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By Judge Robert Van Pelt\*

# The Background of Federal Rules 611(b) and 607

## I. INTRODUCTION

I am honored to participate in a discussion of evidence dedicated to David Dow, who has contributed more to the development of the Nebraska law of evidence than any one person. I have chosen to discuss only two sections of the Federal and Nebraska Rules: (1) cross-examination of parties and witnesses,<sup>1</sup> and (2) a party's right to impeach a witness called by the party.<sup>2</sup>

## II. THE ADVISORY COMMITTEE

An Advisory Committee was appointed in 1965 to draft Federal Rules of Evidence for the United States Courts and Magistrates.<sup>3</sup> The Advisory Committee's members included more lawyers in the active trial practice than did the committee which drafted the Model Code of Evidence in 1939 or the committee which drafted the Uniform Code adopted in 1953. Trial lawyers were in the majority by nine to six; eight of the Committee were members of the American College of Trial Lawyers.<sup>4</sup> The contribution of the trial bar to these rules was thus of major importance. When originally appointed, three members of the Committee were teachers of evidence in law schools and three were judges.<sup>5</sup> During the Commit-

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1. FED. R. EVID. 611(b); NEB. REV. STAT. § 27-611(2) (Reissue 1975).

2. FED. R. EVID. 607; NEB. REV. STAT. § 27-607 (Reissue 1975).

3. The Advisory Committee [hereinafter referred to as the Committee] consisted of Albert E. Jenner (Chairman), Professor Edward W. Cleary (reporter), and members David Berger, Hicks Epton, Robert S. Erdahl, Egbert L. Haywood, Frank G. Raichle, Herman F. Selvin, Craig Spangenberg and Edward Bennett Williams (who were active trial lawyers), Professors Thomas F. Green, Jr., Charles W. Joiner and Jack B. Weinstein, and Federal Judges Simon E. Sobeloff, Joe Ewing Estes, and Robert Van Pelt.

4. 46 F.R.D. 173 (1969) (Transmittal letter of the Advisory Committee's Preliminary Draft of Rules of Evidence to Albert B. Maris, Chairman, Standing Committee on Rules of Practice and Procedure, Judicial Conference of the United States).

5. See note 3 *supra*.

tee's existence two of the teachers, Weinstein and Joiner, were appointed federal district court judges.<sup>6</sup>

### III. CROSS-EXAMINATION OF PARTIES AND WITNESSES

There are at least three recognized rules of cross-examination:

1. The limited or restrictive rule limits cross-examination either of the adverse party or a witness to matters about which the person has testified on direct examination. This rule was first employed in the United States in 1827 in an opinion by Chief Judge Gibson of Pennsylvania,<sup>7</sup> and is also known as the "federal rule."
2. The rule of wide-open cross-examination permits cross-examination upon any subject relevant to any of the issues in the entire case and is not limited to topics which the examiner has chosen to open on direct examination. This is frequently called the "English rule."<sup>8</sup>
3. The "Michigan rule" forbids cross-examination concerning matters relating to the cross-examiner's affirmative case unless these matters were raised in the examination in chief.<sup>9</sup>

The Committee's discussion centered on the federal and English rules. The Michigan rule did not have Committee support.

A discussion of the state of the law relating to examination and cross-examination of witnesses and parties when the Advisory Committee began its work in 1965 may be helpful. The more recent history can begin with Rule 43 of the Federal Rules of Civil Procedure. The American Bar Association's Committee for the Improvement of the Law of Evidence for the year 1937-38 reported:

The rule limiting cross-examination to the precise subject of the direct examination is probably the most frequent rule (except the Opinion rule) leading in trial practice today to refined and technical quibbles which obstruct the progress of the trial, confuse the jury, and give rise to appeal on technical grounds only. Some of the instances in which Supreme Courts

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6. Professor Weinstein was appointed a Judge of the United States District Court for the Eastern District of New York on April 15, 1967. Professor Charles W. Joiner was appointed a Judge of the United States District Court for the Eastern District of Michigan on June 9, 1972.
  7. *Ellmaker v. Buckley*, 16 Serg. & Rawl. 72, 77 (Pa. 1827). For further history, see *Houghton v. Jones*, 68 U.S. (1 Wall.) 702 (1863); *Philadelphia & Trenton R.R. v. Stimpson*, 39 U.S. (14 Pet.) 448 (1840); *Floyd v. Bovard*, 6 Watts & Serg. 75 (Pa. 1843); 1 S. GREENLEAF, GREENLEAF ON EVIDENCE § 445 (16th ed. 1899).
  8. See *Moody v. Rowell*, 34 Mass. (17 Pick.) 490 (1835); ARIZ. R. EVID. 611(b) (a witness may be cross-examined on any relevant matter).
  9. See *Campau v. Dewey*, 9 Mich. 381 (1861) (Christiancy, J., dissenting); C. McCORMICK, EVIDENCE § 21, at 46-48 (2d ed. 1972); Comment, 36 U. DET. L.J. 162 (1958).

have ordered new trials for the mere transgression of this rule about the order of evidence have been astounding.

We recommend that the rule allowing questions upon any part of the issue known to the witness . . . be adopted.<sup>10</sup>

In the Federal Rules of Civil Procedure as adopted in 1938, Rule 43(b) provided:

A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.<sup>11</sup>

This provision represented a compromise of the conflicting views among the "rulemakers." The Advisory Committee drafting the Federal Rules of Civil Procedure had been undecided as to whether evidence was a substantive or procedural matter and thus on whether the Supreme Court "had any power to promulgate rules of evidence."<sup>12</sup>

Judge Maris, in *Moyer v. Aetna Life Insurance Co.*,<sup>13</sup> gave the history of Rule 44(b) (later to be renumbered 43(b)) and told of an Advisory Committee proposal relevant to the issue here discussed:

In the final report of the Advisory Committee made in November, 1937, proposed Rule 44 included the provision that "Except as stated in the last preceding sentence, any witness called by a party and examined as to any matter material to any issue may be cross-examined by the adverse party upon all matters material to every issue of the action." The Supreme Court, however, rejected these proposals. The only reference to the subject in the rules as adopted is in Rule 43(b) which provides that an adverse party or officer, director or managing agent of an adverse corporate party called by the other party "may be cross-examined by the adverse party only upon the subject matter of his examination in chief."<sup>14</sup>

Judge Maris, referring to the failure of the Supreme Court to adopt the Committee version, further stated: "By its failure to promulgate the rule proposed by the Advisory Committee the Supreme Court indicated that the historic limitation upon the scope of cross-examination to the subject matter of the direct ex-

10. 5 MOORE'S FEDERAL PRACTICE ¶ 43.10 (2d ed. 1964), transferred to and adapted in 10 MOORE'S FEDERAL PRACTICE § 611.05[5] (2d ed. 1976) (evidence volume).

11. FED. R. CIV. P. 43(b). This rule was abrogated upon passage by Congress of the Federal Rules of Evidence, Act of Jan. 2, 1975, Pub. L. No. 93-595, § 2076, 88 Stat. 1926 (effective July 1, 1975).

12. See 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2401, at 308 (1971).

13. 126 F.2d 141 (3d Cir. 1942).

14. *Id.* at 143.

amination is still to be enforced in the federal courts."<sup>15</sup>

This discussion continued when the American Law Institute's Model Code of Evidence was drafted. Work on the Model Code had started in February, 1939. A proposed draft was submitted in 1940 and 1941. The final draft proposed in February, 1942, and revised in May, 1943, was then adopted as the American Law Institute Model Code of Evidence. Rule 105(h) made the extent of cross-examination subject to judicial discretion.<sup>16</sup> It is interesting to note that the stated purpose of the rules concerning the scope of cross-examination under the Model Code was to produce "an honest, expeditious and understandable presentation of admissible evidence."<sup>17</sup>

Subsequently the National Conference of Commissioners on Uniform State Laws began its work on uniform rules of evidence which were approved in August, 1953. The Uniform Rules provided that "No person is disqualified to testify to any matter."<sup>18</sup> Thus it is not surprising that the reporter in the first draft of Rule 6-14, later to become 611(b), provided: "The scope of cross-examination is not limited to matters testified to on direct but extends to all matters material to every issue in the action, including the credibility of the witness."<sup>19</sup> At the same time, the reporter submitted proposed Rule 6-07 to the Committee. The proposed rule permitted the impeachment of one's own witness.<sup>20</sup>

At the Committee's first vote on whether to limit cross-examination, there was a tie vote when the author and one other member, who were not present at the vote, were counted as favoring limited cross-examination. The chairman thereupon cast the deciding vote making it eight to seven for limited cross-examination.<sup>21</sup> Discussion continued both at bar meetings and in the law reviews.<sup>22</sup> Nothing is to be gained by further reference to the

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15. *Id.*

16. MODEL CODE OF EVIDENCE rule 105(h) (1942).

17. *Id.* Comment on clause (h).

18. UNIFORM RULE OF EVIDENCE 7(b) (1953).

19. Volume IV B, Advisory Committee on Evidence, Art. VI, Witnesses, Memo 14-B at 141. (First Draft of Proposed Rules of Evidence) (1967). It was decided that most of the Committee's correspondence and the discussion drafts would not be published until the preliminary drafts had been approved for circulation to the bench and bar. However, the author and other members each retained personal files. Accordingly, citations to the Committee's actions refer to the author's personal files and his notes therein and will be cited hereinafter as author's file.

20. *Id.* at 86.

21. Author's file, *supra* note 19, Vol. 5, Advisory Committee Notes and Comments, Memo 18 at 25 (Second Draft of Proposed Rules of Evidence) (1967).

22. See generally Green, *Highlights of the Proposed Federal Rules of Evidence*, 4 GA. L. REV. 1 (1969); *Symposium on the Proposed Federal Rules of Evidence*

names of those supporting or opposing the Committee's original position favoring limited cross-examination.

At the meeting of the Committee when the draft was readied for submission to the United States Supreme Court, the Committee had further lively discussion and again a vote was taken on Rule 611(b). Three members changed their position and by a vote of eight to seven a draft calling for open cross-examination in civil cases was approved. Berger and the author and another member who had supported limited cross-examination on the previous vote, voted this time for open cross-examination. One other member, whose identity is unknown to the author, and who had previously voted for open cross-examination, changed his vote to favor limited cross-examination. It is interesting to note, because it emphasizes the continuing division of opinion on this subject, that the Standing Committee of the Judicial Conference also approved Rule 611(b) by only a one-vote margin, when it approved the Evidence Code and submitted it to the Supreme Court. On both Rule 611(b) and Rule 607, the Supreme Court approved the proposals of the Evidence Committee.<sup>23</sup>

The arguments presented were the usual ones both pro and con. Those favoring limited cross-examination argued the constitutional right of a defendant not to incriminate himself and objected to use by a cross-examiner of leading questions, especially when by cross-examination he was in effect presenting his own case. Additionally it was argued that much confusion would result in letting the cross-examiner present his case by cross-examination on matters which were outside the scope of direct examination, while the adverse party was still presenting his case. Limited cross-examination, it was asserted, had the advantage of orderly presentation of evidence.<sup>24</sup> The continuous courtroom bickering and delay which result from discussions as to the scope of direct examination and subject the trial court to many needless possibilities of error were advanced as reasons to support the rule change.<sup>25</sup> The vouching-for-a-witness rule,<sup>26</sup> earlier advanced as a reason for limited cross-examination, lost influence, at least with the author, when proposed Rule 607, rejecting the "voucher" rule,

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(pts. 1-2), 15 WAYNE L. REV. 1061 (1969) & 16 WAYNE L. REV. 135 (1969); *Proceedings of the Judicial Conference for the Second Circuit*, 48 F.R.D. 39 (1969).

23. For the Supreme Court's order, see 56 F.R.D. 183 (1973) (Douglas, J., dissenting), and note 45 *infra*.

24. See author's file, *supra* note 19, *passim*.

25. *Id.*

26. See C. McCORMICK, *supra* note 9, § 38, at 75 (the rule provides that a party vouches for the "trustworthiness" of a witness when the witness is called to testify).

was adopted.<sup>27</sup> There were many other arguments pro and con. Suffice it to say here, that although votes were changed on the Committee during the course of the many discussions between the first and last votes, the changes were not the result of any new arguments.

Without debate the House of Representatives struck Rule 611(b) as submitted by the Supreme Court and inserted the 1969 Committee draft version,<sup>28</sup> saying in a Committee report that it was a "return to the rule which prevails in the federal courts and thirty-nine State jurisdictions."<sup>29</sup> The Standing Committee of the Judicial Conference and the Advisory Committee objected without avail. It was not surprising that the Senate Committee went along with the House version.<sup>30</sup> It must be conceded that the rule adopted by the Congress expresses the viewpoint of the majority of lawyers.

Professor Dow, in his work on the Nebraska Committee, favored, I am told, the wide-open rule. However, when Congress made its change, the Nebraska proposed draft was changed to follow the draft approved by the Congress.<sup>31</sup> This article is not written to settle the controversy. The author would still favor the wide-open rule except in criminal cases until the constitutional issue is settled. I am certain only that this is not the last time a law review will make mention of the subject.

#### IV. A PARTY'S RIGHT TO IMPEACH HIS OWN WITNESS

Rule 607 changed the voucher rule<sup>32</sup> and thus permitted impeachment by the party calling the witness. It reads: "The credi-

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27. See text accompanying notes 33 & 54-56 *infra*.

28. This was the "traditional rule" which limited "cross-examination to credibility and to matters testified to on direct examination, unless the judge permits more, in which event the cross-examiner must proceed as if on direct examination." H.R. REP. NO. 650, 93d Cong., 1st Sess. 12, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7075, 7085.

29. *Id.*

30. S. REP. NO. 1277, 93d Cong., 2d Sess. 25, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7051, 7071.

31. See NEB. REV. STAT. § 27-611(2) (Reissue 1975). *But see* NEBRASKA SUPREME COURT COMMITTEE ON PRACTICE AND PROCEDURE, PROPOSED NEBRASKA RULES OF EVIDENCE 101 (1973), in which rule 611(b) was of the wide-open type. The Comment to subdivision "b" indicates that this is a wider rule than that formerly used in Nebraska and that the use of the wider rule was prompted by "considerations of economy, of time and orderliness of trial." *Id.* at 102.

The Nebraska Evidence Code is not identical to the federal code on all matters. This note is unnecessary for those who know Professor Dow and others of the Nebraska Committee. They were not a rubber stamp committee and any of them could have served well on the federal committee.

32. See note 26 & accompanying text *supra*.

bility of a witness may be attacked by any party, including the party calling him."<sup>33</sup> Such a change in the voucher rule found support with a majority of the scholars and from a few courts as early as 1936. That year both Dean Ladd<sup>34</sup> and the United States Court of Appeals for the Eighth Circuit, speaking through Judge Sanborn,<sup>35</sup> without reference to each other, had concluded that a change was needed.

The second circuit, in a widely cited case,<sup>36</sup> and without mentioning the earlier eighth circuit case, stated its "repudiation of the pernicious rule against impeachment of one's witness"<sup>37</sup> and has received much credit for its part in the rejection of the rule. Dean Ladd, Judge Sanborn and Judge Lumbard, who authored the second circuit opinion, are each in their own right great scholars and all are entitled to be mentioned when naming those who brought about this change.

In the April, 1937, draft as amended by its final report in November, 1937, the Advisory Committee for the Federal Rules of Civil Procedure framed Rule 43(b)<sup>38</sup> "in terms of permitting prior inconsistent statements to impeach a witness, irrespective of calling party considerations, but the Supreme Court struck the modification."<sup>39</sup>

The sentence disapproved by the Supreme Court read: "A party may show that any witness whether called by him or by an adverse party, has previously made, under oath or otherwise, statements contradictory to his testimony . . ."<sup>40</sup>

The Model Code<sup>41</sup> and the Uniform Rules<sup>42</sup> had each proposed changes in the voucher rule. Thus it is not surprising that Rule 607 was adopted by the Committee in the form first proposed by the reporter.<sup>43</sup> The author's notes indicate that only one amendment was offered. The amendment was a motion by Professor Weinstein, to strike the words "calling him" and to insert in place

33. FED. R. EVID. 607.

34. Ladd, *Impeachment of One's Own Witness—New Developments*, 4 U. CHI. L. REV. 69 (1936).

35. *London Guarantee & Accident Co. v. Woelfle*, 83 F.2d 325 (8th Cir. 1936).

36. *United States v. Freeman*, 302 F.2d 347 (2d Cir. 1962).

37. *Id.* at 351.

38. See note 11 & accompanying text *supra*.

39. Comment, *Witnesses Under Article VI of the Proposed Federal Rules of Evidence*, 15 WAYNE L. REV. 1236, 1266-67 (1969).

40. Thomas, *The Rule Against Impeaching One's Own Witness: A Reconsideration*, 31 MO. L. REV. 364, 385 n.83 (1966); 5 MOORE'S FEDERAL PRACTICE ¶ 43.10, at 1347 (2d ed. 1964), transferred to and adapted in 10 MOORE'S FEDERAL PRACTICE §§ 611.02-.03 (2d ed. 1976) (evidence volume).

41. MODEL CODE OF EVIDENCE rule 106 (1942).

42. UNIFORM RULE OF EVIDENCE 20 (1953).

43. For the text of the first proposed draft, see author's file, *supra* note 19, at 86.

thereof the words "who in good faith called him." The majority, including the author, did not support the motion.<sup>44</sup>

After the rule was approved by the Committee and the Supreme Court and during the time it was before the Congress,<sup>45</sup> objection was made to the section by the National Legal Aid and Defenders' Association.<sup>46</sup> They called particular attention to the possible abuse in criminal cases from such a rule and expressed the feeling that a party should show both damage and surprise before being allowed to impeach its own witness.<sup>47</sup>

The South Carolina chapter of the American Trial Lawyers and the District of Columbia Conference Committee both expressed opposition and proposed deletion of the section in its entirety.<sup>48</sup> The District of Columbia Conference Committee in the alternative would have added "in the discretion of the court."<sup>49</sup> The Virginia Trial Lawyers Committee would have added the word "support" as well as "attacked."<sup>50</sup> The Railroad Trial Counsel Committee, the American College of Trial Lawyers Committee, and the ABA Committee likewise expressed disagreement with the rule.<sup>51</sup> Nothing is to be gained by further detail as to the objections made. The Committee's reporter succinctly stated the reason for these different opinions, which were related to the Committee in the hope that these arguments would be presented to the Congress. Upon learning of the opposition to the rule, he commented that practitioners generally preferred to adhere to the practice with which they were familiar and that those expressing their objections almost without exception had viewed restrictions on the scope of cross-examination with disfavor.<sup>52</sup>

During the time the Rules were pending in the Congress, the Supreme Court decided *Chambers v. Mississippi*.<sup>53</sup> In the opinion

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44. *Id.*

45. The Supreme Court, by order on November 20, 1972, prescribed the Federal Rules of Evidence to be effective July 1, 1973. 56 F.R.D. 183 (1973). The Rules were transmitted to Congress on February 5, 1973. Congress, by Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9, deferred the effectiveness of the Rules until expressly approved by Congress.

46. *Proposed Rules of Evidence: Hearings on H.R. 5463 Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 2 (1973) (Statement of John J. Cleary, Exec. Director Federal Defenders of San Diego, Inc., on behalf of the National Legal Aid & Defender's Association).

47. *Id.*

48. See author's file, *supra* note 19, Vol. XVI, Advisory Committee on Evidence, Reporter's Comments on Suggestions Received at 114.

49. *Id.*

50. *Id.*

51. *Id.* at 115.

52. Statement of Professor Edward W. Cleary (Advisory Committee reporter).

53. 410 U.S. 284 (1973). The case was argued November 15, 1972. The Federal

by Mr. Justice Powell, the Court affirmed the view that the right of cross-examination is more than a desirable rule of trial procedure, and stated: "It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' . . . It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.'"<sup>54</sup>

Taking up the voucher rule, the Court stated:

Although the historical origins of the "voucher" rule are uncertain, it appears to be a remnant of primitive English trial practice in which "oath-takers" or "compurgators" were called to stand behind a particular party's position in any controversy. Their assertions were strictly partisan and, quite unlike witnesses in criminal trials today, their role bore little relation to the impartial ascertainment of the facts.

Whatever validity the "voucher" rule may have once enjoyed, and apart from whatever usefulness it retains today in the civil trial process, it bears little present relationship to the realities of the criminal process. It might have been logical for the early common law to require a party to vouch for the credibility of witnesses he brought before the jury to affirm his veracity. Having selected them especially for that purpose, the party might reasonably be expected to stand firmly behind their testimony. But in modern criminal trials, defendants are rarely able to select their witnesses: they must take them where they find them.<sup>55</sup>

In a footnote the Court called attention to the rejection of the voucher rule by Rule 607 of the newly proposed Federal Rules of Evidence.<sup>56</sup> In *Chambers*, the Court decided that the voucher rule, as applied in that case, "plainly interfered with Chambers' right to defend against the State's charges"<sup>57</sup> and that thereby he was denied due process in his trial.<sup>58</sup>

It has been noted that "Congress made no change in Rule 607, and it was not the subject of floor debate."<sup>59</sup> It would appear that the rule will not revolutionize federal practice. As a matter of historical interest impeachment of one's own witness had previously been allowed

where his testimony surprised the party calling him and was harmful to his case, by having the judge call the witness, by allowing the impeachment of compulsory witnesses, adverse parties in civil cases, government agents called by defendants in criminal cases in the Second Circuit, witnesses in civil cases by their depositions, by permitting a party limited scope to bring out damaging matter about a witness on direct examina-

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Rules of Evidence were approved by the Supreme Court on November 20, 1972, and sent to the Congress. The *Chambers* case was decided February 21, 1973.

54. *Id.* at 295.

55. *Id.* at 296 (footnotes omitted).

56. *Id.* at 296 n.9.

57. *Id.* at 298.

58. *Id.*

59. 3 J. WEINSTEIN & M. BERGER, EVIDENCE ¶ 607, at 607-1 (1977).

tion, by allowing the accuracy of the testimony to be contradicted by extrinsic evidence, and by getting the impeaching evidence before the jury in the guise of refreshing the witness' recollection.<sup>60</sup>

The Supreme Court of Nebraska, on February 19, 1971,<sup>61</sup> concluded that the traditional explanation that a party held out his own witnesses as worthy of belief was no longer tenable, and that "Parties, including the State, often have no real free choice in selecting witnesses. We abandon the rule; credibility of a witness may be attacked by any party, including the party calling him."<sup>62</sup> The court cited, with other authority, the Advisory Committee's 1969 preliminary draft of Rule 6-07.<sup>63</sup>

As a member of the Advisory Committee, I would be derelict in not calling attention to the fact that the Committee in proposing Rule 6-07 had also proposed a change in the rule relating to the effect of the receipt in evidence of inconsistent statements, which was well summarized in its note to the original draft.<sup>64</sup> The Committee note stated: "Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence."<sup>65</sup>

The proposed change was not adopted. On some other occasion, the reasons for the proposal and for its rejection can be discussed.

## V. CONCLUSION

Reason and experience develop much of the law of evidence. Any advisory committee on rules of evidence will soon find itself deeply indebted to the law schools for the collection and discussion of the experience of the bench, as shown by the reported cases, and for the reasoning contained in law review articles, whether supportive or critical of the rulings of the courts. It is to be hoped that the law schools will continue to have teachers like David Dow and that the bench and bar will be listening when they speak.

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60. *Id.* at 607-13 to -14 (footnotes omitted).

61. *State v. Fronning*, 186 Neb. 463, 183 N.W.2d 920 (1971).

62. *Id.* at 465, 183 N.W.2d at 921.

63. *Id.*

64. See author's file, *supra* note 19, Comments to Rule 6-07 at 90.

65. FED. R. EVID. 801(d)(1)(A), Adv. Comm. Note; Comment, *supra* note 39, at 1266 n.78 (1969).