Fordham Law Review

Volume 27 | Issue 4 Article 1

1958

Sua Sponte Consideration in Appellate Review

Allan D. Vestal

Follow this and additional works at: https://ir.lawnet.fordham.edu/flr

Part of the Law Commons

Recommended Citation

Allan D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 Fordham L. Rev. 477 (1958).
Available at: https://ir.lawnet.fordham.edu/flr/vol27/iss4/1

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Sua Sponte Consideration in Appellate Review

Cover Page Footnote

Professor of Law, State University of Iowa.

This article is available in Fordham Law Review: https://ir.lawnet.fordham.edu/flr/vol27/iss4/1

SUA SPONTE CONSIDERATION IN APPELLATE REVIEW

*ALLAN D. VESTAL**

> To say that appellate courts must decide between two constructions proffered by the parties . . . would be to render automatons of judges, forcing them merely to register their reactions to the arguments of counsel at the trial level.[1]

> An appellate court decides only the issues presented by the parties.[2]

These apparently inconsistent statements suggest a very challenging problem which faces appellate courts. With some frequency a reviewing court in considering a case will discover an unargued legal issue which the court feels is decisive of the case. The failure to argue the point to the appellate court may be a matter of either inadvertence or intention. The court must then decide, either consciously or unconsciously, whether it will be restricted to the issues posed by the litigants. The court must decide whether it will view the controversy in the terms and issues posed by counsel or whether it will independently analyze the case in terms and issues of its own making.[3]

---

* Professor of Law, State University of Iowa.

1. Rentways, Inc. v. O'Neill Milk & Cream Co., 308 N.Y. 342, 349, 126 N.E.2d 271, 274 (1955).

2. Hampton v. Superior Court, 38 Cal. 2d 652, 656, 242 P.2d 1, 3 (1952). "This Court will not perform the duties of counsel; it will not examine a record to see if it can find any errors upon which to reverse a judgment. If the appellant's counsel does not choose, in some form, to call the attention of the Court to the points, provisions of the statute, and the authorities upon which he relies, the judgment will be affirmed." Edmondson v. Alameda County, 24 Cal. 349-50 (1864).

3. This should be distinguished from the situation wherein a court as a matter of dicta articulates a principle of law not urged or argued by the litigants. See Dickinson v. Porter, 31 N.W.2d 110 (Iowa 1948), superseded by 240 Iowa 393, 35 N.W.2d 66 (1949); Larkin v. Tsavaris, 85 So.2d 731 (Fla. 1956); Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23 (1956), dicta noted in 42 Iowa L. Rev. 450 (1957). To the litigants in the law suit, dicta is not vital. Courts, however, use dicta as a device to declare what the law is in a given field. Certainly the bench and bar of a given jurisdiction cannot safely disregard such statements. Best v. Yerkes, supra.

Some judges apparently favor the use of dicta to spell out legal principles although a particular case does not call for it. See, e.g., Mr. Justice Clark dissenting in Gold v. United States, 352 U.S. 985 (1957); but compare Nelson v. Estill, 175 Ga. 526, 543, 165 S.E. 820, 828 (1932); Lawlor v. National Screen Serv. Corp., 352 U.S. 992 (1957).

The idea of a court sua sponte considering an issue is not a matter to be found only at the appellate level. In the trial of a law suit a court on its own motion will consider the question of jurisdiction of the subject matter. It has been held that the litigants cannot circumscribe the examination of the court in this area; the litigants cannot waive this issue.

I. Facts, Legal Issues, and Bases of Decision

An appellate court in hearing and deciding a case is concerned with the facts, the legal questions or issues arising from the factual situation, and the authorities or bases of decision. In getting the controversy into a posture suitable for adjudication by a court, the litigants will be interested primarily in the factual background of the legal questions.[4] Either by agreement or by trial, the facts will be established and the judgment of the trial court will be handed down. Then, if an appeal is taken, the litigants, in the construction of the record on appeal, have the right to establish the factual background against which the controversy will be viewed by the appellate court. It is generally assumed that the appellate court will accept the litigants' statement of the facts and that the appellate court will not independently investigate the matter to ascertain whether the facts are as stated or whether there are additional facts which would alter the outcome of the litigation.

However, it would be a mistake to assume that the appellate court will never go beyond the facts related in the record.[5] During the argument of a divorce case before the Iowa Supreme Court in the early part of January 1954, it was intimated that the parties had remarried in California. The court recessed the hearing on the case to get factual information about the current status of the parties. Finally, on April 23, 1954, an affidavit of the parties, dated April 17, 1954, was filed indicating that they had remarried on January 26, 1954. The court then dismissed the appeal and remanded the case for disposition by the lower court.[6] Similarly, the Supreme Court of the United States, sua sponte after an argument of a case, inquired of counsel whether the defendants were still officials of the state of Oklahoma. The reply was that the terms of the defendants had expired and that there was no

4. In re Fried, 161 F.2d 453, 464 (2d Cir. 1947); Frank, Courts on Trial, 14 (1949); Frank, What Courts Do In Fact, 26 Ill. L. Rev. 645, 761 (1932).

5. "This section purports to give the Supreme and Appellate Courts power to receive evidence not produced on the trial. . . . In so far as section 92 of the Civil Practice Act . . . attempts to give the Supreme Court original jurisdiction on the appeal of a cause, of matters germane upon the trial thereof, this provision contravenes section 2 of article 6 of the constitution, . . . which provides that the Supreme Court has appellate jurisdiction, only, in all cases except in cases relating to the revenue, mandamus and habeas corpus. The matters offered do not come within the original jurisdiction of the court." Schmidt v. Equitable Life Assur. Soc., 376 Ill. 183, 198, 33 N.E.2d 485, 492 (1941). See also Wines, Establishing The Basis For Appellate Review, Ill. L. Forum 135 n. 1 (1952), "A statutory provision which undertakes to authorize the introduction of new evidence in the reviewing court has been held unconstitutional as an attempt to confer original jurisdiction on the court. Schmidt v. Equitable Life Assur. Soc. [supra], cited with approval in Atkins v. Atkins, 393 Ill. 202, 65 N.E.2d 801 (1946)"; 34 Iowa L. Rev. 521 (1949), commenting on Lohman v. Edgewater Holding Co., 227 Minn. 40, 33 N.W.2d 842 (1948).

6. Miller v. Miller, 66 N.W.2d 43 (Iowa 1954).

provision for revival or continuance against the successors in office. The court then concluded that "it follows that the controversy has become merely moot and that we have no authority to further consider or dispose of it."[7] The attorneys in this case wanted a decision to clarify the rights of parties in a continuing controversy. The court, however, stated: "[T]he absence of power which results from such disappearance cannot be supplied by the request referred to since after all it amounts to but a suggestion that that be done which there is no authority to do; in other words that the cause be decided in the absence of the parties whose presence is essential to its decision."[8]

In addition, persons not parties to the action may under certain circumstances establish facts in the appellate court which will terminate the justiciability of a case in that court.[9] In one case in the United States Supreme Court, it was noted that:

> [I]t appearing to the court here, from affidavits and other evidence filed in this case in behalf of persons not parties to this suit, that this appeal is not conducted by parties having adverse interests, but for the purpose of obtaining a decision of this court, to affect the interests of persons not parties—it is therefore now here ordered and adjudged by this court, that the appeal in this case be and the same is hereby dismissed. . . .[10]

Although the general rule is that litigants control the factual milieu of the controversy, there are exceptions and occasionally the appellate courts can and will go beyond the record presented.[11]

In an analysis of the authorities, precedents, and bases of decisions, the judges of the appellate courts generally feel that they have the right to go beyond the materials presented by counsel. Although counsel will present cases and other materials in briefs and oral arguments, the court may go beyond these authorities and in independent examina-

---

7. Shaffer v. Howard, 249 U.S. 200, 201 (1919). See also Williams v. Simons, 355 U.S. 49 (1957); Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States § 277 (2d ed., Wolfson & Kurland, 1951).

8. Shaffer v. Howard, supra note 7. Generally, reviewing courts will note developments which have occurred since the decision in the lower court. Patterson v. Alabama, 294 U.S. 600 (1935); Missouri ex rel. Wabash Ry. v. Public Service Comm., 273 U.S. 126 (1927); Gulf, Colorado & Santa Fe Ry. v. Dennis, 224 U.S. 503 (1912). See also Fink v. Continental Foundry & Machine Co., 240 F.2d 369 (7th Cir. 1957).

9. Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States § 276 (2d ed., Wolfson & Kurland, 1951).

10. Cleveland v. Chamberlain, 66 U.S. (1 Black) 419, 426 (1861).

11. The appellate court can either consider the additional facts or the court can send the case back down to the lower court to let that court consider the additional facts and render a decision based upon such facts. Land v. Dollar, 330 U.S. 731, 739 (1947); Helvering v. Gowran, 302 U.S. 238, 247 (1937); Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892); Estho v. Lear, 32 U.S. (7 Pet.) 130 (1833).

tion reach a conclusion concerning the legal issue posed.[12] As one court has stated, "upon an appeal, while we are limited to the points or questions made, we are not limited to the arguments submitted, or to the authorities cited."[13] The courts have always felt free to reach a decision concerning a given legal issue on any grounds available.[14] The

12. "Thus the Supreme Court has said that an appellate court reviews judgments not statements in opinions. Black v. Cutter Laboratories, 76 S. Ct. 824. The party's failure to call the trial court's attention to a relevant statute does not preclude the appellate court from considering it . . . . A court of review may consider and construe a statute determinative of the case which was not specifically called to the attention of the trial court." Huntress v. Estate of Huntress, 235 F.2d 205, 209 (7th Cir. 1956). "Curiously enough, these statutes were not presented to the District Court for consideration. We must consider them here." FDIC v. Vest, 122 F.2d 765, 768 (6th Cir. 1941), cert. denied, 314 U.S. 696 (1941).

13. District Township of Boomer v. French, 40 Iowa 601, 603 (1875). The lower court decision was correct if only the arguments presented were considered, but the court reversed upon a theory not urged, "that where the party against whom a cause of action existed in favor of another, by fraud or actual fraudulent concealment prevented such other from obtaining knowledge thereof, the statute would only commence to run from the time the right of action was discovered, or might, by the use of diligence, have been discovered." Id. at 603.

14. Courts have held the general rule against sua sponte consideration is subject to an exception in the case of a change in the law applicable. Most courts apparently feel that they can and should consider intervening changes in the law even though not argued to the court. The Supreme Court of the United States noted this a century and a half ago when it stated, "It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801). More recently this same idea has been articulated by courts, federal and state, and commentators. In Trapp v. Metropolitan Life Ins. Co., 70 F.2d 976, 982 (8th Cir. 1934), a state court decision had changed the applicable law after the district court opinion, and the circuit court in reversing the case on the basis of the change in Missouri law said, "We regard this case as an exceptional one and analogous to those in which a change of the law after trial has required a reversal of a judgment right when rendered. . . . [W]e think it is our duty to recognize the changed situation and 'to give effect to a matter arising since its judgment, and bearing directly upon the right disposition of the case.' "

The Oregon Supreme Court in Lambert Pharmacal Co. v. Roberts Bros., 192 Ore. 23, 233 P.2d 258 (1951), reversed a lower court decision after the ruling in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). "After this decision was rendered, on motion of the defendant, we ordered the filing of supplemental briefs and a reargument, directed to the effect of the Schwegmann decision on the present case. . . . The general rule . . . is that the parties to an appeal are restricted to the theory upon which the cause was presented or defended in the trial court . . . . But, in the posture of this case, that rule must yield to the court's right to notice a plain error when that is essential to prevent a miscarriage of justice. . . . And this is emphatically so when 'questions of a general public nature affecting the interest of the state at large' are involved . . . ; and when to ignore the issue would be to lend the aid of a court of equity to the accomplishment of

judge writing the opinion will consider the briefs, his own fund of information concerning the area of the law involved, the precedents discoverable in the library, what his research assistant can uncover, and other materials called to his attention. Without a doubt, there is a feeling of absolute freedom concerning sources from which the just answer to legal problems is to be ascertained.

A third fact, which arises in point of time before the consideration of legal authorities, is that of determining what legal questions or issues are posed by the case submitted to the court. Here, there is not the rigid, almost complete acceptance of the articulation of the attorney as in the case of the factual environment. Neither is there the complete freedom as in the case of the examination of decisional materials. In determining the legal·issues, a general rule—in both law and equity cases[15]—is that, "an appellate court decides only the issues presented by the parties. . . ."[16] The same idea was reflected when a court stated "[that] is a question that has not been submitted and hence need not

---

what has now been determined to be an illegal act." 192 Ore. at 28, 233 P.2d at 260. "If the record here discloses that the transactions involved affect interstate commerce, then, in view of the decision in the Schwegmann case, it would become manifest that a wrong result was reached in the Circuit Court and that an affirmance would make final a decree which could not be justified under the law. . . . The case is, therefore, an exceptional one, not governed by the general rule as to the scope of review by an appellate court, and we conceive it to be our duty to examine the record for the purpose of determining whether or not the plaintiff's price-fixing arrangement affects interstate commerce, and is, therefore, illegal as determined in the Schwegmann case." 192 Ore. at 31, 233 P.2d at 261, 262.

See also Moore's Judicial Code 571 (1949) wherein it is stated "in the exercise of its appellate jurisdiction it has power to make such disposition of the case as justice requires; in so doing the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment under review was entered; and may, because of the supervening change, vacate that judgment and remand the case to the state court so that it may be free to act."

15. "On an appeal in an equity suit, the whole case is before the court, and it is bound to decide the same, so far as it is in a condition to be decided, on its merits." Waterloo Mining Co. v. Doe, 82 Fed. 45, 51 (9th Cir. 1897). "Whilst the action is in equity and is real merits of the controversy." Jordan Co. v. Sperry Bros., 141 Iowa 225, 227, 119 N.W. 692, 693 (1909); cf. "It is the prevalent equity rule that only errors properly assigned will be considered on review." Orfield, Appellate Procedure in Equity Cases: A Guide for Appeals at Law, 90 U. Pa. L. Rev. 563, 578 (1942). Professor Orfield then lists certain examples of exceptions to the general rule. The rules and statutes both restricting and liberalizing sua sponte consideration on review do not make any distinction between cases at law and in equity. It would seem to be fair to say that the law-equity dichotomy is not fundamental in the area. Courts in some cases refer to the de novo review by appellate courts in equity cases. This may make the attitude of the courts more liberal in reviewing matters on the court's own motion. The equitable nature of the case has been decisive or of great weight only rarely in deciding whether to consider a matter sua sponte.

16. Hampton v. Superior Court, 38 Cal. 2d 652, 656, 242 P.2d 1, 3 (1952).

be decided."[17] A number of statutes[18] and rules of court[19] so provide. On the other hand, a number of courts have suggested and held that an appellate court is not necessarily restricted to issues proffered by the litigants, so that it is quite apparent that exceptions to the general rule do exist.[20] Categorizing the exceptions, however, is not simple.

17. Laramore v. Laramore, 64 So. 2d 662, 670 (Fla. 1953). The same idea is found in the following statements: "No constitutional question was suggested or argued below or here. And as a general rule, this Court will not consider any question not raised below and presented by the petition. . . . Here it does not decide either of the questions presented but, changing the rule of decision in force since the foundation of the Government, remands the case to be adjudged according to a standard never before deemed permissible." Erie R.R. v. Tompkins, 304 U.S. 64, 82 (1938) (dissenting opinion). "No application has been made for reconsideration of the constitutional question there decided . . . [the State of New York] is not entitled and does not ask to be heard upon the question whether the Adkins case should be overruled." Morehead v. New York ex rel. Tipaldo, 298 U.S. 587, 604, 605 (1936). "The court can only decide questions that are before it." Esselstyn v. Casteel, 205 Ore. 344, 347, 288 P.2d 215, 217 (1955).

See also Elson v. Security State Bank, 246 Iowa 601, 605, 67 N.W.2d 525, 528 (1954) wherein the dissenting judge stated, "I respectfully dissent because the majority opinion is contrary to countless decisions of this and other courts that a case will not be reversed upon a proposition not argued. See also 58 I.C.A. Rules of Civil Procedure, rule 344(a)(4)(Third) which says, 'Errors or propositions not stated or argued shall be deemed waived.'"

18. For example, Wash. Rev. Code Ann. 4.88.200 (1952): "Any questions of fact or of law, decided upon trials by the court or by referees, in either legal or equitable causes, may be reviewed, when exceptions to the findings of fact or to the conclusions of law, or both, have been duly taken, by either party and sent up in the record on appeal; and in actions legal or equitable, tried by the court below without a jury, wherein a statement of facts or bill of exceptions has been certified, the evidence of facts shown by such bill of exceptions or statement of facts shall be examined by the Supreme Court de novo, in so far as the findings of fact or a refusal to make findings based thereon have been excepted to, and the cause shall be determined by the record on appeal, including such exceptions or statement." See also note 90 infra.

19. For example, Iowa R. Civ. P. 344(a)(4)(Third): "Errors or propositions not stated or argued shall be deemed waived." See also Iowa R. Civ. P. 371: "The supreme court shall have power to revoke, change or supplement any of these rules which prescribe the procedure in that court. Under this power the court may revoke, change or supplement any rule in division XVI hereof except rules 331-339 inclusive." See also note 90 infra.

20. Kessler v. Strecker, 307 U.S. 22, 34 (1939) (request that Court use plain error doctrine; Court stated that it had the power to note plain error not presented). The same idea was urged in the concurring opinion of Mr. Justice Frankfurter in Sherman v. United States, 356 U.S. 369, 379 n. 2 (1958) in which he stated, "It is of course not a rigid rule of this Court to restrict consideration of a case merely to arguments advanced by counsel." When the Supreme Court of Michigan was faced recently with the question of sua sponte consideration of a matter, Mr. Justice Black stated that, "There is no hard and fast rule that appellate courts, sitting either in law or equity, cannot and hence do not raise and decide important question sua sponte. Indeed, a mere glance at available precedent will disclose the contrary. True, the power is exercised sparingly and with full realization of the restrictions and limitations inherent in the employment thereof." City of Dearborn v. Bacila, 353 Mich. 99, 90 N.W.2d 863, 873 (1958).

II. Reasons for Appellate Review

Appellate courts have been a part of the tradition of the common law for centuries.[21] Although litigants have no absolute, constitutional[22] right to appellate review of decisions of trial court, the re-examination of cases by a reviewing court has been the rule rather than the exception. With one noteworthy exception,[23] American states, American territories, and the federal government have traditionally provided multiple levels of courts with the right of appeal from one level to another. The fact of appellate review is quite clear; the rationale of appellate review is less clear. However, a number of concepts, persuasively urged,[24] seem to be valid.

First, appellate courts have been rationalized as courts for the correction of errors of the trial courts.[25] The underlying reasoning is that trial courts, in deciding questions presented to them, will in the nature of things err, that the judges of inferior courts will make mistakes of law. Therefore, it follows, appellate courts are necessary to rectify such errors.

Second, and this is quite different from the first, appellate courts have been justified as assuring litigants that the controversy between them

---

Other courts have adopted this position. The following statements are examples: "No objection to this action of the court or to the plaintiff's opening statement was interposed by the railroad's attorney, and the points are not raised on appeal; therefore, we do not reverse the judgment on such grounds, though this court may notice a plain error of its own motion if justice requires it . . . ." Atlantic Coast Line R. R. v. Kammerer, 205 F.2d 525, 526 (5th Cir. 1953); "The right . . . of an appellate court to notice a plain error where that is essential to prevent a miscarriage of justice, even in a civil case, has been recognized." Trapp v. Metropolitan Life Ins. Co., 70 F.2d 976, 981 (8th Cir. 1934).

21. See generally Pound, Appellate Procedure in Civil Cases (1941); Holdsworth, History of English Law (1938).

22. "Under it [due process clause] he may neither claim a right to trial by jury nor a right of appeal." Dohany v. Rogers, 281 U.S. 362, 369 (1930); Hubbard v. Marsh, 239 Iowa 472, 32 N.W.2d 67 (1948) (principle reaffirmed that right of appeal is not inherent nor constitutional and may be granted or withheld by the legislature); Van Der Burg v. Bailey, 207 Iowa 797, 223 N.W. 515 (1929); Washita Ranger Oil Co. v. Disney, 264 S.W. 630 (Tex. Civ. App. 1924) (privilege of requiring an appellate court to reverse the proceeding of a trial court is dependent upon legislative grant and regulation).

23. Lamar, A Unique and Unfamiliar Chapter In Our American Legal History, 10 A.B.A.J. 513 (1924).

24. See cases cited in notes 25 to 37 infra.

25. "The judge may make a mistake. Indeed, it is expected that judges will occasionally make mistakes; otherwise there wouldn't be appellate courts. And all judges of any humility at all know that they make quite a fair percentage of mistakes." Judge Wyzanski speaking in Ware v. Garvey, 139 F. Supp. 71, 74 (D. Mass. 1956). "As has been well said, appellate courts are established for correction of the errors of trial courts, and 'only in very exceptional cases can a point not brought to the attention of the court below and not passed upon by that court be raised upon appeal.'" Zindler v. Buchanon, 61 A.2d 616, 617 (Mun. Ct. D.C. 1948).

will be decided correctly. This does not turn upon the question or questions presented to the trial court, but considers the law suit in a broader aspect.[26] The appellate court, it is urged, will offer a second opportunity to get a correct decision of the controversy. This, of course, assumes that an appellate court will be more able to ascertain where justice lies than will an inferior court.[27] The emphasis in this rationale is upon the controversy and its solution in a just manner, without being limited to the litigants' view of the case.

Third, one may justify appellate review in terms of uniformity of decisions. This does not place correctness of decision as the *sina qua non*; here rather one places equality of treatment as the primary consideration.[28] In referring to an appellate court, a Justice of the United States Supreme Court, speaking of the experience of Georgia where for seventy years there were only trial courts, said:

---

26. This, of course, is reflected in the disagreement over the question of considering matters not urged in the lower courts. Where appellate courts are viewed as established to rectify errors, only matters urged at the lower level will be considered; where the court is viewed as one to dispense justice, all matters will be considered. See pp. 490-93 infra. For examples of this broader approach to appellate review, see In re Kruger, 130 Cal. 621, 63 Pac. 31, 33 (1900) ("there is no such rule that points not made at the trial cannot be made here. . . . It was not necessary to show that the same argument was made below"); In re Initiative Petition No. 10 of Oklahoma City, 186 Okla. 497, 98 P.2d 896, 897 (1940) ("There is here no question of public policy or public interest in which situations this court may review a matter not presented below.").

The vitality of the opposite point of view should not be underestimated. For example, Mr. Justice Frankfurter dissenting in Terminiello v. Chicago, 337 U.S. 1, 11 (1949), wherein he stated, "This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency." And see Miller v. Lawlor, 245 Iowa 1144, 1157, 66 N.W.2d 267, 275 (1954), wherein the court stated, "We cannot find it was ever urged to the trial court and we cannot and should not consider it on appeal." See also Watts v. Elmore, 198 Okla. 141, 176 P.2d 220 (1946), and Shaw v. Edwards, 198 Okla. 79, 175 P.2d 315 (1946).

27. But see Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751 (1957).

28. On the importance of uniformity of treatment, see United States v. Ohio Power Co., 353 U.S. 98, 99 (1957), wherein the Court sua sponte vacated an order more than six months after it was handed down so that the case "might be disposed of consistently with . . . companion cases. . . . We have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules."

The importance of uniformity of decisions is recognized in Rule 38 of the Rules of The Supreme Court of the United States. See particularly parts 5(a) and (b).

"The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal." Chief Justice Taft in Hearing Before the House Committee on the Judiciary, 67th Cong., 2d Sess. 2 (1922). See also Cardozo, Selected Writings 153 (1947).

> Probably nine men out of ten would think that the main purpose of such a Court was to correct errors which had, in some way, impaired or denied the rights of a private litigant. And yet the records show that between 1810 and 1845, the strong and reiterated argument for such a Court was its value to the general body of the public. Governor after governor attacked the system on the ground that it produced not only infinite confusion, but positive conflict in the law, harmful to the litigant, but more harmful to the public.[29]

This Justice spoke of the confusion and uncertainty and indicated that the "situation was intolerable." In discussing the place of a supreme court, he pointed out that such a court brings "certainty out of doubt. This is really one of the silent, unconsidered, yet most valuable functions of a supreme court. Not that it is infallible, but that it can authoritatively settle disputed questions and make uniform a law that might be differently and variously decided by the ablest and most upright men. . . ."[30]

A fourth rationale is that of establishing a corpus juris for a jurisdiction.[31] The importance of this concept is recognized in Rule 38 of the United States Supreme Court wherein certain rules are indicated for the exercise of the discretionary review under writs of certiorari. The Court indicates that it will exercise its power when there is a "special and important question of federal law which has not been, but should be, settled by" the Supreme Court.[32] Within the past year the Supreme Court of the United States has been rent by an internecine conflict over the proper function of an appellate court. Although there is some controversy in specific areas, most would agree with Mr. Justice Frankfurter's position as an abstract proposition of law when he states: "This is not the supreme court of review for every case decided 'unjustly' by every court in the country."[33] In Mr. Justice Frankfurter's view, the Supreme Court of the United States is concerned only with "constitutional issues or other questions of national importance."[34] Certainly

---

29. Lamar, A Unique and Unfamiliar Chapter in Our American Legal History, 10 A.B.A.J. 513, 515 (1924).

30. Id. at 516.

31. "One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. Therefore in the main there shall be adherence to precedent." Cardozo, Selected Writings 153 (1947). As to the effect of a decided case on the deciding court at a later time, see Radovich v. National Football League, 352 U.S. 445 (1957); and on a lower court, Houston Farms Development Co. v. Commissioner, 194 F.2d 520 (5th Cir. 1952); Nichols v. Sprague S.S. Co., 119 F. Supp. 443 (D. Mass. 1954). See also Wright, op. cit. supra note 27.

32. Revised Rules of the Supreme Court of the United States, Rule 38(5).

33. Rogers v. Missouri Pac. R.R., 352 U.S. 500, 541 (1957) (dissenting opinion).

34. Id. at 547. See also Mr. Justice Frankfurter's dissenting opinion in Gibson v. Phillips Petroleum Co., 352 U.S. 874 (1956).

one of the primary functions of any appellate court is to establish the corpus juris for its jurisdiction.[35] Under common law jurisprudential concepts, law is established and grows through the decisions primarily of appellate courts.

Other factors become apparent in an examination of appellate review. Some are intangible and tangential but nevertheless of real importance. The stabilizing influence of the existence of reviewing courts,[36] the prestige which a high court can lend to a court system, and the delay to be found in judicial review are such factors.[37]

In any analysis of the place and function of appellate review, it becomes quite clear that these various factors are not mutually exclusive.[38] Rather, the court in considering and deciding any given case may be motivated by any one or perhaps several of these factors in varying degree. Of course, these factors do not always work toward the same end.[39]

---

35. "[I]n view of the possibility that the rule of law as announced in Lane v. Beveridge may have affected property rights and guided the conduct of public officials, we deem it our duty, under the doctrine of stare decisis, to withdraw the statement in our former opinion overruling this decision." Esselstyn v. Casteel, 205 Ore. 344, 372, 288 P.2d 215, 216 (1955).

36. "Amid the cross-currents and shifting sands of public life the law is like a great rock upon which a man may set his feet and be safe, while the inevitable inequalities of private life are not so dangerous in a country where every citizen knows that in the Law Courts, at any rate, he can get justice." Lord Sankey, in 1929, then Lord Chancellor of England. Hewart, The New Despotism 151 (1929).

37. "Judicial review gives time for the sober second thought. . . . The cooling period is good for most hotly-contested issues. And where basic fundamental rights of the citizen are at stake, the contemplative pause, necessitated by judicial review, may be critical. . . . It assures that basic unfairness will be corrected . . . ." Douglas, We The Judges 445 (1956).

38. Hearing Before the House Committee on the Judiciary, supra note 28.

39. See Great Northern Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932) (justice to litigants perhaps required affirmance but corpus juris demanded reversal); Wehrman v. Farmers' & Merchants' Savings Bank, 221 Iowa 249, 259 N.W. 564 (1935) (no error by lower court in ruling on case as argued by litigants, but reversal required if law to be correctly applied).

"If I could revise the precedent doctrine, it would require that a court should never change a rule, retroactively, in its application to any person when the court has reason to believe that he actually relied on that rule and would be harmed substantially by the change; but the court would be free to change an unjust rule as to all other persons, both retroactively and prospectively." Frank, Courts on Trial 270 (1949). See Collins v. Webb, 133 F. Supp. 877 (N.D. Cal. 1955) (state court has power to give overruling decision prospective application only, and to deny it any retroactive effect); Hare v. General Contract Purchase Corp., 220 Ark. 601, 249 S.W.2d 973 (1952) (present transaction not usurious, but subsequent transactions will be).

III. General Rule

A number of arguments and rationalizations have been urged for the general rule that an appellate court will not consider sua sponte a legal argument not presented and urged by the litigants.[40] These might be summarized as follows: (1) the litigants have a right to control the litigation, therefore the court should decide only those questions raised by the parties; (2) no error requiring rectification has been committed by the lower court since the lower court has—by definition—not ruled on the matter if the question is raised for the first time by the appellate court sua sponte; (3) in some cases this last concept has been enlarged into a fundamental, jurisdictional limitation which foreclosed the consideration of a question not raised in the lower court; and finally (4) the losing party has had no opportunity to rebut the argument accepted by the court, which may in fact be erroneous, and the court has received no assistance in deciding the question from the litigants who are well informed in the matter. Now to consider these rationales seriatim.

A. *Control by Litigants*

The common law system of jurisprudence is based upon the adversary principle. Our courts are passive instrumentalities, available to right wrongs, but the initiative is never theirs.[41] Our courts require the catalyst of a litigant who seeks relief. A concomitant of this attitude is that the litigants have the right to control the course of the law suit. Courts generally allow litigants to agree by stipulation to do all sorts of things not authorized by rule or statute. Although there has been a movement away from absolute control in the hands of litigants in the area of procedure, much of this is still to be found. Courts allow litigants to stipulate the facts involved,[42] to waive time limitations in connection with the filing of papers,[43] and to decide when cases will be tried.[44]

40. See Note, Raising New Issues on Appeal, 64 Harv. L. Rev. 652 (1951).

41. "Take a poor man with a poor lawyer . . . a case argued with a giant on one side and a pygmy on the other, and the judge hearing the case whose associations have been with the rich. What show has the poor fellow got? Nobody is crooked or dishonest; it is just the natural course of evolution that has made the law of today. You can't get into court for nothing. Even if you could you couldn't get along by yourself. You must have a lawyer. You can have any kind of a lawyer you can pay for. But you can't try your own case. You don't know how. The judge won't help you. He sits there to umpire the game and nothing else; it's all a lottery. If your case is just, that counts nothing. . . . There is only one true thing about it, you can always get a run for your money, as long as you have got any there is another court. There is no effort in the courts to get at abstract justice." Clarence Darrow, in Bruce, The American Judge 10-11 (1924).

42. Gillespie v. Norris, 231 F.2d 881 (9th Cir. 1956); Newman v. Granger, 141 F. Supp. 37 (W.D. Pa. 1956).

43. Vestal, A Decade of Practice Under the Iowa Rules of Civil Procedure, 38 Iowa L. Rev. 439, 448 (1953).

44. Id. at 449.

Litigants decide whether a law suit will be started and against whom.[45] Courts allow litigants to waive certain claims[46] and defenses[47] and to establish the record to be considered by an appellate court.[48] Is it any wonder, then, that courts have allowed litigants to cast the law suit in certain terms, even though those represent a totally incorrect analysis of the situation. A classic example is *Wehrman v. Farmers' & Merchants' Sav. Bank.*[49] In this case, involving descent of property, a great deal of evidence was introduced and arguments urged concerning the sequence of deaths of a mother and twin children delivered post mortem by Caesarean section. All this, when in fact such sequence has had no significance under the applicable state law either before or since the decision on the descent of property in this particular factual situation. The court, in fact, on petition for rehearing acknowledged that it "must be conceded" that the argument was entirely irrelevant.[50] But the court refused to grant the petition for rehearing; since the correct argument had not been urged initially, the court would not consider it. The litigants had controlled the course of the law suit even to the point of having the case decided on a completely irrelevant point.

The control of the litigants is clearly spelled out in many statutes and rules of court. In Iowa, for example, Rule of Civil Procedure 344(a) states that "Errors or propositions not stated or argued shall be deemed waived,"[51] while the rules of the Supreme Court of the United States indicate this same concept when it is stated that "only the questions specifically brought forward by the petition for writ of certiorari will be considered."[52] This is all part of the orderly presentation which is so much sought by the legal technicians interested in the smooth functioning of the judicial machinery.[53] Even though vital principles may

45. See Moore's Federal Practice § 14.15 (1948).

46. By not commencing an action within the period of the statute of limitations.

47. Fed. R. Civ. P. 12(g), (h).

48. Fed. R. Civ. P. 75(g): "The Clerk of the District Court . . . shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: . . . the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. . . ."

49. 221 Iowa 249, 259 N.W. 564 (1935).

50. 221 Iowa 263, 266 N.W. 290, 291 (1936).

51. See Chief Justice Garfield dissenting in Elson v. Security State Bank, 246 Iowa 601, 67 N.W.2d 525, 528 (1954). See also Iowa R. Civ. P. 340(b): "If the abstract does not embrace the whole record, and all evidence and proceedings in the transcript, depositions and exhibits, it shall include a concise statement of all points upon which appellant will rely on the appeal, which shall be limited thereto."

52. Revised Rules of the Supreme Court of the United States, Rule 38. Compare Rule 27(6).

53. In Fransioli v. Brue, 4 Wash. 124, 125, 29 Pac. 928 (1892), it was argued that there

be involved, some judges will fall back on this right of litigants to control the course of the case as a barrier against sua sponte consideration by the bench.[54] In a case before the United States Supreme Court involving possible unconstitutional discrimination, Mr. Justice Holmes, speaking for the Court, refused to consider the matter. Rather he stated:

It may or may not be that if the facts were called to our attention in a proper way the objection would prove to be real. . . . It rests with counsel to take the proper steps, and if they deliberately omit them, we do not feel called upon to institute inquiries on our own account. Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way. Therefore, without prejudice to the question that we have suggested, when it shall be raised, we must conclude that so far as the present case is concerned the judgment must be affirmed.[55]

In this language one sees the reluctance to act affirmatively. Here is the common-law court, willing to judge but unwilling to act the advocate.

---

were not facts sufficient to constitute a cause of action, but appellant failed to suggest such in his brief, and the court stated: "The statute provides that this question may be raised at any time. This provision must, however, be reasonably construed; and thus construed we think it must be held to mean simply that such question can be raised at any time in the orderly course of argument. What is such orderly course of argument? All points relied upon on appeal are required to be stated in the briefs of the respective parties, the briefs are, in fact, the formal presentation of the cause, and when all are on file in a particular case, such case is fully made up and cannot thereafter be added to without the consent of all parties and the court. . . . By failing to suggest it in his brief appellant lost the right to insist upon it." Jurisdiction of the subject matter was excepted from this interpretation.

54. This idea of estoppel is found in the following cases: United States v. Hancock Truck Lines, Inc., 324 U.S. 774, 779-80 (1945), the court stating: "It was manifestly improper to reverse the Commission's order [in the District Court] in respect of a provision therein as to which the suitor had advised [the ICC] it no longer objected but acquiesced"; Lumpkin v. Meeks, 263 Ala. 395, 397, 82 So. 2d 535, 537 (1955), wherein it was stated, "Let it suffice to say that the petition in this cause was sufficient to invoke the jurisdiction of the equity court and as no objection was made below to the form of the petition and the parties submitted to the jurisdiction of the equity court, we will not avoid this proceeding on appeal"; Verlinden v. Godberson, 238 Iowa 161, 166, 25 N.W.2d 347, 350 (1946), the court stating: "Having gone to trial on the petition, and having litigated the issue raised without objection, and not having objected to evidence offered to establish such claim of waste, we do not think that the objection now made by appellant can be of any avail to him . . ."; Buckley v. City of Bloomfield Hills, 343 Mich. 83, 85, 72 N.W.2d 210, 211 (1955), "Accordingly, we pass on none of those questions. Plaintiffs' statement of questions involved raises but one other question, the parties agree it is a question to be determined, and it alone do we decide, namely, whether the projected soil removing and leveling operation is violative of the provisions of ordinance No. 64 zoning the property 'residential'."

"As an almost universal rule, this court may very justly presume that the counsel who tried the case in the court below fully comprehends the issues which were necessary to be submitted to the jury in order to protect his client's rights. . . ." Nightingale v. Barnes, 47 Wis. 389, 399, 2 N.W. 767, 774 (1879) (dissenting opinion).

55. Quong Wing v. Kirkendall, 223 U.S. 59, 63, 64 (1912).

This same attitude was revealed in a rather recent decision of the Iowa Supreme Court wherein the court apparently acted sua sponte. The court later changed its position, and withdrew the opinion in part at least because of the stinging attack of the dissenting opinion wherein it was stated:

> The majority has no right to reach out and supply the principal ground on which it holds this act void. In doing so it has assumed the role of advocate. This is a plain violation of the fundamental rule, repeatedly and universally recognized, that a reversal will not be ordered on a ground not properly raised in the court below, much less upon one not advanced in this court.[56]

Time and again the courts have indicated that the attorneys are the ones who are fully informed on the litigation and the interests of their clients. They are the only ones who are in a position to evaluate the whole picture. It follows that the attorneys have a right and duty to decide exactly what positions will be taken.[57] Articulating the idea, judges have stated:

> As an almost universal rule, this court may very justly presume that the counsel who tried the case in the court below fully comprehends the issues which were necessary to be submitted to a jury in order to protect his client's rights . . . .[58]
>
> The true application is to permit the litigants over matters of private right to say for themselves what the dispute is, and that certain proof will warrant a recovery.[59]

B. *Correction of Errors*

When a matter is considered sua sponte at the appellate level it rarely has been presented for the consideration of the trial court.[60] If the

---

56. Dickinson v. Porter, 31 N.W.2d 110, 126 (Iowa 1948). The subsequent opinion is reported in 240 Iowa 393, 35 N.W.2d 66 (1948).

57. Trans-Continental Mutual Ins. Co. v. Harrison, 262 Ala. 373, 376, 78 So. 2d 917, 919-20 (1955). "Wherever possible, cases should be reviewed by this Court on the issues conceived by the contending parties in the trial court and the questions presented to, and determined by, the trial judge."

58. Nightingale v. Barnes, 47 Wis. 389, 399, 2 N.W. 767, 774 (1879) (dissenting opinion).

59. Heiman v. Felder, 178 Iowa 740, 752, 160 N.W. 234, 239 (1916).

60. Some of the same considerations as those being presented are found in those cases where a matter, not properly presented in the lower court, is urged to the appellate court. The appellate court must then decide whether such matter will be considered. "Ordinarily an appellate court does not give consideration to issues not raised below. . . . There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court . . . below." Hormel v. Helvering, 312 U.S. 552, 556-57 (1941).

See also Crawford v. United States, 212 U.S. 183 (1909); Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States § 418 (2d ed. Wolfson & Kurland 1951). But see Swiss Bankverein v. Zimmermann, 240 Fed. 87, 92 (2d Cir. 1917), wherein a question was raised in the trial court, but not on appeal, and the court stated: "we have a right under our rule 11 . . . to 'notice a plain error not assigned,' and we have less hesita-

appellate court is viewed solely as a court for the correction of errors, it is powerless when faced with an error not called to the attention of the lower court. Since the lower court has not been given an opportunity to consider the matter and rectify it, the lower court has not erred, and it follows that the appellate court cannot act.[61] The logic here is that the litigants must call the question to the attention of the lower court.

> This [is] in fairness to both the lower court and the opposing party so that each may have the opportunity of promptly remedying the error, if it in fact amounts to error, and is of a character to be subject to correction.[62]
>
> The law requires that errors, to be reviewable, must have been definitely and timely called to the attention of the trial court, in order to afford that court a fair opportunity to pass upon the matter, and correct its own errors, if any.[63]

This again is just a phase of the orderliness required in the treatment of controversies. Piecemeal presentation of arguments runs counter to such thinking, and therefore courts generally are reluctant to allow new arguments to be urged at the appellate level.[64]

Deference to the lower courts is an additional basis upon which this concept is grounded. Appellate courts generally feel that respect must be shown to the inferior courts and that a lower court should not be reversed when it in fact committed no error.[65] This, of course, is mean-

---

tion in doing so because the question was fully presented to and considered by the trial judge."

61. "It has been our universal holding, . . . that an issue or contention not raised in the lower court cannot be considered on appeal." McCornack v. Pickrell, 231 Iowa 737, 741, 2 N.W.2d 57, 59 (1942); accord, Kallem v. Kallem, 232 Iowa 1269, 8 N.W.2d 250 (1943). See also Kurtz v. Kurtz, 228 Iowa 256, 290 N.W. 686 (1940); supra note 26.

62. Harrison v. St. Louis Pub. Serv. Co., 251 S.W.2d 348, 353 (Mo. App. 1952).

63. Arkansas Bridge Co. v. Kelly-Atkinson Const. Co., 282 Fed. 802, 804 (8th Cir. 1922). To the same effect is the dissent of Justice Taylor in Nightingale v. Barnes, 47 Wis. 389, 398, 2 N.W. 767, 773 (1879), in which he stated: "Upon the questions litigated in the court below there was no error committed by that court, and therefore, no errors for this court to correct; and the only way this court can raise any error in the case is to introduce a defense which the defendant did not make in the court below, and which I think he clearly waived, and then hold that, if such defense had been made, the evidence was sufficient to have sustained it, and therefore the judgment must be reversed."

64. Diggs v. Cities Serv. Oil Co., 241 F.2d 425 (10th Cir. 1957); United States v. Waechter, 195 F.2d 963 (9th Cir. 1952). It should be noted that this argument against sua sponte consideration of an argument is not valid if the argument has been urged at the lower level. There is a possibility that the lower court had considered and rejected the argument, and that the litigants chose not to make the argument to the appellate court. Usually, however, consideration sua sponte goes hand in hand with failure to consider the matter in the lower court. See notes 26 and 60 supra.

65. This, of course, does not keep an appellate court from considering all authority available on the legal question at hand. Where a controlling decision has been handed down since the decision in the lower court, the appellate court will note the change in the law. Johnson v. Union Pacific R.R., 352 U.S. 957 (1957). See also Boynton v. Moffat

ingful only when the sua sponte consideration would result in a reversal. Deference does not foreclose sua sponte consideration to affirm a decision erroneously reached.[66]

There is a matter of fundamental importance in the federal-state relationship which bars the consideration of matters sua sponte by the United States Supreme Court in a case coming from the highest court of the state. As Mr. Justice Brandeis has stated, in a case coming from a state court, "Our power of review is limited not only to the question whether a right guaranteed by the Federal Constitution was denied . . . but to the particular claims duly made below, and denied . . . . This is a writ of error to a state court."[67] The vitality of this particular doctrine may be somewhat questionable at the present time in view of the decision of the United States Supreme Court in *Terminiello v. Chicago*,[68] wherein the Court apparently disregarded this limitation. The change in the personnel of the Court since this decision makes the question an open one. Certainly the limiting consideration has a champion in Mr. Justice Frankfurter whose remarks have clearly spelled out the classic point of view. Dissenting in the *Terminiello* case, he stated:

For the first time in the course of the 130 years in which State prosecutions have come here for review, this Court is today reversing a sentence imposed by a State court on a ground that was urged neither here nor below and that was explicitly disclaimed on behalf of the petitioner at the bar of this Court. . . .

The relation of the United States and the courts of the United States to the States

---

Tunnel Improvement Dist., 57 F.2d 772, 777 (10th Cir. 1932), the court stating that: "[S]ince appeals in equity are trials de novo, and since equity speaks as of the present . . . we need not explore the effect of that order [no longer in force]."

66. See cases cited in notes 123-25 infra.

67. Whitney v. California, 274 U.S. 357, 380 (1927) (concurring opinion), quoted in the dissenting opinion of Mr. Justice Frankfurter in Terminiello v. Chicago, 337 U.S. 1, 10 n. 1 (1949).

"[T]he Court is properly cognizant that the question must be timely and properly raised in accordance with state practice, where that practice is reasonably calculated to permit it, unless, of course, the highest court actually entertains the question and decides it. If the question is not so raised and the highest court of the state accordingly declines to consider it, the Supreme Court is without jurisdiction to review." Moore's Judicial Code 571 (1949). See also Wines, Establishing The Basis for Appellate Review, Ill. L. Forum 135, 146 (1952), wherein the author concludes that "The federal requirement that a federal question must be 'set up and specially claimed' and preserved for review in the state courts is more than a principle of federal appellate procedure. It marks the limits of the United States Supreme Court's appellate jurisdiction. The United States Supreme Court has many times held that it is without jurisdiction to review a question that was not 'set up and specially claimed' and preserved for review in the state court."

68. 337 U.S. 1 (1949); see Note, Scope of Supreme Court Review: The Terminiello Case in Focus, 59 Yale L.J. 971 (1950). The Terminiello decision is also noted in 38 Geo. L.J. 94 (1949); 9 Law. Guild Rev. 70 (1949); 21 Miss. L.J. 278 (1950); 7 Wash. & Lee L. Rev. 75 (1950); 52 W. Va. L. Rev. 65 (1949).

and the courts of the States . . . is too delicate to permit silence when a judgment of a State court is reversed in disregard of the duty of this Court to leave untouched an adjudication of a State unless that adjudication is based upon a claim of a federal right which the State has had an opportunity to meet and to recognize. If such a federal claim was neither before the State court nor presented to this Court, this Court unwarrantably strays from its province in looking through the record to find some federal claim that might have been brought to the attention of the State court and, if so brought, fronted, and that might have been, but was not, urged here. This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.[69]

This specific limitation, of course, has no application outside of the very narrow area of Supreme Court review of state court decisions.[70] It is, however, an attempt to elevate to a constitutional doctrine the generally accepted idea that a lower court should be given an opportunity to rule on a matter initially.

C. *Matter Not Fully Considered*

When the appellate court considers a matter sua sponte for the first time it means that the litigants have not been given an opportunity to consider the matter and urge arguments in support of and against the position adopted by the reviewing court. If the question had been raised there is at least a possibility that other facts or other authorities might have been presented which might have changed the court's attitude on the matter.[71] But this opportunity is not given to the losing party.

69. 337 U.S. 1, 8, 9, and 11.

70. "[I]t is . . . the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. . . ." McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434 (1940); Robertson and Kirkham, Jurisdiction of the United States Supreme Court, §§ 87, 418 (2d ed., Wolfson & Kurland, 1951).

71. An analogous argument is urged that all arguments must be presented at the lowest level. Unless the argument is presented at that time the litigants are not in a position to bring all counterarguments—law and fact—to the attention of the court. Consistently courts have required full disclosure—full presentation of the arguments—at the trial level. "One of the rules of well nigh universal application established by courts in the administration of the law is that questions not raised and properly presented for review in the trial court will not be reviewed on appeal. . . . The reason for the rule is plain. If the question had been raised below, the situation might have been met by the opposite party by way of amendment or of additional proof. In such circumstances, therefore, for the appellate court to take up and decide on an incomplete record questions raised before it for the first time would, in many instances, at least, result in great injustices, and for that reason appellate courts ordinarily decline to review questions raised for the first time in the appellate court." Cappon v. O'Day, 165 Wis. 486, 490-91, 162 N.W. 655, 657 (1917). This argument is certainly as valid for matters considered sua sponte as it is for matters urged by litigants for the first time at the appellate level. See also Kurtz v. Kurtz, 228 Iowa 256, 290 N.W. 686 (1940); Daley v. Brown, 167 N.Y. 381, 60 N.E. 752 (1901); Osgood v. Toole, 60 N.Y. 475 (1875).

When considered sua sponte both parties are taken completely by surprise and the court decides the matter on grounds not urged by either. Neither has had any opportunity to consider the matter, and both are now bound by res judicata grounded on considerations which represent not well reasoned positions for the litigants, but rather only the fortuitous decision of a wayward court.[72]

Again the argument is made that orderly presentation of proceedings requires presentation of the matter by the litigants so that it can be fully considered. Appellate courts are entitled to and should have the assistance of the attorneys for the litigants.[73] To ask appellate courts to take the record on appeal and do all of the analytical and research work is not reasonable.[74] For this reason, reviewing courts have generally been unwilling to consider cases on review unless the problems are presented with accompanying briefs.[75] Understanding this attitude of

---

72. An appellate court, when faced with a question, rather than consider the matter sua sponte, might send the case back down to the lower court to allow that court to consider the matter. See note 136 infra. This would make the decision on the matter one reflecting the consideration of a trial court and the counsel in the case. Another possibility would be to order a reargument of the case on the question which seems to be controlling, thereby hearing the views of the litigants. As to the latter suggestions, see note 73 infra.

In a footnote in his concurring opinion in Sherman v. United States, 356 U.S. 369, 379 n.2 (1958) Mr. Justice Frankfurter stated, "It is of course not a rigid rule of this Court to restrict consideration of a case merely to arguments advanced by counsel. Presumably certiorari was not granted in this case simply to review the evidence under an accepted rule of law. The solution, when an issue of real importance to the administration of criminal justice has not been argued by counsel, is not to perpetuate a bad rule but to set the case down for reargument with a view to re-examining that rule."

In Mr. Justice Butler's dissenting opinion in Erie R.R. v. Tompkins, 304 U.S. 64, 88 (1938) he stated, "Against the protest of those joining in this opinion, the Court declines to assign the case for reargument. It may not justly be assumed that the labor and argument of counsel for the parties would not disclose the right conclusion and aid the Court in the statement of reasons to support it."

73. Hormel v. Helvering, 312 U.S. 552, 556 (1941), wherein the Court in discussing why an appellate court does not give consideration to issues not raised in the trial court stated, "it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." See also Campbell, Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved, 8 Wis. L. Rev. 147, 173 (1933) wherein it is stated, "It is the duty of counsel to know their cases more thoroughly than the court can know them, and to give the court the benefit of this more thorough knowledge. Courts cannot always save clients from the results of the carelessness of their attorneys." Bruce, The American Judge 154 (1924).

74. "An assignment of errors is required for the benefit of the opposing party and the court. Where the opposing party makes no objection to his opponent's failure to assign an error, the only objection to its consideration is the convenience of the court." Campbell, Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved, 8 Wis. L. Rev. 147, 163.

75. "No authorities are cited; no grounds are stated, nor is the point supported by

courts generally, it then becomes easier to understand the reluctance of courts to consider sua sponte matters not urged on appeal. If the court decides to go outside the case made by the litigants, it becomes necessary for the court to do all of the work, analytical and research, with absolutely no assistance from the parties.[76] In view of the vast workload facing most appellate courts, this very practical consideration becomes extremely important. Even were a court inclined to consider a matter sua sponte, the labor involved would tend to make the court hesitate.[77]

IV. Overt Rationale in Cases Decided on Matter Raised Sua Sponte

It must be recognized that action by an appellate court may be the result of the interplay of numerous factors on at least three levels. An obvious one is the legalisms found in the opinion, the articulated reasons for decisions. A second factor might be one consciously considered but not described in the opinion. This can be of various sorts. The most extreme case would be the bribe given to the dishonest judge. The judge does not talk of a bribe in his opinion, but from the point of view of meaningful analysis of his action,[78] it is extremely important to know of the bribe-factor. Such influences can be much more subtle and complex. For example, the judge who decides a case involving a factual

argument. This is inadequate briefing, and the question is not for consideration. . . ." Dailey v. Town of Ludlow, 102 Vt. 312, 147 Atl. 771 (1929); "Appellant has neither designated nor argued in his brief any error arising from the trial court's holding that the complaint fails to state a claim. Failure to comply in this regard with Rule 19 of this Court . . . will warrant an affirmance of the judgment without further consideration. . . . The Court of Appeals has no duty to search the record for error upon a ground neither briefed nor argued." Murphy v. Citizens Bank, 244 F.2d 511, 512 (10th Cir. 1957); accord, Edmondson v. Alameda County, 24 Cal. 349 (1864); Bigelow v. Indemnity Ins. Co., 206 Iowa 884, 221 N.W. 661 (1928); A. Makray, Inc. v. McCullough, 103 N.J.L. 346, 135 Atl. 815 (1927); Hatcher v. Roberson, 63 Okla. 296, 164 Pac. 1141 (1917). As to a criminal appeal submitted upon the record: People v. Wilder, 52 Cal. App. 320, 198 Pac. 841 (1921) (examine the record only so far as to determine whether fundamental right violated, and other points are waived); People v. Medaini, 40 Cal. App. 676, 181 Pac. 673 (1919) (same).

76. But see Butler v. State, 102 Wis. 364, 365-66, 78 N.W. 590 (1899), stating "Twenty-two assignments of error are presented in plaintiff's brief, more than half of which are not argued, either orally or in the brief; and we shall assume from that fact that they are abandoned, and shall not consider them. This court ordinarily will not assume the labor of searching for grounds to support assignments of error which counsel deem unworthy of argument, though we should not, for that reason, ignore an assignment which presented a palpable and obvious error prejudicial to justice."

77. See Cappon v. O'Day, 165 Wis. 486, 490, 162 N.W. 655, 656 (1917), where the court required briefs filed on a question not raised in the court below.

78. See United States v. Manton, 107 F.2d 834 (2d Cir. 1938) (former Senior Judge of the Second Circuit Court of Appeals convicted of conspiracy to obstruct justice and defraud the United States).

situation closely akin to his own personal circumstances where personal involvement becomes great. Religion, prior personal experience, racial background, personal predilections—all of these may be factors that will be consciously considered in deciding a case.[79]

A third factor might be one not identified as such by the judge—one not consciously perceived. Legal writers have not reported on this type of influence, and this is quite understandable since this is not purely a legal problem. This does not mean, however, that this factor is unimportant. "We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations. . . ."[80]

We may then conclude regarding the three types of factors—the articulated, the consciously perceived but unarticulated, and the unconsciously perceived—that only the first can be expressed meaningfully in traditional legal terms. The second, not classifiable and fragmentary, is not of any lasting value as precedent. It forms no part of the great body of decisions which forms the common law. Materials concerning the influencing factors at levels other than the articulated are extremely hard if not impossible to discover. This is not to say that such levels are not important; certainly a complete picture requires a total understanding of all levels,[81] but this is not now possible. We then must sketch the picture with the colors we have at hand; but we must recognize that the picture is not a whole one. Some shades and pigments are missing.

All of this does not mean that the articulated rationale presented by courts is unimportant. Quite the contrary; there are many reasons why

79. On the matter of extra-legal considerations in deciding cases, see Frank, Are Judges Human?, 80 U. Pa. L. Rev. 17 (1931); Laski, Judicial Review of Social Policy in England, 39 Harv. L. Rev. 832 (1926); and see Northrop, Underhill Moore's Legal Science: Its Nature and Significance, 59 Yale L.J. 196 (1950). See also Frankfurter and Landis, Business of the Supreme Court 310 (1927) ("the process of constitutional interpretation compels the translation of policy into judgment, and the controlling conceptions of the Justices are their 'idealized political picture' of the existing social order. Only the conscious recognition of the nature of this exercise of the judicial process will protect policy from being narrowly construed as the reflex of discredited assumptions or the abstract formulation of unconscious bias"); 2 Holmes-Laski Letters 1364 (1953) ("humbug of the judge as a soulless automation whose mind and heart are silent when he performs his operations. . . .").

80. In re J. P. Linahan, Inc., 138 F.2d 650, 651 (2d Cir. 1943). See also Frank, Courts on Trial 146 (1949).

81. "My analysis of the judicial process comes then to this, and little more; logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired." Cardozo, Selected Writings 153 (1947).

such decisions are extremely important.[82] Such legalisms form a framework within which courts operate. Stare decisis is a vital force in the adjudicatory process;[83] "The strongest strand that ties a judge to previous decisions is the desire to avoid the intolerable burden of personal responsibility. He no more wants to be free than we want him to be."[84] Courts demand arguments in the terms of decided cases. This is the language of courts and lawyers, and even though a judge may consider other factors decisive, he must have a rationale in legal terms which will allow him to reach the desired results. All of this should be borne in mind in considering the legalistic discussion which follows. It is, however, a good idea, occasionally, to step back and get a complete picture of the adjudicatory process.

When an appellate court decides a case upon matters not urged by the litigants in that court, it may simply avoid mention of the shift in the basis and write an opinion discussing the facts and the applicable law as the court sees it, and so decide the case. Unless there is a dissenting opinion noting the fact,[85] only the attorneys for the litigants will be aware that the court has decided the case on issues not argued to the court. There is no possible way of knowing whether this is a common

82. "In recent years, the attitudes of observers toward this distinctive language of the law have varied between two polar extremes. At one extreme the uncritical assume that this language has some peculiar, compulsive, autonomous control over social processes—over relations between people—independently of concrete power structures, personalities and other aspects of the immediate contest. At the other extreme cynics deride this language as meaningless. In such extremes of ignorance, it is not surprising that there has been little understanding of the role that authoritative doctrine does, and can be made to play, among other interdependent variables, in affecting individual behavior and social processes in the distribution of values." McDougal, The Law School of the Future; From Legal Realism to Policy Science in the World Community, 56 Yale L.J. 1345, 1346 (1947).

83. "Legal learning is largely built around the principle known as stare decisis. . . . Like a coral reef, the common law thus becomes a structure of fossils. . . . Precedents largely govern the conclusions and surround the reasoning of lawyers and judges. . . . Under this doctrine decisions made today become the guide and precedent by which future similar cases will be governed." Jackson, The Struggle for Judicial Supremacy 295 (1941).

84. Curtis, Lions Under the Throne 79 (1947). "The legal tradition gives the Court that subtle pride which springs from the humility of knowing you are only a part of something vaster than yourself." Cardozo, Selected Writings 112 (1947).

85. See Lynch v. Uhlenhopp, 248 Iowa 68, 83, 78 N.W.2d 491, 503 (1956), where the dissenters point out that a proposition in the majority opinion was not urged in the trial court, and never presented on appeal. One judge may feel very strongly about a matter, so that such feeling becomes a vital part of the jurisprudence of the court during his tenure on the bench, and perhaps continuing beyond his time. For example, on the matter of considering a matter sua sponte, Justice Garfield of the Supreme Court of Iowa has been very articulate concerning his disapproval, as evidenced by his dissents in Elson v. Security State Bank, 246 Iowa 601, 67 N.W.2d 525 (1955) and Dickinson v. Porter, 31 N.W.2d 110, 125 (Iowa 1948).

occurrence or whether this happens only rarely. Certainly, there is some evidence that this has happened on occasion.

On the other hand, the court may face squarely the problem of sua sponte consideration of issues, and state that the instant case warranted a departure from the usual rule in such matters. Courts at this point will usually indicate some reason for the decision to go beyond the case made by the litigants.

Some courts of review operate within a framework which specifically authorizes the consideration of issues not raised by the parties.[86] One example of this is found in the Rules of the Supreme Court of the United States wherein it is provided that "errors not specified according to this rule will be disregarded, save as the court, at its option, may notice a plain error not assigned or specified."[87] The Federal Rules of Criminal Procedure provide: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."[88] Another example of this is found in a statute of Wisconsin which provides: "In any action or proceeding brought to the supreme court by an appeal or writ of error, if it shall appear to that court from the record, that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the supreme court may in its discretion reverse the judgment or order appealed from, regardless of the question whether proper motions, objections or exception appear in the record or not. . . ."[89] Such provisions in statutes or rules, although not establishing definite rules governing the area, certainly indicate an attitude which should be reflected in the decisions of the court. Such provisions, since they make discretionary the consideration of matters sua sponte, can be nothing more than signposts; the applicable rules must be ascertained by an examination of the decided cases. In the long run, there may be some reason to question whether this type of provision, or the restricting

86. "The defendant did not raise in the trial court or in this court the questions which we shall hereafter discuss. However, under the provisions of section 793.18 . . . we are directed, in our consideration of an appeal in a criminal case, to '. . . examine the record, without regard to technical errors or defects which do not affect the substantial rights of the parties, and render such judgment on the record as the law demands; . . .'" State v. Cusick, 84 N.W.2d 554, 555 (Iowa 1957). See also Mo. Sup. Ct. R. 3.27, "Plain errors affecting substantial rights may be considered . . . on appeal, in the discretion of the court, though not raised in the trial court or preserved for review, or defectively raised or preserved, when the court deems that manifest injustice or miscarriage of justice has resulted therefrom." 2 Neb. Rev. Stat. § 25-1919 (1956) "The Supreme Court may, at its option, consider a plain error not specified in appellant's brief."

87. Rules of the Supreme Court of the United States 27(6).

88. Fed. R. Crim. P. 52(b).

89. Wis. Stat. Ann. § 251.09 (West 1957).

type of provision,[90] will have any real effect. One might, after examining a number of decisions on this point, conclude that courts in all jurisdictions regardless of statutes or rules, react in a common manner when faced with such problems.[91] The question is not one of power but rather of administration. The question is "should the court" not "does the court have power."[92]

A. *Jurisdiction*

When the general rule concerning the restricting of appellate review to matters urged by the litigants is stated, often a statement concerning the exception of jurisdictional defects will be appended.[93] Even when such exception is not specifically provided for, it is implied. Since jurisdiction involves the essential power of the court, it has been consistently held that an appellate court must sua sponte examine its jurisdiction and the jurisdiction of the trial court and if either is defective, the reviewing court must dismiss. The litigants cannot by consent give a court jurisdiction.[94]

---

90. Iowa R. Civ. P. 344(a)(4) (Third) "Errors or propositions not stated or argued shall be deemed waived." Md. Code Ann. art. 5, § 4 (1957), "The court from whose judgment or order an appeal is taken . . . shall immediately upon the entry of the order for appeal certify and state the questions raised in and decided by such court; and no question which shall not appear by such certificate to have been raised in said court shall be considered by the Court of Appeals." Tex. Ann. Rules of Civ. P. 476 (Vernon 1948), "Trials in the Supreme Court shall be only upon the questions of law raised by the assignments of error in the application for writ of error, or upon the questions of law which were certified to the Supreme Court from a Court of Civil Appeals." See also notes 18 and 19 supra.

91. In considering appellate procedure in equity cases, Professor Orfield stated, "In a number of jurisdictions the statutes or rules of court reserve to the court the power to consider 'plain errors' which are not assigned. Even in the absence of statute or rule the appellate court has the power to review." Orfield, Appellate Procedure in Equity Cases, 90 U. Pa. L. Rev. 563, 579 (1942).

92. See Cappon v. O'Day, 165 Wis. 486, 491, 162 N.W. 655, 657 (1917). "The appellate court . . . has to consider whether or not it will relieve the defendant from the omissions of his attorney, and consider the questions none the less. In the absence of any statutory restriction the appellate court has the power to consider the questions. Some courts rest the power on the general authority to supervise the inferior courts. Others put it on the single duty of all courts to administer justice. The power itself is clear. The real problem is, when should the power be exercised?" Orfield, Criminal Appeals in America 95 (1939).

93. "And whether that court [Circuit Court] had or had not jurisdiction, is a question which we must examine and determine, even if the parties forbear to make it, or consent that the case be considered upon its merits." Metcalf v. Watertown, 128 U.S. 586, 587 (1888). Contra, Patterson v. Scottish American Mortgage Co., 107 Ind. 497, 8 N.E. 554 (1886) (court refused to consider question of jurisdiction of the subject matter). On raising jurisdictional questions for the first time on appeal, see Elliott, Appellate Procedure § 498 (1892).

94. American Fire & Cas. Co. v. Finn, 341 U.S. 6, 17 (1951). See also Hampton v. Des

The question of the jurisdiction of the appellate court can involve any one of a number of different problems. In a recent Iowa case a question arose concerning the rendition of a final judgment in the trial court. If no final judgment had been handed down, then appeal could be had only under the rule governing appeals from interlocutory rulings.[95] The court noted: "While plaintiff has not moved to dismiss the appeal or urged the lack of our jurisdiction, we cannot gain jurisdiction by such silence on her part. It is our duty to reject an appeal not authorized by statute."[96]

A similar consideration of the jurisdiction of an appellate court sua sponte, by the Court of Appeals for the Second Circuit, is found in *Council of Western Elec. Technical Employees v. Western Elec. Co.*, wherein the court was faced with a question of the stay of proceedings and was not certain whether it had jurisdiction. The court noted: "The first question, although the parties have not raised it, is whether we have any jurisdiction over the appeal."[97] The court then held that it did have jurisdiction.

The appellate court must go beyond the question of its own jurisdiction, that is, whether the appeal is within the permissible scope of examination by the court, and must sua sponte examine the proceeding in the lower court to consider the jurisdictional basis of action at that level. "An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review."[98] The same thing was stated in a hotly contested case in the Supreme Court of Wisconsin, in the following language: "I do not question the propriety of reversing a judgment when the record presents a state of facts which clearly shows that the court below had no jurisdiction of the subject matter of the action, even though the defendant may not have raised any objection upon that ground."[99] It is possible to conclude that there is one exception to the general rule against considering items or issues not presented by the litigants. "The first and fundamental question is that of the jurisdiction of the appellate court, and of the court from which the appeal came; and this question to court is bound to ask itself, whether suggested or not. . . ."[100]

Moines & Cent. Iowa Ry., 216 Iowa 640, 249 N.W. 436 (1933); Stucker v. County of Muscatine, 87 N.W.2d 452 (Iowa 1958).

95. Iowa R. Civ. P. 332.

96. Crowe v. De Soto Consol. School Dist., 246 Iowa 38, 40, 66 N.W.2d 859, 860 (1954); accord, Forte v. Schlick, 248 Iowa 1327, 85 N.W.2d 549, 552 (1957).

97. 238 F.2d 892, 894 (2d Cir. 1956). For a similar approach by the Court of Appeals for the Ninth Circuit, see Guerin v. Guerin, 239 F.2d 909 (9th Cir. 1956).

98. Mitchell v. Mauer, 293 U.S. 237, 244 (1934). See also Pacific Freight Lines v. United States, 239 F.2d 191 (9th Cir. 1956).

99. Nightingale v. Barnes, 47 Wis. 389, 398, 2 N.W. 767, 773 (1879) (dissenting opinion).

100. Simkins, Federal Practice § 1016 (1st ed. 1934).

However, having established this exception, it is necessary to examine the matter more closely. Jurisdiction is a misleading, nebulous word that requires definition. In this particular context, the courts, almost without exception, are referring to jurisdiction of the subject matter rather than jurisdiction of the person of the litigants.[101]

Jurisdiction of the subject matter can relate to the power of either the appellate court or the trial court. In the appellate court certain procedural steps may be viewed by the court as jurisdiction. Service of notice of appeal, for example, may be so labeled. If the appellant then fails to serve such notice within the proper period, the court will say that it does not have jurisdiction. In courts of limited jurisdiction, such as the federal district courts, the problem of jurisdiction of the subject matter arises with some frequency,[102] and the consideration and importance of such question is considered in Rule 12(h) of the Federal Rules. Even in courts of general jurisdiction, the problem will arise occasionally. One concept which apparently involves jurisdiction of the subject matter is that of the indispensable party. Although there may be some question about the essential nature of indispensability,[103] many courts and writers view it as jurisdictional.[104] "The want of indispensable parties . . . may be raised for the first time on appeal; and there are authorities to the

101. In any discussion of questions raised for the first time on appeal, when jurisdictional questions are mentioned, almost without exception the jurisdiction referred to is that of the subject matter. Note, however, should be taken of the doctrine of exclusive primary jurisdiction which has been articulated by the federal courts. Recently the Supreme Court stated, "Before this Court neither side has questioned the validity of the lower court's views in these respects. Nevertheless, because we regard the maintenance of a proper relationship between the courts and the Commission in matters affecting transportation policy to be of continuing public concern, we have been constrained to inquire into this aspect of the decision." United States v. Western Pacific R.R. (1956) 352 U.S. 59, 63.

As to the possibility of raising jurisdiction of the person for the first time on appeal, see Elliott, Appellate Procedure § 137, specifically § 182 (1892). See also Wines, Establishing the Basis for Appellate Review, U. Ill. L. Forum 135 (1952).

102. For a decision dealing with the limited jurisdiction of a justice of peace court see Nightingale v. Barnes, 47 Wis. 389, 2 N.W. 767 (1879).

103. See Zwack v. Kraus Bros. & Co., 237 F.2d 255 (2d Cir. 1956); Warner v. First Nat'l Bank, 236 F.2d 853 (8th Cir. 1956); Moore, Federal Practice § 19.05 [2] (2d ed. 1948) ("barring exceptional equities, it should not proceed without his joinder, even though his citizenship would not destroy jurisdiction in the cases of diversity and alienage, or although it is immaterial, as when jurisdiction is based on the character of the subject matter—a federal question. . . . the matter is so vital that an appellate court, sua sponte if necessary, may consider it although the point was not raised in the trial court.")

104. Order of Railroad Telegraphers v. New Orleans, Tex. & Mex. Ry., 229 F.2d 59 (8th Cir. 1956); Morgan v. Blatchley, 33 W. Va. 155, 158, 10 S.E. 282, 283 (1889), citing Barton, Chancery Practice, that "although no objection be made [in the court of appeals], the court itself will regard it, of its own motion, and will reverse the same for lack of proper parties, and send it back, that the person whose presence is necessary to a just and final adjudication of the case may be brought before the court."

effect that, where the want thereof is apparent from the record, the appellate court should sua sponte raise the question and remand the cause."[105] The same idea has been stated by the Pennsylvania court in these words:

It is a settled rule of equity jurisprudence that as the absence of an indispensable party goes to the jurisdiction of the court, an objection to the proceeding on that ground may be raised at any time, during the hearing or on an appeal from the decree of the trial court. The court may, of its own motion for the like reason, raise and pass upon the objection, and if the ground of want of jurisdiction be not removed by bringing the proper parties on the record as parties to the proceedings the chancellor may dismiss the bill.[106]

Thus a broad articulation of one exception to the rule against sua sponte consideration of matter on appeal is possible. Courts with great consistency have initiated a consideration of jurisdictional matters. Since such matters go to the elemental power of the courts, the rationale is easily presented. The litigants, by inaction, cannot grant power to a court; the grant of power must come from the legislature. The courts must respect the limitations imposed by the legislature and guard against possible attempts to expand such jurisdiction.

B. *Contra Bonas Mores*

Occasionally a court will label a certain matter *contra bonas mores.* Whether this is a rationale for a conclusion already determined or a step in a process of reasoning to a conclusion is debatable. However, even when the matter is raised sua sponte, if the court concludes that the matter is *contra bonas mores* it will refuse to grant any relief.[107] For example, one court, considering an apparently illegal arrangement, said:

Although this point was not raised in argument in the briefs, we are justified in suggesting it and enforcing it by the doctrine of Jackson v. Baker, . . . where the court . . . laid down the rule thus: "If the illegality appears from the complaint

105. Tod v. Crisman, 123 Iowa 693, 700, 99 N.W. 686, 689 (1904). See also Shearer v. Murphy, 63 Kan. 537, 539, 66 Pac. 240, 241 (1901), "A judgment can operate only on the parties properly before the court, and if an indispensable party is not before the court so as to be bound by the judgment, it would be as futile for a reviewing tribunal to affirm it as it was for the trial court to render it."

106. Hartley v. Langkamp, 243 Pa. 550, 556, 90 Atl. 402, 404 (1914).

107. Oscanyan v. Arms Co., 103 U.S. 261 (1880) (excellent statement of position of Supreme Court).

"Where a contract is in terms contra bonos mores, it is not necessary for the defendant to plead the objections. A court will not proceed to judgment upon it, even where both parties assent thereto. In such cases there can be no waiver. The defense is allowed not for the sake of the parties, but for the sake of the law itself." Crichfield v. Bermudez Asphalt Paving Co., 174 Ill. 466, 473, 51 N.E. 552, 558 (1898). Dunham v. Presby, 120 Mass. 285 (1876) (concerning contract which called for illegal trade during the Civil War).

or the plaintiff's case, the court will, at any stage of the proceedings, dismiss the action, although such illegality is not pleaded as a defense, or insisted upon by the parties, and may have been expressly waived by them. It is an objection which the court itself is bound to raise in the due administration of justice, regardless of the wishes of the parties."[108]

Another court, considering the same question, stated:

We do not mean to say that, if a suit were brought for services in committing a murder, there must be a recovery because the petition was not challenged. In such cases, the vitals of the true principle would be absent. The true application is to permit the litigants over matters of private right to say for themselves what the dispute is, and that certain proof will warrant a recovery. In the imagined case, the court would have a duty to act *sua sponte*, because, while the parties may stipulate as to private rights, they cannot stipulate as to public rights, nor may they stipulate against public policy.[109]

C. *Fundamental Error*

Without attempting to circumscribe the area covered, courts have occasionally stated that fundamental error can be considered sua sponte. As one court stated recently: "We shall not undertake to give an all-inclusive definition of fundamental error; but . . . we do hold that an error which directly and adversely affects the interest of the public generally, as that interest is declared in the statutes or Constitution of this state, is a fundamental error."[110] This court has suggested that if a matter is fundamental error, it will be considered even though it is not properly before the appellate court.[111]

Some courts have suggested that if it clearly appears that the party has no cause of action—not that he has failed to plead a cause of action—then the appellate court should note the matter sua sponte.[112] "Where a

108. Newport Const. Co. v. Porter, 118 Ore. 127, 135, 246 Pac. 211, 214 (1926).

109. Heiman v. Felder, 178 Iowa 740, 751, 160 N.W. 234, 239 (1916).

110. Ramsey v. Dunlop, 146 Tex. 196, 202, 205 S.W.2d 979, 983 (1947) (right to consider errors assigned and errors which are fundamental and which appear on the face of the record).

111. Although there may be some question about the matter, the failure to allege a cause of action is not such a fundamental error that it should serve as the grounds for a reversal. A litigant should not be able to wait until an appellate hearing to raise such a question, and an appellate court should not rest a decision on a matter which the litigant has, in the nature of things, waived. Heiman v. Felder, 178 Iowa 740, 160 N.W. 234 (1916); Berly v. Sias, 152 Tex. 176, 255 S.W.2d 505 (1953) (citing a number of Texas cases). Compare Fed. R. Civ. P. 12(h); Iowa R. Civ. P. 110; and Kipp v. Lichtenstein, 79 Ill. 358 (1875); Sargent Co. v. Baublis, 215 Ill. 428, 74 N.E. 455 (1905) (citing a number of Illinois cases). See also Wines, Establishing the Basis for Appellate Review, Ill. L. Forum 135, 142 (1952).

112. A. Santaella & Co. v. Otto F. Lange Co., 155 Fed. 719, 724 (8th Cir. 1907), in which the Court stated, "This proviso [rule of court] was and is intended, in the interest of justice, to reserve to the appellate court the right, resting in public duty, to take cognizance of palpable error on the face of the record and proceedings, especially such as clearly demonstrate that the suitor has no cause of action."

record on appeal discloses a matter which necessarily will prove fatal to a recovery as a final result, the appellate court will recognize and enforce it at the time it first appears."[113] This then turns not on what was omitted in the lower court or on the failure of an attorney to do a particular thing but rather on a fundamental weakness in the case. This suggests that when there is an irreparable defect in the cause of action the appellate court should note the defect sua sponte and render a decision based on the defect.[114]

Somewhat short of the situations where the party under no circumstances has a cause of action are the cases reaching an appellate court where error—plain error—has been committed. As indicated above, court rules or statutes giving appellate courts the power to consider matter sua sponte probably do not add to the power of the courts in this area, but such statutes and rules do suggest the nature of the power of the courts. A number of states, by rule or statute, have established a policy of getting appellate decisions based on the substantial rights of the individuals without regard for technicalities. A number of such rules admonish the court to examine "the record" or the "entire record."[115] When the federal rule refers to "plain error," it suggests that appellate review includes an examination of the record to find any such error, and that the court will consider such matter sua sponte. Although this is a question of degree, it seems clear that the Supreme Court, and appellate courts generally, will consider only clearly

113. State ex rel. Moscow Concrete Inc. v. American Sur. Co., 77 Idaho 17, 25, 285 P.2d 1056, 1060-61 (1955).

114. "If it appears from the record that the necessary fact is impossible of proof, the rule fails with the reason. The record at present does not sustain the claim. Until it is made to appear that the record does not, and cannot, by supplying omitted evidence, be made to sustain the verdict, the verdict must stand." Smith & Sargent v. American Car Sprinkler Co., 78 N.H. 152, 160, 97 Atl. 872, 876 (1916) (claim of irreparable deficiency); cf. Woodward v. Bullock, 27 N.J. Eq. 507, 510 (1875), wherein the court stated, "Where a cause . . . comes up for review, and a point is made here which could not be obviated in the court below by proof or amendment, this court ought not to refuse cognizance of such point."

"An appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had they been presented at the trial. . . . But, quite obviously, the present is not such a case. Here, the issue involved the meaning of the written contract between the parties. The writing was in the record; each party had full opportunity to adduce all pertinent evidence bearing on its construction; and there is no claim or suggestion that either party would or could have offered any further evidence." Rentways, Inc. v. O'Neill Milk & Cream Co., 308 N.Y. 342, 349, 126 N.E.2d 271, 274 (1955) (this did involve a matter argued to the appellate court, one which the court considered as if not argued to the trial court; but see note 3, 308 N.Y. at 349). See also Osgood v. Toole, 60 N.Y. 475 (1875).

115. Ala. Code tit. 15, § 389 (1940); Ariz. Rev. Stat. § 13-1715B (1956); Iowa Code § 793.18 (1954); Minn. Stat. Ann. § 632.06 (1947); Tenn. Code Ann. § 40-3409 (1956). See also text at notes 87, 88, and 89 supra.

apparent errors of real importance. As the Court of Appeals for the Sixth Circuit stated: "It is manifest, however, that the rule does not intend that we are to sift the record and deal with questions which are of small importance, but only to notice errors which are obvious upon inspection and of a controlling character. The underlying purpose of this reservation in the rule is to prevent the miscarriage of justice from oversight."[116] One state court, relying on a state supreme court rule, referring to the rule's "saving grace," stated: "It is true that as an ultimate safeguard against a situation where some great wrong might be rendered incurable because of a mere procedural omission, provision is made that plain errors affecting substantial rights may be considered on appeal in the discretion of the court . . . when the court deems that manifest injustice or a miscarriage of justice has resulted therefrom."[117] Another state court, without the benefit of a rule or statute authorizing consideration sua sponte, reached about the same conclusion, stating: "Notwithstanding these general rules, we do not think they are, at all times and under all circumstances inflexible. The appellate courts may in their discretion, and sometimes do, disregard the same, in order to prevent a miscarriage of justice. . . . We think the substantial rights of litigants are of greater weight than the inadvertence or omissions of their attorneys."[118] This should be recognized as a problem of degree involving a determination of just how far a court should go in departing from the general rule in order to serve best the interests of society and to prevent a miscarriage of justice. Most courts apparently feel that there should be some reluctance to break the pattern of judicial conduct and consider matters sua sponte.[119] On the other hand, it is true that some courts seem relatively more willing to serve the interest of substantial justice by refusing to leave the control of the course of the litigation entirely in the hands of the litigants. As one court stated: "If the mode thus selected impels the speedy enforcement of a right, or induces the hasty redress of a wrong, and, as a correct exposition of the law is appropriate to the facts involved, it is controlling and ought to be adopted, though the legal principle applied may not have been suggested by either party."[120]

116. P. P. Mast & Co. v. Superior Drill Co., 154 Fed. 45, 51 (6th Cir. 1907).

117. Harrison v. St. Louis Pub. Serv. Co., 251 S.W.2d 348, 353-54 (Mo. Ct. App. 1952).

118. King Solomon v. Mary Verna Mining Co., 22 Colo. App. 528, 531-32, 127 Pac. 129, 131 (1912).

119. "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appelate court where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below." Hormel v. Helvering, 312 U.S. 552, 557 (1941); accord, Sisco v. McNutt, 209 F.2d 550 (8th Cir. 1954); Frieze v. West American Ins. Co., 190 F.2d 381 (8th Cir. 1951).

120. Patty v. Salem Flouring Mills, 53 Ore. 350, 364, 100 Pac. 298, 300 (1909).

Most courts evince a willingness to examine criminal cases and consider matters sua sponte to guarantee a fair trial for the accused. The Supreme Court of the United States has said: "[T]his Court in a criminal case may notice material error within its power to correct, even though that error is not specifically challenged and certainly should do so . . . where life is at stake . . ."[121] and "although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it."[122]

D. *Sua Sponte Consideration to Affirm*

Some courts have used consideration of matters sua sponte to do substantial justice in other circumstances. The rationale is cast in terms of affirming a correct judgment. For example, "reviewing courts were concerned with the result and not with the reason, and that if a trial court makes a correct ruling but assigns an incorrect reason its judgment will not be reversed."[123] Another court adopted the same position, using the following language: "[A] judgment correct in ultimate effect will not be disturbed on review although the authority below relied upon erroneous reasoning. . . ."[124] In a surprisingly large number of cases in a number of jurisdictions this doctrine has been articulated and followed.[125] The courts seem to be willing to affirm on unargued reasoning but seem less willing to reverse on matters not considered by the lower court. The primary consideration, then, seems to be the feelings of the trial judge and not the rights of the litigants. The courts seem to suggest that they will use any available reasoning to support a decision rendered.[126] But if the trial court was wrong, then a litigant must follow

121. Fisher v. United States, 328 U.S. 463, 467-68 (1946).

122. Wiborg v. United States, 163 U.S. 632, 658 (1896); accord, Ayers v. United States, 58 F.2d 607 (8th Cir. 1932). See also Clyatt v. United States, 197 U.S. 207 (1905).

123. Reidelberger v. Bi-State Dev. Agency, 8 Ill. 2d 121, 124, 133 N.E.2d 272, 274 (1956).

124. Sunray Mid-Continent Oil Co. v. Federal Power Comm'n, 239 F.2d 97, 101 (10th Cir. 1956).

125. Helvering v. Gowran, 302 U.S. 238 (1937); Burgert v. Union Pac. R.R., 240 F.2d 207 (8th Cir. 1957); Bullen v. De Bretteville, 239 F.2d 824 (9th Cir. 1956); Ginsburg v. Black, 237 F.2d 790 (7th Cir. 1956); Kithcart v. Metropolitan Life Ins. Co., 150 F.2d 997 (8th Cir. 1945); Lautenbach v. Meredith, 240 Iowa 166, 35 N.W.2d 870 (1949); Merkel v. Merkel, 247 Iowa 495, 73 N.W.2d 75 (1955) (citing Iowa Code § 619.16); McManus v. Park, 287 Mo. 109, 229 S.W. 211 (1921). See also Bailey v. O'Fallon, 30 Colo. 419, 70 Pac. 755 (1902) and In re Smith's Will, 245 Iowa 38, 60 N.W.2d 866 (1953). See also Justice Garfield dissenting in Dickinson v. Porter, 31 N.W.2d 110, 125 (1948); substituted opinion, 240 Iowa 393, 35 N.W.2d 66 (1948).

126. See Schmidt v. United States, 63 F.2d 390, 392 (8th Cir. 1933), in which the court stated, "There is respectable authority for the holding that such an amendment in support of the judgment may be treated as having been made in the lower court. Where the trial court receives evidence without objection, the pleadings will, on appeal, be pre-

the rules precisely or the judgment will be affirmed regardless of the erroneous nature of the ruling. This reflects to some extent the idea that the error must be called to the attention of the trial court and if it is not, then the parties have, in the nature of things, waived that particular error.[127]

Other attitudes or reasons back of this particular rule include the idea that appellate courts should seek to affirm decisions rather than reverse judgments.[128] As one court stated, "This court seeks to affirm judgments rather than to reverse them."[129] Another reason presented is that it would be folly for an appellate court to reverse a decision because based upon an incorrect reason when it was apparent that the correct result had been reached.[130] "It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate."[131] This attitude is found not only in the decisions of courts but also in the statutes controlling appellate review. For example, the Virginia Code provides: "No judgment or decree shall be arrested or reversed: . . . (8) For any other defect, imperfection, or omission in the record, or for any error committed on the trial when it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached."[132]

E. *Interpretation of Instruments*

At least some appellate courts have spelled out another exception to the general rule against sua sponte consideration of matters, this in the case of the interpretation of instruments. It is felt that the appellate court is competent to give an authoritative interpretation of the language. As the Wisconsin Supreme Court has stated:

> The real question in the case is, what effect is to be given to that clause of the deed? And although not raised in the court below or discussed by counsel, it is nevertheless before us in the case, and must be considered in order to determine whether the verdict of the jury ought to stand. . . . We shall, therefore, be compelled to treat

---

sumed to have been amended if such amendment is necessary to support the judgment, and this court may presume the pleadings to have been amended to conform to the proof, or will permit an amendment in this court where the record so warrants."

127. As to waiver, see Fed. R. Civ. P. 12(g) (h).

128. Bullen v. De Bretteville, 239 F.2d 824 (9th Cir. 1956); Siebrand v. Gossnell, 234 F.2d 81 (9th Cir. 1956).

129. First Nat'l Bank v. Hinkle, 65 Okla. 62, 64, 162 Pac. 1092, 1094 (1917); accord, Kraus v. Lehman, 170 Ind. 408, 83 N.E. 714 (1908).

130. Hahn v. Padre, 235 F.2d 356 (9th Cir. 1956).

131. Securities and Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 88 (1943).

132. Va. Code § 8-487 (1950).

the construction of this so-called condition as an original question, without aid from the briefs of counsel.[133]

The court then affirmed the decision of the lower court on the basis of the new analysis of the deed. The same sort of approach has been urged recently by the New York Court of Appeals in the following language:

> Here, the issue involved the meaning of the written contract between the parties. The writing was in the record; each party had full opportunity to adduce all pertinent evidence bearing on its construction; and there is no claim or suggestion that either party would or could have offered any further evidence. In that state of the record, the Appellate Division was not limited to a choice between the opposing constructions contended for, at the trial, but was privileged to give to the contract a "meaning conceivably . . . different from that which either party justifiably attached to the words."[134]

V. Conclusion

The generally applicable rule seems to be that appellate courts are reluctant to interfere with the course of litigation determined by the attorneys for the parties, and that generally the courts will allow the parties to determine the nature of the question presented to the courts.[135] The heavy workload of most appellate courts makes impossible any other course as a general policy; most reviewing courts simply do not have the time to do original research into every case coming before the court.[136] Moreover, there seems to be a feeling that deference to the lower court precludes examination in terms other than those in which the case was presented to the lower courts,[137] and this reduces sua sponte consideration of issues by reviewing courts.[138] However, it must be recognized that there are exceptions to the general rule against sua sponte consideration of legal issues.

Courts are generally reluctant to cast these exceptions in absolutes; rather they seem to want to maintain freedom of action, so that the

---

133. Hartung v. Witte, 59 Wis. 285, 291-92, 18 N.W. 175, 177 (1884).

134. Rentways, Inc. v. O'Neill Milk & Cream Co., 308 N.Y. 342, 349, 126 N.E.2d 271, 274 (1955).

135. But see A. Santaella & Co. v. Otto F. Lange Co., 155 Fed. 719, 724 (8th Cir. 1907), stating, "That counsel does not fully recognize and urge a principle of law in argument which is embraced within the pleadings or presented in the record cannot preclude the court from giving due consideration and application to a rule of law which is determinative of the controversy." See notes 73-76 supra.

136. Of course, the appellate court could note the existence of the unargued, undecided question and remand the case to the lower court for consideration of the matter. See, e.g., United States v. Rio Grande Dam and Irrigation Co., 184 U.S. 416 (1902) and United States v. Shelby Iron Co., 273 U.S. 571 (1927). This was the course recommended by the dissenting Justice in Erie R.R. v. Tompkins, 304 U.S. 64, 80 (1938). This course is apparently rarely followed.

137. Harrison v. St. Louis Pub. Serv. Co., 251 S.W.2d 348 (Mo. Ct. App. 1952).

138. See pp. 490-93.

exceptions are articulated in terms of "grace" and "discretion" with no rigid rules established.[139] But common-law concepts are so strong that, regardless of the language, the courts do tend to establish a pattern of action in facing these exceptional situations. Without a doubt the courts refuse to allow the litigants absolute control of the course of litigation, and the actions of the courts do fall into rough categories so that some predictive analysis is possible.

Appellate courts have consistently stated that the question of the jurisdiction of either the trial court or the appellate court can be raised sua sponte by the appellate court. There is a strong thread running through present-day procedure which allows the question of jurisdiction of the subject matter to be raised anytime prior to the final decision of the case. The logic seems to be that since this goes to the essential power of the court to adjudicate in the matter, there can be no estoppel and no waiver.

> [T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of' the parties to it.[140]

An examination of the cases indicates that the area of sua sponte consideration is not limited to jurisdictional matters. Other questions are raised and considered by courts on their own motion. Occasionally an appellate court will consider a matter sua sponte because of the demands of justice.[141] This is a reflection of one of the purposes of appellate review—justice for the parties. Such a decision to probe into the case apparently reflects a number of different factors. Among

---

139. Central Trust Co. v. City of Des Moines, 204 Iowa 678, 683, 216 N.W. 41, 43 (1927), "Our investigation of the record is not to be taken as a precedent for permissive violation of the rules." Clavin v. Semple, 90 Minn. 491, 97 N.W. 1117, 1118 (1903), "By considering the merits of this case in the absence of assignments of error, we do not wish to be understood as establishing a precedent which will require us to do so at any time in the future."

140. Mansfield, C. & L. Mich. Ry. v. Swan, 111 U.S. 379, 382 (1884).

141. "Rule 11 of this court . . . respecting the assignment of errors, declares that 'the court, at its option, may notice plain errors not assigned.' This proviso was and is intended, in the interest of justice, to reserve to the appellate court the right, resting in public duty, to take cognizance of palpable error in the face of the record and proceedings. . . ." A. Santaella & Co. v. Otto F. Lange Co., 155 Fed. 719, 724 (8th Cir. 1907).

those considered are whether great additional work is involved[142] and whether the matter to be considered sua sponte is clear and overwhelming in its impact.[143] When the matter involves more than just the individuals, and involves a reflection on the courts and the judicial system, there is more willingness to consider it sua sponte.

When consideration of a matter sua sponte will result in an affirmance, and consequently, in the eyes of the appellate court, strengthen respect for the judicial system, the courts are more willing to consider the matter.[144] If all cases are not to be considered de novo by appellate courts, then some rational categories should be established regarding the matters to be considered sua sponte. Perhaps the character of the error or the nature of the rights involved should be considered in deciding whether a court will consider certain matters sua sponte. It does not seem logical, however, to key everything to the result which is called for in the appellate court, that is, whether the court would affirm or reverse.[145]

142. For example, "We do not pass upon matters not decided by the lower court except where judicial notice supplies the omission . . ."; Dermott Drainage Dist. v. Cherry, 217 Ark. 829, 836-37, 233 S.W.2d 387, 391 (1950); Jackson, The Supreme Court in the American Scheme of Government 13 (1955). When the matter involves the interpretation of a contract, the courts apparently feel that little additional burden is assumed, so they are willing to give sua sponte consideration. See notes 133 and 134 supra. See also text at notes 74 and 75 supra.

143. For example, Rentways, Inc. v. O'Neill Milk & Cream Co., 308 N.Y. 342, 126 N.E.2d 271 (1955).

144. The implementation of the doctrine of sua sponte consideration only to affirm can lead to some very anomalous results. The ultimate outcome of the litigation can well turn on the question of the nature of the error at the trial level. If the injured party sues and wins on an incorrect theory in the lower court, the appellate court might affirm on the correct theory. On the other hand, if the trial court makes a more egregious error and rules for the defendant on the incorrect theory, the appellate court will not reverse even though the correct theory demands it. To say that litigants must allow the nature of the error committed by the trial court to control rather than the rights of the litigants is foolish to say the least. For apparent confusion in this matter, see the dissent of Justice Garfield in Dickinson v. Porter, 31 N.W.2d 110, 126-27 (1948), substituted opinion in 240 Iowa 393, 35 N.W.2d 66 (1948), wherein that judge noted, "The majority has no right to reach out and supply the principal ground on which it holds this act void. In doing so it has assumed the role of advocate. This is a plain violation of the fundamental rule, repeatedly and universally recognized, that a reversal will not be ordered on a ground not properly raised in the court below, much less upon one not advanced in this court. . . . Nor is this court concluded by one of the arguments of the attorney general (nor by his entire argument for that matter), in defense of the measure." Can the court act the part of the advocate or not? Only to affirm? Only to uphold a measure as constitutional?

145. Certainly there should be some relationship between the results obtaining and the merits of the controversy. Mechanical tests, unrelated to the rights of the parties, should be rejected. The continuing danger in procedure is that of exalting rules and mechanical tests over the merits of the controversy. See, e.g., Wright, Estoppel by Rule: The Compulsory Counterclaim Under Modern Pleading, 39 Iowa L. Rev. 255 (1954), wherein

On occasion the appellate court will recognize in a case a question of public policy which the litigants either through choice or inadvertence have failed to raise. If the question involves a fundamental question of the public policy of the jurisdiction, the court will raise the question and decide the case on the matter.

Since the establishing of the corpus juris is of primary importance in appellate review, absolute control by the litigants is somewhat anomalous. There have been a number of occasions when extremely important questions have come before appellate courts where there was some reason to believe that there was lack of adequate representation on one side.[146] Where only private rights are involved, then perhaps there is no reason for overriding the control of the parties. But where public rights are involved or where law of wide application is being established through stare decisis for the public at large, the interest of the public should control.

> It may be that in private litigation the plaintiff should himself and alone decide what issues he wants tried. For he is the litigant and it is his litigation. But here we are dealing with something more than private litigation. When what the Court is really doing amounts in fact to a determination of governmental policy, it is preposterous to let a party's choice of a lawyer frame the issue.[147]

It would seem appropriate for the court to be free in deciding what the legal question is in such a case. Any other conclusion would seriously circumscribe the appellate court in its very vital, jurisprudential function of establishing the law.

Since case-by-case adjudication affords a very imperfect vehicle for the articulation of the corpus juris of a jurisdiction,[148] judges are occasionally forced to use cases to present a particular ruling when the litigants have not asked for it. When there is a pressing need for a statement of a point of law, the court may be forced to go outside the issues posed by the litigants. The classic case, of course, is *Erie R.R.*

---

a common law-type of strictness is suggested with no possible modification for the aberrational case.

146. See Curtis, Lions Under the Throne 22-23 (1947); Jackson, The Struggle for Judicial Supremacy 153 (1941); Freund, On Understanding the Supreme Court 84 (1949); Jackson, The Supreme Court in the American Scheme of Government 13 (1955). See also Helvering v. Davis, 301 U.S. 619 (1937) (shareholder v. the corporation); Carter v. Carter Coal Co., 298 U.S. 238 (1936); In re American States Pub. Serv. Co., 12 F. Supp. 667 (D. Md. 1935).

147. Curtis, Lions Under the Throne 149 (1947), referring to Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936).

148. "Judicial control . . . must from inherent limitations of the judicial process treat the subject by the hit and miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation. Spasmodic and unrelated instances of litigation cannot afford an adequate basis for the creation of integrated national rules. . . ." McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176, 188-89 (1940).

v. Tompkins.[149] Although neither side asked for a re-examination of *Swift v. Tyson*,[150] and both sides indicated that they felt that they were controlled by this case, the first words of the decision of the Supreme Court were, "The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved."[151] It was apparent that the Supreme Court used the *Erie* case as a vehicle for the presentation of a new concept concerning the law applied in cases not involving a federal question. This approach is understandable when one considers the limited opportunity the courts have to present their ideas in a given field. The courts cannot give an advisory opinion gratuitously, rather they must wait until some litigant wishes to raise the question. Since this may occur only infrequently—particularly where the matter is well established—the courts understandably may go somewhat afield in seeking a vehicle for their pronouncement. This would seem to be the explanation of the *Erie* case and other such cases.[152]

Occasionally a court, considering the matter of the corpus juris, may be unwilling to rule on a particular point because of the unsettled or unsettling nature of the problem. The court then may use an unargued point as decisive of the case.[153] So the sua sponte consideration is a two-edged sword which can be used either to pronounce new doctrine or to avoid the making of new law.

Excepting the jurisdictional rationale which is a matter apart and well understood, the multitude of cases wherein matters will be considered sua sponte by appellate courts reflect various factors of appellate review. The cases are aberrational cases in which one of the justifications for appellate review overwhelms the traditional conservatism of appellate courts. These are the cases in which the courts are moved by considerations which seem to cry out for particular results; these are extraordinary cases—extraordinary circumstances—which demand extraordinary results.

---

149. 304 U.S. 64 (1938) (decided upon an issue not presented by counsel in either trial or appellate court). See Justice Frankfurter dissenting in Terminiello v. Chicago, 337 U.S. 1, 12 (1949). See also Jackson, The Struggle for Judicial Supremacy 278 (1941).

150. 41 U.S. (16 Pet.) 1 (1842).

151. 304 U.S. at 69.

152. See Sibbach v. Wilson & Co., 312 U.S. 1 (1941) (Court reversed and remanded on point of statutory construction not assigned as error); Murdock v. Ward, 178 U.S. 139 (1900) (same).

153. Lynch v. Uhlenhopp, 248 Iowa 68, 78 N.W.2d 491 (1956) wherein the court rather than facing and deciding whether a court could order a child brought up in a particular religion, decided that the order of the lower court was void because uncertain and indefinite. The dissent noted that "Such contention was not urged in the Court below and was never presented to this Court. Its first appearance is in the majority opinion." Id. at 503-04.