privilege, and at the same time the requirement of unanimity could be considered as an imperative requirement.

The issue of the relinquishment of the unanimity requirement should be resolved by reference to the underlying social policies. It could be argued that most defendants cannot properly evaluate the protection afforded by the unanimity requirement and consequently could not make an intelligent waiver. It could also be argued that the unanimity requirement is closely allied with the requirement of proof of guilt beyond a reasonable doubt, and that if waiver were allowed an accused could be convicted even though some of the triers of fact were not convinced of his guilt. It could also be said that to allow an accused to wager his freedom on his guess as to which way the jury was split would introduce into criminal trials a singularly inappropriate element of chance.

The result reached by the court in the principal case is supported by the fact that a provision for waiver of unanimity was considered but not included in the Federal Rules of Criminal Procedure. It may be, however, that the history of the unanimity provision does not resolve the issue; the failure to include a provision for waiver does not necessarily require an implication of an intent to prohibit waiver.

The rights guaranteed by the Constitution are intended for the protection of the accused. If the accused in a prosecution intelligently decides that his interests will be advanced by discarding some of his Constitutional protections, he should be allowed to do so. He is in a much better position to weigh the various factors of his particular case than is a legislator formulating abstract rules to cover all cases. It is submitted that the result reached by the court in the principal case is incorrect, and that the requirement of unanimity, like the other Constitutional protections, should be subject to waiver.

EVIDENCE—EXPERT OPINION ON ULTIMATE FACTS

Hooper v. General Motors Corp., 260 P.2d 549 (Utah 1953)

The plaintiff brought an action against the defendant to recover damages for injuries sustained when her truck overturned due to a separation of the rear wheel. An expert witness for the defendant was asked what caused the separation. The plaintiff's objection to the question on the ground that it called for opinion testimony on the ultimate fact in issue was overruled. The Utah Supreme Court, affirming the ruling of the trial court, said that an expert witness may express an opinion as to the cause of any particular condition or occurrence, and may do so with any degree of positiveness he deems necessary.[1]

1. Hooper v. General Motors Corp., 260 P.2d 549 (Utah 1953). (Reversed on other grounds.)

As a very general rule, a witness must testify only to facts as perceived by him, and inferences drawn from those facts are opinion and inadmissible as evidence.[2] The reasons given for the exclusion of opinion are that such testimony is superfluous and consumes unnecessary time, and that it may have undue influence upon the jury.[3] The courts have recognized an exception to the general rule and have allowed expert witnesses to testify as to their opinion when the subject matter of the controversy is outside the scope of ordinary knowledge; the jury, in such a case, would be unable to render an intelligent verdict without the aid and opinion of an expert witness.[4] In applying this exception many courts have assumed, as an inflexible rule of law, that an expert may render an opinion as to secondary and evidentiary facts, but he may not utter an opinion touching upon the ultimate fact in issue before the jury.[5] The proponents of this rule, the historical majority of courts, have invariably uttered the platitudinous phrase that such testimony upon the ultimate fact invades the province of the jury.[6] An explanation sometimes given for the rule is that the expert should not be permitted to go beyond stating the causes that "could" result in a certain condition, because the question of whether or not it "did" is one of controversy and not within the scope of expert opinion.[7]

2. 7 WIGMORE, EVIDENCE § 1917 (3d ed. 1940).

3. 7 *id.* § 1918; WIGMORE, CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW, Rule 100, Art. 2, § 758 (1942).

4. 7 WIGMORE, EVIDENCE § 1917 (3d ed. 1940); Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 416 (1952).

5. Carter v. City of Los Angeles, 67 Cal. App. 2d 524, 154 P.2d 907 (1945); Keefe v. Armour & Co., 258 Ill. 28, 101 N.E. 252 (1913); *In re* Harris' Estate, 247 Mich. 690, 226 N.W. 661 (1929); Roberts v. New York Elevated Ry., 128 N.Y. 455, 28 N.E. 486 (1891).

6. Carter v. City of Los Angeles, 67 Cal. App. 2d 524, 528, 154 P.2d 907, 909 (1945); Morton's Adm'r v. Kentucky-Tennessee Light & Power Co., 282 Ky. 174, 177, 138 S.W.2d 345 (1940); DeGroot v. Winter, 261 Mich. 660, 671, 247 N.W. 69 (1933). *Cf.* Patrick v. Treadwell, 222 N.C. 1, 4, 21 S.E.2d 818, 821 (1942). In the case of *In re* Harris' Estate, 247 Mich. 690, 226 N.W. 661 (1929), the court expressed some suspicion in regard to expert testimony, saying:

> The rule permitting experts, usually employed and paid to express desired opinions, has gone far enough. It should not now be extended so as to permit such experts to substitute their conclusions for those of the jury.

Id. at 696, 226 N.W. at 663.

7. Fellows-Kimbrough v. Chicago City Ry., 272 Ill. 71, 111 N.E. 499 (1916); DeGroot v. Winter, 261 Mich. 660, 247 N.W. 69 (1933); Patrick v. Treadwell, 222 N.C. 1, 21 S.E.2d 818 (1942).

In the *DeGroot* case Justice Wiest differentiated between testifying as to cause and testifying as to a condition, saying that an expert could give his opinion as to the competency and sanity of an individual because that is testimony as to a "condition," not a "cause." There was a strong dissent in the case.

In Hurwit v. Prudential Ins. Co. of America, 45 Cal. App. 2d 74, 113 P.2d 691 (1941), and Weaver v. Shell Co. of California, 34 Cal. App. 2d 713, 94 P.2d 364 (1939), the court, recognizing the binding jurisdictional precedent excluding opinion evidence touching upon the ultimate fact, refused to reverse the lower court ruling admitting such testimony because there was no showing of prejudice to the appellant.

Missouri, which generally allows expert opinion as to the ultimate fact (Scanlon v. Kansas City, 336 Mo. 1058, 81 S.W.2d 939 (1935)) does not allow direct opinion evidence as to testamentary capacity on the theory that it invades the jury's province (Rothwell v. Love, 241 S.W.2d 893 (Mo. 1951); Baptiste v. Boatman's

The more recent rule is that an expert may testify as to the ultimate fact in issue.[8] Courts favoring the admissibility of expert opinion on the precise issue before the jury tenaciously hold that such testimony does not invade the province of the jury because it is only opinion and can be accepted or rejected by them in whole or in part.[9] It is further felt that, since expert opinion is admissible notwithstanding the opinion rule, it should be treated as factual testimony and therefore should always be admissible regardless of its relationship to the ultimate fact in issue.[10] Adhering to this broader rule, courts feel that the expert should be allowed to give his honest belief with any degree of positiveness which he feels justified, so that the jury can reap the benefit of an unequivocal opinion of the expert as to a matter with which he is fully informed.[11]

To allow opinion testimony only on evidentiary facts and exclude it on the ultimate facts apparently makes evidence admissible when it is of little relevancy and inadmissible when it is at its peak of probative value. In effect, this makes irrelevancy the ground for admission and relevancy the ground for exclusion.[12] The modern trend seeks to aid the jury in every possible way in arriving at an intelligent finding by utilizing the exception to the opinion rule in its broadest application. The court in the principal case, in following this modern trend, undoubtedly reached a sound decision.

National Bank of St. Louis, 148 S.W.2d 743 (Mo. 1941)). Perhaps the reason for the exclusion of such testimony on questions of testamentary capacity is that it involves a legal standard rather than a mere question of fact. *Cf.*, Express Pub. Co. v. Commissioner of Internal Revenue, 143 F.2d 386, 388 (5th Cir. 1944); Grismore v. Consolidated Products Co., 232 Iowa 328, 361, 5 N.W.2d 646, 663 (1942); Cole v. Uhlmann Granin Co., 340 Mo. 277, 297, 100 S.W.2d 311, 332 (1937). In both the *Baptiste* and *Rothwell* cases, *supra*, the court cites the concurring opinion in Heinbach v. Heinbach, 247 Mo. 301, 202 S.W. 1123 (1918) as authority for holding that an *expert* cannot testify as to the competency of a testator; however the majority opinion in the *Heinbach* case held that a *lay* witness should not give his opinion as to testamentary capacity. The important distinction is that lay witnesses, in will cases, are allowed to testify as to opinion only when based upon personally perceived facts, while an expert can give an opinion in answer to a hypothetical question.

8. Grismore v. Consolidated Products Co., 232 Iowa 328, 5 N.W.2d 646 (1942); Scanlon v. Kansas City, 336 Mo. 1088, 81 S.W.2d 939 (1935) (see note 7 *supra*); Tullis v. Rankin, 6 N.D. 44, 68 N.W. 187 (1896); 7 WIGMORE, EVIDENCE § 1920 (3d ed. 1940).

9. *Ibid.* An analogy is mentioned in the *Tullis* case. An expert by the rule of that court can express an opinion on the cause of a condition whether numerous factors could have caused the condition or only one could have caused it. The type of evidence in each case is the same; the jury is left to determine the weight of the evidence. Similarly, whether the expert testifies to the evidentiary facts or to the ultimate fact, the testimony is of the same type, and the jury still determines the weight to be accorded the evidence. Tullis v. Rankin, 6 N.D. 44, 45, 68 N.W. 187, 188 (1896).

10. Grismore v. Consolidated Products Co., 232 Iowa 328, 5 N.W.2d 646 (1942). See 7 WIGMORE, EVIDENCE § 1920 (3d ed. 1940).

11. Grismore v. Consolidated Products Co., 232 Iowa 328, 5 N.W.2d 646 (1942); Scanlon v. Kansas City, 336 Mo. 1058, 81 S.W.2d 939 (1935).

12. Cropper v. Titanium Pigment Co., Inc., 47 F.2d 1038, 1043 (8th Cir. 1931); Grismore v. Consolidated Products Co., 232 Iowa 328, 347 5 N.W.2d 646, 657 (1942) citing 11 R.C.L. 583 (1916).