witnesses is whether the opinion expressed by such a witness with regard to the ultimate issue invades the province of the jury. According to one line

34. *Id.* at 178-79, 180 N.W. at 817.

35. 77 S.D. 206, 90 N.W.2d 170 (1958).

36. *Id.* at 212, 90 N.W.2d at 174.

37. In *Burens v. Industrial Comm'n*, 162 Ohio St. 549, 556, 124 N.E.2d 724, 729 (1955), the court stated: ". . . the fact of striking the shelves before the coronary attack should have been a premise presented to the witness, which, if found by the jury to be true, could then have formed a basis for the acceptance of the expert opinion as to causation. Failure to include such premise renders the opinion defective for the reason that it assumes as true the critical issue involved in the cause, an assumption that was without the province of the expert witness." See also *Olsen v. Electric Autolite Co.*, 164 Ohio St. 283, 130 N.E.2d 363 (1955).

38. *Cochran v. Gritman*, 34 Idaho 654, 203 Pac. 289 (1921).

39. *McGaw v. Wassman*, 263 Wis. 486, 57 N.W.2d 920 (1953).

40. *Stephanofsky v. Hill*, 136 Conn. 379, 71 A.2d 560 (1950).

41. *Stanley Co. of America v. Hercules Powder Co.*, 16 N.J. 295, 108 A.2d 616 (1954); *Carroll v. Newark Printing Co.*, 25 N.J. Super. 528, 96 A.2d 728 (Essex County Ct. 1953); see also *Annot.*, 38 A.L.R.2d 13, 46-47 (1954).

of reasoning, it is objectionable for an expert to express his opinion on the ultimate issue to be decided by the jury.<sup>42</sup> Likewise, it would be objectionable to frame a hypothetical question to an expert that would elicit an answer stating the expert's opinion as to the *proximate cause* rather than what would *probably follow* the facts as hypothesized.<sup>43</sup> At least one jurisdiction has differentiated between situations where the facts are in dispute and those where the facts are not in dispute.<sup>44</sup> The practice followed in this type of jurisdiction is to allow the expert to answer that a certain set of facts *did* cause a certain result only when the facts of the case are not disputed. However, when the facts are in dispute, the expert may only reply that the facts *could* result in a certain situation, and it would be an invasion of the province of the jury for the expert to say the facts did occasion the result.

In this writer's opinion the better rule is to allow an expert to express his opinion based on facts in a hypothetical question even though it is on the ultimate issue before the jury. This rule has been followed in some jurisdictions. In *Patrick v. Smith*<sup>45</sup> plaintiff's well failed shortly after an explosion on a railroad right of way adjoining the plaintiff's land. A hypothetical question based on proper assumed facts was propounded to two mining engineers concerning the causal relation between the explosion and the failure of the plaintiff's well. Defendants objected, claiming that the experts' opinion would be upon the same issue the jury was to decide. However, the experts were allowed to testify that in their opinion the explosion caused the loss of water in plaintiff's well.

The Illinois Supreme Court, in reversing a long line of cases,<sup>46</sup> ar-

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42. *Carroll v. Magnolia Petroleum Co.*, 223 F.2d 657, 664 (5th Cir. 1955). The court stated: "It must always be remembered that the jury is sitting to hear and decide the *facts*, and in a case like this one, to determine the real *cause* of the accident. There is an ever present danger that an expert witness may invade, indeed, usurp the jury's province by giving an opinion upon the ultimate issue to be decided. . . ."

43. *Underwood v. Smith*, 261 Ala. 181, 73 So. 2d 717 (1954).

44. *DeGroot v. Winter*, 261 Mich. 660, 247 N.W. 69 (1933).

45. 75 Wash. 407, 134 Pac. 1076 (1913).

46. In *Illinois Central R.R. v. Smith*, 208 Ill. 608, 70 N.E. 628 (1904), the court was of the opinion that it would be an invasion of the province of the jury to allow a medical expert to testify as to what "did cause" an injury. However, the expert could testify as to what "might" have caused the injury. In *City of Chicago v. Didier*, 227 Ill. 571, 81 N.E. 698 (1907), the court held that an expert could testify as to what "did cause" an injury only in cases where there was no dispute about the manner of injury and where the area involved was one appropriate for expert testimony. However, where the evidence conflicted as to the manner of injury the expert could only testify as to what "might" have caused the injury. In *Kimbrough v. Chicago City Ry.*, 272 Ill. 71, 111 N.E. 499 (1916), the court was of the opinion that where evidence conflicted as to the manner of injury the expert could not testify that a set of facts assumed to be true "did cause" the injury in question. However, an expert could give his opinion as to whether the injury "may or could" result from and be caused by the assumed facts in the hypothetical question. Finally, in *People v. Rongetti*, 338 Ill. 36, 170 N.E. 14 (1929), the court held that an expert could not state what "did cause" an injury, but he could be asked whether from a medical point of view the facts assumed in a hypothetical question were sufficient to cause a certain result.

rived at the conclusion in *Clifford-Jacobs Forging Company v. Industrial Commission*<sup>47</sup> that it made no difference whether the party propounding a hypothetical question framed it so as to elicit an opinion on "what did" or "what might" cause a certain result.<sup>48</sup> This appears to be the proper approach to a controversial subject. In reality, such testimony is the opinion of an expert in the field based on facts supported by evidence in the record. Hence, such an opinion should be acceptable even when it deals directly with the ultimate issue before the jury for it may be of help to the jury who still retain the task of making a final decision on the matter.

Ohio also follows the line of reasoning expressed by the Illinois Supreme Court. The Ohio Supreme Court has stated:

A well recognized exception to the rule which excludes opinion evidence is found in a situation . . . where it is necessary to admit deductions from observed facts, which require scientific or specialized knowledge or experience and for which the general common sense and practical experience of the jury are inadequate. . . .<sup>49</sup>

Where the opinion of the expert is based partly on his own personal knowledge<sup>50</sup> as well as assumed facts in the hypothetical question, an even stronger case can be made for allowing the expert's opinion to be directed to the ultimate issue before the jury. The expert's opinion under such circumstances should be more responsive and of a greater value to the court and jury than it would be in a case where his opinion is based only on assumed facts. However, under circumstances where the opinion of an expert tends to be speculative beyond the point of mere disagreement with other experts, this would probably mislead the jury.<sup>51</sup> Under these circumstances it would be proper for the trial court to rule against a hypothetical question propounded to elicit such an opinion. Besides being misleading, such an opinion would also be an invasion of the province of the jury.

Regardless of any opinion given by an expert witness in reply to a

47. 19 Ill. 2d 236, 166 N.E.2d 582 (1960).

48. *Id.* at 243, 166 N.E.2d at 586, where the court stated: "So long as the witness is not called upon to decide any controverted fact, but is asked to assume the truth of facts testified to, he may give his opinion thereon in any form. The objection, if any, should be a specific one directed to that which might improperly be incorporated or deleted from the hypothetical question."

49. *Burens v. Industrial Comm'n*, 162 Ohio St. 549, 552, 124 N.E.2d 724, 727 (1955). See also *Shepherd v. Midland Mut. Life Ins. Co.*, 152 Ohio St. 6, 87 N.E.2d 156 (1949); *Baird v. Cincinnati Transit Co.*, 168 N.E.2d 413 (Ohio Ct. App. 1959).

50. In *Temple v. Continental Oil Co.*, 182 Kan. 213, 229, 320 P.2d 1039, 1051 (1958), the court was of the opinion: "It is not fatal to a hypothetical question that it includes the personal knowledge of the expert witness when the extent of that knowledge is proved, so that the actual basis of the witness's opinion is in fact disclosed. . . ." See also *Curtis v. Fruin-Colon Contracting Co.*, 363 Mo. 676, 253 S.W.2d 158 (1952); *Golden v. National Util. Co.*, 356 Mo. 84, 201 S.W.2d 292 (1947).

51. *Johnson v. Toscano*, 144 Conn. 582, 136 A.2d 341 (1957).

hypothetical question which touches the ultimate issue before the jury, the jury still has an important function remaining. The jury must sift through all of the evidence offered to determine which facts have been supported by the preponderance of evidence. Once this has been done it becomes apparent that an expert's opinion is entitled to only such weight as the jury wishes to give it.<sup>52</sup> It has been said, "Such opinion evidence is but to supplement and not to supplant the judgment of the jury . . . ."<sup>53</sup> It should be remembered that even though a hypothetical question is not based on all of the facts (even material facts), this does not affect the admissibility of the opinion as long as it is not misleading. However, the jury may take this into consideration when deciding how much weight to give to the expert's opinion.<sup>54</sup> This is also the proper approach for a court to follow when attempting to decide whether to direct a verdict for either of the parties in a case.

#### CONCLUSION

Certain definite rules must be followed by counsel when framing a hypothetical question to an expert witness. As a general rule, the facts assumed as true in a hypothetical question must be found in the record and established by a preponderance of the evidence. Furthermore, the omission of a material fact from a hypothetical question may result in the question being objectionable, or at least in mitigating the value of the expert's opinion.

In addition, an expert should not be allowed to supply a missing material fact in the chain of causation through his opinion as to the ultimate cause. However, he should be allowed to state his opinion in regards to the ultimate issue where the opinion is not speculative and does not mislead the jury.

It is suggested that the strictness and exactness so often required by courts in the past is giving way to a more liberal and functional use of the hypothetical question. As a result, this is increasing the discretion of the trial court in matters dealing with a hypothetical question. This is desirable in areas where factual situations are often extremely complex and of a technical nature.

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52. *Lovich v. Salvation Army*, 81 Ohio App. 317, 75 N.E.2d 459 (1947).

53. *Id.* at 323, 75 N.E.2d at 462.

54. *Permanente Metals Corp. v. Pista*, 154 F.2d 568 (9th Cir. 1946).