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Constitutional Law -- Retroactivity of Constitutional Decisions

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Constitutional Law—Retroactivity of Constitutional Decisions

In 1965, the United States Supreme Court in *Griffin v. California,*[1] held that comment by the prosecutor or judge on the accused's silence at a state trial is violative of the fifth amendment as applied to the states through the fourteenth amendment. In 1966, in *Tehan v. United States,*[2] the Court held that this no-comment rule would not be applied retroactively to judgments that became final prior to the 1965 opinion. How then do we reconcile the application of one constitutional principle to pre-1965 criminal judgments with the application of a different constitutional principle to post-1965 judgments?

Under the common-law view, the question of whether to apply a new judicial decision retroactively did not arise. The judge's role was merely to *declare* the law, not to change it. If a prior decision mistakenly declared the law, then a subsequent overruling decision declared it to be no law.[3] Consequently, under this "declaratory theory" the law remained constant; any overruling decision was, of necessity, applied retroactively.

The inequities arising from strict adherence to the declaratory theory led to several exceptions to the rule, especially where prospective limitation was deemed necessary to do fairness to a party.[4] With general acceptance of the view that the court has discretion to determine whether an overruling decision should operate retroactively or be limited prospectively,[5] the problem has become one of line-drawing rather than one of across-the-board adoption of any one theory.[6] The same development is also evident in decisions hold-

[1] 380 U.S. 609 (1965).

[2] —— U.S. ——, 86 Sup. Ct. 459 (1966).

[3] "For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law,* but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined." 1 BLACKSTONE, COMMENTARIES * 70.

[4] See Note, 43 VA. L. REV. 1279, 1281, 1290 (1957).

[5] This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal. We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.
Great No. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932).

[6] The argument against prospective limitation is that such a result consti-

ing statutes unconstitutional.[7]

However, there seems to have been an implied adoption of the declaratory theory when the overruling decision expanded constitutional protections accorded the criminally accused, *i.e.*, when fairness to a party seemed to support retroactive application. This implied adoption resulted from a refusal by the Court to face squarely the issue.[8]

In *Eskridge v. Washington Prison Bd.*,[9] in 1958, the Court, in a per curiam decision, applied the rule that indigents on appeal must be provided transcripts[10] to a 1935 case with no discussion of the retroactivity issue.

Again, in *Norvell v. Illinois*,[11] the Court side-stepped the prob-

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tutes judicial legislation. See, *e.g.*, James v. United States, 366 U.S. 213, 224-25 (1960) (separate opinion of Black, J.).

[7] *Compare*, Norton v. Shelby County, 118 U.S. 425 (1886), *with* Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940). In *Norton*, it was stated:

> An unconstitutional act is not a law; it confers no right; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

Norton v. Shelby County, *supra* at 442.

In *Chicot County* the same question was discussed as follows:

> The actual existence of a statute, prior to such a determination, [of unconstitutionality] is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. . . . Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and its previous application, demand examination.

Chicot County Drainage Dist. v. Baxter State Bank, *supra* at 374.

[8] Individual justices had foreseen the retroactivity problems in this area and had urged the Court to take a stand. In Griffin v. Illinois, 351 U.S. 12 (1956), which declared that due process required making necessary transcripts available to indigents on appeal, Justice Frankfurter spoke for express consideration of the issue as follows:

> The Court ought neither to rely on casuistic arguments in denying constitutional claims, nor deem itself imprisoned within a formal, abstract dilemma. The judicial choice is not limited to a new ruling necessarily retrospective, or to rejection of what the requirements of equal protection of the laws, as now perceived, require. For sound reasons, law generally speaks prospectively. . . . In arriving at a new principle, the judicial process is not impotent to define its scope and limits. . . . We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights. It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law.

Griffin v. Illinois, *supra* at 25-26.

[9] 357 U.S. 214 (1958).

[10] Griffin v. Illinois, 351 U.S. 12 (1956).

[11] 373 U.S. 420 (1963).

lem. Following *Griffin v. Illinois,* in which the Court declared that due process required making necessary transcripts available to indigents on appeal, Illinois had, by statute, provided for free transcripts to all indigents convicted prior to or after *Griffin,* but granted the court authority to deny a petition for transcripts if the court reporter be dead or unable to furnish the record. Norvell had been convicted in 1941 and, because he could not afford transcripts, failed to pursue an appeal. In 1956 he requested transcripts and was refused because the reporter had died. No one could read the reporter's shorthand notes, and the trial testimony could not otherwise be reconstructed. The United States Supreme Court affirmed the denial of a new trial on the ground that Norvell had a lawyer at the trial and failed to pursue his remedy at that time. This unreasoned modification of what had been done summarily in *Eskridge* was attacked by Justices Goldberg and Stewart in a vigorous dissent.

> *Griffin* was a constitutional decision vindicating basic Fourteenth Amendment rights and is no more to be restricted in scope or application in time than other constitutional judgments. This, it seems to me, is the clear import of this Court's decision in *Eskridge v. Washington* . . . .[12]

An opportunity to meet the retroactivity question was again avoided in *Pickelsimer v. Wainwright,*[13] where the Court summarily applied with no discussion, *Gideon v. Wainwright*[14] retroactively.

This remained the situation until a decison finally spoke to the issue and established the framework within which subsequent arguments for retroactivity in this field are to be evaluated. The decision in *Linkletter v. Walker*;[15] it held that the *Mapp v. Ohio*[16] exclusionary rule would not be applied retroactively.[17]

After noting that "heretofore, without discussion, we have ap-

[12] *Id.* at 425 (Goldberg, J., dissenting).

[13] 375 U.S. 2 (1963). Justice Harlan dissented in *Pickelsimer* on the ground that the Court should address itself expressly to the problem of retroactivity.

[14] 372 U.S. 335 (1963) (indigent's right to counsel declared).

[15] 381 U.S. 618 (1965).

[16] 367 U.S. 643 (1961) (holding illegally-seized evidence not admissible at trial).

[17] It should be noted that the exclusionary rule was not limited to complete prospective application; it was applied to the *Mapp* case itself as well as to all cases pending on appeal at the time *Mapp* was decided.

plied new constitutional rules to cases finalized before the promulgation of the rule,"[18] the Court proceeded to enumerate the factors upon which it was now going to base its line drawing.

> Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.[19]

The main thrust of the opinion seems to have centered on the purpose argument. Viewed on this level, the exclusionary rule is necessary merely as an effective deterrent to illegal police action. Consequently, retroactive application of the rule would not serve to further the purpose of the rule, nor could it restore "the ruptured privacy of the victims' homes and effects."[20]

Continuing this pragmatic approach, the Court noted the terrible impact retroactive application would have upon the judicial machinery. The Court's concern for the problems inherent in new trials in which witnesses and evidence may be unavailable and with the increased burden upon trial dockets seems reminiscent of the *Norvell* result. However, the Court apparently incorporated an additional factor into its administration of justice argument, *i.e.*, the fact that in *Linkletter* "there is no likelihood of unreliability or coercion present. . . ."[21] The Court's statement that "to thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice"[22] would seem to imply that if the procedure had a "bearing on guilt," the administration of justice would not be deemed disrupted by retroactive application. The net result seems to be that hardship on the judiciary becomes a relevant argument for prospective limitation only if it is first determined that the newly announced constitutional

[18] 381 U.S. at 628.
[19] *Id.* at 629.
[20] *Id.* at 637.
[21] *Id.* at 638. This emphasis on the reliability of the guilt-determining process seems also to have played an important part, independent of the other criteria, in providing a ground for distinguishing the *Gideon* and *Griffin* line of cases, which had applied new rules retroactively in situations where the prior practice was deemed by the *Linkletter* Court to have effected the determination of guilt.
[22] *Id.* at 637-38.

principle has no bearing on the reliability of the guilt-determining process. Such a distinction seems very dubious.[23]

Finally, the Court gave some credence to the fact that the states had relied upon the *Wolf v. Colorado*[24] decision holding the exclusionary rule was not required by the fourteenth amendment. In speaking of the states' "vested interest" in sustaining prior decisions, the Court relied upon cases involving individual interests,[25] even though it would seem very difficult to view the states as having a vested interest in keeping a man incarcerated.

Justice Black's dissent in *Linkletter* warrants mention here because it was adopted by him in *Tehan*. In attacking what he considered to be discrimination against Linkletter solely because his trial proceeded more swiftly than did Miss Mapp's, Justice Black noted his failure to understand "why those who suffer from the use of evidence secured by a search and seizure in violation of the Fourth Amendment should be treated differently from those who have been denied other guarantees of the Bill of Rights."[26] In attacking the purpose argument, he noted that the exclusionary rule is more than a mere punishment against police officers;[27] it is also a right accorded the accused,[28] a right that the *Mapp* decision itself

[23] *Gideon* itself did not rely upon any showing of prejudice resulting from the denial of counsel. Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 270 (1965). Unfortunately, the Court seems to have equated "fairness of trial" with the reliability of the guilt-determining process. It stated: "Finally, in each of the . . . areas in which we have applied our rule retrospectively the principle that we applied went to the fairness of the trial—the very integrity of the fact-finding process." 381 U.S. at 639.

[24] 338 U.S. 25 (1949).

[25] See 381 U.S. at 627.

[26] *Id.* at 646. In support of his position that there should be no such distinction, Justice Black relied upon the following language from *Mapp*:

> [W]e can no longer permit that right to remain an empty promise. Because it is enforceable *in the same manner and to like effect as other basic rights secured by the Due Process Clause*, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment.

Mapp v. Ohio, 367 U.S. 643, 660 (1961). (Emphasis added.)

[27] The inference I gather from these repeated statements is that the rule is not a right or privilege accorded to defendants charged with crime but is a sort of punishment against officers in order to keep them from depriving people of their constitutional rights. In passing I would say that if that is the sole purpose, reason, object and effect of the rule, the court's action in adopting it sounds more like law-making than construing the Constitution.

381 U.S. at 649.

[28] This was the position taken by the Ninth Circuit.

had recognized might lead to the release of some criminals.[29] On the increased burden retroactive application might place upon the judicial system, Justice Black merely stated his view that the argument is no more applicable to *Linkletter* than it was in the decisions growing out of *Gideon* and *Griffin v. Illinois*. In conclusion, Justice Black addressed himself to the reliance argument as follows:

> No State should be considered to have a vested interest in keeping prisoners in jail who were convicted because of lawless conduct by the State's officials. Careful analysis of the Court's opinion shows that it rests on the premise that a State's assumed interest in sustaining convictions obtained under the old repudiated rule outweighs the interests both of that State and of the individuals convicted in having wrongful convictions set aside.[30]

Notwithstanding these objections,[31] the majority opinion in *Linkletter* seems to establish the following criteria for determination of retroactivity.

(1) Line drawing will be applied on the question of retroactivity to decisions broadening the constitutional rights of criminal defendants.

(2) The relevant factors to be considered in drawing the line are the degree of state reliance upon the prior rule, the purpose of the newly announced rule, the effect retroactive application would have upon the attainment of this purpose and the effect of retroactivity upon the efficient administration of justice.

(3) If the new rule does not go to the "fairness of the trial—

> We agree that the underlying policy objective of the doctrine of exclusion is to deter. The doctrine of exclusion is nevertheless a Constitutional privilege of the victim, and its status as such is not altered by identification of its purpose.

California v. Hurst, 325 F.2d 891, 895 (9th Cir. 1963).

[29] "In some cases this will undoubtedly be the result. . . . The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." Mapp v. Ohio, 367 U.S. 643, 659 (1961).

[30] 381 U.S. at 652-53.

[31] An additional objection has been voiced by some commentators that the retroactivity problem is an "illusion." Relying upon the language of the federal habeas corpus statute that the writ is available to state prisoners who are "in custody in violation of the Constitution of the United States," 28 U.S.C. § 2241(c)(3), these writers argue that the petition puts in issue only present confinement under present standards and that the legality of the initial incarceration is in no way relevant. See United States v. Fay, 333 F.2d 12, 25 (2d Cir. 1964) (Marshall, J., dissenting); Meador, *Habeas Corpus and The "Retroactivity" Illusion*, 50 VA. L. REV. 1115 (1964).

the very integrity of the fact-finding process,"[32] then it seems that it will not be applied retroactively.

Putting aside the propriety of the *Linkletter* rule, was it, as announced, properly applied in the *Tehan* situation?

In *Twining v. New Jersey*,[33] it was held that the federal constitution did not require the states to accord criminal defendants the fifth amendment privilege against self-incrimination. Then, in 1963, over fifty years later, *Twining* was overruled, and it was held that the privilege against self-incrimination is protected by the fourteenth amendment against abridgment by the states.[34] Two years later, *Griffin v. California*[35] held that the fifth amendment forbade comment on the accused's silence.

Griffin is important to the analysis of *Tehan* for its statement of the basis upon which the no-comment rule is established. The Court seems to have made it clear that allowing comment had a direct bearing upon the integrity of the guilt-determining process.

> It is not every one who can safely venture on the witness stand, though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character and offenses charged against him will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand.[36]

The Court in *Griffin* also viewed the comment rule as a "remnant of the 'inquisitorial system,' "[37] and as an attempt, while recognizing the accused's privilege against self-incrimination with one breath, to penalize its assertion with the next.[38]

The Court in *Tehan* was quick to note these multi-purposes of

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[32] 381 U.S. at 639.
[33] 211 U.S. 78 (1908).
[34] Malloy v. Hogan, 378 U.S. 1 (1963).
[35] 380 U.S. 609 (1965).
[36] *Id.* at 613.
[37] *Id.* at 614. The Court disposed of the argument that the jury will infer guilt from silence even though no comment be allowed as follows: "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." *Ibid.*
[38] "It [comment] is a penalty imposed by the courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Ibid.*

the rule against compulsory self-incrimination.[39] Equally swiftly, it identified the "basic purpose" behind the privilege to be the preservation of the accusatorial system, stating that the basic purposes of the privilege "do not relate to protecting the innocent from conviction."[40] Then, by what appears to be somewhat doubtful reasoning, the Court stated that since all the states had granted the testimonial privilege against self-incrimination prior to *Griffin,* any variations in the application of the privilege "did not go to the basic purposes of the federal privilege."[41] Finally, the Court stated that as the privilege related to "our respect for the inviolability of the human personality,"[42] retroactive application could not remedy the already consummated intrusion. Thus, since the privilege is "not an adjunct to the ascertainment of truth,"[43] but merely represents values reflecting our concern for the "right of each individual to be let alone,"[44] the Court apparently viewed itself as clearly within the *Linkletter* rationale.[45]

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[39] The Court, in a footnote, quoted at length from a 1964 opinion written by Justice Goldberg:

> It [privilege against self-incrimination] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play . . . ; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," . . . ; our distrust of self-deprecating statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

[40] Tehan v. United States, —— U.S. ——, 86 Sup. Ct. 459, 464 (1966).

[41] *Ibid. But see* Griffin v. California, 380 U.S. 609, 614 (1965), where it is stated: "For comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' . . . which the Fifth Amendment outlaws."

[42] Tehan v. United States, —— U.S. ——, 86 Sup. Ct. 459, 465 (1966).

[43] *Ibid.*

[44] *Ibid.*

[45] The impact of retroactive application upon the administration of justice in those states that had relied upon *Twining v. New Jersey,* apparently six in number in 1960, was felt to be "so devastating as to need no elaboration." —— U.S. ——, 86 Sup. Ct. at 467. It should be noted, however, that in *Adamson v. California,* 332 U.S. 46 (1947), five justices felt that the fifth amendment forbade comment; but, Justice Frankfurter believed the fifth not applicable to the states through the fourteenth and thus made the majority for holding the comment practice constitutional. Consequently, reliance upon *Twining* would appear, at least no more warranted than was the reliance upon *Wolf v. Colorado.*

That which *Linkletter* implied, *Tehan* has apparently confirmed, *i.e.*, the approach to retroactivity in decisions expanding the constitutional rights of the criminally accused is to be pragmatic with emphasis on the practical reverberations in light of the one dominant objective sought by the new rule. Such an approach, at least in the *Tehan* situation, does not seem appropriate.

The mere fact that the declaratory theory has been discarded would not seem adequate reason for completely ignoring one of the apparent considerations behind the rule. Professor Mishkin has expressed the role of the declaratory theory as follows:

> [T]he 'declaratory theory' expresses a symbolic concept of the judicial process on which much of courts' prestige and power depend. This is the strongly held and deeply felt belief that judges are bound by a body of fixed, overriding law, that they apply that law impersonally as well as impartially, that they exercise no individual choice and have no program of their own to advance. . . . [T]his symbolic view of courts is a major factor in securing respect for, and obedience to, judicial decisions. If the view be in part myth, it is a myth by which we live and which can be sacrificed only at substantial cost; consider, for example, the loss involved if judges could not appeal to the idea that is 'the law' or 'the Constitution'—and not they personally—who command a given result.[46]

It would seem that when constitutional rights are in issue—when the rights in issue are pregnant with the ethical judgments that are involved in due process and fair trial discussions—the appropriateness of this declaratory theory concept is strengthened.[47] Society, with its sense of the eternalness and all-inclusiveness of ethical judgments, is likely to view any overruling decision as an admission of past error, rather than as a creative exercise of the judicial power to adopt to changed conditions[48]—that which is due process for Mr. Griffin should also be due process for Mr. Tehan. Consequently, the values of equality of treatment and the image of justice, if not controlling in such situations, merit, it would seem, at least some recognition by the Court in its line-drawing exercise.[49]

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[46] Mishkin, *The High Court, The Great Writ, and The Due Process of Time and Law*, 79 HARV. L. REV. 56, 62 (1965).

[47] See Comment, 16 RUTGERS L. REV. 587 (1962).

[48] Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 257 (1965).

[49] See *Ibid.*

Considerations of stability, reliance and the efficiency of the administration of justice seem insufficient in themselves to support arbitrarily drawing a line between cases pending and those finally decided.[50]

Nevertheless, it might be argued that the *Linkletter* result is supportable upon the policy for finality of judgments as it reflects concern for the efficient administration of justice. Thus, retroactivity would be applied only when the new constitutional standard was intended to improve the reliability of the guilt-determining process.[51] Since the exclusionary rule was deemed to be not so conceived, the refusal to allow collateral attack on the prior judgment through habeas corpus is, it is argued, justified.[52]

Assuming that this rationale is that which was intended by the purpose and judicial administration arguments of *Linkletter,* the standard still seems improperly applied in *Tehan.* By construing "purpose" to mean "dominant objective," the Court, in *Tehan,* apparently ignored the *Griffin* statements that the no-comment rule did serve, among other purposes, to assure the reliability of the guilt-determining process.[53] Where *Linkletter* had drawn a distinction between the right to counsel and the right to be protected against illegal search and seizure, *Tehan* has now apparently drawn a distinction between the various elements of the single right against compulsory self-incrimination dependent solely upon what is perceived to be the dominant purpose of the individual element of the privilege in issue. It is submitted that in treating the no-comment rule as unrelated to the reliability of the guilt-determining process and in giving controlling weight to considerations of dominant objective, reliance and judicial efficiency, the Court in *Tehan* reached an unwise result and in broadening the already doubtful base of

[50] See Mishkin, *supra* note 46, at 72-76.

[51] See *Id.* at 87.

[52] It would seem at least arguable that since across-the-board retroactivity might stifle the development of new legal principles, some such basis for line drawing is warranted.

[53] Although Professor Mishkin agreed with the *Linkletter* result, he believed that *Tehan* required retroactive application.

> Yet, though other factors may predominate, unless the court is willing to treat the asserted purpose of assuring the reliability of the guilt-determining process as insubstantial—which would seem virtually impossible in the face of *Griffin v. California*—the present requirements would . . . be applicable to all past convictions.

Id. at 94.

Linkletter allowed practical considerations to overcome considerations of justice and equality.

Fairness of trial would seem not to depend solely upon the accuracy of the ultimate determination of guilt or innocence. As Miss Mapp, Mr. Gideon and Mr. Griffin were deprived of certain elements of the ritual to which we refer as a "fair trial," so also was Mr. Tehan deprived. On this ground, there appears to be no distinction. Neither would a valid distinction between Mr. Gideon and Mr. Tehan seem permissible on the ground of accuracy of verdict.

Consequently, the *Tehan* result appears to be based upon an argument geared to support a preconceived decision against retroactivity, pleaded as a purpose argument but actually sounding in flooding the courts. In so extending the pragmatic approach, the Court has apparently lost sight of the remaining relevance of the theoretical approach based upon equality for persons similarly situated, equal protection of the laws and the often crucial image of judicial fairness.

How then do we reconcile the application of one constitutional principle to pre-1965 criminal judgments with the application of a different principle to post-1965 judgments? In Mr. Tehan's case, we can do so neither upon the basis of precedent nor of sound judicial policy.

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Corporations—1965 Amendment to the North Carolina Business Corporation Act

The following comments concern the changes in the North Carolina Business Corporation Act of 1955, Chapter 55 of the General Statutes, made by the 1965 General Assembly.

I. INSPECTION RIGHTS

Section 55-38 was amended by adding a new provision blocking shareholders of banks from inspecting "deposit records or loan records of a bank customer, except upon order of a court of competent jurisdiction for good cause shown."[1] This enactment obviously responds to the effort in *Cooke v. Outland*[2] to reach such records,

[1] N.C. Sess. Laws 1965, ch. 609, adding new subsection (i) to N.C. GEN. STAT. § 55-38 (1965).

[2] 265 N.C. 601, 144 S.E.2d 835 (1965).