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The Power of a Trial Judge to Call a Witness--A Tool to Mend Defects

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THE POWER OF A TRIAL JUDGE TO CALL A WITNESS— A TOOL TO MEND DEFECTS

I. Introduction

The power of a trial judge to assist the fact finding process of the adversary system, by calling his own witnesses in the interest of justice, has been generally recognized by the American judiciary.[1] Normally, the task of evidence production is placed upon the parties, but there are certain practical reasons which often preclude the production of a vital witness to permit reasonable and intelligent examination of the facts by the judge and jury.[2]

This article will attempt to shed some light on the circumstances in which the judicial perogative of calling witnesses should be utilized, and when necessary precautions should be exercised by a judge in using this perogative. Within this discussion attention will be directed to the role of the trial judge in our legal system. As was stated by Judge Learned Hand:

> A judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert.[3]

II. From Whence This Power Came

The power of a trial judge to call a witness is inherently a part of judicial administration.[4] The actual practice of this form of judicial action had its origin in England[5] and was later adopted by some American courts.

1. 5 B. Jones, Commentaries on Evidence § 2287 (2d ed. 1926); H. Underhill, Criminal Evidence § 496 (5th ed. 1956); J. Wigmore, Evidence § 2484 (3d ed. 1940).
2. *See* J. Frank, Courts on Trial ch. VI (1963). Judge Frank's unblinking examination of the American adversary system points out the need for more judicial action in the fact finding process.
3. United States v. Marzano, 149 F.2d 923, 925 (2d Cir. 1945).
4. *See* 9 J. Wigmore, Evidence § 2484 (3d ed. 1940).
5. *E.g.*, Coulson v. Disborough [1894] 2 Q.B. 316. The English courts have since limited the power of the trial judge to call a witness to criminal proceedings. *See* Rex v. Dora Harris [1927] 2 K.B. 587; *In re Enouch* [1910] 1 K.B. 327.

In jurisdictions where the English rule, which required the prosecution to call all of the eyewitnesses, was not adopted American courts regarded the power of a judge to call a witness as a form of protection for the accused in a criminal trial.[6] These decisions were later used as authority to give the state the limited right to have witnesses called by the court when the prosecutor did not want to be bound by their testimony.[7] The majority of American cases dealing with court called witnesses, therefore, have been criminal actions; the probable reason being the erroneous conception that the trial judge in a civil suit is a moderator, with the parties solely responsible for the production of evidence.

At present, the utilization of this power by trial courts, particularly in civil actions, is still in its infancy. Unquestionably the power exists, yet only a minority of American jurisdictions have used it or recognized its existence.[8]

III. Is the Power a Right or a Duty?

A. The Judge's Right to Call a Witness

It has been generally conceded that a trial court is under no affirmative duty to call witnesses at the request of either party to the case.[9] The vast majority of the courts consider this judicial power a matter of discretion better left up to the individual trial judge.[10] The majority view is that since, under the Anglo-American trial system, the parties have the primary responsibility of producing evidence, a trial judge should call a witness only when the adversary system fails to produce the necessary facts and a miscarriage of justice would likely result.[11] Some courts, moreover, have evidenced reservations about the desir-

6. *E.g.*, Pugh v. State, 69 Tex. Crim. 357, 151 S.W. 546 (1912); Hill v. Commonwealth, 88 Va. 633, 14 S.E. 330 (1892).

7. Brown v. State, 91 Fla. 682, 108 So. 842 (1926); People v. Cleminson, 250 Ill. 135, 95 N.E. 157 (1911); Pendleton v. Commonwealth, 131 Va. 676, 109 S.E. 201 (1921).

8. *See* 9 J. WIGMORE, EVIDENCE § 2484 n.1 (3d ed. 1940).

9. *See* 9 J. WIGMORE, EVIDENCE § 2484 (3d ed. 1940); 44 IOWA L. REV. 795 (1959).

10. *See* J. WIGMORE, EVIDENCE § 2484 (3d ed. 1940). *See also* United States v. Wilson, 361 F.2d 134 (7th Cir. 1966); McBride v. Dexter, 250 Iowa 7, 92 N.W.2d 443 (1958); Commonwealth v. Bready, 189 Pa. Super. 427, 150 A.2d 156 (1959).

11. *Cf.* J. WIGMORE, EVIDENCE §§ 2483-84 (3d ed. 1940).

ability of the use of this discretion[12] and have urged extreme caution in its application.[13]

Discriminatory use of the power to call a witness is reversible error.[14] In *People v. Bell*,[15] the defendant was tried for illegal possession of narcotics and sentenced to life imprisonment. During the trial, the prosecutor requested that the court call as its witness a special employee of the state who had purchased narcotics from the defendant. The request was made so that the state might avoid vouching for the credibility of the witness. The court called the witness and both sides were allowed to examine her. Later the defense asked that the witness be recalled as the court's witness, but this request was refused. The appellate court reversed on the grounds that this refusal was an abuse of discretion, stating: "Once the evidentiary door is opened in the name of justice for the prosecution it cannot as a matter of discretion be closed to the defendant."[16]

Another recent case held that it was an abuse of discretion and a denial of due process for the trial court to call twenty-seven witnesses on its own motion since only three of them had been named in interrogatories requesting the names and addresses of all witnesses to the facts alleged in the complaint.[17] With reference to the trial judge's action this court said:

> The power of a trial judge to call and examine witnesses is not unlimited. His conduct of a trial contrary to traditional rules and concepts which have been established for the protection of private rights constitutes a denial of due process.[18]

B. The Judge's Duty to Call a Witness

Only a few courts have suggested that a trial judge is under a duty to call a witness on his own motion, and that failure to do so could constitute reversible error.

12. *See, e.g.*, Smith v. United States, 331 F.2d 265 (8th Cir. 1964); United States v. Marzano, 149 F.2d 923 (2d Cir. 1945).
13. *See, e.g.*, City of Portales v. Bell, 72 N.M. 80, 380 P.2d 826 (1963); Montesi v. State, 417 S.W.2d 554 (Tenn. 1967). There have been few reversals grounded on abuse of discretion. In the cases where reversal did occur the abuse was flagrant, resulting in a miscarriage of justice.
14. *E.g.*, People v. Bell, 61 Ill. App. 2d 224, 209 N.E.2d 366 (1965).
15. *Id.*
16. *Id.*, 209 N.E.2d at 370.
17. Band's Refuse Removal, Inc. v. Borough of Fair Lawn, 62 N.J. Super. 522, 163 A.2d 465 (1960).
18. *Id.* at 548, 163 A.2d at 479.

Supreme Court Justice Frankfurter's dissenting opinion in *Johnson v. United States*[19] carried a strong implication that in certain circumstances the failure of a trial judge to call a witness should result in reversal. In *Johnson*, even though there was an eyewitness to the accident, both parties relied on the theory of *res ipsa loquitur*. Neither party called the eyewitness and a verdict was entered for the plaintiff. The dissent suggested that the trial judge erred in allowing the plaintiff to rely on *res ipsa loquitur* when an eyewitness was available. In this instance, Frankfurter suggested, the trial judge should have called the witness since neither of the parties was willing to do so.[20] One court has stated that when it is fairly clear that intervention is necessary, it is obligatory that a chancellor in equity intervene and call a witness.[21]

Although generally leaving it within the sound discretion of the trial judge as to when a witness should be called, several courts by way of dicta have said that in circumstances in which it appears a miscarriage of justice is likely, it is imperative that the trial judge call a witness. These courts imply that judicial inaction in these circumstances could constitute reversible error.[22]

It would seem that in light of the circumstances under which court witnesses are or should be called, it is far more practical to leave the exercise of the discretion flexible and completely in the hands of the trial judge. His vantage point is far greater than that of an appellate court in assessing the needs of the trial. It would indeed be unfortunate to impose an affirmative duty upon him to call a witness. Further, establishment of guidelines for determining when this duty exists would be virtually impossible.

19. 333 U.S. 46, 50 (1948) (dissenting opinion).

20. *Id.* at 53-55. *But see* Note, *Trial Judge's Duty to Call Witnesses in Res Ipsa Loquitur Cases*, 58 YALE L.J. 183 (1948). The writer there suggests that the practice of calling witnesses by the court in *res ipsa loquitur* cases would lead to insurmountable administrative problems that would outweigh the advantages gained by such action.

21. Moore v. Sykes' Estate, 167 Miss. 212, 149 So. 789 (1933). The Court adamantly stated:

> [W]hile . . . this *duty* of calling the witness and the conduct of their examination is placed in the first instance and generally throughout on counsel, the power and *duty* of the Chancellor in that respect is not thereby abrogated . . . . *Id.*, 149 So. at 791. (emphasis added).

22. *See* Commonwealth v. DiPasquale, 424 Pa. 500, 230 A.2d 449 (1967); Commonwealth v. Burns, 409 Pa. 619, 187 A.2d 552 (1963).

IV. THE CRIMINAL ARENA AND JUDICIAL POSITIVISM

Perhaps the strongest argument for judicial action in calling witnesses, as opposed to inaction, is to be made with regard to criminal proceedings, in which life or death often hangs upon a tenuous thread of fact. It is imperative, therefore, that all available evidence which has bearing on the guilt or innocence of the accused be brought to light. It has long been recognized that the trial judge has the power to effectuate this illumination when it otherwise could not be had.[23]

As noted earlier, the expedient of having a witness called by the court evolved as a modification of the English rule which required that all the witnesses listed on the prosecution's indictment be called. Later it grew into a technique by which the prosecution could have a witness put on the stand when the State was afraid of being bound by his testimony.[24]

The rule against impeaching one's own witness[25] remains today as the major reason why a party elicits the trial judge's assistance in producing witnesses;[26] because when the court calls the witness, the party who requested the witness be called can impeach the witness on direct examination.[27]

Some jurisdictions recognize the right of a trial judge to call a witness in the interest of justice, but have sought to place certain restrictions on this power to preserve the rule against impeachment. Consequently, these courts have required either that only eyewitnesses may be called,[28] or that the parties requesting the court to act show that an injustice will result from the failure to do so.[29]

23. 2 H. UNDERHILL, CRIMINAL EVIDENCE § 496 (5th ed. 1956); Annot., 67 A.L.R.2d 538 (1959). Although the present discussion centers on the court-called witness in criminal trials, the same considerations are supportive of the right and the power of the trial court to utilize its own witnesses in civil proceedings.

24. *See* Carle v. People, 200 Ill. 494, 66 N.E. 32 (1902).

25. An examination of the rule as it exists in the various jurisdictions can be found in 3 J. WIGMORE, EVIDENCE § 905 n.4 (3d ed. 1940).

26. *See generally* 44 IOWA L. REV. 795 (1959).

27. *E.g.*, United States v. Browne, 313 F.2d 197 (2d Cir. 1963); Browne v. State, 91 Fla. 682, 108 So. 842 (1926); People v. Wesley, 18 Ill. 2d 138, 163 N.E.2d 500 (1959).

28. People v. Hundley, 4 Ill. 2d 244, 122 N.E.2d 568 (1954); People v. Boulahanis, 394 Ill. 225, 68 N.E.2d 467 (1946); People v. Grisby, 357 Ill. 141, 191 N.E. 264 (1934). Another test developed by the Illinois court is the "miscarriage of justice" test, which requires probable material injustice. *See* People v. Banks, 7 Ill. 2d 119, 129 N.E.2d 759 (1955); People v. Bennett, 413 Ill. 601, 110 N.E.2d 175 (1953).

29. *See* Fournier v. United States, 58 F.2d 3 (7th Cir. 1932); People v. Sears, 62 Cal. 2d 737, 40 P.2d 938 (1965).

The court should explain to the jury that it is calling the witness because neither side is willing to vouch for his honesty and integrity. If the trial court fails to explain why it is calling a witness on its own motion, the jury might be overly influenced by subsequent testimony.[30] Since the trial judge must be very careful to preserve an attitude of strict impartiality, some courts have shown reluctance to take affirmative action which might destroy this impartiality.[31] The courts' reluctance to call their own witnesses does not seem to be well founded since the problem of destroying impartiality in the jurors minds can be remedied by proper instructions from the trial court.

It is settled that a judge may call a witness at his discretion without any request by either of the parties to the litigation.[32] It is also settled, however, that when a party makes a request, he must show why the particular witness is essential to the case and why he cannot call the witness.[33] Failure to make the necessary showing normally results in the court's refusal to call the witness.[34] In this situation it has been held reversible error for the trial judge to act without a proper foundation having been laid.[35]

30. *See* United States v. Wilson, 361 F.2d 134 (7th Cir. 1966).

31. City of Portales v. Bell, 72 N.M. 80, 380 P.2d 825 (1963). *See generally* Thomas, *The Rule Against Impeaching One's Own Witness: A Reconsideration,* 31 Mo. L. REV. 364, 387-89 (1966). This writer suggests that the impeachment problem could be solved by having the court call all of the witnesses with the exception of the real parties.

32. United States v. Browne, 313 F.2d 197 (2d Cir. 1963); Commonwealth v. Bready, 189 Pa. Super. 427, 150 A.2d 156 (1959).

33. Such a showing of necessity was made in People v. Stoudt, 232 N.E.2d 800 (Ill. App. Ct. 1968), a homicide case, in which the state requested the court to call the defendant's girlfriend to the stand. On the night of the homicide, the defendant, bathed in blood, had gone to the witnesses' house to wash his clothes. The court concluded that the defendant's relationship with the witness was such that the prosecution could rightfully doubt the integrity and veracity of the witness. Such a showing was also made in Smith v. United States, 331 F.2d 265 (8th Cir. 1964), in which the prosecutor requested that the court call an accomplice of the defendant who had previously pleaded guilty to the same offense with which the defendant was charged and being tried.

34. United States v. Lester, 248 F.2d 329 (2d Cir. 1957); Fielding v. United States, 164 F.2d 1022 (6th Cir. 1947); People v. Ricks, 86 Ill. App. 2d 70, 230 N.E.2d 50 (1967).

35. People v. Moriarity, 33 Ill. 2d 606, 213 N.E.2d 516 (1966). In this case the prosecution called the defendant's wife to rebut testimony of the defendant and after a few questions the court on its own motion made her its witness and allowed her testimony to be impeached. In reversing, the supreme court said:

> [A] proper foundation must be laid for the calling of a court's witness which would necessarily consist of the reasons why the party desiring the witness cannot vouch for his veracity, and showing that the testimony of the witness will relate to direct issues . . . .

Id., 213 N.E.2d at 517.

Both parties may cross-examine a court-called witness; this has been unquestionably established.[36] Nevertheless, some courts have placed limitations upon the extent of the cross-examination allowed.

The purpose of allowing cross-examination by both parties is "to refresh [the] recollection, or to awake [the] conscience"[37] of the witness. Thus, in *People v. Boulhanis*,[38] the court said that cross-examination does not include everything that may affect credibility.

Although both parties should be allowed a thorough cross-examination of a court-called witness, its scope should be limited to the issues of material importance. This would extend to the court-called witness the usual protection against impeachment on collateral matters. A proper application of this limitation is found in *People v. Cleminson*.[39] In this homicide case, the Supreme Court of Illinois found that while the trial court had properly called its own witness it had been too lenient in allowing the prosecution to degrade the witness, a friend of the defendant, by insinuating that the defendant had performed two abortions for her.

V. USE OF COURT-CALLED WITNESSES IN CIVIL LITIGATION

A. Generally

If it is true, as Justice Frankfurter once stated, that "judges are not referees at prizefights but functionaries of justice,"[40] then there is no compelling reason why a trial judge should not be able to summon a witness in a civil case. The English courts have restricted this practice to criminal cases on the assumption that in a civil case the judge merely "keeps the ring," but in a criminal case the main judicial object is to see that justice is done between the state and the accused.[41] The notion that a trial

36. *E.g.*, United States v. Wilson, 361 F.2d 134 (7th Cir. 1966); United States v. Lutwak, 195 F.2d 748 (7th Cir. 1952); Young v. United States, 107 F.2d 490 (5th Cir. 1939); Kissie v. State, 266 Ala. 71, 94 So. 202 (1957); People v. Williams, 6 Ill. App. 2d 325, 127 N.E.2d 505 (1955); Stoots v. Commonwealth, 192 Va. 857, 66 S.E.2d 866 (1951) (dictum).

37. People v. Boulhanis, 394 Ill. 255, 68 N.E.2d 467, 469 (1946).

38. *Id.* This case contains an excellent discussion of other Illinois cases in which cross-examination exceeded the allowable limits.

39. 250 Ill. 135, 95 N.E. 159 (1921).

40. Johnson v. United States, 333 U.S. 46, 54 (1948) (dissenting opinion),

41. One English judge has reasoned that "a judge in a civil action must find out the truth so far as the parties are willing to allow him to arrive at it . . . ." Rex v. Dora Harris, [1927] 2 K.B. 587, 590.

judge is a mere moderator in a civil action, however, is intellectually and practically unsound. While a party to a civil suit need not fear physical incarceration resulting from a decision against him, a substantial judgment enforceable by liens or forced sales may place him in an extremely perilous financial position.[42] The need for full disclosure of the available facts is therefore equally as great in a civil suit as in a criminal trial.[43] Even so, the practice of a trial court calling a witness in a civil case, as other than an expert, has not been widespread in America. More recently, however, courts have begun to resort to this procedure when the circumstances require additional evidence that neither of the parties is willing or able to furnish.[44]

As noted earlier, undue judicial restraint in a civil suit can often be severely damaging. Because of this, a trial judge should not, without a valid reason, refuse to call an essential witness who is known by the court to be adverse to one of the parties. Such inaction on the part of the trial judge can be considered a miscarriage of justice and may result in reversal when reviewed by an appellate court.[45]

B. Necessity of a Complete Trial Record

It is necessary to present a complete trial record in a civil proceeding in order for an appellate court to have all the pertinent facts with which to review the case. Thus, when due to an oversight on the part of counsel or other aforementioned circumstances the trial court's record is incomplete, it is necessary and proper for a trial judge, on his own motion, to call witnesses to elicit additional information for the purpose of clarifying the record.[46]

C. Use in Equity

Although the method of allowing the court to call a witness is used as a device to circumvent the rule against impeachment of one's witness,[47] this is not always the case. There are times

42. *See* J. FRANK, COURTS ON TRIAL 96 (1963).
43. *Id.* at 102.
44. *See, e.g.,* Green v. Smith, 59 Ill. App. 2d 279, 207 N.E.2d 169 (1965).
45. *See* Fortune v. Fortune, 138 A.2d 390 (D.C. Mun. App. 1958).
46. Chalmette Petroleum Corp. v. Chalmette Oil Distrib. Co., 143 F.2d 826 (5th Cir. 1944).
47. *See, e.g.,* Green v. Smith, 59 Ill App. 2d 279, 207 N.E.2d 169 (1965); Scroggs Feed & Grain Co. v. Vos, 254 Iowa 620, 118 N.W.2d 543 (1962).

when only by calling a witness can the court obtain the facts necessary for complete illumination of the issues. A proceeding in equity is a notable example of an area where court-called witnesses can be extremely useful. The sole determination of the rights of the parties is a matter reserved to the sound judgment of the presiding judicial officer. In order for him to reach a decision upon the merits of the case, he must be fully apprised of all facts having a bearing thereon. If additional testimony is needed, the judge, master or chancellor as the case may be, should in the exercise of his discretion call witnesses.[48]

D. Positive Judicial Action can Avoid Defects

That the potential defects in an adversary presentation can be remedied by positive judicial action is well illustrated in the Illinois case of *Green v. Smith*.[49] Here, a suit was brought against two defendants to recover damages for injuries sustained in an automobile accident. On the day before the trial, the plaintiff executed a covenant not to sue with one of the co-defendants, who was subsequently dismissed from the suit. At the trial, the defendant stated that she had intended to call the original co-defendant as an adverse party before his dismissal. Because she doubted his veracity, she did not want to call him as her witness and asked the court to do so. The trial judge complied with her request and gave both sides the opportunity to cross-examine. On appeal the appellate court affirmed the lower courts action, stating:

> The court may call a witness as its own when a party, for good cause, will not vouch for the integrity and veracity of the witness and his testimony appears necessary for the furtherance of justice.[50]

48. In regard to the use of the power in equity the following cases are noteworthy:
(a) Bradley v. Canter, 200 Va. 747, 113 S.E.2d 878 (1960). Here the Chancellor was faced with a question concerning the accounting of certain trust proceeds. Since the original recipients of the proceeds were not present in court, the Chancellor, upon his own motion, called one of the parties who had knowledge of the original transaction to testify as to what took place.
(b) Commonwealth v. Cerlach, 399 Pa. 74, 159 A.2d 915 (1960). In a proceeding to compel specific performance of land purchased under an option, the court, of its own motion, called the counsel for the plaintiff to testify as to what had transpired in his office when the deed to the land in question was signed.
49. 59 Ill. App. 2d 279, 207 N.E.2d 169 (1965).
50. *Id.*, 207 N.E.2d at 171.

VI. TRIAL JUDGE'S POWER TO CALL A WITNESS IN SOUTH CAROLINA

A. Use Of The Power

Once on the stand, the status of the court called witness in South Carolina is unquestioned.[51] Substantial clarification is needed, however, to determine when and to what extent the trial judge can exercise this inherent power of calling his own witness.

Only one South Carolina case, *Elletson v. Dixie Home Stores*,[52] has shed any light on the power of a trial judge to call a witness in this jurisdiction. In *Elletson*, the plaintiff was arrested by the police following a call from the manager of a food store, who had allegedly seen the plaintiff place a jar of coffee in his pocket and walk past the check out stand without paying for it. Elletson was subsequently tried in the Municipal Court of Greenwood and acquitted. He then instigated a malicious prosecution suit, and at the ensuing trial the question of what had transpired in the municipal court became significant. Since the municipal court is not a court of record, the trial judge, on his own motion, called the Assistant City Attorney who had prosecuted the case and the police officer who had signed the arrest warrant, to place in the record the proceedings of the municipal court. On appeal from a judgment for the plaintiff, the defense contended that this action on part of the trial judge was error. In affirming the trial court's decision, the South Carolina Supreme Court said:

> The court may of its own motion call a witness and examine same even out of order. It is a matter within the discretion of the trial judge, and we can see no merit in appellant's contention that the circumstances of the instant case are so unusual as to take it out of the rule.[53]

While this case enunciates the general rule as it is recognized in other jurisdictions, a more positive statement is needed. There is still much uncertainty as to what extent this power can be utilized in South Carolina and what limitations, if any, the South Carolina court will place upon it.

51. *See* Elletson v. Dixie Home Stores, 231 S.C. 565, 99 S.E.2d 384 (1957).
52. *Id.*
53. *Id.* at 576, 99 S.E.2d at 393.

B. Results of Failure to Use the Power

State v. Nelson[54] is a striking example of a South Carolina case in which the use of a court-called witness could have insured a complete trial record rather than reversal. The defendant was tried for the homicide of a nine year old child whose body was found in a creek about a mile from the home of the accused. At the time of the alleged murder the defendant's mother was visiting one of the defendant's sisters in the same community. At the coroner's inquest the mother of the defendant testified that the defendant had confessed that she had smothered the child and her husband had taken the body from their home and placed it in the creek.

Four days prior to the trial, counsel for the defendant served the county solicitor with a written notice stating that the mother would not testify at the trial as she had done at the inquest. The notice also contained a sworn statement by the mother repudiating all of her testimony at the inquest and giving a full statement of what she would testify to at the trial. The solicitor, nevertheless, called the mother as the state's witness and attempted to get her to admit the confession. The mother, instead, gave alibi testimony. At the end of the testimony the solicitor claimed surprise and asked for the right to cross-examine. The trial judge granted this request over the objection of the defense counsel and the solicitor used the prior testimony given at the inquest to impeach the witness. On appeal, the supreme court held that allowing the solicitor to impeach the witness with the prior statement was reversible error because surprise, a necessary element in gaining the right to impeach one's own witness, was lacking in this instance. It is submitted that had the trial judge called this witness on his own motion or on the motion of the solicitor, and allowed both sides the opportunity to cross-examine and impeach, neither side would have been prejudiced; the truth surrounding the issue would have quickly come to light and the record would have been complete, absent the reversible error.

VII. CONCLUSION

Certainly, a trial judge is not a mere spectator viewing disinterestedly the adversary antagonists as they pit their skills in the arena of the courtroom. The final decision of the contest, of

54. 192 S.C. 422, 7 S.E.2d 72 (1939).

which he is an integral part, is accompanied by a profound effect on one or all parties. Thus, when justice so demands, the trial judge should enter the arena and use the power of his own discretion to see that the jural audience has all of the facts available in order to insure an honest outcome of the contest. Of necessity, this power must be wielded with great care; but when it appears evident that the adversaries are not able to use all of the weapons at their disposal, then the court should use its power to call a witness in the interest of truth and justice.

ELLISON D. SMITH, IV