Procedure -- Certiorari -- Scope of Review by Supreme Court

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Thus water pipes, oil pipes, subways and traffic tunnels placed under the highway have been held to be a proper highway use and not an unwarranted extension of the highway easement.

The court in the instant case has once more extended the use to which an easement for highway purposes may be subjected. This was accomplished by holding that it is within the police power of a municipality to include underground parking, which though not travel, is an aid toward making surface traffic safer. It is reasoned that the use of the subsurface for a parking facility is actually not an additional servitude, but merely an additional level for parking, which has been held to be an appropriate highway use. This addition of subsurface parking as a proper highway use is a logical and helpful advance. Once the owner of property has been properly compensated, there is no reason why he should be allowed to prevent the use of new aids to transportation as our cities grow and traffic problems become more complex.

PROCEDURE—CERTIORARI—SCOPE OF REVIEW BY SUPREME COURT

Defendant was charged with a breach of the peace in violation of a municipal ordinance which was interpreted by the trial court, in the instruction to the jury, to have five disjunctive meanings. Upon a general verdict of guilty the court passed judgment of conviction. The defendant did not take exception to the correctness of the instruction, either in the trial court or upon appeal in the state courts which affirmed the judgment. In the petition for certiorari to the Supreme Court of the United States, the defendant did...
not allege as error the trial court's instruction or interpretation of the ordinance. 

Held, conviction reversed. The failure to take exception to, or to allege as error, the instruction or interpretation, does not prevent the Supreme Court from searching into the records to find and to review the interpretation. And, the interpretation, being one of a state law by a state court, is binding upon the Court.

The Supreme Court held that three of the five alternative interpreted meanings were unconstitutional, and that since the general verdict may have been upon those grounds the judgment of conviction could not be affirmed. 


Supreme Court Rules require that a petition for a writ of certiorari shall state specifically the questions presented as well as the reasons relied on for granting the writ, that the assignments of error shall particularly state each error alleged, and, further, that the errors assigned shall be urged in the brief. Only those questions which were specified in the petition for a writ of certiorari, and only the points of law and the errors which were urged in the printed brief, will be considered by the Court. The rules are the same, in that respect, for cases brought up on appeal. Even though the error is assigned and is passed upon by the state court, or is assigned but an exception to the instruction is not preserved, the Supreme Court ordinarily will refuse to consider questions or errors which are not properly before the Court.

However, the Supreme Court has the power to search the record of a case, either to determine whether an unsubstantiated finding of fact is abrogating a constitutional right, or to remedy errors which are so plain that

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5. The Court relied on Stromberg v. California, 283 U. S. 359 (1931).


16. Milk Wagon Driver's Union v. Meadowmoor, 312 U. S. 287 (1940) (certiorari); rehearing denied, 312 U. S. 715 (1941). But cf. Thornhill v. Alabama, 310 U. S. 88, 98, 96 (1940): "Where regulations of the liberty of free speech are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or
the Court should take notice of them even though they were not presented by the petition for certiorari.\textsuperscript{17} This power will be exercised only in clear cases and under exceptional circumstances.\textsuperscript{18} In \textit{Stromberg v. California}, the Court exercised this power to find and to base its decision upon an instruction to the jury which had not been objected to nor made the basis of the petition to the Supreme Court. The information against the defendant varied from the statute by stating the offense conjunctively, while the instruction followed precisely the terms of the statute by stating the offense disjunctively.\textsuperscript{19} And, it has been stated to be the duty of the Court, on an appeal from the decision of a state court construing a municipal ordinance, to guard against a violation of constitutional rights under guise of the construction of the ordinance.\textsuperscript{20}

Whether the interpretation of the ordinance, by the trial court in the instruction to the jury, was properly before the Court and should be considered when the instruction had neither been specifically objected to in the state courts, nor particularly assigned as error, nor specified as a question in the petition for certiorari, was the problem in the instant case. The majority of the Court held that the failure to take exception to or to allege as error the instruction, did not prevent the Court from basing its decision upon the interpretation by the trial court in the instruction, relying upon the authority of \textit{Stromberg v. California}.\textsuperscript{21} Chief Justice Vinson and Mr. Justice Frankfurter, in separate dissenting opinions, challenged the holding; and Mr. Justice Frankfurter especially criticized this use of the \textit{Stromberg} case as a precedent.\textsuperscript{22}

There are several points on which the two cases are alike. In both, a general verdict of guilty and the judgment of conviction\textsuperscript{23} are founded upon a disjunctive construction of the legislation,\textsuperscript{24} by an instruction of the trial court. Defendants, in these cases, neither took exception to it in the state

\begin{itemize}
  \item the evidence under it, which prescribes the limits of permissible conduct and warns against transgression. \textit{Stromberg v. California}, [308 U. S. 359, 368]; \textit{Schneider v. State}, [308 U. S. 147, 155, 162, 163]." And, "Conviction upon a charge not made would be a sheer denial of due process." \textit{De Jonge v. Oregon}, [299 U. S. 353]; \textit{Stromberg v. California}, [283 U. S. 359]."
  \item \textit{Kessler v. Strecker, supra}; \textit{Mechanics Universal Joint Co. v. Culhane}, 299 U. S. 51 (1936) (certiorari). \textit{Cf. Michigan Ins. Bank v. Eldred}, 143 U. S. 293 (1892) (trial court admitted defendant's incompetent evidence over plaintiff's objection and exception, and stated that it would instruct jury to find for defendant upon evidence which wholly failed to support the finding, thereby inducing plaintiff to omit giving evidence on another issue. Although plaintiff did not take exception to the instruction for a directed verdict, the judgment given in pursuance of it was reversed).
  \item \textit{Terminiello v. Chicago, supra}, at 896. \textit{Stromberg v. California, supra}.
  \item \textit{Terminiello v. Chicago, supra}, at 897, 898.
  \item \textit{Stromberg v. California, supra}, at 361, 367-368; \textit{Terminiello v. Chicago, supra}, at 895, 896.
  \item \textit{Stromberg v. California, supra}, at 364; \textit{Terminiello v. Chicago, supra}, at 895 (by implication), 896.
\end{itemize}
courts, nor alleged it as error, nor raised it as a point to be relied upon in
the petition for certiorari. The similarity continues in that the instruction
is not in the exact terms which were charged in the information, but varies as
to one term in the Stromberg case, and defines one term in the Terminiello
case.

However, the two cases differ in three respects. In the Stromberg case
the information varies from the terms of the statute by stating the offense
conjunctively, while in the Terminiello case the information recites the offense
as it was enacted by the ordinance. In the former case the instruction
varies from the information, and follows the exact terms of the statute, by
stating the offense disjunctively. In the latter case, the instruction varies
from both the ordinance and the information, in the interpretation by defi-
nition of the essential term of the ordinance. Finally, in the Stromberg case
there does not appear to be any difference between the trial court and the
appellate court, as to the interpretation of the offense disjunctively; yet in
the instant case it appears that the interpretation by the appellate courts is
less restrictive than that by the trial court.

It appears that neither the majority nor the dissenting opinions of the
Court in the instant case discussed these distinctions between Stromberg v.
California and Terminiello v. Chicago. The search into the record by the
Supreme Court in the earlier case was obscured, because the instruction fol-
lowed the exact terms of the statute and the appellate court in affirming the
conviction did so upon the ground of the statute itself. Still, the point in both
cases is that the construction upon which the defendant was convicted dif-
fered from the information by which the defendant was charged with violating
the legislation. Therefore, a more fundamental question is posed by these
two cases: Is the construction which was the basis of the judgment a question
presented or a reason relied on in the petition for certiorari, when it is the

25. Stromberg v. California, supra, at 364; Terminiello v. Chicago, supra, at 895-
898.
26. Stromberg v. California, supra, at 363; Terminiello v. Chicago, supra, at 895 (by
implication); Brief and Argument for Appellee, p. 1, and Petition for Rehearing, pp. 9,
10, Terminiello v. Chicago, supra.
27. Stromberg v. California, supra, at 363; Terminiello v. Chicago, supra, at 895, 898 (by implication); Brief and Argument for Appellee, supra, pp. 1, 2.
29. Terminiello v. Chicago, supra, at 895 (by implication); notes 26, 27, supra.
31. Terminiello v. Chicago, supra, at 896 (the conviction was not under such a nar-
row construction that only 'fighting words' were punished by the ordinance as applied);
of peace or diversion tending to a breach of the peace, acts of violence, threats of violence,
epithets, derisive 'fighting words,' feelings of anger and hatred) with Chicago v. Hunt,
374 Ill. 234, 29 N. E.2d 86 (1940) (held that the same ordinance is not indefinite and un-
certain, on the ground that 'breach of peace' may be used in the common law meaning).
32. Stromberg v. California, supra; Terminiello v. Chicago, supra.
33. It is submitted that the dissenting opinion by Mr. Justice Frankfurter in the
instant case does not appear to consider this point, which was made by Mr. Justice
McReynolds in his dissent in Stromberg v. California, supra.
In partial answer, it may be urged that the decision in the instant case, taken with the action of the Court in *Stromberg v. California*, indicates more than only an exception to the Supreme Court Rules stated above. The Supreme Court will exercise the power to search the record, even when there are no exceptional circumstances, in order to determine whether the judgment of conviction had been obtained upon an unconstitutional basis, although the construction, which was the basis, had not been specifically objected to, or raised as being in violation of a constitutional right. And in so doing, the Court appears, in these two cases at least, to regard the petition for review of the conviction as implicitly presenting the construction of the legislation.

### REAL PROPERTY—REVERSIONARY RIGHTS TO SCHOOL BUILDINGS

Plaintiff's predecessor in title conveyed land to the trustees of the school district by deed providing for the reversion of the land whenever it was no longer used for school purposes. A schoolhouse and other buildings were erected upon the land. After 1945 the premises ceased to be used for school purposes and the defendant trustees of the school district took steps to sell the buildings. An action was brought by plaintiff to enjoin the sale and to gain title to the buildings on the site by reason of the reverter clause. Held, that since trustees of the school district could not, by virtue of statute, give away buildings erected with public funds directly, they were not empowered to give them away indirectly by means of a reverter clause. *Low v. Blakeney*, 403 Ill. 156, 85 N. E.2d 741 (1949).

According to the common law, buildings erected upon land by the grantee became part of the real estate and were treated as fixtures unless the deed expressed a contrary intention. Title to such improvements vested in the reversioner when the estate was no longer used for the purpose specified.

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34. *Terminiello v. Chicago*, *supra*, at 896, 897 (both points were raised, that the speech by the defendant was protected by the Constitution, and that the prohibition and punishment of the speech by the ordinance were a violation of the Constitution). *Cf.* Erie R. v. Tompkins, 304 U. S. 64 (1938) (J. Butler, dissenting, asserted that the constitutional question on which the case was decided was not raised in the lower courts nor in the petition for certiorari. And J. Reed, concurring in part, stated that the majority opinion shows the Court has taken the view that “laws” includes “decisions” by a court, in contrast to the view of J. Story, in Swift v. Tyson [16 Pet. 1 (U. S. 1842)], that court decisions are at most evidence of the law).


1. *Teaff v. Hewitt*, 1 Ohio St. 511, 530 (1853) (sets forth the test which should be applied in determining what is a fixture: (1) Actual annexation to the realty. (2) Appropriation to the use or purpose of that part of the realty with which it is connected. (3) The intention of the party making the annexation to make the article a permanent accession to the freehold—intention being inferred from the nature of the article affixed, relation and situation of party making the annexation, structure and mode of annexation, and purposes for which annexation has been made†).