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Examination of the Medical Expert

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THE EXAMINATION OF THE MEDICAL EXPERT

THE expert witness differs essentially from the ordinary witness in at least two particulars; first, in that the field of his testimony is outside the range of ordinary knowledge and experience; and, secondly, in that his testimony in the great majority of cases is in the form of opinions or conclusions that are deemed necessary for the proper guidance of the jury. It goes without saying that the lawyer who undertakes the examination of the expert should have such familiarity with the subject of inquiry as will enable him to develop it through the expert logically and clearly, but unfortunately it does not go without saying that this is generally the case. Proper preparation for such an examination means not only a thorough study of the subject itself, but a careful planning with the expert as to the course of the examination, a complete understanding with him as to the theory to be developed, and in a case that calls for the use of the hypothetical question an exact agreement with him as to its content and form in each instance. But the matter of preparation for the examination of the expert is only incidental to this article, the primary object of which is the consideration of questions that have arisen upon the examination itself, particularly of the medical expert, and that have been adjudicated by courts of last resort.

While the medical expert is sometimes called upon to testify as to scientific facts simply, yet in the great majority of cases in which he acts as a witness, he is summoned for the purpose of securing his opinion as a medical man upon admitted or assumed facts. Although not always strictly so in form, the basis of his opinion is in every case essentially hypothetical. For example, his opinion may be based upon his own testimony as to facts, or upon the testimony of other witnesses, or upon facts stated in a hypothetical question, the facts, whatever the form of the examination, being regarded as established, but only for the purposes of the opinion of the expert. If the jury find that the basis of fact upon which the opinion rests is not established by the evidence, they should reject the opinion. It must be apparent that a consideration of the questions connected with the examination of the medical expert must have to do largely with this hypothetical basis.

The examiner is always confronted with at least two prominent dangers that he must avoid if he would keep his case free from error, namely, the assumption of facts as the basis for the expert opinion that the evidence fails to support, and, secondly, the conducting of the examination in such a way that the expert usurps

the function of the jury. These dangers will be examined in the order named.

The general rule upon the assumption of facts in the hypothetical question undoubtedly is that the examiner may assume therein such facts as support his theory of the case and as he believes the evidence tends to establish.[1] "It is a general rule," says the Supreme Court of Iowa, "that hypothetical questions put to experts should be based upon facts which the evidence tends to show. * * * * It is not required that the questions should be based upon conceded facts, nor is technical accuracy required in framing the questions. If they are entirely without the support of evidence, they should be excluded."[2] And in a later case the same court in considering the question observes that "counsel may assume the facts in accordance with his theory of them. It is not essential that he state the facts as they exist, but the hypothesis should be based on a state of facts which the evidence tends to prove. Under familiar rules of practice, each side has its theory of what is the true state of facts, and assumes that it has (proved) or can prove them to the satisfaction of the jury, and, so assuming, shapes hypothetical questions to experts accordingly."[3] The New York Court of Appeals states the rule as follows: "It is the privilege of the counsel in such cases to assume, within the limits of the evidence, any state of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed. The facts are assumed for the purposes of the question and for no other purpose."[4] The

[1] Louisville, New Albany and Chicago Ry. Co. *v.* Wood, 113 Ind. 544, 553, 14 N. E. Rep. 572; Goodwin *v.* State, 96 Ind. 550, 554, 555; Guetig *v.* State, 66 Ind. 94, 104; Louisville, New Albany and Chicago Ry. Co. *v.* Falvey, 104 Ind. 409, 412, 413, 3 N. E. Rep. 389; Boor, Adm., *v.* Lowrey, 103 Ind. 468, 3 N. E. Rep. 151; Medill *v.* Snyder, 61 Kans. 15, 58 Pac. Rep. 962; Peterson *v.* Chicago, Mil. & St. P. R'y Co., 38 Minn. 511, 515, 39 N. W. Rep. 485; Quinn *v.* Higgins, 63 Wis. 664, 669, 671, 24 N. W. Rep. 482, 53 Am. Rep. 305; People *v.* Hill, 116 Cal. 562, 566, 567, 48 Pac. Rep. 711; People *v.* Durrant, 116 Cal. 179, 215-217, 48 Pac. Rep. 75; Courvoisier *v.* Raymond, 23 Col. 113, 117, 47 Pac. Rep. 284; This general rule applies to the cross-examination as well as to the direct examination. Conway *v.* State, 118 Ind. 482, 490, 21 N. E. Rep. 285.

[2] Meeker *v.* Meeker, 74 Iowa, 357, 37 N. W. Rep. 773. See, also, Burnett *v.* Wilmington, etc., Ry. Co., 120 N. C. 517, 520.

[3] Bever *v.* Spangler, 93 Iowa, 576, 602, 61 N. W. Rep. 1072. See, also, Muldowney *v.* Ill. Cent. R'y Co., 39 Iowa, 615; Hurst *v.* The Chicago R. I. Pac. R'y Co., 49 Iowa, 76; Smalley *v.* City of Appleton, 75 Wis. 18; Russ *v.* Wabash Western R'y Co., 112 Mo. 45, 48; Smith *v.* Chicago and Al. R. R. Co., 119 Mo. 246, 255, 23 S. W. Rep. 784; Hicks *v.* Citizens' R'y Co., 124 Mo. 115, 125, 27 S. W. Rep. 542, 25 L. R. A. 508; Ray *v.* Ray, 98 N. C. 566, 568, 569, 4 S. E. Rep. 526; Denver and R. G. R. Co. *v.* Roller, 41 C. C. A. 22, 39, 100 Fed. Rep. 738; City of Aledo *v.* Honeyman, 208 Ill. 415, 70 N. E. Rep. 338; Chicago City Ry. Co. *v.* Bundy, 210 Ill. 39, 46, 71 N. E. Rep. 28.

[4] Filer *v.* New York Cent. R. R. Co., 49 N. Y. 42, 46; Hornett *v.* Garvey, 66 N. Y. 641; Cowley *v.* People, 83 N. Y. 464, 470; Dillaber *v.* Home Life Ins. Co., 87 N. Y. 79; Stearns *v.* Field, 90 N. Y. 640; Cole *v.* Fall Brook Coal Co., 159 N. Y. 59, 68.

Supreme Court of Minnesota says that "all hypothetical questions must be based upon facts admitted or established, or, which, if controverted, might legitimately be found by the jury from the evidence. Such a question should embody substantially all the facts relating to the subject upon which the opinion of the witness is asked."* But while it is necessary that the hypothetical question should cover fairly the essential facts of the case, or of that part of it to which the question relates, as claimed by the party putting the question, it is not essential that it should contain all the facts as to the subject matter under investigation. If this were the rule, it is apparent that the hypothetical question could not be used in cases where there is a conflict as to the facts which the jury alone can settle, for it would be a gross irregularity to impose upon the expert the duty of settling contradictory statements.[5] The very meaning of the word hypothetical conveys the notion that something is assumed for the time being and for certain purposes. "Each side, in an issue of fact, has its theory of what is the true state of the facts, and assumes that it can prove it to be so to the satisfaction of the jury, and so assuming, shapes hypothetical questions to experts accordingly."[6] This rule would manifestly be unjust were it not for the opportunity afforded to the opposing counsel, through cross-examination, to bring out omitted facts and to develop his theory of the case for the opinion of the expert.[7] If the assumed facts are such as the evidence fairly tends to prove, the requirements of the rule are satisfied. It has been held not to be necessary that the facts be clearly proved. Slight errors and discrepancies are not usually regarded as prejudicial, as the opposing counsel may bring them out on cross-examination if they exist.[8]

But although the hypothetical question need not be framed with technical accuracy, yet it should reflect fairly the facts that are admitted or are in evidence, for, if it does not, it will tend to confuse the issue and induce profitless speculation by the jurors.[9] It should

*Wittenberg *v.* Onsgard, 78 Minn. 342, 346, 347, 81 N. W. Rep. 14; Smith *v.* Minneapolis St. Ry. Co., 91 Minn. 239, 97 N. W. Rep. 881.

[5] Louisville, New Albany and Chicago R'y Co. *v.* Wood, 113 Ind. 544, 554, 555, 14 N. E. Rep. 572.

[6] Cowley *v.* People, 83 N. Y. 464, 470; Filer *v.* N. Y. Cent. R. R. Co., 49 N. Y. 42; Jackson *v.* Burnham, 20 Col. 532, 535, 39 Pac. 577; Kerr *v.* Lunsford, 31 W. Va. 659, 672, 673; Bowen *v.* City of Huntington, 35 W. Va. 682, 686-691; In re Will of Fenton, 97 Iowa, 192; Peterson *v.* Chicago, Mil. and St. Paul R'y Co., 38 Minn. 511, 515, 39 N. W. Rep. 485; Kickhoefer *v.* Hidershide, 113 Wis. 280, 290, 89 N. W. Rep. 189.

[7] Davidson *v.* State, 135 Ind. 254, 261, 34 N. E. Rep. 972.

[8] Hall *v.* Rankin, 87 Iowa, 261, 54 N. W. Rep. 217; People *v.* Bowers, 79 Cal. 415, 18 Pac. Rep. 660; Baker *v.* State, 30 Fla. 41, 59, 60, 11 South. Rep. 492; Roark *v.* Greeno, 61 Kan. 299.

[9] O'Hara *v.* Wells, 14 Neb. 403, 408, 15 N. W. Rep. 722.

be remembered, moreover, that the hypothesis that is to serve as the basis for the expert opinion, should be a hypothesis of fact and not of impressions. Mere conjecture cannot properly form the basis for such an opinion, for there is no way by which the jury can determine as to the soundness of the conjecture.[10] Nor can the expert properly base his opinion upon the conclusions and inferences of other witnesses.[11]

The propriety of a hypothetical question may depend upon the way in which the facts are stated or in which omissions are made. Such a question would certainly be subject to objection, if by reason of the manner of statement adopted or through omissions, it should manifestly fail to present the facts included therein in their just and true relation. For example, in the case cited below an objection to a hypothetical question was interposed on the ground that it stated "the existence of certain conditions and the happening of divers incidents (all for the purpose of determining the sanity of a man at a given moment) without any statement as to their relation to one another in point of time or otherwise," * * * leaving the witness to believe that he might "base his opinion on their having happened contemporaneously or in close continuous succession." In discussing this objection the Supreme Court of Connecticut says: "We think that all we are required to say in reference to this objection is, that in this particular, as in all others, a question to an expert witness, testifying as to a person's mental condition, about which he has no personal knowledge, should contain such assumptions of fact and such only as counsel may fairly claim that the evidence in the case tends to justify, and that while such a question may not be improper because it includes only a part of the facts in evidence, it would be so if by reason of omission it manifestly failed to present the facts which it did include in their just and true relation, and caused them to appear in one that was untrue and unjust."[12] In further illustration, it may be suggested that it has been held improper, in a case involving the mental competency of a testator, for the examiner to select a few facts which tend to show competency and sanity, and ask an expert witness who has testified that in his opinion the testator was insane, whether such facts change his opinion.[13] Not only should the facts included in a hypothetical question fairly represent the case as made by the proofs,

[10] Higbie *v.* Guardian Mut. Life Ins. Co., 53 N. Y. 603; Kelly *v.* Perrault, 5 Idaho, 221, 241, 48 Pac. Rep. 45. See, also, People *v.* Millard, 53 Mich. 63, 74, 75.

[11] Williams *v.* State, 64 Md. 384, 394; The Berry Will Case, 93 Md. 560, 568-570, 49 Atl. Rep. 401.

[12] Barber's Appeal, 63 Conn. 393, 409, 27 Atl. Rep. 973, 22 L. R. A. 90.

[13] Prentis *v.* Bates, 88 Mich. 567, 590, 50 N. W. Rep. 637.

but all assumptions should be consistent with the theory of the case as presented.[14] It would be irregular to examine the expert upon theories that are contrary to the positive and uncontradicted facts.[15]

Ordinarily the expert will answer the question propounded without additions or suggestions. But it is by no means necessary that he should do so. He should not attempt an answer if the facts stated in the question do not constitute a substantial basis for an opinion. And it has been held proper for an expert to include in his answer considerations not assumed in the question, provided he states the considerations fully and they are such as the testimony tends to sustain and as might properly have been included in the question. By such a course the suggested considerations really become a part of the question.[16]

While the form of the hypothetical question is not of special significance, provided it contains a fair statement of the facts as claimed by the party putting it and calls for an opinion based upon the assumed statement,[17] yet the matter of form should not be entirely neglected or, in most cases, left to be determined by the examiner upon the spur of the moment at the time of the trial. The careful practitioner will agree with his expert before the trial as to the substance and form of the hypothetical questions to be used upon the trial, and in most cases he will, with the aid of the expert, reduce such questions to writing in advance of the trial. Of course, the form cannot always be determined in advance; indeed it rarely can be, so far as cross-examination is concerned; but so far as the principal hypothetical questions to be used upon the direct examination are concerned, they may usually be formulated before the trial. We are not without judicial opinion as to the proper practice. "It is the duty of the court to determine whether a question put to an expert witness is one proper to be put; but when he has determined that the question as presented may be put, he should see that it is in such shape as to present clearly the facts upon which the opinion is asked; and if of considerable length, embracing a long history of a case, it should be reduced to writing, in order to enable the witness to answer intelligently, and the opposite counsel to cross-examine, or offer testimony in rebuttal."[18] The hypothetical question is not ordinarily subject to objection simply because of its length, provided it states in a logical and clear manner the

[14] Turner *v.* Township of Ridgeway, 105 Mich. 409, 63 N. W. Rep. 406.
[15] People *v.* Hall, 48 Mich. 482, 489.
[16] Hathaway, Adm'r. *v.* Nat. Life Ins. Co., 48 Vt. 335, 351, 352.
[17] City of Decatur *v.* Fisher, 63 Ill. 241.
[18] Mayo *v.* Wright, 63 Mich. 32, 42, 29 N. W. Rep. 832; Jones *v.* Village of Portland, 88 Mich. 598, 613, 50 N. W. Rep. 731.

assumed facts upon which the opinion sought is to be based. But whenever possible the lengthy question should be avoided, as a long recital of facts has a tendency to confuse and mislead the jury. This matter, "like the extent to which the examination of a witness may be allowed, must, in a great degree, be left to the discretion of the court."[19] Although there is no set form for the hypothetical question, yet when such a question is attempted, it should be essentially hypothetical throughout. It has been held, for example, to be irregular to read what purports to be a statement of facts but which in reality contains much that is not within the range of legitimate evidence, together with inferences and conclusions, and which has nothing in it until near its close to give it the appearance of being hypothetical in character, and then to ask the witness for his opinion thereon. "The hypothetical feature of the question," says the Supreme Court of Illinois in commenting upon the proceeding, "is hardly discernible. The question covers some two and a half pages, containing in it no appearance of hypothesis, until in the last sentence, in the words, 'on this supposed state of facts.' The reading over of this lengthy paper, filled with partial statements of facts, containing conclusions drawn from them, many times in the hearing of the jury, was calculated to possess them most fully with the plaintiff's side of the case, and not to leave their minds open to an unbiased consideration of the whole of the facts of the case. Opportunity should not be given for doing this through the medium of a question put to witnesses. The question is an anomaly, and must receive condemnation."[20] But there is no objection to a question being in form partly hypothetical and partly based upon knowledge that the expert has derived from his own examination. It will, of course, be observed that such a question is essentially hypothetical throughout.[21] Though no particular form need be adopted in framing the hypothetical question, it should never be so constructed as to be indefinite and it should always fairly reflect the facts, either admitted or proved.[22]

It has been held to be the better practice first to introduce all the evidence in support of the facts that are to be assumed in the hypothetical question.[23] But although the better course, it need not necessarily be followed. Testimony in support of the assumed facts may, in the discretion of the court, be introduced after the hypotheti-

[19] Forsyth *v.* Doolittle, 120 U. S. 73, 76, 77, 78, 7 Sup. Ct. Rep. 408.

[20] Haish *v.* Payson, 107 Ill. 365, 371, 372.

[21] Joslyn *v.* Grand Rapids Ice and Coal Co., 53 Mich. 322, 326, 327, 19 N. W. Rep. 17; Olmsted *v.* Gere, 100 Pa. St. 127, 128-132.

[22] O'Hara *v.* Wells, 14 Neb. 403, 407, 408, 15 N. W. Rep. 722.

[23] Rivard *v.* Rivard, 109 Mich. 98, 113, 66 N. W. Rep. 681.

cal question has been asked.[24] If, however, after the close of the testimony, it be found that the hypothetical question assumed facts not justified by the evidence, opposing counsel may move to have the answer stricken out, and the ruling upon such request raises a question for review.[25] It has been held that the trial court may, in the exercise of its discretion, exclude a hypothetical question until a foundation for it has been laid by the evidence.[26]

In the direct examination, as has been shown, the facts assumed in a hypothetical question must be fairly within the scope of the evidence. If this condition is observed, the putting of the question is a matter of legal right. Upon the cross-examination, the same strictness as to the assumed facts is not necessary, for counsel may "assume any facts pertinent to the inquiry, whether testified to by witnesses or not, with a view of testing the skill and accuracy of the expert."[27] But such a proceeding is not a matter of right. Assumptions of this kind are under the control of the trial court, and may in the exercise of a fair discretion be excluded.[28] Further, it is proper in the cross-examination of an expert to assume facts that have not been put in evidence when such a course is necessary in order to supply defects in the testimony given by the other side that might result in misleading the jury. For example, if a medical expert has testified that in a particular case he discovered no evidence of an abortion, he may properly be asked on cross-examination whether traces would exist under circumstances stated, though no proof of such circumstances has been made. The statement of the witness that at a certain time he discovered no evidences of abortion, standing by itself, would have no value for the jury, for the very obvious reason that it would not inform them whether at that time evidences of abortion would have been discoverable if one had taken place. In such a case, it would be the duty of the person producing the expert to call out the necessary information as to whether or not, at the time of the examination, evidences of abortion, if one had taken place, would have been discoverable, and if he fails to do so, the necessary inquiry may be supplied on cross-examination, and to that end facts may be assumed, as suggested.[29]

[24] Anderson *v.* Albertstamm, 176 Mass. 87, 57 N. E. Rep. 215.

[25] Wilkinson *v.* Detroit Steel and Spring Works, 73 Mich. 405, 418.

[26] Porter *v.* Ritch, 70 Conn. 235, 262, 263, 39 Atl. Rep. 169.

[27] Dilleber *v.* Home Life Ins. Co., 87 N. Y. 79, 83; Bever *v.* Spangler, 93 Iowa, 576, 608, 61 N. W. Rep. 1072; Taylor *v.* Star Coal Co., 110 Iowa, 40, 45, 46, 81 N. W. Rep. 249; Williams *v.* Great Northern R'y Co., 68 Minn. 55, 65, 70 N. W. Rep. 860.

[28] Dilleber *v.* Home Life Ins. Co., 87 N. Y. 79, 83; People *v.* Angsbury, 97 N. Y. 501, 505, 506.

[29] Bathrick *v.* Detroit Post & Tribune Co., 50 Mich. 629, 643, 16 N. W. Rep. 172, 45 Am. Rep. 63.

The proposition suggested will be clear if it is remembered that the answer to the hypothetical question must relate to the question and be based upon the facts therein assumed. If the question omits facts that, in the judgment of the other side, are important as bearing upon the opinion expressed by the expert, it would follow logically that the other side should be permitted to show to the jury upon cross-examination that the answer of the expert was based upon an imperfect statement of facts. "It might be wiser," says the court in the case cited below, "to exclude such questions altogether, when they are very complicated or involve much detail."[30]

If the medical expert has testified as to the condition of a party at a particular time, he may be cross-examined as to the causes, other than the one alleged by the party, that might bring about the condition described. This would be a legitimate subject of inquiry upon cross-examination, for if such an inquiry were not allowed, the jury would naturally conclude that the cause alleged and insisted upon by the party bringing the action was the true cause, when the cross-examination might show such a conclusion to be erroneous. For example, in an action for malpractice in improperly setting and caring for a broken leg, a medical expert for the plaintiff had testified that when he first examined the leg, a ligamentous connection had formed at the place of fracture, making a false joint. On cross-examination he was asked as to the causes which might result in this ligamentous union instead of the usual bony union, and whether non-union in compound fractures might not take place sometimes in case of the best treatment. These questions were excluded as not proper cross-examination. In considering the matter, the Wisconsin Supreme Court said: "We are very clear that the objection should have been overruled. The witness had testified as to the condition of the leg when he first saw and examined it. The condition in which he described the limb was undoubtedly shown on the part of the plaintiff as tending to show improper treatment on the part of the defendant, and it seems to us very clear that the defendant had the right on the cross-examination of the witness to disprove the inference of negligence on his part sought to be drawn from its condition, by showing that such condition might, and often did, result from causes other than negligence on the part of the attending surgeon, and that it did often result under the best of care."[31]

But there are limits to the cross-examination of the medical expert, not so clearly defined to be sure as could be desired, and

[30] Howes *v.* Colburn, 165 Mass. 385, 387, 388, 43 N. E. Rep. 125.

[31] Quinn *v.* Higgins, 63 Wis. 664, 667, 668, 24 N. W. Rep. 482, 53 Am. Rep. 305.

these limits should be observed. The examiner cannot properly under the guise of cross-examination make the expert his own witness. For example, in an action for personal injuries, it would not be proper to ask a medical witness who had been produced by the plaintiff and who had described the condition of the patient at the time of the trial and expressed the opinion that the injury would be permanent, whether the condition of the patient was not attributable to the method of treatment, and what would be the proper treatment for such an injury, as the answers to such questions would not explain, limit, or modify the testimony in chief, but would be properly matters of defense. The expert for such purposes should be introduced as a witness for the defense.[32] Further, where the testimony of an expert has been confined to a contradiction of the theory of the experts of the other party, it has been held improper to propound upon cross-examination, a hypothetical question similar to the one put by the cross-examiner to his own experts, as such a question would be outside the limits of proper cross-examination and could not, whatever the answer, be justified as a test of the capacity of the expert. It was suggested by the court in the case cited that if the answer of the expert to such a question were the same as that given by the experts of the cross-examiner, it would simply strengthen the affirmative case of the cross-examiner and would properly be a part thereof, and that if it were different, it would no more tend to prove the incompetency of the witness than it would tend to prove the incompetency of the experts called by the cross-examiner.[33] Moreover, the cross-examination should always be confined to the field for which the expert has qualified and within which he has testified, that is to say, it should not go outside the subject-matter in regard to which he has shown his qualifications to speak and concerning which he has been examined. A witness cannot be treated as an expert to any greater extent than he has qualified as an expert. It would follow, then, that if a physician has testified to facts not as an expert but simply as an ordinary witness, he cannot be cross-examined as an expert.[34] He becomes an expert, however, in contemplation of the law, when in addition to testifying as to facts, he expresses a professional opinion.[35] For example, if an attending physician, who is a witness to a testator's will, has, upon direct examination, testified as to the fact of his having been the physician of deceased during his last sickness, and,

[32] Rice *v.* City of Des Moines, 40 Iowa, 638, 645.

[33] Gridley *v.* Boggs, 62 Cal. 190, 200.

[34] Enos *v.* St. Paul F. & M. Ins. Co., 4 S. Dak. 639, 57 N. W. Rep. 919, 46 Am. St. Rep. 796; Olmsted *v.* Gere, 100 Pa. St. 127, 131.

[35] Shields *v.* State, 149 Ind. 395, 401, 49 N. E. Rep. 351.

in addition to detailing the circumstances attending the execution of the will, has given his opinion as to the mental condition of deceased at the time of the transaction, he may be cross-examined fully as to the facts and circumstances upon which his conclusion is based, as to the character of his patient's affliction, as to the disclosures made by an autopsy and further as to his qualifications as an alienist. He makes himself an expert in the broad field of the alienist when he qualifies as a physician and surgeon and expresses an opinion as to the mental condition of deceased, and is properly cross-examined along the lines suggested.[36]

The extent of the cross-examination is largely within the control of the trial court. Except for special reasons, it should not be allowed to go beyond the field of the principal inquiry. It has been held, for instance, that after a witness has given his professional opinion, based upon a proper hypothesis of fact, "it is ordinarily opening the door to too wide an inquiry to interrogate him as to what other scientific men have said upon such matters, or in respect to the general teachings of science thereon."[37]

The objection to a hypothetical question in order that it may be considered by the court should be specific. It is not sufficient to object because the question is not a proper hypothetical one;[38] or upon the ground that it is irrelevant, immaterial and incompetent and not a proper hypothetical question. The particular defect that in the opinion of counsel interposing the objection renders the question either incompetent, irrelevant or immaterial, or that makes the question improper as a hypothetical question, should be designated, in order that the point raised may be intelligently passed upon by the trial court.[39] The objection that a question assumes facts that are not supported by the evidence would be a legitimate one and should prevail in the absence of any evidence upon the subject.[40] But the court cannot properly reject a hypothetical question because in its judgment the facts assumed are not established by a preponderance of evidence. Indeed, if there is any evidence in the case in support of the facts assumed, the trial court should not reject the question, because thereby the court would usurp the functions of the jury. "It may be true," says the Supreme

[36] In re Mullin, 110 Cal. 252, 255, 256, 257, 42 Pac. Rep. 645; Titus v. Gage, 70 Vt. 13, 39 Atl. Rep. 246.

[37] Davis v. United States, 165 U. S. 373, 377, 17 Sup. Ct. Rep. 360.

[38] Longan v. Weltmer, 180 Mo. 322, 79 S. W. Rep. 655, 64 L. R. A. 969.

[39] Howland v. Oakland Consol. St. R. Co., 110 Cal. 513, 42 Pac. Rep. 983; Roark v. Greeno, 61 Kans. 299, 307, 308, 309; Prosser v. Montana Cent. R. R. Co., 17 Mont. 372, 382, 43 Pac. Rep. 81.

[40] Reber v. Herring, 115 Pa. St. 599, 608, 609, 8 Atl. Rep. 830; Burnett v. Wilmington, &c., Ry. Co., 120 N. C. 517, 520, 26 S. E. Rep. 819.

Court of Wisconsin, "that the court ought not to allow hypothetical questions to be propounded to an expert witness which are plainly outside of the case and based upon a statement of facts as to which there is no pretense that they are proved by the evidence in the case. The rule in that respect must be that, in propounding a hypothetical question to the expert, the party may assume as proved all facts which the evidence in the case tends to prove, and the court ought not to reject the question on the ground that, in his opinion, such facts are not established by the preponderance of the evidence. What facts are proved in the case, when there is evidence tending to prove them, is a question for the jury and not for the court. The party has the right to the opinion of the expert witness on the facts which he claims to be the facts of the case, if there be evidence in the case tending to establish such claimed facts, and the trial judge ought not to reject the question because he may think such facts are not sufficiently established."[41] In considering such an objection, the Supreme Court of Indiana says: "Whether or not the facts so assumed were or had been established by the evidence, and whether or not all or any of such facts were true, were questions for the consideration and determination of the jury, upon the evidence adduced, but, in no event, could all or any of these questions be made the basis of valid objections by the appellants to appellee's hypothetical question."[42] Further, an objection to a hypothetical question upon the ground that it embraces facts not in evidence will not be sustained where the exceptions and evidence reported to the reviewing court do not show that there was no evidence in the case tending to prove the facts, and where it does not appear that the objections to the question in the court below were for that cause.[43]

But while the trial court cannot ordinarily reject a hypothetical question because in its judgment the assumptions of the question are not sustained by the evidence in the case, it has a duty to perform toward the jury in connection with such a question, for the jury should be advised as to what their attitude should be in regard to the assumed facts and the conclusions based thereon. They should be instructed that if the facts assumed are not found by them to be substantially sustained by the evidence, the expert opinion based upon such assumed facts should be rejected. "The sole value of the opinion must, of necessity, depend upon the correctness of the statment of facts upon which it is based. If that is

[41] Quinn *v.* Higgins, 63 Wis. 664, 670, 671, 24 N. W. Rep. 482, 53 Am. Rep. 305.

[42] Deig *v.* Morehead, 110 Ind. 451, 460, 461, 11 N. E. Rep. 458; People *v.* Johnson, 70 Ill. App. 634.

[1] Powers v. Mitchell, 77 Me. 361.

incorrect, then the opinion can have no weight or value whatever."[44] In the case cited below the trial court said to the jury: "If the evidence does not substantially sustain the hypothesis or supposed state of facts presented in the question to the witness, then the opinion would be of less value than if the facts presented were sustained or established by the evidence—how much less in value depends upon the materiality of the variance, if any, between the facts in the question and the true facts as the evidence shows them to be. * * * Considering, therefore, the true facts * * * as shown by the evidence and comparing the same with the supposed state of facts presented to the witnesses upon which they based their opinions, give the same weight to which you find them justly entitled, if any, or no value at all, as you find the facts will warrant." In considering this instruction, the Supreme Court of the state says: "It will not do to allow juries to say what facts were material in securing the opinion of the medical expert, and to what extent a variance in the facts would have changed this opinion. The only safe rule is to reject the opinion unless the facts hypothetically stated are established by the evidence. If a portion of the facts are to be eliminated, the witness and not the jury should be permitted to estimate the difference this change would effect in the opinion he has expressed."[45] This conclusion is undoubtedly correct; yet the Supreme Court of Wisconsin has said that a jury may properly be instructed that if a hypothetical question does not contain all the facts necessary to a proper opinion upon the case, the testimony based upon such a question "is very much weakened, if not entirely destroyed and of no effect,"[46] a suggestion that has in it an element of danger, for it implies that the jury may, under certain circumstances, determine as to the facts necessary as a basis for the expert opinion, a doctrine that finds support neither in reason nor authority.

We come now to a consideration of the second of the dangers to be avoided in connection with the use of expert testimony, namely, the examination of the expert in such a way that he will usurp the function of the jury by passing upon facts. It is fundamental and elementary that the expert witness cannot properly give his opinion as to the merits of the case. That opinion is for the jury. The opinion of the expert should have a basis in fact, but it should

[44] Hall *v.* Rankin, 87 Iowa, 261, 264, 265, 54 N. W. Rep. 217; Kirsher *v.* Kirsher, 120 Iowa, 337, 342, 94 N. W. Rep. 846; Hovey *v.* Chase, 52 Me. 304, 313, 314; Loucks *v.* Ch. Mil. & St. P. R'y Co., 31 Minn. 526, 534, 18 N. W. Rep. 651.

[45] Stutsman *v.* Sharpless, — Iowa —, 101 N. W. Rep. 105; Kirsher *v.* Kirsher, 120 Iowa, 337, 342, 94 N. W. Rep. 846.

[46] Quinn *v.* Higgins, 63 Wis. 664, 671, 672, 24 N. W. Rep. 482, 53 Am. Rep. 305.

not have a basis in a conclusion of fact reached by the expert himself after weighing the testimony of others. His opinion may be based either upon facts to which he testifies, or upon facts in regard to which there is no controversy, or upon facts hypothetically stated. For the purposes of the opinion in each case, the facts are deemed to be established, but before the jury can properly be guided by the opinion, they must find that the facts upon which it has been based have been established.[47]

If the facts upon which the expert opinion is to be based are hypothetically stated by the examiner, there can usually be but little danger of an invasion of the functions of the jury. Some courts hold this to be the only proper way of securing such an opinion in cases where there is a conflict of testimony. "The proper way to interrogate an expert, to obtain his opinion on facts to be derived from testimony, is," says the Supreme Court of Massachusetts, "to put questions on hypothetical statements of facts, or to ask the witness to give opinions founded on possible views of the evidence, stating in connection with the opinions the hypothetical facts to which they relate, so as to make them intelligible. An expert witness cannot be asked to give an opinion founded on his understanding of the evidence, against the objection of the other party, except in cases where the evidence is capable of but one interpretation. In other words, questions must be so framed that the witness will not be called upon to give an answer involving his opinion on disputed questions of fact which are not proper subjects for the testimony of an expert, nor to intimate to the jury his opinion as to the credibility of any of the witnesses."[48] According to the Supreme Court of Indiana, the danger in receiving an opinion based upon the testimony of other witnesses which the expert has heard, lies in the fact that the jury have no way of informing themselves as to what prompted the opinion, and, therefore, no means of judging as to its correctness. "The expert's memory," says this court, "might be deficient in recollecting all the facts testified to; he might have a different understanding of, or place a different construction upon, the language used by the witness or witnesses upon whose testimony he based his opinion, from what the jury would have or place, if they were informed upon what facts testified to the opinion was based. We think the

[47] Tingley *v.* Cowgill, 48 Mo. 291, 297, 298; Manufacturers' Accident Indemnity Co. *v.* Dorgan, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. Rep. 945, 22 L. R. A. 620; Baltimore and Ohio R. R. Co. *v.* Thompson, 10 Md. 76, 84; Stoddard *v.* Winchester, 157 Mass. 567, 575, 32 N. E. Rep. 948.

[48] Stoddard *v.* Winchester, 157 Mass. 567, 575, 32 N. E. Rep. 948; Chalmers *v.* Whitmore Man'f'g Co., 164 Mass. 532, 42 N. E. Rep. 98.

only safe rule in allowing an expert witness to give an opinion, based upon the testimony of others, is to require the assumed facts, upon which an opinion is desired, to be stated hypothetically; then the jury can judge whether the assumed facts, upon which the opinion is based, have been proved, and weigh the opinion as applicable to them."[49] The Supreme Court of New Hampshire has declared that it is "improper to ask an expert, who has heard the evidence, what his opinion may be upon the case, as shown upon the proof, but he may be asked to give his opinion upon a state of facts such as the evidence tends to establish, hypothetically stated."[50] The suggestion that it is safer and better to incorporate in the question all the particulars upon which the opinion of the expert is to be based, has frequently been made by courts of last resort. "If this is done," says the Supreme Court of Connecticut, "the witness will have distinctly in mind all the elements which are to enter into the opinion he gives, and the jury will also know what these elements are, and so be able properly to weigh the opinion when given. A prudent lawyer would be quite likely to ask such questions in this way. In most cases the court would probably require this kind of questions to be put in the form indicated. But as there may be cases in which no harm could be done by permitting questions which are to be answered by the opinion of the witness, to be asked without such enunciation, we think it may fairly be left to the discretion of the presiding judge to prescribe the form in which such questions must be asked, whenever it is necessary to do so."[51] And the same court holds that when a hypothetical question is propounded that contains a great number of particulars, it is improper to ask an expert to base his answer upon the facts contained in the question and also upon the testimony of a witness, assuming it to be true, as it would be impossible for the jury to determine as to the basis of the opinion.[52] But as somewhat opposed to this doctrine, it has been held that an expert, after having testified fully as to his knowledge of a party, may be asked to give an opinion as to the party's sanity, based upon his own knowledge and the facts stated in a hypothetical question to another expert, assumed for the purposes of the question to be true. It

[49] Craig *v.* Noblesville and Stony Creek Gravel R. Co., 98 Ind. 109, 111, 112; Elliott *v.* Russell, 92 Ind. 526; Bedford Belt R'y Co. *v.* Palmer, 16 Ind. App. 17, 44 N. E. Rep. 686. See, also, to same effect Guiterman *v.* Liverpool, N. Y. and Phil. Steamship Co., 83 N. Y. 358.

[50] Spear *v.* Richardson, 37 N. H. 23, 34. See, also, Perkins *v.* Concord R. R., 44 N. H. 223, 225; Boardman *v.* Woodman, 47 N. H. 120, 135.

[51] Roraback *v.* Pennsylvania Co., 58 Conn. 292, 20 Atl. Rep. 465.

[52] In re Barber's Estate, 63 Conn. 393, 408, 409, 27 Atl. Rep. 973, 22 L. R. A. 90.

should be said, however, that the question was objected to, not upon the ground of its basis being his own knowledge and another hypothetical question, but because the knowledge of the party to which reference was made, was not in the question limited to the knowledge testified to. But the objection was overruled on the ground that the question must have referred to the knowledge in regard to which testimony had been given.[52]

It is not necessary that the facts upon which the opinion of the medical expert is to be based, should be stated in the question, if the expert has already in his testimony stated the facts. It is only necessary that the witness and the jury should understand the facts upon which the opinion is based, and in order to their understanding of them, one statement is ordinarily sufficient.[54] But the Supreme Court of California has held the practice of reciting the facts in the question not objectionable.[55] It should be noted, however, that a witness cannot properly be asked for an expert opinion, based upon what he knows of the facts personally, without stating what that is. If this were allowed, he might take into consideration facts that would be altogether irrelevant, and it would, under such circumstances, be impossible for the jury to pass upon the truth of the facts upon which the opinion was based or to apply the opinion to the facts in the case. "The opinion of an expert must be based upon proved or admitted facts, or upon such as are assumed for the purpose of a hypothetical question."[56] Moreover, it would be improper for a physician, in answering a hypothetical question, to take into consideration facts derived from his own knowledge of the case, but which are not stated in the hypothetical question or brought out by the witness in connection with his answer. In the absence of explanation or suggestion that other facts are taken into consideration as a part of the basis for his opinion, the expert should confine himself in his answer strictly to the facts stated in the question. "If he is permitted to inject facts into the question out of his own knowledge and * * * without the knowledge of the court or jury, the answer is misleading, and a hindrance rather than an aid to justice." And the court suggests that when it appears that this has been done by an expert, "the answer to the question should be excluded at once, and any further answer of the witness to hypothetical questions taken with caution, if not rejected altogether, unless it can be made clearly to appear that in

[52] Foster's Ex'rs *v.* Dickerson, 64 Vt. 233, 254.

[54] McDonald *v.* Ill. Cent. R. R. Co., 88 Iowa, 345, 353, 55 N. W. Rep. 102.

[55] In re Flint, 100 Cal. 391, 397, 34 Pac. Rep. 863.

[56] Burns, Ex'r. *v.* Barenfield, 84 Ind. 43.

such answer he acts upon the facts stated in such questions alone, and without recourse to facts within his knowledge not embraced in such questions."[57] But it has been held not to be improper to ask a medical witness to assume, as the basis of his opinion, in addition to the facts stated in a hypothetical question, what he knew from his personal examination of the patient as testified to by him.[58]

The courts generally, hold it to be improper in a case where the facts developed upon the trial are such that there is an issue for the jury, to ask an expert who has heard the evidence what his opinion upon the case is. For example, where evidence has been given tending to show sanity and other evidence tending to show insanity, it would be improper to ask the medical witness to give his opinion, based upon the testimony adduced upon the trial, as to the sanity or insanity of the party.[59] To put the matter differently, an expert cannot properly answer a question when his answer must necessarily require him to pass upon conflicting evidence. In a malpractice case, for example, an expert who has testified that he has heard all the evidence cannot properly be asked whether, taking all the facts as he understands them, he sees any evidence of malpractice, for the answer would be a determination by the witness of the very question that the jury were impaneled to decide.[60] The Supreme Court of Wisconsin has spoken upon the subject as follows: "The jury should in every case distinctly understand what are the exact facts upon which the expert bases his opinion. This is, perhaps, best accomplished by limiting him to answering hypothetical questions, and if it be proper in any case to permit an expert who has heard the testimony of a particular witness or of all the witnesses, to give his opinion upon such evidence, and there be any conflict of evidence, or any doubt as to what the evidence is, he should be required to state fully his understanding as to what facts are established by such testimony. In such case the jury will be able to

[57] Fuller *v.* City of Jackson, 92 Mich. 197, 201, 203, 52 N. W. Rep. 1075.

[58] Tebo *v.* City of Augusta, 90 Wis. 405, 407, 63 N. W. Rep. 1045.

[59] Dexter *v.* Hall, 82 U. S. (15 Wall.) 9, 26, 27. See, also, Woodbury *v.* Obear, 7 Gray (Mass.) 467, 471; People v. McElvaine, 121 N. Y. 250, 254-258, 24 N. E. Rep. 465; Reynolds *v.* Robinson, 64 N. Y. 589, 595, 596; Link *v.* Sheldon, 136 N. Y. 1, 9, 32 N. E. Rep. 696; In the Matter of Will of Snelling, 136 N. Y. 515, 518, 32 N. E. Rep. 1006; Butler *v.* St. Louis Life Ins. Co., 45 Iowa, 93, 98; Fairchild *v.* Bascomb, 35 Vt. 398; Pyle *v.* Pyle, 158 Ill. 289, 299, 300, 41 N. E. Rep. 999; Myers *v.* Lockwood, 85 Ill. App. 251; Tefft *v.* Wilcox, 6 Kan. 46, 58; Kempsey *v.* McGinniss, 21 Mich. 123, 138, 139.

[60] Hoener *v.* Koch, 84 Ill. 408. See, also, Henry *v.* Hall, 13 Ill. App. (13 Bradw.) 543; Wilkinson *v.* Moseley, 30 Ala. 562, 572, 573; Rush *v.* Megee, 36 Ind. 69, 73-77; Bishop *v.* Spining, 38 Ind. 143; Smith *v.* Hickenbottom, 57 Iowa, 733, 738, 11 N. W. Rep. 664; Armendaiz *v.* Stillman, 67 Texas, 458; Luning *v.* State, 1 Chand. (Wis.) 178; 2 Pin. 215, 52 Am. Dec. 153.

determine whether his opinion is based upon the evidence in the case as they understand it, or otherwise. Any other rule, it seems to us, leaves the jury entirely in the dark as to the most important fact, viz., whether the opinion is based upon the evidence as they understand it, or upon some other construction of the evidence not in their opinion justified by the testimony in the case."[61]

But although it would seem to be the better practice to state the facts hypothetically which are to be the basis of the expert opinion, as by this course there is little danger of encroaching upon the province of the jury, yet some courts, while recognizing this practice as proper, seem to favor that of basing the opinion upon particular testimony in the case, which, for the purposes of the opinion, is to be taken as true. These courts would not permit a general reference to the testimony in the case, if contradictory, as a basis, but they apparently favor the testimony of a particular witness or of particular witnesess, as, for example, the witnesses of the party calling the expert, he having heard the testimony, being taken as a basis. It is argued, in support of this practice, that a question based upon particular testimony in the case, assumed for the purpose of the question to be true, is essentially hypothetical, and that it requires no expression of opinion by the witness as to the truth of the testimony or as to the weight that should be given to it. To illustrate: In the case of *Wright* v. *Hardy,* the rejecting of the testimony of an expert to be based upon the case as made by the testimony of one of plaintiff's witnesses, was assigned as error. The suit was for malpractice, and after having shown by the medical expert that he had heard the testimony of the witness, counsel for the plaintiff asked the following questions: "Suppose his (the witness') statement relative to the amputation and its subsequent treatment to be truthful, was or was not the amputation well performed? Was the subsequent treatment of the patient proper or improper? And, in your opinion, was or was not the death of the patient the result of any neglect or want of skill in the surgeon?" In commenting upon the ruling of the trial court, the Supreme Court of the state says: "There is some conflict of decisions as to the advisability of questions in the form here put and rejected; some courts holding that the witness may be asked for his opinion only on an assumed state of facts; others, upon the evidence given on trial, if he heard it, viewing it as a case stated: and others still, that the latter course is not proper except where the facts are admitted, or not disputed. The decided weight of authority seems to be in favor of the rule secondly above stated, and consequently

[61] Bennett *v.* State, 57 Wis. 69, 81-85.

in favor of the admissibility of the questions here put. For ourselves, we can see no reasonable objection to it."[62] This court is probably mistaken in the suggestion that the decided weight of authority is in favor of the practice of asking the expert to base his opinion upon "the evidence given on trial, if he heard it, viewing it as a case stated," although there is certainly considerable authority for such a course. The Supreme Court of Vermont has spoken as follows upon the subject: "Where an expert hears or reads the evidence, there is no reason why he may not form as correct a judgment based upon such evidence, assuming it to be true, as if the same evidence was submitted to him in the form of hypothetical questions; and it would seem to be an idle and useless ceremony to require evidence with which he is already familiar to be repeated to him in that form."[63] The Supreme Court of Pennsylvania, while not perhaps distinctly favoring the practice of basing the opinion of the expert upon testimony that has been given in the case, regards it as essentially the same as that of incorporating the facts into the question and as in no way objectionable, provided the witness is not asked to state his opinion upon the whole case.[64] Courts sometimes, in the exercise of their discretion, sanction this practice as a convenient one, although recognizing the stated hypothetical

[62] Wright *v.* Hardy, 22 Wis. 334 [349], 339 [354]; Abbot *v.* Dwinnell, 74 Wis. 514, 520, 521; Gates *v.* Fleischer, 67 Wis. 504, 508, 509, 30 N. W. Rep. 674; McKeon *v.* Ch. Mil. & St. P. Ry. Co., 94 Wis. 477, 483, 69 N. W. Rep. 175. It should be noted that the holding in Wright *v.* Hardy is not entirely in accord with the attitude of the same court in other cases, as, for example, in Bennett *v.* The State, 57 Wis. 69, 81, 84, in which the court clearly indicates its opinion to be that the facts should be stated hypothetically to the expert, particularly in a case where the evidence is voluminous and not entirely harmonious. The court attempts to distinguish this case from Wright *v.* Hardy, on the ground that in the latter case the facts were simple while in the former they were voluminous and not entirely in harmony. And in the subsequent case of Quinn *v.* Higgins, 63 Wis. 664, 669, this same court, in speaking as to the propriety of examining experts upon a hypothetical case stated, says that "it is clearly a more appropriate way than to allow the expert witness who may have heard the evidence in the case to give his opinion upon his understanding of the evidence so given," and quotes approvingly the following from Bennett *v.* The State, 57 Wis. 85; 86. "It is almost impossible that all the testimony given in the case, coming from many witnesses and elicited by a long examination, should be entirely uncontradictory, or should be so plain that different inferences would not be drawn by different men. And to permit an expert to give his opinion, which is to go to the jury as competent evidence, upon such a mass of testimony, without any explanation as to what state of facts such an opinion is based upon, is, in effect, taking the case from the jury and deciding it upon the understanding of the witnesses as to what facts the evidence in the case established." See, also, to the same effect, Krenziger *v.* The Chicago and Northwestern Ry. Co., 73 Wis. 158, 162-164.

[63] Gilman *v.* Town of Strafford, 50 Vt. 723, 727. See, also, State *v.* Hayden, 51 Vt. 296, 304, 305, 306; Foster's Ex'rs *v.* Dickerson, 64 Vt. 233, 256, 257, 24 Atl. Rep. 253; Davis *v.* State, 38 Md. 15, 41; Baltimore City Pass. R'y. Co. *v.* Tanner, 90 Md. 315, 319, 320, 45 Atl. Rep. 188.

[64] Gardley *v.* Cuthbertson, 108 Pa. St. 395, 450, 453. See, also, Howland *v.* Oakland Consolidated St. Ry. Co., 110 Cal. 513, 521, 42 Pac. 983.

case to be the more desirable method of getting the necessary facts before the expert. "We think," * * * says the Supreme Court of Minnesota, "that the trial court may, in its discretion, as a matter of convenience, permit the hypothesis to be put to the witness, by referring him to the testimony, if he has heard it, instead of requiring the counsel to recapitulate it."[65]

But if the opinion of the expert is to be based upon testimony in the case, there are some matters that should receive the careful attention of the examiner. The principal danger lies in the fact that he may so frame his question that the expert must exercise his own judgment and draw his own conclusions in regard to facts.[66] In order to avoid doing this, it is of the first importance for him to remember that his question must be put in such a form that the expert will understand that, for the purposes of the answer, he must assume the testimony to which reference is made, to be true. A simple reference to the testimony in the question is not sufficient, for thereby in most cases the function of the jury would be invaded by the witness.[67] It is not proper to ask an expert for his opinion based upon all the evidence he has heard in the case, without assuming any facts as established thereby, for by this course the witness is permitted to accept such of the evidence as he believes to be true and to reject other parts of it, thus usurping the function of the jury.[68] Nor can an expert "be safely permitted to state that he has read or heard the testimony of a witness or witnesses, and then base his opinion upon such testimony, without stating the particular points of the evidence—the facts upon which he rests his conclusions."[69] A form for the examination is suggested by the court, speaking through SHAW, C. J., in *Commonwealth* v. *Rogers:* "Even where the medical or other professional witnesses have attended the whole trial, and heard the testimony of the other witnesses as to the facts and circumstances of the case, they are not to judge of the credit of the witnesses or of the truth of the facts testified by others. And the proper question to be put to the pro-

[65] Getchell *v.* Hill, 21 Minn. 464, 472; State *v.* Lautenschlager, 22 Minn. 514, 521; In the Matter of Storer's Will, 28 Minn. 9, 11, 12; Jones *v.* Chicago, St. Paul, Minneapolis and Omaha Ry. Co., 43 Minn. 279, 281, 45 N. W. Rep. 444; Jerry *v.* Townshend, 9 Md. 145, 158, 159. See, also, Hunt *v.* Lowell Gas Light Co., 8 Allen (Mass.) 169, 172; McCarthy *v.* Boston Duck Co., 165 Mass. 165, 42 N. E. Rep. 586; Rafferty *v.* Nawn, 182 Mass. 503, 506, 507; Atchison, Topeka and Sante Fe R. R. Co. *v.* Brassfield, 51 Kans. 167, 173.

[66] McMechen *v.* McMechen, 17 W. Va. 683, 694.

[67] Jones *v.* Chicago, St. Paul, Minneapolis and Omaha Ry. Co., 43 Minn. 279, 281, 45 N. W. Rep. 444; State *v.* Bowman, 78 N. C. 509.

[68] Carpenter *v.* Blake, 2 Lans. (N. Y.) 206.

[69] People *v.* Aikin, 66 Mich. 460, 475, 476, 33 N. W. Rep. 821.

fessional witnesses is this: If the symptoms and indications testified to by other witnesses are proved, and if the jury are satisfied of the truth of them, whether, in their opinion, the party was insane, and what was the nature and character of that insanity; and what state of mind did they indicate; and what they would expect would be the conduct of such a person in any supposed circumstances."[70] This form of question is also specifically approved by the Supreme Court of Mississippi,[71] and by the Supreme Court of Missouri.[72]

It has been held that, if the opinion of an expert is to be based upon the assumption that the testimony of certain specified witnesses is true, it must appear that he has heard the whole of their testimony. If the rule were otherwise, the jury would be unable to determine upon what facts the opinion was based.[73] But it has also been held that a medical expert who has heard only a part of the testimony of a witness may be asked his opinion based upon that part of the testimony that he has heard and a hypothetical statement as to the part that he has not heard.[74]

In basing a question upon the testimony of another witness, the examiner cannot properly eliminate from such testimony facts that are necessary to enable the expert to form an opinion that the issue demands. As a rule none of the facts should be eliminated. For example, in an action to recover damages for assault and battery, the plaintiff had testified to an injury previous to the alleged assault and battery, and the question was as to the cause of the trouble from which he was suffering. It might have been caused by the previous injury or by the assault and battery. In a question to a medical expert based in part upon the testimony of the plaintiff, there was no reference whatever to the previous injury. That part of the plaintiff's testimony was by the form of the question practically eliminated. Yet the expert was asked as to the exciting cause of plaintiff's trouble. "The plaintiff," says the court, "testified to two wounds upon his leg, either of which might have been such proximate cause. Without taking both of these wounds into consideration, the expert could give no intelligent or reliable opinion as to which of them caused the injury complained of; yet in the hypothetical question propounded to him, one of these probable causes was excluded from the consideration of the witness, and he was

[70] Commonwealth *v.* Rogers, 7 Met. (Mass.) 500, 505. See, also, Woodbury *v.* Obear, 7 Gray (Mass.) 467, 471; Reynolds *v.* Robinson, 64 N. Y. 589, 595, 596; Livingston's Case, 14 Gratt. 592, 603, 604; Butler *v.* St. Louis Life Ins. Co., 45 Iowa 93, 97, 98.

[71] Reed *v.* State, 62 Miss. 405, 409, 410.

[72] State *v.* Klinger, 46 Mo. 224, 228.

[73] Kempsey *v.* McGinnis, 21 Mich. 123, 140.

[74] Gates *v.* Fleischer, 67 Wis. 504.

required to give his opinion upon an imperfect and insufficient hypothesis,—one which excluded from his consideration a material fact essential to an intelligent opinion."[75]

Although the authorities upon the subject are somewhat in conflict and very generally confused, they probably justify the following propositions: Ordinarily in the examination of an expert whose opinion must be based upon facts with which he is not familiar, the facts upon which the opinion is to be based, should be stated clearly and logically in the question. This is the safe practice, and may properly be adopted in every case. If the facts are complicated, and, as given in the testimony, are in any way ambiguous or contradictory, this is the only safe practice. If, however, there is no controversy as to the facts, or if it is desired to base the opinion of the expert upon the testimony of a single witness or of several witnesses, and that testimony is in no way confused, complicated, ambiguous or contradictory, then the examiner may properly ask the expert to base his opinion upon the undisputed facts or the indicated testimony, assumed for the purposes of the answer as having been established.

[TO BE CONTINUED.]

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[75] Vosburg *v.* Intney, 80 Wis. 523, 50 N. W. Rep. 403, 27 Am. St. Rep. 47, 14 L. R. A. 226.