

December 1949

## Federal Appellate Procedure--Certiorari--Consideration of Constitutional Objections Not Preserved on the Record

W. E. C.

*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Civil Procedure Commons](#), and the [Courts Commons](#)

---

### Recommended Citation

W. E. C., *Federal Appellate Procedure--Certiorari--Consideration of Constitutional Objections Not Preserved on the Record*, 52 W. Va. L. Rev. (1949).

Available at: <https://researchrepository.wvu.edu/wvlr/vol52/iss1/7>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

of judicial rather than legislative discretion; for, whether the court intends to restrict moral obligations to claims that would entitle the relator to relief against a private party, or whether the exceptions to the general test must spring only from the court's conscience, the result is the same: in cases of moral obligation in West Virginia, the legislature (after originally instituting the action) stands on no higher a level than a lower court in an ordinary action or suit, or than an administrative agency in its hearings of proceedings.

P. J. F.

---

### CASE COMMENTS

FEDERAL APPELLATE PROCEDURE—CERTIORARI—CONSIDERATION OF CONSTITUTIONAL OBJECTIONS NOT PRESERVED ON THE RECORD  
Petitioner was convicted of disorderly conduct for violating a Chicago ordinance concerning which the trial judge gave an instruction abridging the right of freedom of speech, to which petitioner did not except. The ground on which he based his appeal to the state appellate courts was that the ordinance as applied to his conduct violated his right of freedom of speech. Following affirmance in the appellate and supreme courts of Illinois, *Chicago v. Terminiello*, 332 Ill. App. 17, 74 N. E.2d 45 (1947); 400 Ill. 23, 79 N. E.2d 39 (1949), the case went on certiorari to the United States Supreme Court without specification of the erroneous instruction as ground for review in the application for the writ. *Held*, reversed. The ordinance as construed being unconstitutional, the fact that petitioner did not except to nor contest the instruction left it none the less ripe for review by the Supreme Court. *Terminiello v. Chicago*, 337 U. S. 1 (1949) (5-4 decision).

The majority opinion relies on *Stromberg v. California*, 283 U. S. 359 (1931). Although the *Stromberg* case substantially upholds the decision in the principal case, a distinction exists, however significant, which would have permitted an opposite result in the principal case under available authority. In the *Stromberg* case the trial court instructed, following the express terms of the statute, that appellant could be convicted if her conduct fell within any of the purposes set forth therein. There was a general verdict of guilty. Appellant did not except to the instruction but, on appeal to the state appellate court, contended that one of the proscriptions of the statute was invalid under the Fourteenth Amend-

ment. The state court affirmed the conviction, *People v. Mintz*, 62 Cal. App. 677, 290 Pac. 93 (1930), and this contention was made the basis of appeal to the United States Supreme Court, where appellant's views were sustained. In the principal case, petitioner did not except to the instruction but maintained that the ordinance as applied to his conduct was violative of his right of freedom of speech. On appeal to the state appellate courts, the instruction was not claimed as error nor was it mentioned in their opinions, the Illinois Supreme Court saying, in part, "The sole question resolves itself into whether the conduct and utterances of defendant constituted a breach of the peace. . . . The *evidence* amply supports the verdict of the jury . . ." *Chicago v. Terminiello*, 400 Ill. 23, 33, 79 N. E.2d 39, 45 (1948) (*italics supplied*). The issue argued before the United States Supreme Court was whether petitioner's speech was composed of "fighting words" not protected by the Constitution. That difference between the *Stromberg* and principal case posed the question whether the Supreme Court may reverse a decision of the highest court of a state on a point not brought by the record before that court and hence not a part of the judgment declared by that court. The case was one of first impression. In *McGoldrick v. Compagnie Generale Transatlantique*, 309 U. S. 430, 434 (1940), it was said that "only in exceptional cases, and then only in cases coming from the federal courts", would the Court consider questions urged by a petitioner "not pressed or passed" *upon* in the court below; and that, in cases coming from a state court, reasons of a "peculiar force" forbade the Court to decide questions not presented, urged, or decided therein or to consider grounds of attack not raised below. The Court concluded, "we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and *error is not to be predicated upon their failure to decide questions not presented*," *id.* at 435 (*italics supplied*); *accord*, *Wilson v. Cook*, 327 U. S. 474 (1946); *New York ex rel. Cohn v. Graves*, 300 U. S. 308 (1937); *Blair v. Oesterlein Co.*, 275 U. S. 220 (1927) (not involving a constitutional question). However, the *McGoldrick* case involved the commerce clause of the Constitution and not freedom of speech. Moreover the Court there disposed of the cause by remand for further proceedings, while in the principal case, the alternatives were to affirm the state court notwithstanding the erroneous instruction or to reverse on the point not decided by the state court.

The petition for certiorari in the principal case urged the question of whether the content of petitioner's speech was composed of "fighting words" not protected by the Constitution, without mentioning the erroneous instruction by the trial court nor argument addressed to it. This would appear a manifest limitation of the scope of review accorded under the text of the Supreme Court Rules. Rule 38, subd. 2, 306 U. S. 716 (1939), reads in part as follows: "The petition for certiorari shall contain . . . the questions presented; and the reasons relied on for allowance of the writ. Only the questions specifically brought forward by the petition . . . will be considered." In *Flourney v. Wiener*, 321 U. S. 253, 259 (1944), it was said that, on application for certiorari to a state court, the Supreme Court would not pass upon or consider federal questions not assigned as error or designated in the points to be relied upon, even though properly presented to and passed upon by the state court, a proposition as authority for which the court cited *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350 (1940) and *General Talking Pictures Co. v. Western Electric Co.*, 304 U. S. 175 (1938); cf. *Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587 (1936) (by implication). But, in the principal case, the error was not only not assigned; it was not even presented to or passed upon by the state court.

Whatever its merits, the case adds nothing to constitutional law. Cf. 1 MERCER L. REV. 114 (1949); 9 LAW. GUILD REV. 70 (1949). Mr. Justice Douglas' majority opinion, the dissent of Mr. Justice Jackson and the opinions of the judges in the state appellate courts expressed no disagreement regarding the substantive rights and limitations with respect to freedom of speech. The significance of the case, it is submitted, is the extent to which the Court has disregarded its rules of procedure as well as meanings attributed to them by language in prior decisions, in protecting this basic freedom.

W. E. C.

---

MASTER AND SERVANT—RECOVERY FOR SILICOSIS UNDER BOILER INSPECTION ACT AND FEDERAL EMPLOYERS' LIABILITY ACT.—*P*, fireman on *D* railroad, allegedly contracted silicosis as a result of inhalation of silica dust emanating from defective sanders on *D*'s locomotives. *P* charged violations of the Boiler Inspection Act, 36 STAT. 913 (1911), as amended, 43 STAT. 659 (1924), 45