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

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

W. F.

EVIDENCE—EXPERT WITNESSES—HYPOTHETICAL QUESTION—MODEL EXPERT TESTIMONY ACT—[California].—In a suit to recover the reasonable value of legal services, a hypothetical question was asked of an expert witness by plaintiff. No objection was made to it then by defendant, but on appeal he contended that it was error to allow the hypothetical question because it omitted mention of certain letters that had a bearing on the case. *Held;* the competency of a hypothetical question is not affected by the fact that it does not contain all the facts bearing on the issue in the case.[1]

Because of the abuses to which it has been subjected, the abolition of the hypothetical question has been urged.[2] The instant case is in accord with the general rule.[3] Being permitted to use as few facts as he desires in framing his hypothetical question, a clever lawyer can often, by concealing the real significance of the evidence or by unduly emphasizing certain data, mislead the jury.[4] Furthermore, the opinion he obtains from the witness will be remembered by the jury, but the fact that it is based upon a partial statement of the facts in the actual case will be forgotten.[5] Cross

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

25. Sullivan & Sons Mfg. Co. v. Ideal Bldg. & Loan Assoc., 313 Pa. 407, 170 Atl. 263, 98 A. L. R. 1 (1934); Cryan's Estate, 301 Pa. 386, 152 Atl. 675 (1930).

26. Note, The Declaratory Judgment and the Insurance Contract (1936) 46 Yale L. J. 286.

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

1. Matthiesen v. Smith, 60 P. (2d) 873 (Cal., 1936).

2. 1 Wigmore, *Evidence* (2d ed. 1923) sec. 686; 32 Am. L. Rev. 851 (1898).

3. 1 Wigmore, *Ibid.* sec. 682; 18 Ann. Cases 646 (1909).

4. Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405 (1908).

5. Opp v. Pryor, 294 Ill. 538, 128 N. E. 580 (1920).

examination will not remedy the deception[6] because it is difficult to erase entirely the impression created by the first opinion,[7] and because an expert, once he has given an opinion bearing upon the case, is not likely to change it to fit hypothetical variations.[8] In all fairness to the expert it might be added that such a procedure whereby he is expected to give an opinion to each hypothetical variation becomes ridiculous where the facts are numerous and complicated, as in insanity cases.[9]

Because of these abuses, a few states, including Missouri[10] and Arkansas,[11] require that the hypothetical question contain all undisputed facts material to the issue. But this rule, while it is better than the general rule, does not afford a remedy. Where all the facts are undisputed the only possibility of abuse is in framing a very long question which may confuse the jury. But where the facts are disputed, the party asking the question need include only those facts which the evidence on his side tends to prove.[12] Here again cross examination will be an inadequate corrective. Furthermore, the hypothetical question is not limited to facts actually proven or directly testified to, but may assume facts which there is fair reason to believe the evidence will produce.[13] Consequently, the court, in determining whether a question is competent, must rely to a great extent upon the good faith of counsel as to what he expects the evidence will be.[14]

The Model Expert Testimony Act, based upon Porfessor Wigmore's suggestions,[15] proposes 1) that the expert witness be permitted to give his opinion, with its basis, without hypothetical questions and that cross examination be employed to bring out further the facts upon which it rests, and 2) that when a hypothetical question is asked it must first be submitted in writing to the opposite party and approved by the court.[16] In some situations it may be necessary, or more helpful to the jury, to ask a hypothetical question, and for such situations the second provision brings the hypothetical question to its best possible form. Such is the practice in

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6. One of bases of general rule is that opposing counsel can correct any misapprehensions by cross-examination. See Herpolsheimer v. Funke, 95 N. W. 688 (Neb., 1901).

7. Opp v. Pryor, supra, note 5.

8. People v. Vanderhoof, 71 Mich. 158, 39 N. W. 28 (1888). See 32 Am. L. Rev. 851, 855 to effect that expert will not change his opinion because it puts him in position of disagreeing with the general drift of his own testimony and thereby of impeaching himself.

9. Glueck, *Mental Disorder And The Criminal Law* (1927) 29.

10. Powell v. Union Pac. R. Co., 255 Mo. 420, 164 S. W. 628 (1914); Hahn v. Hammerstein, 272 Mo. 248, 198 S. W. 833 (1917).

11. Ford v. Ford, 100 Ark. 518, 140 S. W. 933 (1911); Taylor v. McClintock, supra, note 4. Contra, Ince v. State, 77 Ark. 426, 93 S. W. 65 (1906); Mo. R. Co. v. Daniels, 98 Ark. 352, 136 S. W. 651 (1911). Ince v. State was expressly overruled in Ford v. Ford.

12. Opp v. Pryor, supra, note 5.

13. 11 R. C. L. 586, sec. 15; Com. v. Tucker, 189 Mass. 457, 76 N. E. 127 (1905).

14. *Ibid.*

15. 1 Wigmore, *Evidence* (2d ed. 1923) sec. 686.

16. Tentative Draft of Model Expert Testimony Act, sec. 11.

Michigan, and it has been described as "practically ideal."[17] The first proposal is revolutionary. It makes possible the situation which it is the purpose of the hypothetical question to avoid, namely the giving of an opinion without letting the jury know beforehand the facts upon which it is based.[18] But while at fault theoretically, this proposal will work out better than the present hypothetical question, especially in those jurisdictions following the general rule that the hypothetical question need not contain all the facts bearing on the issue in the case. Under that rule the lawyer has more opportunity for abuse than he has under the minority rule, but the first proposal of the act will practically eliminate all abuse by the lawyer because the statement of the facts upon which the expert's opinion is based is shifted to the expert himself. The expert is also relieved of the necessity of giving opinions on cross examination in accordance with hypothetical variations. Furthermore, he is given the opportunity to base his opinion upon data which *he* thinks competent and relevant. While at first thought this might appear to be objectionable, it should work out to advantage,[19] especially in insanity cases, in connection with which criticism of the hypothetical question is most vigorous.[20] Continued decisions like that in the principal case emphasize the need of reform, if expert testimony is to be of real assistance in the securing of proper decisions upon complex issues of fact.

S. K.

INSURANCE—RELATIONSHIP BY AFFINITY AS CONSTITUTING INSURABLE INTEREST—[Missouri].—The relationship of a son-in-law to the insured in an industrial life insurance policy was recently held to constitute an insurable interest in the father-in-law when coupled with the fact that the son-in-law had provided his father-in-law a home, taken care of him and paid his funeral expenses.[1]

While, apparently at common law, life insurance policies not supported

17. 2 Law and Contemporary Problems 454 (1935).
18. 1 Greenleaf, *Evidence* (16th ed. 1899) sec. 441.
19. 2 Law and Contemporary Problems 455 (1935).
20. Glueck, supra, note 9, pp. 29 et seq.

1. Chandler v. American Life & Accident Ins. Co., 96 S. W. (2d) 883 (Mo. App., 1936). Industrial insurance is distinguished from ordinary insurance in that the amounts are usually small and the premiums are paid at weekly intervals instead of annually, semi-annually, or quarterly. For definitions see Ark. Crawf. & Moses, Dig. Supp., 1927, sec. 6016e; L. R. A. 1916F 461. In Kentucky the requirement of insurable interest has been held unnecessary in industrial insurance on the ground that the purpose of such insurance is not to create a fund to provide for the future support of the insured's family, but to provide for the proper care of the insured in his last illness and a respectable burial. Metropolitan Life Ins. Co. v. Nelson, 170 Ky. 674, 186 S. W. 520, L. R. A. 1916F 457 (1916); contra, Williams v. People's Life & Accident Ins. Co., 224 Mo. App. 1229, 35 S. W. (2d) 922 (1931).