Cynthia G. Fox. THE BATTLE OF HAYES POND: THE KU KLUX KLAN VERSUS THE LUMBEE INDIANS, ROBESON COUNTY, NORTH CAROLINA, 1958. (Under the direction of Dr. Fred D. Ragan) Department of History, East Carolina University, December 1979.

On Monday, January 13, 1958, members of the Ku Klux Klan under the leadership of James W. Cole burned two crosses in Robeson County, North Carolina. A Lumberton newspaperman Bruce Roberts accompanied them and wrote a news story about the event. Roberts' article indicated that the cross burnings were aimed at members of the Lumbee Indian community. Five days later Cole was scheduled to speak at a Klan rally outside the Robeson community of Maxton. Between twenty-five and thirty Klansmen gathered to hear the speech but the meeting never took place. An estimated five hundred Lumbees shooting guns and yelling war whoops attacked the Klan members before anyone had begun to speak. The county sheriff, Malcolm G. McLeod, arrested two Klan members for inciting the Indians to riot. They were tried in Superior Court in Robeson County and convicted on the grounds that their cross burning activities had so inflamed the Lumbee community that their mere presence was sufficient to provoke a riot.

This paper is an account of that celebrated incident and an analysis of the constitutional issues involved. It attempts to examine the events as they occurred in light of contemporary Court opinions on freedom of speech and assembly as well as current assessments of those rights. It also attempts to examine the politically progressive label so often attached to North Carolina as it applies to this case. The paper contends that the 1958 conviction was unconstitutional because

the Klansmen committed no overt act of incitement on January 18, 1958. One might suppose that had the Indians waited fifteen minutes until the meeting actually began there would be no thesis.

THE BATTLE OF HAYES POND:
THE KU KLUX KLAN VERSUS THE LUMBEE INDIANS,
ROBESON COUNTY, NORTH CAROLINA, 1958

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Cynthia Gregory Fox

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INTRODUCTION

The Ku Klux Klan is part of the southern political tradition. While originally formed as a social club, the Klan of Reconstruction rapidly evolved into the violent and terroristic voice of disfranchised whites. Founded in 1915 as a fraternal order, the second Klan, over its twenty-nine year history, gained and lost remarkable power. Revitalized by Court ordered desegregation in the nineteen-fifties and the civil rights movement of the nineteen-sixties, the Klan consistently returned to the political arena as one means of expressing its point of view. In North Carolina during the early nineteen-twenties the group enjoyed the open support of state Senator Rivers Johnson from Duplin County. Loss of this defender caused a reduction in membership and Klan activity did not play a major role in North Carolina's defection from the Democratic solid South and vote for Herbert Hoover in 1928. In 1950, a bitter campaign for the United States Senate brought the race issue to the fore and spawned a revival of terrorist activities. The Klan, since its revival, has not enjoyed the political successes in North Carolina that favored it in other southern states. This lack of power has left it open to attack from the state government at least twice in the past thirty years.[1]

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[1]J. C. Lester and K. S. Wilson, Ku Klux Klan: Its Origin, Growth and Disbandment (New York, 1905), 47-67; Otto H. Olsen, "The Ku Klux Klan: A Study in Reconstruction Politics and Propaganda," North Carolina Historical Review, 39 (Summer, 1962), 360; Arnold S. Rice, The Ku Klux Klan in American Politics (Washington, 1962), 85-91, hereinafter cited as Rice, The Klan in Politics; Kenneth T. Jackson, The Ku Klux Klan in the City, 1915-1930 (New York, 1967), 251, hereinafter cited as Jackson, The Klan in the City; David Mark Chalmers, Hooded Americanism (Garden City, 1965), 92-97, hereinafter cited as Chalmers,

The 1915 resurrection of the Ku Klux Klan owed its impetus, at least in part, to North Carolina. In 1906, North Carolina born Thomas Dixon helped create a romantic image of the Reconstruction Klan with the publication of his book The Clansman: An Historical Romance of the Ku Klux Klan. The novel became a hugh commercial success as David War Griffith's film "Birth of a Nation." This, the first full length feature film, was released on March 3, 1915. It glorified the Klan and is often credited with causing the rebirth of the organization the same year. Two weeks before "Birth of a Nation" was scheduled to play in Atlanta, Georgia, sixteen men climbed nearby Stone Mountain, stood beneath a flaming cross, and swore their allegiance to the Invisible Empire, Knights of the Ku Klux Klan. On December 4, 1915, a preliminary charter was granted and in July of the following year the "patriotic, secret, social benevolent order" was incorporated in Fulton County, Georgia. William Joseph Simmons, a "Colonel" in the Woodmen of the World, was the Imperial Wizard of this second Ku Klux Klan.[2]

While primarily a fraternal order from 1915 to 1918, the Klan battled immorality in Alabama. In 1918 it helped prevent strikes in Mobile and Birmingham. The Birmingham vigilantes continued assisting

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Hooded Americanism; Monroe Lee Billington, The Political South in the Twentieth Century (New York, 1975), 50, hereinafter cited as Billington, The Political South; Jack Bass and Walter De Vries, The Transformation of Southern Politics (New York, 1976), 227-229, hereinafter cited as Bass and De Vries, The Transformation of Southern Politics.

[2]William Pierce Randel, The Ku Klux Klan: A Century of Infamy (Philadelphia, 1965), 156-181, hereinafter cited as Randel, The Ku Klux Klan; Rice, The Klan in Politics, 1; Chalmers, Hooded Americanism, 28-30.

police in controlling the city's criminal element so effectively "that the police chief advised Nashville authorities to organize a klavern."[3] Despite a generally favorable image, by 1920 the lodge was in financial difficulties. On June 7 of that year Simmons acquired the services of two enterprising recruiters, Edward Young Clarke and Mrs. Elizabeth Tyler.[4]

Clarke and Tyler focused their membership drive on growing popular concern over postwar morals and a spirit of nativism embodied the zenophobia of the "Red Scare." More than two hundred recruiters brought in over one hundred thousand new members in eighteen months. Simmons' new Ku Klux Klan began to attract national attention. Enforcement of its moral standards often included instances of violence and terrorism. A series of newspaper exposes prompted the Committee on Rules of the House of Representatives to open hearings on the Klan.[5] "Colonel" Simmons testified and denied the group's involvement in any violence. As a result of the newspaper stories and the congressional hearings, membership soared to over a million in one year and Simmons observed, "Congress made us."[6] In November of 1922, Simmons lost

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[3]Jackson, The Klan in the City, 7.

[4]Chalmers, Hooded Americanism, 31-32; Randel, The Ku Klux Klan, 184-185; Rice, The Klan in Politics, 5-7.

[5]Randel, The Ku Klux Klan, 184-185; Rice, The Klan in Politics, 6-7. In July 1921, William Allen White, editor of the Emporia, Kansas Gazette, began a series of editorials focusing attention on Klan violence. Rowland Thomas followed White with his three week expose printed in the New York World. A number of major newspapers across the country carried Thomas' articles.

[6]Rice, The Klan in Politics, 8.

control of the organization to Hiram Wesley Evans who severed relations with Clarke and Tyler.[7]

The moral thrust of the Klan remained unchanged. During the nineteen-twenties the group was oriented toward Fundamental Protestantism. Robed figures frequently disrupted church services to make en masse donations.[8] They also opposed "modernism" and its accompanying "immorality" and committed themselves to "one hundred per cent Americanism." On the surface, they posed a challenge only to Catholics, Jews, Negroes, and recent immigrants. In a broader sense, however, the Klan questioned much of what America had rapidly become, a highly industrialized world power.[9] The entire period had been marked by growth of both business and government. As corporations and governments enlarged, removing themselves farther still from the working man, frustrations appeared as the worker lost control of his destiny. The Klansmen as others before them displaced by radical change, glorified the past. The desire for the maintenance of white supremacy, hatred for Jews and Catholics, and extreme ethnocentricity were symptoms of their frustration. The Ku Klux Klan offered a mechanism by which to voice their anger. Individual inadequacy disappeared as the Klansmen joined forces to recapture the past. The Klan offered twentieth century man a "mystical nationalism with a

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[7]Jackson, The Klan in the City, 10-11, 14; Rice, The Klan in Politics, 10; Randel, The Ku Klux Klan, 184-185.

[8]Rice, The Klan in Politics, 27-28.

[9]Jackson, The Klan in the City, 22-23.

Christian veneer."[10] For a small segment of the group the Klan continued to offer an opportunity to express their anger, as an apparently acceptable outlet for sadism and violence. This moral theme continued into the nineteen-fifties.[11]

The Ku Klux Klan in North Carolina boasted respectable leadership for a time in the early nineteen-twenties. The Grand Dragon, Henry A. Grady, was a superior court judge and state Senator Rivers Johnson was an open and powerful sympathizer. Johnson was instrumental in defeating 1923 anti-mask legislation in the state legislature. In the early years the Klan limited its political activities to propagandizing about the positive effects their organization could have on the nation's political immorality. They sought to inform the public about the candidates and thereby direct the voting of the electorate.[12] Beyond this Judge Grady denied Klan participation in politics. In 1927, Grady resigned as Grand Dragon taking with him Senator Rivers Johnson. Hiram Evans had ordered a nationwide membership drive against Grady's wishes and also ordered Klan groups to assume a more active role in state politics. Johnson then introduced a new bill outlawing secret political societies and the wearing of masks in public. This

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[10]Fritz Stern, The Politics of Cultural Despair (Berkeley, 1961), 52. Stern's work deals with the nineteenth century philosophical origins of antisemitism and the National Socialist Party in Germany. The same sense of frustration felt by Germans struck by rapid industrialization, fostered the rebirth of the Ku Klux Klan as a national movement. The Klan offered scapegoats for personal failure, for example, large corporations, unresponsive government, non-Protestant religious groups and blacks.

[11]See Chapter one, page 2.

[12]Rice, The Klan in Politics, 31-32.

bill passed the Senate but failed in the House.[13] The Klan demonstrated little influence in North Carolina politics as its membership, estimated in 1923 at twenty-five thousand, dropped to below eight thousand. The Raleigh Klavern disbanded and the headquarters was moved to Charlotte.[14]

Declining political influence accompanied declining membership. During the nineteen-thirties the Klan was most powerful numerically outside the South but vigilante southern klaverns continued vigorous and violent enforcement of their moral code. On June 10, 1939, Hiram Evans stepped down as Imperial Wizard and was replaced by Indiana veterinarian, James Arnold Colescott. The new wizard attempted to recruit more members but he competed with a number of new organizations including the American Nazi movement. Five years later Colescott disbanded the Ku Klux Klan when it lost its tax exempt status and the federal government presented him with a bill for $685,000 in back taxes. The Invisible Empire officially ceased to exist on April 28, 1944, ending the second period of the nationally organized Ku Klux Klan.[15]

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[13]Chalmers, Hooded Americanism, 92-95.

[14]Rice, The Klan in Politics, 44; News and Observer (Raleigh, North Carolina), November 26, 1924, hereinafter cited as News and Observer. Raleigh newspaper owner and publisher, Josephus Daniels consistently opposed the Klan in North Carolina. Similar opposition by the Memphis (Tennessee) Commercial-Appeal won that paper a Pulitzer Prize in 1922; Billington, The Political South, 50; Ahoskie mayor, L. C. Williams behaved cooperatively and Goldsboro mayor, Edgar H. Bain praised the Klan in glowing terms.

[15]Chalmers, Hooded Americanism, 323-324; Rice, The Klan in Politics, 92-94; Randel, The Ku Klux Klan, 223; Jackson, The Klan in the City, 253-254.

Virtually moribund during the war years, 1946 marked a revival of Klan activity. In Georgia the remnants of the Invisible Empire formed a loose alliance known as the Association of Georgia Klans under the leadership of Dr. Samuel J. Green, an active Klansman since 1922.[16] In Georgia, the Klan regained some of its former political clout when in 1946, Eugene Talmadge publicly invited its support in his bid for reelection as governor. Klan membership increased in Tennessee, Florida, Alabama, Michigan, Indiana and southern California. This revival, however, met opposition from citizens groups, veterans groups, church associations, government bodies and newspapers. In Milledgeville, Georgia, the Klan burned a cross at the home of the town's anti-Klan newspaper editor, Jere Moore. Moore responded with an editorial charging the night riders with abridging freedom of the press. Citizens groups joined him and offered $1000 reward for the cross-burners' capture. In 1948, southern leaders of the Presbyterian Church meeting in Montreat, North Carolina called on the House of Representatives Committee on Un-American Activities to investigate the Klan. Between 1946 and 1949, a number of states revoked Klan charters, passed anti-mask legislation, and outlawed the organization. The Association of Georgia Klans, still approximately 100,000 strong, lost Imperial Wizard, Samuel Green who died of a heart attack in August of 1949. Samuel W. Roper replaced him but not without a struggle.[17]

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[16]Roi Ottley, "I Met the Grand Dragon," The Nation (July 2, 1949), 10-11.

[17]Rice, The Klan in Politics, 108-114.

The efforts of various Klan leaders to succeed Green led to division within the association. At least twelve splinter groups existed by late 1949, all claiming rightful descent from the original Invisible Empire, Knights of the Ku Klux Klan, Inc. One such splinter organization was the Association of Carolina Klans, headquartered in Leesville, South Carolina. Thomas L. Hamilton, an Athens, Georgia grocer, had vied to fill Green's place in Atlanta. His failure prompted him to take his organizing abilities to South Carolina.[18]

In the early nineteen-fifties Hamilton increased his efforts in North Carolina, considered by many the most enlightened of the southern states. According to Will W. Alexander, North Carolina liberal, the activities of the Klan increased immediately after a particularly bitter 1950 senatorial campaign between Frank Porter Graham and Willis A. Smith.[19] Racism played a major role in defeating Graham, Samuel Lubell asserted in his 1952 analysis of the primary. This was not in keeping with the accepted view of the state on the racial issue. Lubell wrote, "for decades every book on the South had pointed to the Tarheel State as the inspiring exception . . . supposed[ly] . . . free of race fixation."[20] V. O. Key writing in 1949, said that the state enjoyed a "reputation for progressive outlook and action in many phases of life, including industrial development,

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[18]Chalmers, Hooded Americanism, 335-342.

[19]Wilma Dykeman and James Stokely, Seeds of Southern Change: The Life of Will Alexander (Chicago, 1962), 300-301, hereinafter cited as Dykeman and Stokely, Seeds of Southern Change.

[20]Samuel Lubell, The Future of American Politics (New York, 1952), 101.

education, and race relations."[21] Key admitted that North Carolinians themselves were the first to point out that their state did not entirely deserve the label and later critics have agreed that on the racial issue the reputation was more a myth than a reality.[22] Racial strife of the nineteen-fifties and nineteen-sixties made North Carolina more "conservative politically on race and other aspects of public philosophy," they contend.[23] In fact, when the progressive label was questioned the black man was generally the example used. Even the critics, however, admitted that in comparison with other southern states the paternalistic racial attitude of Key's "progressive plutocracy" was more moderate. The race issue remained out of North Carolina political campaigns by gentleman's agreement until 1950 when the pact was broken by Willis Smith.[24] The failure of this tacit suppression prompted the adoption of other methods of subduing the forces of racial discord.

With race a preeminent issue in the minds of North Carolinians, Thomas Hamilton initiated his organizing attempts in Columbus, Robeson and New Hanover counties. He met opposition from newspapers and civic

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[21]Valdimer Orlando Key, Southern Politics in State and Nation (New York, 1949), 205-211.

[22]Neal Peirce, The Border South States: People, Politics, and Power in the Five Border South States (New York, 1975), 113, hereinafter cited as Peirce, The Border South States.

[23]Preston W. Edsall and J. Oliver Williams, "North Carolina, Bipartisan Paradox" in William C. Havard, (ed.), The Changing Politics of the South (Baton Rouge, 1972), 418-419.

[24]Bass and De Vries, The Transformation of Southern Politics, 219.

groups. The Columbus County press reacted immediately. For two years the Whiteville News-Reporter and the Tabor City Tribune attacked the Klan in editorials and sought to expose their vigilante activities. For their courage the editors of the two newspapers, Willard G. Cole and W. Horace Carter received Pulitzer Prizes in Journalism for Meritorius Public Service. The North Carolina Junior Chamber of Commerce joined the battle led by Will Alexander's son William. Jaycee members attended Klan rallies, took photographs, and recorded speeches. The National Jaycee Organization recognized the younger Alexander's efforts in 1952 and awarded him a citation for useful public service.[25] Hamilton's group continued its late night crusade against alleged immorality with a vengence. Between January 18, 1951 and January 8, 1952, thirteen persons, mostly white, were kidnapped and flogged for supposedly immoral acts in Columbus County alone.[26]

Four court cases brought Klan activities in North Carolina to national attention, two in Columbus County, one in New Hanover County and the fourth in Robeson County. On February 6, 1952, the New York Times announced that Hamilton had been named Imperial Wizard of the Eastern Klans. Ten days later the Federal Bureau of Investigation arrested ten men in the kidnapping and flogging of Dorothy Dillard Martin and Ben Grainger, a white couple, from New Hanover County. Martin and Grainger had been taken to South Carolina for their beating thereby making it a federal offense. On February 27,

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[25]Dykeman and Stokely, Seeds of Southern Change, 301.

[26]News and Observer, April 3, 1952; Chalmers, Hooded Americanism, 338.

the North Carolina Bureau of Investigation took twelve men into custody in connection with the kidnapping of Esther Lee Floyd in Columbus County, six of whom were already charged in the Martin-Grainger case. Additional arrests in Columbus County brought the total to twenty-five men charged for six separate instances of kidnapping and flogging.[27]

Robeson County authorities adopted a slightly different tactic to combat the Klan. County Solicitor Malcolm B. Seawell revived an 1869 statute outlawing secret political societies and arrested sixteen men for being members of the Ku Klux Klan. The Robeson County case led to no convictions but was the most interesting of the concurrent North Carolina Klan trials. The solicitor reasoned that since Klan circulars and handbills urged members to "use the ballot box," the Klan, an admittedly secret organization, was by this activity also a secret political organization.[28] All but four of the sixteen arrested repudiated the Klan or otherwise explained their association. According to the nineteenth century law, disavowal of future membership was sufficient to dismiss the charges against them. The remaining four defendants appeared in Recorder's Court in Lumberton, North Carolina on March 8, but the state's witnesses were unable to attend and the judge dismissed the case.[29]

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[27] New York Times, February 6, 17, 28, 1952; March 21, 1952; News and Observer, March 5, 1952.

[28] News and Observer, March 26, 1952.

[29] News and Observer, March 8, 9, 1952; one of the men, Fentriss Hardin, a Fairmont police officer, was freed of charges when he satisfactorily explained his association with Klan members to Sheriff Malcolm G. McLeod.

Undaunted by this reversal, Seawell announced that the grand jury would convene two weeks later at which time he would have the four indicted in superior court on the same charges. The solicitor obtained the indictments and told the press that "he was using the law as a warning." He would not tolerate Klan activities. "If they break into a person's home for whipping or flogging a victim," he said, "I'll indict . . . for burglary in the first degree," a capital offense.[30] The case ended in a mistrial when the jury failed to reach a verdict, but Seawell made his position clear in his closing remarks when he stated, "Any Klan activity will be followed by arrest."[31] The charges were eventually dismissed.[32]

The Columbus County authorities also had difficulties prosecuting Klan members. District Solicitor Clifton L. Moore called a special grand jury to indict the twenty-five Klansmen charged with participation in five cases of kidnapping and flogging. The grand jury returned forty-four bills of indictment on March 31. Judge Clawson L. Williams presided over the trial and after a week's deliberation sustained a defense motion to quash the indictment on the grounds that blacks and white women were excluded from the special grand jury. A new grand jury was sworn in at noon and returned thirty indictments against twelve men for flogging a white man, Woodrow Johnson.

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[30] News and Observer, March 26, 1952.

[31] News and Observer, March 29, 1952.

[32] News and Observer, March 1, 8, 9, 25, 27, 29, 1952; April 1, 1952; May 15, 1952.

Solicitor Moore postponed indictments against the other Klansmen and told the press that new evidence promised to produce more arrests in the other cases.[33]

The new trial began May 6, 1952, with Judge Williams ordering special venires to bring in potential unbiased jurors from New Hanover County. Even with this special effort, since New Hanover County had its share of Klan trouble, jury selection alone took two full days. Before the trial opened eight of the defendants pleaded no contest to the charges. Judge Williams delayed sentencing them until the jury found the remaining four defendants guilty.[34] He then passed sentence on the twelve saying, "Somebody has been preying on Columbus County . . . . Someday he's going to be caught . . . he's going to be punished . . . at the bar of justice in North Carolina."[35] He did not specify who "somebody" was but the press speculated that the judge meant Hamilton.

Two other nationally prominent trials took place in May and July of that year. In Wilmington, North Carolina, Judge Donald Gilliam heard the Martin-Grainger case and on May 13, sentenced ten Klansmen to jail.[36] The following July, Judge Williams again presided in the Whiteville courtroom for a second Klan trial. Clifton Moore, county solicitor, obtained seventy-three indictments against Klan members

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[33]News and Observer, March 30, 31, 1952; April 28, 29, 1952; May 6, 1952.

[34]News and Observer, May 12, 1952.

[35]News and Observer, May 6, 7, 8, 9, 12, 1952.

[36]News and Observer, May 13, 14, 1952.

including Thomas L. Hamilton. The Imperial Wizard pleaded guilty to one charge of flogging Mrs. Evergreen Flowers. On July 31, 1952, Williams sentenced eighteen Klansmen to prison and imposed fines totalling $16,500 on forty-seven others. He gave Hamilton the maximum prison term for assault, seven years. The Klan leader began his sentence October 1.[37]

Ku Klux Klan activity subsided but only temporarily; a new rallying point soon presented itself. Two years after the North Carolina trials the United States Supreme Court ruled that segregated schools were inherently unequal in Brown v Board of Education. The following year the court instructed the lower courts to insure that desegregation begin with "all deliberate speed." Shortly after the school decision an Atlanta, Georgia automobile plant worker, Eldon Edwards, absorbed the remnants of the Georgia Association of Klans in a newly-chartered U. S. Klans, Knights of the Ku Klux Klan. In 1956, Edwards commissioned the Reverend James W. Cole to organize North Carolina. Cole, however, decided to become an independent and at a rally in Shannon, North Carolina later that year proclaimed himself Grand Wizard of the Carolina Klans.[38]

In demonstrating its opposition to the desegregation order the Klan used a variety of techniques; bombings, parades, rallies and cross burnings occurred throughout the state during the mid and late nineteen-fifties. In addition to the bombing of a home in Greensboro in late

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[37]New York Times, July 22, 29, 30, 1952; October 1, 1952; News and Observer, July 29, 31, 1952.

[38]Chalmers, Hooded Americanism, 343-347.

1957, there were two attempted bombings of synagogues in Charlotte and Gastonia that indicated the Klan had not lost sight of its old values.[39] James Cole spoke against integration of the schools but did not stop there; he also attacked the government, the courts, major corporations and non Protestant religions, all purported causes of the general moral decline. The Klan recalled its Christian mission to protest immorality which included racial integration. On Monday, January 13, 1958, James Cole and several of his followers set out to protest the alleged immoral activities of several Lumbee Indians in Robeson County.

In 1958, the population of Robeson County was composed of forty thousand whites, thirty thousand Lumbees and twenty-five thousand blacks. The exact origins of the Lumbee Indians are obscure but they claim descent from Manteo's tribe of Lost Colony fame. Legend has it when Scotch settlers moved into the area in the seventeenth century they found the Indians living in houses and speaking an Elizabethan dialect. In 1887, based on the Lost Colony theory, the North Carolina General Assembly designated them the Croatan Indians. Protesting that the name Croatan carried a negative connotation, the Indians petitioned the State Legislature in 1913 to redesignate them the Cherokee Indians of Robeson County. They remained "Cherokee" until a 1953 plebiscite renamed them the Lumbee Indians of North Carolina. The number of pure blooded Indians was small; the 1950 census listed the figure at 3,742.

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[39]Barbara Patterson, "Defiance and Dynamite," New South, 18 (May, 1963), 8-11, lists the bombing of a Negro home in October, 1957, and the attempted bombings of two synagogues, one in Charlotte in November, 1957 and one in Gastonia in February, 1958.

They had no tribal organization or language. The Lumbees were primarily farmers but some tribe members were tradesmen, mechanics and several served as city officials, law enforcement officers, judges and teachers. The center of Indian activity in Robeson County was Pembroke, North Carolina. In 1958, the population of Pembroke was 80 per cent Indian and the town's mayor, J. C. Oxendine, was a member of the Lumbee Nation.[40]

In 1958, the races were for the most part highly segregated. While in some parts of the county Indians and whites attended the same schools, separate school, jail, and nursing home facilities existed for each of the three races. The county schools, in fact, maintained four separate systems. Included in the population of Robeson County were between three and four hundred Smilings. The Smilings were members of a family, claiming to be Indians, who moved to the county from Sumter, South Carolina. They wanted their children to attend Indian schools but the Lumbees refused to allow this, insisting they were of mixed Indian and Negro blood. The Smilings, in turn, refused to allow the fifty or so affected children to enter black schools. In 1956, the Robeson County Board of Education resolved the matter by appropriating $50,000 to build a separate school for the Smilings. The Lumbees demonstrated strong racial pride. Their refusal to attend segregated schools with blacks initiated three way segregation. They

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[40]Adolph L. Dial and David K. Eliades, The Only Land I Know (San Francisco, 1975), 1-27, hereinafter cited as Dial and Eliades, The Only Land I Know; Charles Craven, "The Robeson County Indian Uprising Against the Ku Klux Klan," South Atlantic Quarterly, 57 (Autumn, 1958), 434, hereinafter cited as Craven, "The Robeson County Indian Uprising;" New York Times, January 20, 1958.

also continued exercising their right to vote after blacks had been disfranchised.[41] The clash between the Ku Klux Klan and the Lumbees was in large part the result of this intense Indian pride and demonstrated the Lumbees' political power within Robeson County.

On January 18, 1958, outside Maxton, North Carolina approximately twenty-five members of the Ku Klux Klan congregated for an announced rally, on a field leased for that purpose. The Reverend James W. "Catfish" Cole was the slated speaker; his topic was "Why I am for Segregation." Before the meeting could begin, however, an estimated five hundred Lumbee Indians arrived and routed the assembly. As a result, Klan leader Cole and one associate, James Garland Martin, were indicted and convicted on charges of incitement to riot. This is an account of that celebrated incident and an analysis of the constitutional issues involved. The paper attempts to examine the events as they occurred in light of contemporary Court opinions on freedom of speech and assembly as well as current assessments of those rights. It also attempts to examine the progressive political tradition in North Carolina in so far as it applies to this case. It contends that constitutional rights should take precedence over local concerns for order and tranquillity. In 1958, the government of North Carolina failed to perform one of its primary duties. It refused to protect the constitutional rights of two men.

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[41] Durham Morning Herald, January 20, 1958; New York Times, January 20, 1958.

CHAPTER 1

THE BATTLE OF HAYES POND

An account of the clash between the Ku Klux Klan and the Lumbee Indians must begin a full week before the actual riot because events that preceded the "Battle of Hayes Pond" actually caused the conflict. The weekend previous to the scheduled date of the Maxton rally a man identifying himself as "Guy" visited Bruce Roberts, Robeson County newspaper editor, in his offices in Lumberton. Roberts, a twenty-eight year old newcomer, purchased the Scottish Chief in Maxton and the Lumberton Post, local weekly papers in November of 1957. In addition to publishing his own weeklies he supplied reports to various newspapers and worked as a correspondent for the Fayetteville Observer and the Charlotte News. As a result of the conversation between Roberts and "Guy," the following Monday night, January 13, 1958, Roberts and Howard Taylor, his bookkeeper and handyman, went to a house on Fifth Street in Lumberton at 6:30 p.m. Here the newspaperman met the Grand Wizard of the Carolina Klans, Reverend James W. "Catfish" Cole.[1]

James Cole was a native of Kinston, North Carolina. A rowdy youth, he had a police record in Lenoir County that included drunkenness, disorderly conduct and assault charges. While living in Kinston Cole operated a taxi and performed odd jobs. His mother ran a fruit stand. During service in World War II, he decided to "start living a

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[1] New York Times, January 26, 1958; State of North Carolina v James Cole, James Garland Martin and others to the State unknown by name, March 1958 Criminal Term of Robeson County Superior Court, Record, 42-43, hereinafter cited as Trial Record.

new life"[2] and in 1947, in Orangeburg, South Carolina, he became a preacher. Nine years later, at a Klan rally in Shannon, North Carolina, Cole proclaimed himself leader of the Carolina Klans. At forty-two, he was a Southern Freewill Baptist minister, preaching primarily at tent revivals and Klan meetings. Cole's speeches at rallies were often religious, prompting one observer to conclude Cole's religion was a sort of Klan Christianity.[3] He condemned racial and religious minorities and major corporations and spoke vehemently against school integration saying, "If the Pearsall Plan [for continued segregation] was not enough, then the Smith and Wesson Plan is."[4]

While no evidence linked Cole to any Klan violence, his participation in two cross burnings on Monday, January 13, 1958, enraged the Lumbee population of Robeson County.[5] On that night in Lumberton, the Grand Wizard announced to Bruce Roberts that they had "a couple of crosses to burn."[6] Gathering from their conversation that the Klansmen sought publicity, Roberts agreed to accompany them. He drove his own car with Howard Taylor and James Cole as passengers. On the Klansman's instructions they followed several cars to St. Pauls, a small community

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[2]Fayetteville Observer, March 10, 1958.

[3]Trial Record, 18.

[4]Paul Mason testified to this and other statements made by Cole at a rally in late 1957 expressing his views on school integration, Trial Record, 63.

[5]Fayetteville Observer, January 22, 1958; New York Times, January 26, 1958; Trial Record, 27-28.

[6]Trial Record, 43.

in Robeson County. Stopping at a parking area they joined several other cars containing fifteen robed Klan members. Those not in costume, including Cole and "Guy," donned their regalia consisting of robes and hoods but not masks. The Wizard's robe was purple, sporting two crosses on the front.

The Klansmen proceeded to carry out what may best be described as a vigilante raid. Roberts, Cole and Taylor followed the Klan procession from the parking area for about two miles into the country where they turned onto a dirt road and stopped in front of a house. Here directly in front of the house, about one hundred fifty feet away, the Klansmen burned a cross six or seven feet tall. Roberts took a photograph of Cole and "Guy" standing beside the burning cross. Cole told Roberts that the Indian woman who lived in this house was having an affair with a white man and the cross burning was a warning to her.[7] Roberts learned that the Klan disapproved of a married woman with six or seven children running around with another man while her husband was in Florida. The Klansmen remained at the St. Pauls location for five or ten minutes before getting into their cars and driving down Highway 301 to East Lumberton. The newsman and his passengers followed the Klan cars until they stopped near an old mill in East Lumberton for a second cross burning. The Klansmen erected their cross on a vacant lot with some difficulty. It had begun to rain. When the cross was up and burning Cole informed Roberts that this action was a warning for an

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[7]Trial Record, 45; Fayetteville Observer, January 14, 1958; Charlotte News, January 15, 1958.

Indian family which had moved into a previously all white neighborhood. It was approximately 8:00 p.m. when Roberts left Cole and the Klansmen in East Lumberton. Both cross burnings had been quiet and orderly and the Klan members were careful not to trespass on private property. "We don't intend to break any law," Cole said.[8]

Bruce Roberts, believing he had witnessed a newsworthy event, informed the public. While he wrote no story for either his Lumberton Post or its Maxton counterpart the Scottish Chief, on Tuesday morning he telephoned his report to the Fayetteville Observer and the Charlotte News. That afternoon the Fayetteville Observer ran a front page story under Bruce Roberts' byline accompanied by a photograph of the flaming cross at St. Pauls. The following Wednesday the Charlotte paper ran a similar story. The articles reported that the cross burnings were "the first warning to the Indians of Robeson . . . who were trying to break down the barriers of segregation."[9] The papers also carried an announcement that a rally was to be held near Presbyterian Junior College on Saturday night.

Following the newspaper accounts of Klan activities, Robeson residents expected trouble. On Wednesday an editorial in the Fayetteville Observer warned the group "to get plenty of police protection" if it decided to burn a fiery cross in Pembroke. Mayor J. C. Oxendine called Robeson County Sheriff Malcolm G. McLeod to attend a meeting in Pembroke. McLeod arrived while the meeting was in progress

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[8]Trial Record, 42-47; Fayetteville Observer, January 14, 1958.

[9]Fayetteville Observer, January 15, 1958.

at the city hall auditorium around noon, accompanied by Assistant County Solicitor Charles McLean. About thirty Lumbees, the town council, composed of two whites and two Indians, and the mayor discussed "a possible problem arising out of community feelings, caused by both Indians and whites."[10] Several Indians asked the sheriff if they could carry guns, shotguns and rifles, to the rally in Maxton. The sheriff responded affirmatively telling them "the Constitution allowed them all to bear arms, but [they] couldn't carry a weapon concealed." However, he recommended that "the best thing for them to do was to stay away from the rally and not go at all."[11]

Area leaders were quick to deny any connection with the night riders. The Maxton town board met and unanimously passed a resolution condemning the policies and activities of the Ku Klux Klan. It urged citizens to boycott the rally scheduled for Saturday night and expressed belief that the only support for the rally came "from out of town professional agitators."[12] They were, no doubt, referring to three Klan organizers staying at the King Cole Hotel and young toughs who were handing out membership applications and putting up Klan stickers on store windows.[13] Maxton Police Chief Bob Fisher echoed this sentiment on Wednesday when he said, "We always have had good race relations here

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[10] Fayetteville Observer, January 16, 1958.

[11] Trial Record, 17.

[12] Fayetteville Observer, January 16, 1958; Scottish Chief (Maxton, North Carolina), January 17, 1958.

[13] New York Times, January 26, 1958.

and we don't intend to let any outside group stir up trouble now."[14] When questioned about a possible clash between the Klan and the Indians he claimed that reports were exaggerated, "townspeople here were treating it like a joke."[15] Regardless of Chief Fisher's statements several members of the Maxton Town Board felt the matter serious enough to issue publicly its resolution expressing strong feelings against the Ku Klux Klan and saying they hoped "that all our good Indian friends know that we want nothing to do with the Klan."[16]

Sheriff McLeod also took the matter seriously. After attending the meeting in Pembroke he called Sergeant G. D. Dodson, the officer in charge of the State Highway Patrol in Robeson County. McLeod then contacted Captain C. Raymond Williams, Commander of Troop B of the Highway Patrol stationed in Fayetteville. The sheriff had good reason to call for outside assistance since area merchants were reporting brisk sales of guns and ammunition. When reporters questioned him McLeod expressed his belief that the Klan only wanted publicity and that several papers by printing the story on the January 13 raid were doing a disservice. "The less publicity we give this sort of thing, the better off we all will be," he said and refused to comment further.[17]

The Lumbees were not silent. One Indian spokesman told newsmen that he suspected "quite a few of the young . . . Indians would attend,"

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[14]Fayetteville Observer, January 16, 1958.

[15]Durham Morning Herald, January 18, 1958.

[16]Fayetteville Observer, January 16, 1958.

[17]Fayetteville Observer, January 16, 1958.

while Mayor J. C. Oxendine flatly stated that Lumbees would definitely attend the rally, if one took place.[18] Furthermore, Oxendine stated, "there are thirty thousand of us and I understand about ten Klan members in the county. We ought to be able to keep things under control."[19] In general there were two reports from Robeson County. The United Press ran a story stating that the Lumbees would attend the rally and "wipe out the Klan" while Indians announced that no law enforcement officers would be present at the rally on Saturday night.[20]

Preparations for the rally began in earnest. At 3:30 a.m. Thursday morning Civil Defense leaders, Eugene Chavis and Leon Hunt, called an emergency exercise involving fifty volunteers. Whether it had anything to do with proposed rally, no one would say, but the Indians claimed to be organized for any eventuality.[21] With feelings continuing to run high on Thursday, Captain Williams drove to Robeson County in the morning and, together with Sheriff McLeod and Sergeant Dodson, telephoned James Cole at his home in Marion, South Carolina. Following the phone call the three men drove to Cole's home at 300 South Pine Street where they met with him for approximately thirty minutes to an hour. McLeod did most of the talking. He told Cole about the meeting in Pembroke on Wednesday and about growing tension among the

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[18] New York Times, January 17, 1958; Fayetteville Observer, January 17, 1958.

[19] Robersonian (Lumberton, North Carolina), January 16, 1958.

[20] Fayetteville Observer, January 17, 1958; News and Observer, January 17, 1958.

[21] Fayetteville Observer, January 20, 1958.

Indians in Robeson County over the Ku Klux Klan holding a rally in Maxton as advertised. The Indians were upset, he explained, by the articles in the Fayetteville and Charlotte newspapers. McLeod stressed that the Grand Wizard's statements reported in the press agitated the Indians and in the sheriff's opinion Cole's "life would be in danger if he made the same speech he had been making."[22]

Cole appeared surprised to learn of the Indian unrest. The Marion papers had not carried the story and he was unaware of any agitation. Furthermore, he flatly denied any "hard feeling toward the Indian people of Robeson County."[23] He told the policemen that he wanted no trouble and asked McLeod whom he should call to correct the misunderstanding. The sheriff responded that he should call Bruce Roberts. The Klansman then requested the name of an Indian leader to contact. McLeod's response is unclear. He either refused to answer the question or told Cole that there was not an official Lumbee leader but rather four separate Indian factions and he did not know whom to call.[24]

The Grand Wizard announced he was unafraid but he could cancel the rally. He did not say, however, that he would call off the meeting. Nor did the three officers tell Cole that the Klan could not hold its assembly. Responding to questions about the two previous cross burnings,

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[22]As sheriff, McLeod had attended two or three of the six to eight Klan rallies held in Robeson County. After a preliminary hymn and prayer Cole would begin his speech which generally included, "Damn the Negro, damn the Jews, Ford Motor Company, Phillip Morris Tobacco Company, and the Catholics." Trial Record, 8, 27-28.

[23]Trial Record, 8, 32.

[24]Trial Record, 25.

Cole informed McLeod that his group received permission from the land owners on January 13 and obtained a permit to burn the cross at East Lumberton from Fire Chief Ed Glover. McLeod knew from experience that this made acts legal. He had checked into the matter at an Ivey's Crossroads rally in late 1957. The Klan's activities on Monday night had been entirely within the law. The sheriff had no grounds to forbid the proposed meeting. Cole refused to give the officers a definite answer about cancelling the rally and the three departed.[25]

Late Thursday afternoon Cole initiated his efforts to mollify the Lumbees. He telephoned Bruce Roberts and asked for another news story to correct the impression left by articles written under Roberts' byline. What Cole requested was a retraction indicating that he bore no animosity toward the Indian race. He stressed that the St. Pauls cross burning had been prompted by alleged infidelity, not racism. The Indian was a married woman with children and a white man was trying to break up her home.[26] Furthermore, the Klan would not back down, asserted Cole, they would hold their rally. In response to Cole's requests, Roberts denied he had any control over what the Fayetteville paper printed and the Klan leader would have to call the newspaper office if he wanted a retraction.[27] Cole took Roberts' advice because the Friday afternoon edition carried his conciliatory statements. Bruce Roberts and the Fayetteville Observer were responsible for Indian anger, he

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[25]Trial Record, 7-8, 17-20, 25, 32, 39.

[26]Trial Record, 46.

[27]Trial Record, 42-47.

maintained.[28] Cole made a real effort to pacify the Lumbees saying:

> You gave the people the impression that our activity was intended for the Indians, which was a direct misinterpretation. The Indians of Robeson County are not leading the way to integration; the Indians are the most segregated people in the United States . . . We have no quarrel with the Indians, none whatsoever.[29]

When asked if the Klan would call off the rally Cole stated,

> If we were to call it off it would be for the best interest of race relationships. We are not out for violence, we would be the last one in the world to hold a rally that would cause violence. I don't see why there should be any Saturday night.[30]

Response to the Grand Wizard's efforts was mixed. J. C. Oxendine declared, "there will be no violence at the Klan rally unless they insult somebody during their speechmaking,"[31] but others were less certain. Simeon Oxendine, Indian service station operator, contradicted his father saying "there will be something going on at the rally," without speculating what that something might be.[32] Generally, however, newspapers carried the elder Oxendine's statement that there would be no trouble without Klan provocation. Doubting the sincerity of Cole's

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[28] Fayetteville Observer, January 17, 1958; Greensboro Daily News, January 18, 1958; News and Observer, January 18, 1958. Simeon Oxendine, son of Pembroke's Lumbee Mayor, made statements contradicting this. Indians and whites in Robeson County had been inter-marrying for twenty-five years, he claimed, and some Indians and whites attended the same schools, churches and Boy Scout troops.

[29] Fayetteville Observer, January 17, 1958.

[30] Fayetteville Observer, January 17, 1958.

[31] Fayetteville Observer, January 18, 1958; Greensboro Daily News January 18, 1958.

[32] Greensboro Daily News, January 18, 1958.

remarks the Lumberton Chamber of Commerce, Agriculture, and Merchants' Association met with Mayor R. A. Hedgepeth and adopted a resolution abhorring, condemning and rejecting the Robeson County Ku Klux Klan and its program of spreading racial hatred among the citizens of Lumberton and Robeson County, "and particularly their recent campaign to disrupt relations with members of the Indian race."[33] Perhaps fearing indiscriminate violence against whites by Lumbees they hastened to disavow the Klan saying they would not tolerate such activities and calling on all citizens to maintain their good race relations.

Since it was still undecided whether the rally would even take place, local residents tried to minimize reports of potential violence. Sheriff McLeod told reporters that the Klan had not requested special protection for this rally. However, late Friday the Klan reached a decision and James Cole issued a statement indicating that they would proceed with their original plan. "We came dangerously close to calling this whole thing off," he said. We had a meeting about it last night . . . but we had gone this far; we knew we had to go through with it."[34] Cole went on to request police protection. Still insisting that he felt there would be no trouble at the rally, he urged that regardless, "the KKK should receive the same protection as Negro pupils in Little Rock."[35]

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[33] News and Observer, January 18, 1958.

[34] Durham Morning Herald, January 18, 19, 1958; News and Observer, January 18, 1958; Greensboro Daily News, January 18, Fayetteville Observer, January 17, 1958.

[35] Fayetteville Observer, January 18, 1958.

Acting on Cole's announcement that the Klan intended to exercise its right of assembly, area police agents met to formulate a single plan for action. On Saturday morning at 11:00 a.m. Captain Williams, Sergeant Dodson, Sheriff McLeod, and McLeod's deputies, Ralph Purcell and Craig Sampson, accompanied Maxton Chief of Police Bob Fisher to the proposed site of the rally. There they "decided on strategy to be used in the event a riot did occur."[36] Williams and McLeod agreed that they could not prevent violence by being present that night so they decided to maintain a low profile. They feared that if they appeared in force "the Klan would feel they had somebody to stand between them and any other people who might have opposing interest and that they would go ahead and hold the rally and real trouble would result."[37] Williams checked the weather reports and learned that the wind would be blowing from the same direction for twenty-four hours. They decided to station two deputies armed with tear gas near the highway. If a riot occurred, they would launch the tear gas grenades, and the remaining officers would be mobilized after the grenades were thrown.[38]

Trouble did occur that night but the Klan meeting never got underway; an Indian attack prevented it. The rally was scheduled to begin at 8:30 p.m., Saturday, January 18, 1958 on a 200 acre open area leased from a white farmer, C. A. "Cateye" Brown, Jr. The field was located between Hayes Mill Pond and Presbyterian Junior College, one mile

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[36]Trial Record, 33, 38.

[37]Trial Record, 38.

[38]Trial Record, 24.

outside the small community of Maxton, ten miles from Pembroke. The site was bordered on one side by highway, on one end by woods, and on the opposite end by Hayes Pond Road, beyond which lay Hayes Mill Pond. Finally, a farm road almost parallel to the highway ran from Hayes Pond Road through the field forming the fourth boundary of the proposed rally site.[39]

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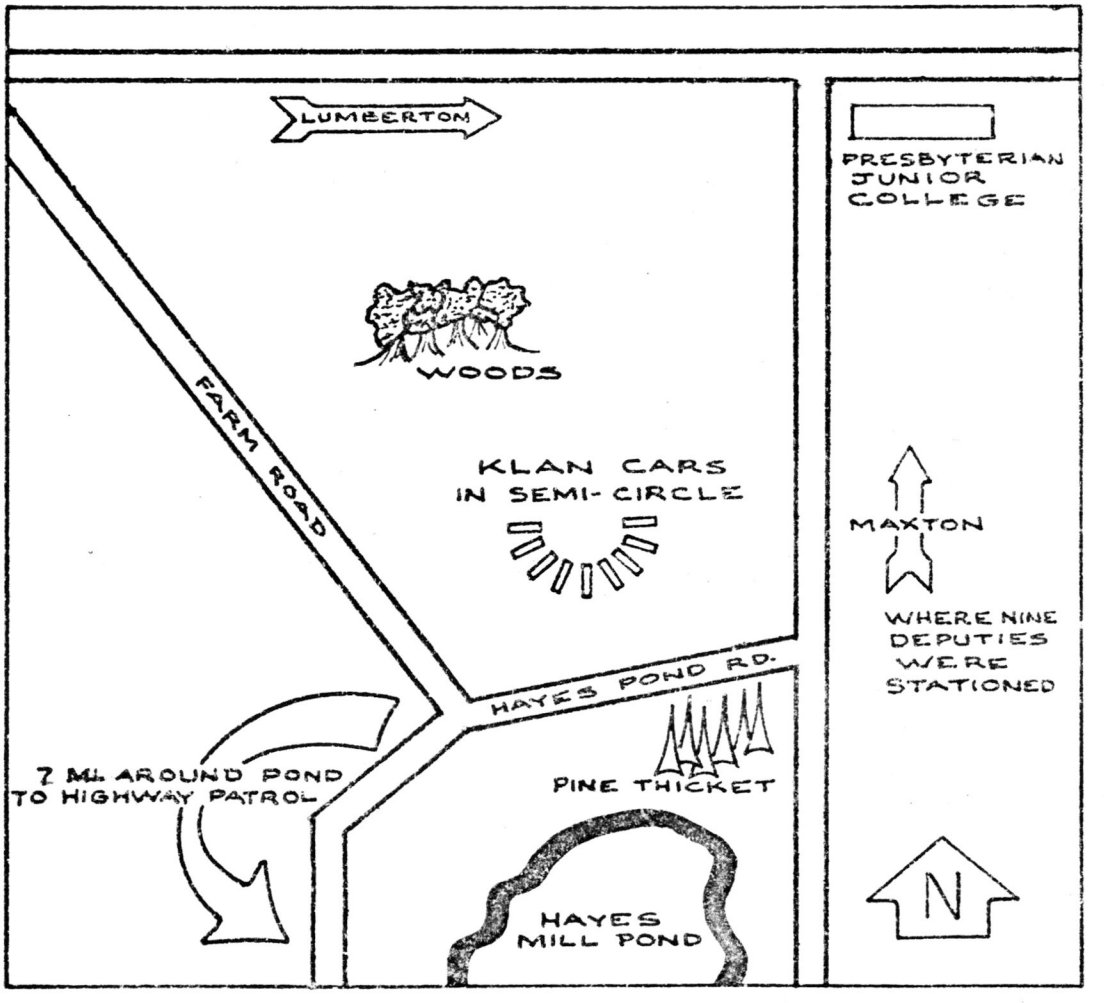
[39]Trial Record, 13, 29, 33, 40; Winston-Salem Journal, March 10, 1966. The map is a reconstruction from testimony of various witnesses and may not be accurate.



It was bitter cold and dark as the first participants arrived between 6:30 and 7:00 p.m. Among the first to reach the scene were Charles Craven, reporter for the Raleigh News and Observer and his news photographer, Thomas Inman, who had received directions from Chief Fisher in Maxton.[40] Several car loads of men recognizable as Klansmen soon joined the two newsmen. One Klan member wore a robe and Craven noted that most of them were armed with shotguns and pistols. One was dressed as a cowboy with an appropriate hat, two side holsters and boots. The others called him "Tex." When Craven approached the one robed Klansman, one of the others had called "Trent," the man responded that "some newspapermen are all right and some ain't."[41] Craven asked about the expected size of the attendance and Trent responded by telling him "the Klan doesn't talk to you."[42] Charles Craven resented the Klan's refusal to give him the information that he wanted. The presence of weapons frightened him and influenced both his news stories and his later testimony at the trial.[43]

Within ten minutes more people began to arrive. Many of the cars parked on the shoulder of the road. Some individuals got out, some remained in their automobiles. "Tex" began waving cars into the field calling "Klan meeting."[44] Approximately every tenth car pulled in while

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[40]Trial Record, 54; Craven, "The Robeson County Indian Uprising," 435-436.

[41]Craven, "The Robeson County Indian Uprising," 437.

[42]Craven, "The Robeson County Indian Uprising," 437.

[43]Craven, "The Robeson County Indian Uprising," 437; Trial Record, 59-60; News and Observer, January 19, 1958.

[44]Trial Record, 56.

the others parked along the highway. When the occupants descended from the road Craven noticed they were Indians. They began forming a line along the road and ditches that ran parallel to it. The Klansmen had positioned themselves in the center of the field around the semi-circle of parked cars. They had raised a banner with KKK on it and erected a pole with a bare light bulb attached. It was about 8:00 p.m.[45] Shortly thereafter the sheriff arrived. McLeod reached the field by way of the farm road at the rear of the rally site. He was not in uniform but his deputy, Ralph Purcell, was. They entered the field and were met by eight to ten armed Klansmen. The officers identified themselves and said they wanted to see James Cole. The group walked toward the center of the field where they found Cole working on an electric generator.[46]

Cole and McLeod conversed for some fifteen minutes. The Grand Wizard confided that he had not wanted to come but that the others had insisted. However, as long as he was there, he asserted that he was "due protection under . . . constitutional rights of lawful assembly."[47] The sheriff responded to Cole's demand by denying that it was a lawful assembly because the Klansmen carried guns. Cole, McLeod noted, carried no weapons. Several reporters wanting interviews joined them. From their positions along the road the Indians began catcalling and calling

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[45]Trial Record, 54; Craven, "The Robeson County Indian Uprising," 457; Fayetteville Observer, January 20, 1958.

[46]Trial Record, 10, 64.

[47]Trial Record, 23.

for James Cole. The sheriff warned that he could not offer the meeting any protection, claiming he had only four deputies and urged Cole to cancel the rally. The Klan leader offered to "tone it down some,"[48] but McLeod insisted that if he had 150 deputies he did not think he could "keep the Indians of Robeson County from coming in that field."[49] A Klan member, James Garland Martin, interrupted their conversation. Martin approached Cole about Mrs. Cole and her children who were still in one of the cars on the field. The Grand Wizard responded, "She will be all right."[50] Two minutes later he reversed his decision and instructed Martin to take them to another car on the road. Martin escorted Mrs. Cole and the children to safety and Klansman Red Morgan, a High Point, North Carolina, service station owner, drove them to Hamlet.[51]

The encroaching Indians caused Cole's change of heart. The Lumbees on the field encircled the cars where the Klansmen had gathered. An elderly man approached Cole and asked, "Governor, do you want to put the ropes up now to keep the crowd back?"[52] Cole vetoed the idea,

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[48]Trial Record, 64.

[49]Trial Record, 23.

[50]Trial Record, 21.

[51]Agent L. E. Anderson to Walter F. Anderson, Director of the Bureau of Investigation, North Carolina Department of Justice, February 14, 1958, Governor Luther H. Hodges, Governors' Papers, General Correspondence, 1958, State Archives, Raleigh, North Carolina, hereinafter cited as Governor Hodges' Papers.

[52]Trial Record, 11.

saying, "Don't put the ropes up; if you do, it will make them worse."[53] McLeod after witnessing this exchange said, "Now you see how it is. You've leased the property and you have a legal right to be here, but you see how it is."[54] The yelling grew louder. Cole did not tell the sheriff that he intended to go ahead with the rally. In fact, the Durham Morning Herald printed a quote from McLeod on January 19 that the shooting broke out as Cole was about to call off the meeting.

The assault began ten or fifteen feet from the generator where a light bulb hung from a pole. Just beyond this pole was the public address system. One man stood between the Indians and that amplifier, a frail looking man in a lightly colored cap and glasses holding a microphone in his hand. Two armed Indians moved toward this Klansman. One, with a .22 calibre rifle, hit the light bulb with his gun barrel causing it to shatter. The second Indian, aiming his shotgun directly at the Klansman, moved forward. The first Indian then attacked the Klan member hitting him on the left side of his head with his rifle butt while a third Indian snatched the microphone from his hand. The man offered no resistance and as he was knocked aside the Lumbees encircled the public address amplifier. None of the other Klansmen moved to assist their frail comrade. Bill Shaw, a photographer for the Fayetteville Observer, was at the scene and photographed this sequence of events. These pictures clearly showed the faces of the Indians

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[53]Trial Record, 21.

[54]News and Observer, January 19, 1958

who initiated the attack. They were published in various newspapers and in Time and Life magazines.[55]

As the Indians attacked, Sheriff McLeod and Deputy Purcell left the field, returned to their car and called for help. Nine deputies two miles away at Maxton Air Base and Captain C. Raymond Williams and fifteen Highway Patrolmen stationed across the pond six or seven miles away at Seven Bridges School, awaited this call. McLeod and Purcell were in the car when shooting broke out.[56] They left behind only two deputies, Charles Morgret and Dickson Britt, dressed in civilian clothes, armed with tear gas. The sheriff claimed that if he had called the Highway Patrol before trouble actually started "twenty or thirty would have been killed."[57] He later testified that he had not brought along more deputies because "we didn't know exactly what was going on until we got up there."[58] After issuing the call for help, McLeod chose not to return immediately to the field where shots were being fired; instead he drove his automobile down the farm access road and up Hayes Pond Road to the highway. By the time he reached the rally site again the Highway Patrol armed with submachine guns was already there. The nine deputies were stuck in traffic and could not reach the scene.[59]

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[55]Trial Record, 52-53; "The Natives are Restless," Time, 71 (January 27, 1958), 20; "Bad Medicine for the Klan," Life, 44 (January 27, 1958), 26-28; Fayetteville Observer, January 19, 1958; New York Times, January 19, 1958.

[56]Trial Record, 24, 33.

[57]News and Observer, January 20, 1958.

[58]Trial Record, 23.

[59]Trial Record, 23; News and Observer, January 20, 1958; Charlotte Observer, January 19, 1958.

Pandemonium ruled on the field. Shortly after the light bulb was broken, while Indians destroyed the amplification system, deputies Morgret and Britt launched their two tear gas grenades, "to prevent a head-on clash between Klan members and Indians."[60] The Klansmen hung back, watching. When the shooting broke out, despite the fact that at least one fourth of them were armed, no Klan member returned the fire.[61] The Lumbees moved toward the Klansmen completely surrounding their cars, yelling war whoops, firing their guns in the air and slashing the tires on automobiles parked in the field. A woman and three children fled from one of the Klan cars, they ran across the field, "the woman half dragging the smallest child."[62] One Indian wore a cardboard war bonnet emblazoned "Souvenir of Chimney Rock, North Carolina."[63] Four people were wounded, two newspapermen, one Klansman and a soldier from Ft. Bragg who had gone AWOL to watch the rally.

The "battle" raged for nearly ten minutes before Captain Williams and the highway patrolmen arrived, between 8:15 and 8:30 p.m. Once on the scene they required an additional thirty minutes to bring the situation under control. When they arrived shots were still being fired. One group was crouched behind cars firing at the others who were

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[60] New York Times, January 20, 1958.

[61] New York Times, January 19, 1958; January 20, 1958; News and Observer, January 20, 1958; Greensboro Daily News, January 20, 1958.

[62] Craven, "The Robeson County Indian Uprising," 439.

[63] Time Magazine reported that the headdress was marked "Souvenir of Chimney Rock, North Carolina but Charles Craven reported that it read "Rock Cola." In either case they agreed it was made of cardboard. Several Indians had painted their faces as well. Time, 71 (January 27, 1958), 20; Craven, "The Robeson County Indian Uprising," 438.

"ducked behind automobiles, not doing anything but ducking; there were shouts from the field, complete disorder."[64] The patrolmen ran between the two groups where the Klansmen were trying to escape but the Indians were dragging them from their cars. Some of the Klan vehicles stuck in the sand as they tried for a quick exit.[65] The state troopers moved in and confiscated weapons, collecting two car trunks and a backseat full of artillery which included rifles, shotguns, pistols, black-jacks and knives.[66] Captain Williams used a public address system, with Civil Defense printed on it, to call for order. The Klan's amplification system was completely destroyed. Several Indians responded, shouting to the rest of the crowd, "We will respect the state troopers, but the Klan has to go."[67] The shooting stopped but instances of violence continued as Indians dragged Klansmen from their cars.[68] The patrolmen expedited the departure of the Klan automobiles. Sheriff McLeod confiscated no weapons but tried to help the Klansmen leave the field. As the commotion died down, the sheriff, using the microphone supplied by the Civil Defense announced, "Hurry home, boys, you have time to see 'Gunsmoke.'"[69]

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[64]Trial Record, 34; Charlotte Observer, January 20, 1958.

[65]Trial Record, 37; Charlotte Observer, January 19, 1958.

[66]Trial Record, 15, 36. The captain testified that they confiscated two pistols from a man dressed as a cowboy. The pistols were introduced as evidence along with numerous other weapons.

[67]Trial Record, 34, 41; Greensboro Daily News, January 19, 1958.

[68]Trial Record, 34.

[69]Trial Record, 30.

The field was finally clear at 10:30 p.m. Most of the Klan cars drove away but two remaining autos with slashed or bullet riddled tires had to be towed. No arrests were made on the field, as Williams and McLeod had previously agreed. The sheriff feared the reaction of the Indians if he attempted to arrest anyone. In fact, no Indians were ever charged even though McLeod later admitted recognizing two members of the Lumbee community, Weldon Lowry and Harry West Locklear, the Pembroke Chief of Police.[70] After most of the crowd had left, they captured one man, a Klan member, James Garland Martin. Patrolmen James S. Jones and Jack Stewart found him staggering out of the woods across the road from the rally site and promptly arrested him for drunkenness and carrying a concealed weapon. Martin had an unloaded shotgun and wore a pistol half hidden by his jacket.[71]

Although the riot had ended, Robeson was not a quiet county. The jubilant Lumbees commandeered the KKK banner and the unburned cross. Simeon Oxendine and Charlie Warriax posed grinning, wrapped in the captured flag, for photographers. The picture appeared in Life magazine. At 11:30 p.m. on Saturday night the Indians celebrated their victory. They burned their cross at midnight, with an effigy marked "Jim Cole" bound to it, while five hundred Lumbees cheered and laughed.[72] Armed Indian vigilante groups patrolled the immediate area either for fear of Klan reprisals or in search of Klansmen who had escaped on foot through

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[70]Trial Record, 13-14; New York Times, January 20, 1958.

[71]Trial Record, 41; New York Times, January 23, 1958.

[72]Fayetteville Observer, January 20, 1958; New York Times, January 19, 1958; Life, 44 (January 27, 1958), 28.

the woods. One Indian patrol stopped a car carrying three United Press reporters and the WTOB News Director.[73] Twelve armed men in three cars searched, threatened and questioned the four newsmen before allowing them to return to their automobile. As the reporters pulled away shotgun blasts blew out their tires but they were unharmed and their attackers did not pursue them. At 4:00 a.m. Sunday, Mrs. Cole phoned Sheriff McLeod to report she had not seen or heard from her husband. She requested the sheriff search the area. McLeod did so later that day but found no one.[74]

Simeon Oxendine and Charlie Warriax drove to Charlotte with their KKK banner and their own version of the events. They appeared at the offices of the Charlotte Observer on Sunday morning. Oxendine made contradictory statements which appeared in various newspapers. He denied that the Indian action Saturday night had been planned, but he was quoted as saying, "I told the boys to take it easy. Slap them around a little if you have to, I told them, but don't hurt 'em . . . ."[75] Reports indicated the Lumbees met prior to the action and supposedly they decided to allow the Klan to make the first move.[76] Oxendine claimed, ironically, that if the Klan had said the crosses burned the previous Monday night

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[73]The four newsmen stopped were Richard Hatch, Alvin B. Webb, and Alan Lloyd of United Press and the WTOB News Director, George Thomas. The UP carried the story of the incident. New York Times, January 19, 1958; Durham Sun, January 20, 1958.

[74]Greensboro Daily News, January 20, 1958.

[75]Charlotte Observer, January 20, 1958; Durham Morning Herald, January 20, 1958.

[76]Dial and Eliades, The Only Land I Know, 160, 162.

had been in protest of immoral activities, and not because the woman was an Indian, "there might not have been any trouble."[77] He described for reporters how the Klansmen had begged the Indians to let them go. Further he made it clear that there would be bloodshed if the Klan returned. The Indians were unanimous in the assertion that they would do it again, if necessary, "and next time we won't miss."[78]

Immediate press response was highly complimentary of Lumbee actions at the event that the Fayetteville Observer dubbed the "Battle of Hayes Pond." In fact, the Indians were given credit for preventing considerable bloodshed through organization and control. The Pembroke Civil Defense received special mention for its role in the events.[79] Lumberton whites were "outspoken in their admiration of the Indians and their part in breaking up the proposed rally," and Sheriff McLeod was grateful there were no fatalities.[80] The Indians were treated as heroes until newspaper editorials charged that lawless action of one group did not justify lawless retaliation. The New York Times led with an editorial which appeared Monday calling the Indian action "clearly illegal" and probably "unnecessary" since the sheriff, his deputies and the

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[77]Charlotte Observer, January 20, 1958; Fayetteville Observer, January 20, 1958; News and Observer, January 20, 1958.

[78]Fayetteville Observer, January 20, 1958.

[79]Fayetteville Observer, January 20, 1958.

[80]Greensboro Daily News, January 20, 1958; New York Times, January 20, 1958.

Highway Patrol were aware of the possible difficulties.[81] National news magazines made light of the "Battle of Hayes Pond" and J. C. Oxendine and his son went to New York to appear on television.

The two Oxendines were invited to New York City by Barry Farber, then producer of the "Tex and Jinx Show." Celebrities Tex McCrary and Jinx Falkenburg hosted this interview program which aired on television during the day and broadcast on radio from the Waldorf Astoria Hotel at night. The mayor and his son appeared on both radio and television. When asked recently if they admitted leadership responsibility for the Indian attack, Farber replied emphatically yes. "Admit it," he said, "they were thrilled. They came draped in the flag . . . they had captured the KKK flag that night."[82] While the Oxendines were in New York boasting of their responsibility for and participation in the rout to a national audience, enjoying their roles as folk heroes, the wheels of justice in North Carolina began to turn.

Action to seek out and punish the guilty parties got underway the day following the rout. Sheriff McLeod announced that he sought to indict James Cole and James Garland Martin on charges of inciting the Indians to riot, a misdemeanor carrying a possible sentence of twenty-four months. Cole from his home in Marion, made several statements and indicated he was contemplating legal action against the sheriff. He

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[81] New York Times, January 20, 1958. A second New York Times article reported that there was a general feeling in Robeson County "that some arrangement was worked out between the Indian leaders of the county and Sheriff Malcolm McLeod to let the Indians teach the Klan a lesson." New York Times, January 26, 1958.

[82] Cynthia Fox interview with New York television and radio personality, Barry Farber, August 15, 1979.

requested but failed to receive protection for a lawful assembly, he told reporters.

> My rights under the First amendment to the Constitution were violated. We are a Christian Fraternal group and we have a right to assemble and to free speech. And my rights under the Fourteenth amendment were violated. It says all races are guaranteed equal protection under the law, and I didn't get it. We were meeting on private property we had leased when these Indians invaded us, shot us up and stole our equipment. Now I hear the sheriff wants to indict me and other Klansmen for inciting a riot, but he's not going to do anything about the Indians. I asked for protection before this started and I was refused. I'm being denied my rights because of my race.[83]

Cole described the clash of Saturday night as "one of the most horrible things I've ever seen . . . one of the most awful."[84]

Regardless of the Grand Wizard's charges the sheriff persisted with his announced plans. The Robeson County Grand Jury, composed of thirteen whites, three Indians and two blacks, met before Superior Court Judge Clawson L. Williams on January 20, 1958, and indicted James Cole, James Garland Martin and their unidentified accomplices. The jurors unanimously agreed that:

> . . . James Cole and James Garland Martin and others to the State unknown by name, . . . with force and arms, . . . together with other persons . . . of a total number of more than ten, did willfully, riotously and unlawfully assemble together of their own authority in such manner . . . as to reasonably create in the minds of firm and courageous persons a well-founded fear of threatening danger to the public peace, to wit: that they, . . . while armed . . . did assemble near the Town of Maxton

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[83] Durham Sun, January 20, 1958; New York Times, January 20, 1958; Fayetteville Observer, January 20, 1958.

[84] Durham Sun, January 20, 1958.

> for the common purpose of conducting a . . . rally . . . with the common intent to preach racial dissension and to coerce and intimidate the populace, and with the common intent to carry out said purpose in a violent and turbulent manner to the terror of the people, with the common intent mutually to assist one another against all who should oppose them, although they well knew, and had been warned, that their prior conduct and pronouncements against the Indians of Robeson County had incensed and inflamed said Indians against them, and that large number of said Indians intended to appear in armed force at said meeting, and that to hold said meeting would cause violence and a breach of peace, . . . [they] did persist in attempting to hold said meeting to which the general public had been invited, although the Sheriff of Robeson County did then and there notify . . . James Cole, . . . that any such action would cause violence . . . and did counsel . . . Cole to disperse his followers to preserve the public order, which . . . were ignored by . . . Cole; and that, as a result . . . violence, riot and tumultuous disturbance . . . did ensue among . . . James Cole, James Garland Martin, and their followers, and the hundreds of others gathered at their invitation and instigation, that guns were fired in anger, and that persons were injured, to the terror, disturbance and danger of diverse citizens . . . there and . . . by the . . . conduct aforesaid, . . . [they] willfully and unlawfully did incite a riot . . .[85]

Following indictment, the state issued warrants against Cole and Martin based on statements Martin made to the sheriff that all Klansmen were instructed to carry arms to the Maxton rally. Martin maintained that Jack Williams of Charlotte signed an order to the effect that Klansmen should carry guns to all future rallies as a symbol of greater authority.[86] Klansmen had carried guns to at least one previous rally in

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[85]Trial Record, 2-3.

[86]Williams' role in the Klan is not explained but Charlotte is referred to as headquarters. Trial Record, 28; Durham Morning Herald, January 21, 1958; L. E. Allen to Walter F. Anderson, January 27, 1958, Governor Hodges' papers.

Greensboro in December, 1957, without inciting a riot.[87] Robeson County Solicitor, E. Maurice Braswell, issued a capias for the arrest of James Cole. Under a capias he could not be extradited, but South Carolina officials could arrest and hold him for North Carolina officers or Cole could be arrested if he entered North Carolina again. Superior Court Judge Clawson L. Williams recommended bond of $1000 be set for Cole if and when he were apprehended.[88]

The Grand Wizard failed to surrender himself on Tuesday, and Judge Williams declared him a fugitive. The judge signed a writ which was mailed to police in Marion asking that Cole be arrested and held for North Carolina officials. A copy of the writ went to the State Bureau of Investigation in case Cole attended a scheduled rally in Burlington, North Carolina.[89] In Marion, South Carolina, County Sheriff J. Leon Gasque, received the writ from Robeson County and called Cole to inform him. Cole had already spoken with Sheriff Gasque and indicated when the order arrived that he would post bond rather than waive extradition. The Klansman then surrendered and posted bond to guarantee appearance at an extradition hearing. Robeson Solicitor Braswell requested extradition proceedings from Governor Luther H. Hodges that same morning. Hodges then forwarded the request to South Carolina Governor, George Bell Timmerman, Jr. A trial date was set for January 29, before Judge Clawson Williams in Robeson County Superior Court. From South Carolina

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[87]Trial Record, 61-62.

[88]Durham Morning Herald, January 21, 1958.

[89]New York Times, January 22, 1958.

Cole claimed he would fight extradition on the grounds "that his life would be in jeopardy if he returned to Lumberton."[90]

While Cole fought to remain in South Carolina, James Garland Martin stood trial in Robeson County Recorder's Court on charges of public drunkenness and carrying a concealed weapon. Martin, a thirty-seven year old tobacco plant worker from Reidsville, was a Titan in the Carolina Klavern in charge of organizing three upstate counties. As Titan he examined membership applications, collected membership fees and dues, ordered robes and leased land for Klan rallies. Patrolmen arrested Martin Saturday night for carrying an unloaded shotgun and wearing a .32 calibre automatic pistol in a holster half-hidden by his jacket. Because he staggered, they added the charge of public drunkenness. In his trial on January 22, Martin served as his own attorney. He admitted that he had been drinking, but claimed he staggered because of the tear gas. His pistol, he asserted, was not concealed but carried openly in a side holster. Officers would admit in later testimony that the holster was only partially hidden and that Martin might have been merely dazed rather than drunk. The judge in Recorder's Court was an Indian, Assistant Judge Lacy Maynor. The charges carried a maximum sentence of two years in jail and $100 fine. Before passing sentence on him, Judge Maynor told Martin, "he was being tried as an individual violator of the peace not as a Klansman." However, Judge Maynor took the opportunity to make a

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[90] Fayetteville Observer, January 22, 1958; New York Times, January 23, 1958.

public statement concerning the Klan activities in the county. From the bench he lectured,

> You came into a community with guns, where there was a very happy and contented group of people. We don't go along with violence . . . . If your organization had something worthwhile to offer us, we would be glad to have you. But the history of your organization proves that it has nothing to offer.[91]

Martin announced he was resigning from the Klan and was sorry he had ever joined. Maynor fined Martin $60 and $14.75 for court costs in lieu of a sixty-day suspended sentence.[92]

A rally had been scheduled for Saturday, January 25, in Burlington, North Carolina, but no one distributed handbills or posted advertisements and it was doubtful whether it would be held. The Alamance County Sheriff, Joe Cole, stated his position clearly, "they have a right to their meeting, but we will be there to make sure it remains orderly, if it comes off at all."[93] The Klan cancelled the rally but two thousand attended anyway. No speakers arrived and the only result was a large traffic jam on the field where the rally was to have been held. James Cole said the meeting had been postponed due to rain and was rescheduled for February 3. The Fayetteville Observer published an article stating a top Virginia Klan official, James F.

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[91]Fayetteville Observer, January 22, 1958; Dial and Eliades, The Only Land I Know, 160.

[92]Fayetteville Observer, January 22, 1958; New York Times, January 23, 1958.

[93]Fayetteville Observer, January 25, 1958.

Milligan of Newport News, had visited Cole to discuss the possibility of a second "giant rally in Robeson County."[94]

Governor Hodges issued a warning to the Ku Klux Klan saying "on the Klan rested squarely the responsibility for the Maxton incident in which the Klansmen were routed in a hail of gunfire by aroused Indians."[95] He further cautioned Klan leaders of possible prosecution for law violations connected with future Klan rallies. James Cole said that this warning meant jail sentences for Klan activities. The Governor's message drove the Klan underground in North Carolina.[96]

On Monday, January 27, 1958, James Cole requested a hearing, before Governor Timmerman, on the North Carolina extradition proceedings. On February 7, the Governor ordered Cole returned to North Carolina to face charges with James Garland Martin of inciting the Indians to riot. He traveled to North Carolina to post bond and then returned to South Carolina where he remained until his trial in Lumberton on March 11, 1958.

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[94]Fayetteville Observer, January 25, 1958; January 27, 1958; New York Times, January 26, 1958.

[95]Fayetteville Observer, January 30, 1958; New York Times, January 31, 1958.

[96]Fayetteville Observer, March 10, 1958. Agent L. E. Allen to Walter F. Anderson, January 27, 1958, Governor Hodges' papers.

CHAPTER 2

AT THE BAR OF JUSTICE IN NORTH CAROLINA[1]

Lawyers Charles B. Nye and P. W. Glidewell Jr., appeared before Judge Clawson L. Williams in the March, 1958 criminal term of Robeson County Superior Court in Lumberton, North Carolina. Charles Nye represented James Cole. A Robeson County native, Nye practiced criminal law there successfully for many years before moving to corporate offices in Durham, North Carolina. When Cole first approached Nye, the lawyer refused to take the case telling the Grand Wizard that he had retired from criminal practice. However, he reconsidered after receiving several phone calls from whites in Robeson County requesting that he represent the Klansman. Nye's reputation as a criminal attorney in Robeson was excellent and some white residents wanted the best possible defense for Cole, sensing that his chances for acquittal were not good.[2] James Garland Martin retained Reidsville attorney, P. W. Glidewell, Jr. Glidewell's defense was unspectacular.[3]

The judge, seventy-one year old Clawson L. Williams, a veteran of twenty-four years on the bench, was known as a hanging judge.

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[1]While sentencing Klansmen in Columbus County in 1952, Judge Clawson L. Williams stated, "Somebody has been preying on Columbus County. Somebody down the line has been reaching out with a greedy hand. Someday he's going to be caught. Someday he's going to be punished. It's not going to be at the great Judgment Day. It's going to be at the bar of justice in North Carolina." News and Observer, May 12, 1952.

[2]Cynthia Fox interview with Durham, North Carolina attorney, Charles B. Nye, March 9, 1978, hereinafter cited as Nye interview.

[3]Charles Nye recalled that Glidewell was indicted for income tax evasion several years later, Nye interview.

Williams in 1952, presided at the Columbus County Klan kidnapping and assault trials. There he sentenced or fined seventy-five Klansmen including the Imperial Wizard Thomas L. Hamilton of Leesville, South Carolina. Following these trials Judge Williams made public statements concerning his personal commitment to punish Klan members involved in terrorism. Williams dealt severely "with Carolina's border county night riders."[4]

The prosecution was amply represented. In addition to Solicitor E. Maurice Braswell and Charles McLean, his assistant, Luther J. Britt and Luther J. Britt, Jr., were retained as private prosecutors by the Robeson County Board of Commissioners. Members of Hackett and Weinstein, a Lumberton law firm reportedly engaged by a group of Indians, also argued for the state.[5]

After Braswell read the indictment and the defendants pleaded not guilty, their attorneys put forth two motions. The first motion was to quash the indictment on two grounds. Charles Nye told the judge that the bill failed to charge the defendants with unlawful assembly, "and if it charges anything, it charges only an attempt to unlawfully assemble." Secondly, he continued, if it did charge them with unlawful assembly, "then there is duplicity in the indictment by the further charge of inciting a riot."[6] Nye felt that the State would attempt to

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[4]Charlotte Observer, March 12, 1958; Durham Morning Herald, March 14, 1958, March 15, 1958; News and Observer, March 14, 1958.

[5]Charlotte Observer, March 12, 1958.

[6]Trial Record, 6.

show that the Klan meeting was an unlawful assembly. He believed, however, he could prove it was not. Unlawful assembly was necessary for the charge of incitement to riot as the judge would explain in his charge to the jury. Williams overruled. A second defense motion to excuse members of the Indian race from serving on the jury was also overruled. Judge Williams told defense attorneys to use their challenges. Each defendant had two challenges and the state also had two.[7]

Jury selection consumed the morning session and a part of the afternoon. The defense used three of its four challenges and excused two Indians and one Negro. Because the trial was expected to be lengthy an alternate juror was selected. Of the jurors chosen to hear State v Cole et al. none were black or Indian.[8]

The state's panel of ten witnesses included five law enforcement officers, four newsmen and one Ft. Bragg soldier, George W. Newman, who had been wounded at the rally. On the afternoon of March 11, 1958, the state called its first witness, Malcolm G. McLeod. The sheriff's lengthy testimony illustrated the thrust of both the prosecution and defense arguments. The state relied heavily on McLeod's story and tried to corroborate the major points with other witnesses. The core of their case was that Cole, having been warned that there might be trouble well

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[7]Trial Record, 6; Charlotte Observer, March 12, 1958; Durham Sun, March 11, 1958.

[8]Minutes Robeson County Superior Court, criminal, Vol 17, 1955-1960 State Archives, Raleigh, North Carolina, 126-127, lists the jurors as Kelly Wilson, Bobby Little, Claude I. Lewis, George F. White, Thomas Allen, Jr., James Byrd, Bobby K. Walters, John Rawls, Robert D. Bartley, T. E. Hauser, Atlas Hickman, John D. Wilcox and E. J. Britt, Jr., alternate. Fayetteville Observer, March 11, 1958.

in advance, persisted in holding the meeting. The defense tried to prove that the Klan meeting was a lawful assembly that was due protection from the sheriff. Furthermore, they sought to demonstrate that the Klansmen had taken no action to incite the Indians on the night of January 18. The meeting, which the state contended caused the riot, never took place.

Sheriff McLeod testified to his part in the events of the week preceding the rally. Describing the tension in Robeson County following the newspaper accounts of the original cross burnings, he recounted his trip to Cole's home in Marion, South Carolina and his warning to the Klansman. The court heard details on the low profile strategy developed by the sheriff and the State Highway Patrol. McLeod told the jury that there had never been a rally in Robeson County where Klansmen appeared armed and he had not known what to expect. Most of the Klansmen at the Maxton rally carried guns, he asserted. Describing his conversation with Cole, he told the court that he had denied the Klan protection. In his account of the events at the proposed rally site and the activities of both Cole and Martin, he declared that the Grand Wizard had been in charge that night. Defense counsel, Charles Nye, questioned McLeod about previous Klan rallies in Robeson County which the sheriff had attended. These previous meetings had not resulted in violence. Nye attempted to demonstrate that the cross burnings on Monday, January 13, 1958, had been legal but was thwarted by Judge Williams. The defense attorney offered McLeod a permit to burn the cross at East Lumberton signed by Fire Chief, Ed Glover. The sheriff verified the signature but when asked to

read the permit into the record the state objected and Williams sustained. Nye was never permitted to prove completely the legality of the original cross burnings.[9]

Nye then attempted to show that Cole did not willfully or maliciously set out to incite a riot. The sheriff testified that Cole had told him in Marion that "he didn't have anything against the Indians in Robeson County" and had stated that he "didn't want any trouble."[10] However, when McLeod was questioned about statements made by Mayor Oxendine, to the effect that there would be no trouble unless the Klan started it, the prosecution objected and Williams again sustained.[11] This line of defense was in the best tradition of common law charges. An English court ruled in 1889, that "an honest and reasonable belief in the existence of circumstances, which, if true, would make a crime for which a prisoner is indicted an innocent act has always been held to be a good defense."[12]

Having one avenue closed, Nye forged ahead attempting to prove his contention that the proposed assembly had been lawful. He asked McLeod if the field had been leased. The sheriff responded that Cole had told him that it was but had not shown him proof. The attorney then asked if he had investigated the matter further. McLeod replied,

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[9]Trial Record, 6-30.

[10]Trial Record, 19.

[11]Trial Record, 19.

[12]Regina v Tolson, L. R. 23 Q. B. Div. 168 (1889) as cited in Francis B. Sayre, A Selection of Cases on Criminal Law (Rochester, New York, 1927), 235 hereinafter cited as Sayre, Cases on Criminal Law.

"I checked with the property owner, I believe it was Saturday before the rally. I asked him and he told me it was leased." Judge Williams without an objection from the state had the last sentence stricken from the record.[13] The trial transcript offered no explanation for the judge's action.

The defense counsel then questioned the strategy of having the Highway Patrol and the deputies stationed two to ten miles from the scene. "Will you explain, if you thought a riot was going to occur, why you didn't have them present to prevent . . . [it]," Nye queried. The prosecution objected and Judge Williams announced, "He has answered that."[14] The lawyer asked about the Indians involved in the rout. McLeod claimed not to know their names other than what he read in the newspapers. In later testimony, however, he identified Weldon Lowry and Harry West Locklear.[15] He admitted that he had made no investigation of those individuals or any other Indians involved. When counsel asked why no Indians had been arrested the state objected and Judge Williams ended the line of questioning saying, "We are not trying the Klan, we are not trying the Indians, we are trying this indictment."[16]

Two pieces of evidence were brought out under cross examination by Martin's lawyer, one appearing favorable to Cole, the other extremely

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[13] Trial Record, 20.

[14] Trial Record, 24.

[15] Trial Record, 25, 31.

[16] Trial Record, 25; Durham Morning Herald, March 12, 1958.

damaging to him. McLeod testified about statements which Martin made while in custody. Martin told the sheriff that the order for Klansmen to carry firearms had come not from Cole but from headquarters in Charlotte and did not specifically apply to the Maxton rally.[17] Glidewell also questioned the sheriff about Martin's statements concerning a rally held in Randleman. After McLeod established the fact that Cole attended this particular rally and made a speech, Nye objected to the questions. Judge Williams informed the jury that the testimony did not apply to the defendant Cole, only Martin, but allowed McLeod to continue. According to Martin, the sheriff recalled, "when Cole came down from the platform at Randleman, Cole said there were about thirty thousand half-breeds down in Robeson County, and [he] was going to have a rally and try to scare them up."[18] Judge Williams did not strike it from the record. Even if he had tried, he could not strike it from the minds of the jurors or the Indian spectators in the crowded courtroom. The newspapers carried the statement and once again tension ran high in Robeson County.[19]

The second witness for the State was Captain C. Raymond Williams of the Highway Patrol. Speaking about the warnings to Cole of possible trouble, he verified that Cole had requested the name of someone he could call to assure the Indians of his good will. Williams described the events at the Maxton riot including his role in helping

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[17]Trial Record, 28.

[18]Trial Record, 26.

[19]Trial Record, 6-31; Fayetteville Observer, March 11, 1958; Greensboro Daily News, March 12, 1958.

the Klansmen escape. Under questioning by Glidewell, he explained the police strategy was used to prevent the Klansmen misconstruing their presence as protection for the rally. When asked about the shooting, the captain admitted that, of the shots fired that night, none came from the Klansmen.[20] Following completion of his testimony the court adjourned for the day. Newsmen rushed to file their stories and James Cole, the target of Indian hatred, received a police escort to South Carolina.[21]

The prosecution concluded its case on Wednesday. Its first witness that day, Sergeant G. D. Dodson, verified the essentials of Captain Williams' testimony. Dodson remembered Cole's request for the name of an Indian leader that he could contact to rectify the misunderstanding. The sergeant concluded, "he didn't mean any offense toward the Indians at all."[22] Dodson also testified that the Indians at the scene had to travel eight to ten miles to attend the rally and their war whoops were the only disturbance he encountered.[23]

Bruce Roberts followed Dodson on the witness stand.[24] Testifying about the Monday cross burnings, he admitted that Cole stated, at the time the cross was burned in St. Pauls, that the Klan disapproved because the Indian was "a married woman with six or seven children

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[20]Trial Record, 31-39.

[21]Durham Sun, March 14, 1958.

[22]Trial Record, 40.

[23]Trial Record, 40-41.

[24]Roberts had already sold his interests in the Robeson County weeklies; Trial Record, 40.

running around with another man."[25] Roberts revealed that Cole telephoned him on the Thursday preceding the proposed rally requesting he write a retraction. On direct examination he asserted that the Klansman boasted "the Klan never backed down."[26] Charles Nye on recross posed a scathing question to Roberts, based on this statement. "[Have]you [ever] backed down from your constitutional rights," he demanded. The state objected and the court sustained.[27]

The sixth and seventh witnesses called were both bystanders wounded in the fray, Ft. Bragg soldier George W. Newman and photographer Bill Shaw. Prompted by curiosity, nine soldiers from Ft. Bragg attended the Maxton rally. Newman testified he had been shot in the face and neck while standing in the road.[28] He was one of four men wounded by the Indians that night. Bill Shaw, a photographer for the Fayetteville Observer, was another. He had witnessed and photographed the initial scuffle between the frail looking Klansman and the armed Indians and testified to the sequence of events. Shaw received six shotgun pellets in the face and hairline while standing beside his car on Hayes Pond Road. Under defense questioning, Shaw characterized the rally site before the Indians arrived as quiet and orderly. The catcalling, hollering and whooping started after the Indians assembled. The Klansmen "were just standing around talking with one another. I did

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[25]Trial Record, 47.

[26]Trial Record, 46.

[27]Trial Record, 42-47.

[28]Trial Record, 49-51.

not see any trouble until the Indians came on the field. Everything had been perfectly calm until that time."[29] The only abusive language he heard that night came from the Indians.[30]

Charles Craven, a reporter for the Raleigh News and Observer, witnessed the rout as he covered the event for the newspaper. Under cross-examination by Martin's attorney, Craven admitted that he was intimidated by the Klansmen and resentful because they would not give him the information he wanted.[31] His testimony was not without bias. One interesting aspect of Craven's story dealt with a discrepancy between his news articles and other written accounts and the certified trial transcript. When Craven approached an armed Klansman he referred to as "Trent" with a question, Craven later wrote, the man told him, "We'd hate to see the wrong people get shot."[32] This incident was repeated during his testimony but the wording was altered considerably. The transcript read, "We'd hate to see young people get shot." The phrase was repeated twice and in both cases "the wrong" was replaced by "young." The word wrong appeared in the Durham Morning Herald's report on Craven's testimony the following day.[33] It was either an interesting error on the part of the stenographer or a marked change in Craven's story.

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[29]Trial Record, 53-54.

[30]Trial Record, 51-55.

[31]Trial Record, 59.

[32]Craven, "The Robeson County Indian Uprising," 437; News and Observer, January 19, 1958.

[33]Durham Morning Herald, March 13, 1958.

In his testimony, Craven characterized the Klan as arrogant, belligerent and uncooperative. He had witnessed a portion of the conversation between Cole and the sheriff and substantiated McLeod's assertion that the Grand Wizard knew the police would not offer the Klan protection. During cross-examination Charles Nye asked Craven a series of questions concerning actions of Klan members prior to the outbreak of violence. While the first question called for a conclusion the others appeared reasonable, but the state objected and Judge Williams sustained. The judge never gave Craven an opportunity to answer even properly phrased, pertinent questions.

> Q. While you were in Mr. Cole's presence, did you see him by act or deed do anything that would agitate or excite anyone?
> Objection By State--Sustained
>
> Q. Did he by word or deed make any hostile approach there in the group?
> Objection By State--Sustained
>
> Q. Did he say anything against the Indians in your presence?
> Objection By State--Sustained
>
> Q. He did not say anything against the Indians in your presence, did he?
> Objection By State--Sustained

Craven was allowed to testify only that "there was no public speaking by members of the white race while I was there."[34] Judge Williams effectively prohibited the introduction of relevant testimony about the actions of one of the defendants on trial for those very activities.

Craven continued his testimony recalling that when the Indians first came on the field, they were not armed or he did not see their

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[34]Trial Record, 58.

guns. However, when they began encircling the Klansmen they all appeared to be armed. Before the Lumbees arrived the Klansmen were simply standing around and he witnessed no other activity on their part. His only complaint was that he had trouble doing his job. He complained, "as a reporter, I don't like it when I go seeking information and people refuse to give it to me . . . no I didn't like it . . . I was resentful . . . ."[35] He admitted there were no open threats against him; but after prompting from Judge Williams he responded, "There was implication of a threat."[36] The judge's urging elicited a response that was pure conjecture in startling contrast to his earlier ruling on questions to the same witness specifically about Cole's actions. When the shooting started Charles Craven ran. He stumbled into a ditch and stayed there.[37]

The prosecution then called Paul Mason of Chapel Hill. As a reporter for National Broadcasting Company's "Monitor," Mason had conducted a series of radio interviews with James Cole at a Klan rally outside Greensboro on December 21, 1957. Mason testified that most of the Klansmen at the Greensboro rally were armed. He repeated statements Cole made concerning the presence of weapons. When Mason asked why they carried guns, the Klan leader responded, "I think they speak for themselves . . . if they don't they will."[38] Over strenuous

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[35]Trial Record, 59-60.

[36]Trial Record, 60.

[37]Trial Record, 54-61.

[38]Trial Record, 62.

objections from the defense, Mason repeated additional remarks he credited to the Grand Wizard, "I've got five guns and I got money in the bank to buy five more, and as long as the Constitution gives me the right to bear arms, there ain't going to be no Negroes in school with my children." He also quoted Cole favoring the Smith and Wesson plan to maintain segregation of the races.[39] Under further questioning Mason admitted that, despite all the discussion of guns, Cole was not armed at the Greensboro rally.[40]

The final witness was Deputy Sheriff Ralph Purcell. After twenty-seven years as deputy sheriff in Maxton and Pembroke, Purcell was familiar with the community where the rally would have been held. He testified that the nearest Indian residence was four or five hundred yards from the site. However, he admitted under cross-examination that the Klan made no noise loud enough to be heard five hundred yards away.[41] Purcell's testimony varied only slightly from McLeod's. The deputy recounted the conversation between Cole and the sheriff before the riot and recalled the Klansman offered to "tone it down some."[42] He also confirmed that, while some Klan members were armed, Cole had no weapon.[43]

Following Purcell's testimony the state rested its case. Defense attorneys moved for a judgment of nonsuit and dismissal, charging

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[39]Trial Record, 63.

[40]Trial Record, 61-63.

[41]Trial Record, 64-65.

[42]Trial Record, 64.

[43]Trial Record, 63-65.

that the prosecution failed to prove the defendants violated any North Carolina law. Cole's only activities on the night in question had been to repair a generator, advise against putting up a rope to hold back the crowd and request police protection for his assembly. Judge Williams overruled the motion. The defense called no witnesses and moved for nonsuit and dismissal in the firm belief that without proof of unlawful assembly Judge Williams could not allow the trial to continue. To this day Charles Nye maintains "most judges unbiased and unprejudiced would not have let it go to the jury. They'd have thrown it out."[44] The testimony indicated that the defendants believed their assembly was lawful and that they could avoid conflict by not insulting the Indians. The defendants believed in conditions, which, if true, made their actions innocent.[45] The judge overruled.

The defense waived the right to opening arguments and the attorneys for the prosecution began their summations. Frank Hackett, Luther Britt, Jr., and Assistant Solicitor, Charles McLean spoke before adjournment on Wednesday afternoon. When the court reconvened the state continued as Luther Britt, Sr., argued the prosecution's case before the jury. Britt called to question James Cole's intellectual capacity and likened him to Adolph Hitler. He told the jurors he had himself been involved in every Klan trial in the area for thirty years but failed to mention that at least once he had served as Klan

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[44]Nye Interview.

[45]Regina v Tolson, L. R. 23 Q. B. Div. 168 (1889), as cited in Sayre, Cases on Criminal Law, 231-241.

defense counsel.[46] He then urged the jury to render a verdict "that will stop this business before there is bloodshed."[47] In summation for the state, County Solicitor Braswell informed the jurors that the "Klansmen had assumed a brutal and unauthorized police power."[48] The panel of jurors learned that the two cross burnings on January 13 created a situation in which the Indians were so inflamed that an attempt to stage a Klan rally on January 18 "was an affront calculated to lead to bloodshed."[49]

The defense summation stressed the prosecution's failure to prove either of the defendants committed any criminal acts. Charles Nye opened his arguments by describing the events of January 18. "A bunch of savages under encouragement of North Carolina law enforcement officers," he said, "staged the riot that broke up a Klan rally at Maxton."[50] Nye concentrated on the Indians' lawless behavior and the police failure to protect the constitutional rights of the Klansmen. He pointed out that Sheriff McLeod had told the Indians they could carry guns to the rally. While he did not go so far as to say McLeod told the Indians to attack the Klansmen, Nye asserted that the sheriff had not tried to stop them either. Moreover, the prosecution, he

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[46]Britt and Frank D. Hackett both defended three Klansmen in the 1952 Robeson County Klan trial, News and Observer, March 8, 1952.

[47]Fayetteville Observer, March 13, 1958; Durham Sun, March 13, 1958.

[48]News and Observer, March 14, 1958.

[49]Greensboro Daily News, March 14, 1958.

[50]Greensboro Daily News, March 14, 1958; Fayetteville Observer, March 13, 1958.

argued, had failed to prove a necessary element of the charge, that the rally constituted an unlawful assembly. Nye repeated that the proposed meeting was to have been held on land leased for that purpose and the Constitution guaranteed the right of assembly. In addition, the Constitution guaranteed the right to bear arms, and the fact that the Klansmen had weapons did not make their meeting an unlawful assembly.[51] P. W. Glidewell summing up for Martin, emphasized the sheriff's failure to perform his duty and called on the jury to consider why no Indians had been charged in the case. He described his own client as "a humble little boy, led around by his nose, who didn't have sense enough to stay out of this. I ask you," he continued, "to accept his apology for his foolish appearance in your community."[52]

When the defense concluded its arguments Judge Williams began his charge to the jury. He read again the indictment informing the jury, "you are not concerned here with the rout, but you are concerned with unlawful assembly and with the riot charge in the bill." Continuing, the judge explained that "indictment for riot always must charge the defendants with unlawful assembly, mutual intent to assist one another, and execution of the intent by overt acts, before they can be convicted."[53] Next Williams defined the charge of inciting a riot as,

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[51] Fayetteville Observer, March 13, 1958; Durham Sun, March 13, 1958.

[52] Greensboro Daily News, March 14, 1958.

[53] Trial Record, 68.

> . . . such conduct as tends to provoke a breach of the peace, although people may have assembled for an innocent and lawful purpose. It means such course of conduct by use of words, sign or language, or any other means, by which one can be urged to action as would naturally lead or urge other men to engage in or enter upon action, which would create riot . . . . The State says and contends you should find beyond a reasonable doubt that on this night . . . a riot took place, or was created . . . that it was incited, . . . by the defendants . . . that there was an unlawful assembly . . . and that having assembled unlawfully, they proceeded to put into effect their plans and intent to conduct a meeting of the organization known as the Ku Klux Klan, and to resist any persons who might in any way oppose or interfere with the organization of that meeting and in carrying it into execution they mustered in a tumultuous manner . . . you should find beyond a reasonable doubt that the riot existed, was created and brought about through unlawful assembly of the defendants . . . . It makes no difference whether the original purpose of assembly be lawful or unlawful. If it be for a lawful purpose and after having so assembled they change their plan or mind about it and adopt an unlawful purpose of assembly, that which has been a lawful assembly is converted into unlawful assembly . . . .[54]

Since North Carolina had no specific statute covering this offense the judge relied on the legislation of other states but more importantly on eighteenth century common law. The specifics of the charge were taken almost exclusively from William Blackstone's Commentaries.[55] Common law, traditionally vague, relied heavily on the implications of the key words "tendency" and "intent." The constant

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[54]Trial Record, 70-72.

[55]Sir William Blackstone, Commentaries on the Laws of England in Four Books, 4, (Philadelphia, 1862) 147, hereinafter cited as Blackstone, Commentaries.

repetition of these highly subjective words in both the indictment and the judge's charge leave both open to the broadest interpretation.[56]

Judge Williams based his charge on common law without regard to legislative modification. He failed to discuss constitutional protection of assembly. The charge of unlawful assembly which was necessary to the conviction for incitement to riot was never dealt with specifically but the implications were that the assembly became unlawful when the Indians joined the Klansmen in battle. Williams failed to discuss the facts that the Klansmen were unwilling participants and apparently offered no resistance. In fact Williams' explanation of the law was sufficiently vague to confuse not only the issue but the jury as well.

After summarizing the state's complete case as presented in the witnesses' testimony, Williams repeated the state's contentions for guilt. In his charge, the entire defense case, in contrast comprised one brief series of denials.

> The defendants contend on the other hand, you ought not to find that the assembly was unlawful, in violation of the statutes, or that they had any mutuality of consent or that they urged, provoked, agitated, or brought about any riot that

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[56]The assembly of three or more with criminal intent may constitute criminal conspiracy, a charge not listed in the indictment but implied both there and in the charge to the jury. A conspiracy is a combination or agreement between two or more persons to commit an unlawful act and the mere agreement to come together may constitute conspiracy. Swift and Company v United States, 196 U. S. 395, as cited in Fred D. Ragan, "Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919," Journal of American History, LVIII (June, 1971), 30. The North Carolina Supreme Court upheld the conviction on the grounds that the Indians were so agitated that the presence of the Klansmen was enough to incite a riot, thereby implying conspiracy.

> might have resulted therefrom; and contend you ought not to find there was an unlawful assembly, or that a riot took place; but that if you do so find, that you ought not to find anything was done by either of them and others to incite or bring it about; and that you ought not to find that either was there present for the purpose of aiding, assisting and abetting others in the commission of any crime, if you find any crime was committed; and contend you should at least have a reasonable doubt as to their guilt and return a verdict of not guilty.[57]

The judge instructed the jury for an hour and twenty-three minutes before allowing them to retire at 5:13 p.m. on March 13, 1958. While they deliberated one Indian remarked of Cole, "They call him Catfish. If he gets out of this courtroom he'd better find a pond of water and go to the bottom, get in some mud and stay there."[58] It took the jurors forty-three minutes to return a verdict of guilty as charged. P. W. Glidewell asked for immediate sentencing for his client but withdrew the request when Clawson Williams said, "I'm going to have to give him time."[59]

After a night in jail Cole and Martin stood before Judge Williams for sentencing. Cole through his lawyer requested leniency for Martin who had an invalid wife, good work record and no prison record. The judge expressed sympathy for Martin but said that an individual was responsible for his actions.[60] In sentencing the two men, Williams recited Cole's police record and said that it revealed a

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[57]Trial Record, 94.

[58]Durham Sun, March 14, 1958.

[59]Durham Morning Herald, March 14, 1958; Durham Sun, March 14, 1958.

[60]Fayetteville Observer, March 14, 1958.

concept of the law consistent with his behavior in the case just tried. While he recognized that the Indians were "not altogether free from blame," he maintained, there was not enough evidence to identify and arrest those involved.[61] Cole was sentenced to eighteen to twenty-four months "on the roads." Martin received a sentence of six to twelve months.[62]

After the verdicts and sentences were handed down Simeon Oxendine, characterized by one newspaper as an Indian prominent in the rout, stated that he thought the Indians were satisfied with the verdicts and the judgment.[63] Another Indian spokesman said it would restore racial peace to Robeson County.[64] When questioned after the trial, juror Robert Bartley said the most persuasive evidence in the case was "people from outside of this county came here with shotguns--and they didn't come bird hunting."[65]

Charles Nye felt the jury was coerced into a guilty verdict. One member of the panel told him afterwards that he was afraid if they found the defendants not guilty, the Indians would burn his house down.[66] Nye had good reason to believe that the jurors were afraid.

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[61]Durham Sun, March 14, 1958; News and Observer, March 15, 1958.

[62]Durham Sun, March 14, 1958; Trial Record, 95.

[63]News and Observer, March 15, 1958.

[64]Greensboro Daily News, March 15, 1958.

[65]Greensboro Daily News, March 15, 1958; Durham Sun, March 14, 1958.

[66]Nye interview.

His remarks during the summation concerning the Indians behaving like savages had appeared in several newspapers. According to Nye, after the trial was over, "about thirty of them got me in a side room at the courthouse and demanded a public apology. One of them had a knife in my back, over my right kidney. I will never forget it. It was a hectic ten minutes."[67] Nye's apology appeared in the newspapers without any mention of the knife. When asked if he reported the incident to authorities, he replied, "I reported it . . . they said I'd better forget it, so I did."[68]

The repercussions from the "Battle of Hayes Pond" reached the entire state since the Ku Klux Klan was virtually driven underground by the threat of imprisonment but the effects on Robeson County were more noticeable. Bruce Roberts sold his interest in the Scottish Chief and Lumberton Post. Many people, Indian and white, blamed his original news reports for creating the entire situation. He accepted a position as photographer with the Charlotte Observer and moved from the area. J. W. Kirkpatrick, member of the Maxton Town Board, claimed that, as a result of the publicity, Maxton lost an industry which had been planning to move into the county.[69] Finally, Sheriff Malcolm McLeod guaranteed his reelection to that position for many years to come.

James Cole and James Garland Martin immediately filed notices of appeal to the North Carolina Supreme Court. Appeal bond for Cole

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[67]Nye interview.

[68]Nye interview.

[69]Craven, "The Robeson County Indian Uprising," 435.

was set at $100 and appearance bond at $3,000. Martin's appeal bond was also $100 but his appearance bond was half of Cole's, $1,500.[70]

[70]Trial Record, 96.

CHAPTER 3

AN OLD RIVALRY: CHARLES NYE VERSUS MALCOLM SEAWELL

The defendants filed their respective appellant briefs with the North Carolina Supreme Court October 16, 1958. Charles B. Nye prepared the brief for James Cole. Since Nye was scheduled to leave the country, an associate, Daniel M. Williams, familiarized himself with the case and appeared before the court to answer any questions the justices might have.[1] E. L. Alston, Jr., presented the case for James Garland Martin. The two defense briefs were very similar and argued many of the same points. In the case of Martin, the North Carolina Supreme Court found the trial judge had erred and Martin was granted a new trial but upheld the conviction of James Cole. In the following discussion, therefore, the defense arguments come almost exclusively from Nye's brief for Cole. Answering Nye's charges for North Carolina was State Attorney General Malcolm B. Seawell, assisted by Claude L. Love and Bernard R. Harrell.

Charles Nye and Malcolm Seawell had been adversaries on numerous occasions in the past. Nye practiced criminal law in Robeson County for many years before moving to Durham, and Seawell had served as county solicitor for several of those years. Nye recalls a strong professional rivalry since he had been a highly successful criminal attorney, with so many clients that Seawell once called the State Bureau of Investigation to determine if he was soliciting criminal cases.

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[1]Nye interview.

Nye won many contests Seawell prosecuted and one trial in particular stands out. Nye obtained a not guilty verdict in a case when Seawell refused to accept a guilty plea in exchange for a life sentence instead of the death penalty.[2]

In the Cole-Martin appeal the two lawyers argued the errors on a variety of legal grounds but frequently returned to the issue of intent. On this issue the two most clearly differed as their arguments reflected. This disagreement arose because the intent with which a person acts is a state of mind and is rarely subject to direct proof, "but must ordinarily be inferred from the facts."[3] This assumes that intent may be determined deductively by examining the evidence. On the surface one may assume this is true for as Justice Oliver Wendell Holmes put it "even a dog distinguishes between being stumbled over and being kicked."[4] It remains however that intent is derived indirectly and requires a conclusion be drawn from the material evidence. Despite its subjective nature, intent is a crucial element in the entire criminal law code. In fact "an injury can amount to a crime only when inflicted by intention."[5]

Only rarely is the question of intent ignored. Francis Sayre pointed out that in criminal syndicalism or sedition cases, where

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[2]Nye interview.

[3]Henry Campbell Black, Black's Law Dictionary, 4th edition (St. Paul, 1968), 947, hereinafter cited as Black's Law Dictionary.

[4]Oliver Wendell Holmes, The Common Law (Cambridge, 1963), 3.

[5]Joseph Goldstein, Alan M. Dershowitz and Richard D. Schwartz, Criminal Law: Theory and Process (New York, 1974), 769, hereinafter cited as Goldstein, et al., Criminal Law.

pressure to convict is strong, it has been accomplished by dispensing with the issue of intent.[6] However these instances are uncommon. Generally criminal intent "is as universal and persistent in mature systems of law as belief in freedom of the human will and consequent ability and duty of the normal individual to choose between good and evil."[7] Acceptance of this principle is reflected in English common law as Blackstone asserted that a crime must be preceded by a "vicious will." Roscoe Pound wrote:

> historically our substantive criminal law is based upon the theory of punishing a vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.[8]

In law as in popular belief "intention and freedom of the will are axiomatic."[9]

Two legal positions exist on the question of intent, the first of which is the common law interpretation of general intent. Black's Law Dictionary states that general intent is "an intention, purpose or design either without specific plan or particular object or without reference to such a plan or object."[10] The courts traditionally interpreted this to mean presumptive intent, indirect causation and assumed

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[6]Francis B. Sayre, "Public Welfare Offenses," Columbia Law Review, 33 (1933), 73.

[7]Goldstein, et al., Criminal Law, 769.

[8]Roscoe Pound in the introduction to Sayre, Cases on Criminal Law, xxxvi-xxxvii.

[9]Max Radin, "Intent, Criminal," Encyclopedia of the Social Sciences, 8 (New York, 1932), 130.

[10]Black's Law Dictionary, 947.

tendency or "a natural and reasonably probable tendence to cause the result" forbidden by law.[11] Justice Holmes had accepted and employed this reading of intent for the majority opinion in the case of Eugene V. Debs v United States. But a new definition emerged in his dissent in the case of Abrams v United States that of specific resolve or determination. "A deed," he wrote, "is not done with intent to produce a consequence unless that consequence is the aim of the deed."[12] Nye and Seawell took the opposing points in the appeal. Seawell argued for common law general intent while Nye pursued specific intent.

Charles Nye charged Judge Clawson Williams with numerous errors divided into five catagories presented as questions. He asked first that the high court examine the defense motions for nonsuit and dismissal and to quash the indictment. His final three questions dealt with the behavior of the trial judge. Nye requested that the justices determine if the judge's actions were prejudicial. He specifically questioned the legality of "certain remarks made in the hearing of the jury and . . . certain questions asked of witnesses, which might have been tantamount to an expression of opinion."[13] Furthermore the

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[11]John Lord O'Brian and Alfred Bettmen, No. 714. In the Supreme Court of the United States, October Term 1918, Eugene V. Debs v the United States of America, Brief for the United States (Washington, 1919), 83.

[12]Abrams et al. v the United States, 40 Sup. Ct. 21.

[13]Charles B. Nye and Daniel M. Williams, Jr., No. 723, State of North Carolina v James Cole, James Garland Martin and Others to the State Unknown by Name, from Robeson, Defendant (James Cole) Appellant's Brief, Supreme Court of North Carolina, Spring term 1959, 1, hereinafter cited as Appellant's Brief.

attorney charged the judge erred by "admitting irrelevant and prejudicial evidence but excluding evidence that was relevant and material to the issues" and in instructing the jury.[14]

Nye summarized the evidence stating that James Cole and James Garland Martin had been indicted, tried and convicted for the common-law crime of inciting a riot by "willfully, riotously and unlawfully assembling on the night of January 18, 1958."[15] Admitting that Cole was warned that he might be in personal danger, the attorney asserted that his client made every effort to prevent trouble and placate the Indians. On the night of the proposed rally, he asserted, James Cole's only activities were to work on a generator, advise against cordoning off the area and request police protection. Martin served only as an escort first leading Charles Craven and Thomas Inman across the field and then accompanying Mrs. Cole and her children to safety. The rally site was leased property eight to ten miles from the Indian community. While some of the alleged Klansmen were armed, Cole was not. "No one ever saw the defendant or any of the white people on the leased site commit or aid in any manner an act or deed of violence," but more importantly no meeting or speechmaking took place that night.[16]

The defense motion of nonsuit and dismissal should have been sustained, Nye argued, because the prosecution failed to prove the defendants committed any crime. The evidence provided by the state

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[14]Appellant's Brief, 2.

[15]Appellant's Brief, 2.

[16]Appellant's Brief, 3.

showed that James Cole "was present AT PREPARATIONS for an assembly . . . only because others had insisted that he come."[17] He was not armed and had not ordered his fellows to bring weapons. Nye continued, "Absolutely no evidence that any Klansman fired a weapon or even pointed a weapon at any person; especially at the Indians who aligned themselves along the road," surfaced during the trial.[18] The lawyer admitted that Cole received a warning of possible personal danger if he made his usual speech at the proposed rally. "However, there is absolutely no evidence in the record that Cole had been warned that a large group of armed, war-whooping Indians intended to or would appear at the site . . . in an isolated area away from the Indian community or neighborhood."[19] Cole had requested and been denied police protection by the sheriff. Nye argued that the trial record indicated that if the sheriff had taken proper steps before the meeting, no disturbance would have occurred. The sheriff was "aware that the Indians intended to attend the proposed assembly under arms" and had deliberately "left the white group to . . . [their] abuse."[20] The state offered no proof that their activities caused any Indian to be frightened or intimidated into committing a violent act, Nye argued. No Indian had testified "that he was incited, oppressed, angered, aided or abetted by words or deeds of the

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[17]Appellant's Brief, 607.

[18]Appellant's Brief, 7.

[19]Appellant's Brief, 6.

[20]Appellant's Brief, 6, 9.

defendants on the night of January 18, 1958."[21] The sheriff, on the other hand, testified that the defendants committed no criminal acts in his presence.

Nye next dealt with the three aspects of riot as recognized in previous North Carolina court decisions, unlawful assembly, intent to mutually assist against lawful authority, and acts of violence. Nye argued that an "overt act is generally regarded as essential to constitute an unlawful assembly."[22] The purpose of the rally, to publicize the beliefs of the Ku Klux Klan, did not make the assembly unlawful, Nye asserted, merely because "numerous persons may be in disagreement with the doctrines . . . of the group."[23] An overt act, literally interfering with the rights of others, was required by law "and in all cases, the constitutional guaranty of the right of assembly must be given the most liberal and comprehensive construction."[24] The proposed rally was not in a public place and was not prohibited by law. "The sheriff himself told the defendant that he had a right to be at the area."[25]

The Klansmen were not in opposition to lawful authority, Nye contended, rather they requested cooperation from the sheriff to protect

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[21]Appellant's Brief, 8.

[22]Appellant's Brief, 12; State v Hoffman, 199 N. C. 328, 154 S. E. 314 (1930), hereinafter cited as State v Hoffman; State v Butterworth, 104 N. J. L. 579, 142 Atl. 57, 58 A. L. R. 744 (1928).

[23]Appellant's Brief, 13.

[24]Appellant's Brief, 12.

[25]Trial Record, 57.

their constitutionally guaranteed rights of assembly and free speech. The Indians forcibly trespassed when they entered the leased property since the meeting "was open to only so much of the public as behaved itself."[26] In fact, Nye argued, they did not attempt to oppose anyone; "the Klansmen chose to vacate" the scene rather than resist the Indians.[27] The trial record depicted a lawful meeting disrupted by criminal acts committed by the Indians. The Lumbees infringed on fundamental rights, and Nye reminded the court, one is not required to surrender constitutionally protected rights simply "because others may break the peace in an effort to disrupt the meeting."[28]

On the third element of a riot charge, Nye asserted, the court record offered no evidence that either defendant participated in any act of violence. The Indians acted violently, Nye contended, but not as a result of overt acts of the defendants since "nothing done or said by the defendants had the reasonable, natural or inevitable consequence of inciting a riot."[29] In fact Cole advised against roping off the area in an effort not to incite the Lumbees. Cole did not aid or abet the Indians in their riot since none were charged with rioting. Again Nye asserted the State could not prove the defendant

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[26]Appellant's Brief, 15; Trial Record, 55.

[27]Appellant's Brief, 16.

[28]Appellant's Brief, 17; Beatty v Gilbanks, 9 Q. B. 308, as cited in Appellant's Brief, 16-17.

[29]Appellant's Brief, 17.

participated in the violence, in fact it failed to prove he was even present when violence occurred.

Summarizing, Nye repeated no evidence presented would legally support the allegation that the defendants were unlawfully assembled, that they intended to assist one another against anyone, or that they committed any acts of violence. Nor did the Klan do or say anything which would reasonably have caused the Indians to riot. Cole's presence that night could not have been sufficient to incite the Indians to riot since he was not in an Indian community. A "fatal variance between the indictment and the proof" existed, the attorney informed the justices, and "an obvious failure of support for . . . [the state's] allegations."[30]

Malcolm Seawell responded that the three elements described applied to charges of participating in a riot and reminded the court that the defendants were not charged with rioting but with inciting a riot. He maintained that the trial record showed "that the avowed purpose of the Maxton Rally was to scare and intimidate the Indian people of Robeson County."[31] This referred to Martin's statements to the sheriff and repeated in his testimony. Although the judge ruled these statements as admissable only against Martin, Seawell chose to treat them as evidence against both men. The Attorney General disregarded specific evidence creating doubt about Cole's intent. Seawell

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[30]Appellant's Brief, 21.

[31]Malcolm B. Seawell, Claude L. Love and Bernard A. Harrell, No. 723, State of North Carolina v James Cole, James Garland Martin and Others to the State Unknown by Name, from Robeson, Brief for the State, Supreme Court of North Carolina, Spring term 1959, 27, hereinafter cited as Brief for the State.

relied principally on the earlier newspaper accounts of Klan cross burning activities in Robeson County. He ignored testimony which indicated Cole believed the reporting of the incident created a misunderstanding as well as Cole's public statements which attempted to place a moral rather than racial interpretation on those activities. Seawell argued that Cole knew the consequences of his statements made at the Monday cross burnings and the probable outcome of the proposed rally. The sheriff warned Cole not to persist in his course of action and the Klansman chose to disregard that warning. His activities prior to the proposed rally, Seawell contended, were "calculated to incite the Indians in the community . . . that was the natural result to be expected."[32]

Some of the Klansmen were armed proving their intent to intimidate the Indians and their willingness to resort to violence. Seawell asserted, "the very carrying of arms by a mob, whose admitted and avowed purpose is to cause fright and consternation, certainly tends to incite and intimidate the populace and certainly tends to provoke a breach of the peace."[33] Whether or not the armed "mob" of twenty-five Klansmen actually intimidated the armed mob of five hundred Lumbee Indians had been the thrust of Nye's arguments for Cole. The defense argued that the Lumbees obviously achieved their admitted

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[32]Brief for the State, 29; Seawell's assertion does not bear up because the sheriff testified that he did not know what would happen. That was his justification for not having deputies stationed closer than two miles away.

[33]Brief for the State, 30.

and avowed purpose and caused the Klansmen considerable fright and consternation. Seawell asserted that the evidence showed "a breach of the peace was not only likely but almost inevitable . . ." and that "Cole, being fully apprised of the facts persisted in holding the rally," thereby assuming responsibility for inciting the violence.[34] To support his contention, the attorney general cited two cases, People v Burman, et al. and Commonwealth v Sciullo, from Michigan and Pennsylvania respectively.[35]

In the case of People v Burman the defendants were found guilty of inciting a riot in Hancock, Michigan. Burman was the leader of a communist political group which held a march through the town of Hancock displaying red flags. He ignored warnings from officials that such a display would lead to a breach of the peace and rioting because the public regarded the flags as symbols of hatred. The Michigan Supreme Court upholding Burman's conviction spoke to the issue of freedom of assembly and freedom of speech.

> The question here is not whether the defendants have in general a right to parade with a red flag. It is this: Had they such right, when they knew that the natural and inevitable consequence was to create riot and disorder? Defendants knew this red flag was hated by those to whom it was displayed, because it was believed to represent sentiments detestable to every lover of our form of government. They knew that it would provoke violence and disorder. Their right to

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[34]Brief for the State, 31.

[35]People v Burman, et al., 154 Mich. 150, 117 N. W. 589, 25 L. R. A. (N. S.) 251 (1909), as cited in State v Cole, 249 N. C. 732, 742-743, hereinafter cited as People v Burman; Commonwealth v Sciullo, 82 Atl. 2d 695 (1951) (PA), hereinafter cited as Commonwealth v Sciullo.

> display a red flag was subordinate to the right of the public. They had no right to display it when the natural and inevitable consequence was to destroy the public peace and tranquillity. It is idle to say that the public peace and tranquillity was disturbed by the noise and violence, not of the defendants, but of those whose sentiments they offended. When defendants deliberately and knowingly offended that sentiment, they were responsible for the consequences which followed, and which they knew would follow. It is also idle to say that these others were wrongdoers in manifesting in the manner they did their resentment at defendants' conduct. This merely proves that they and defendants were joint wrongdoers: that they, as well as defendants, violated the ordinance in question. The object of this proceeding is not to redress the grievance of these other wrongdoers, but it is to redress the grievance of the public whose rights they and defendants jointly invaded. The guilt of their associate wrongdoers does not lessen defendants' responsibility. It is sufficient to say that defendants by their conduct did "aid, countenance, and assist in making a riot, noise, and disturbance, and therefore violated ordinance No. 10 of the City of Hancock."

Malcolm Seawell maintained it did not "avail defendants to say that they have a right to propagate their political views. That right is not denied," but continuing, "we do deny and emphatically deny that in propagating their views they may commit a crime or violate any constitutional law of valid ordinance."[37] Indian initiation of the violence was no defense for the Klan leader. "The fact that some other group may have violated the law in showing their resentment to the defendant . . . is no defense to the charge . . . of inciting a riot."[38]

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[36] People v Burman.

[37] Brief for the State, 32.

[38] State of North Carolina v James Cole, James Garland Martin and Others to the State Unknown by Name, North Carolina Supreme Court, 249 N. C. 742-743 (1959), hereinafter cited as State v Cole.

In Seawell's second citation, Commonwealth v Sciullo, a Pennsylvania case, the defendant, a proponent of racial integration, escorted several blacks to a public swimming pool in Philadelphia. A group gathered to oppose the action and a fracas ensued resulting in several injuries. The defendant was indicted and convicted for inciting a riot. Upholding the conviction, the Pennsylvania Supreme Court stated, "If any man or set of men should combine and arrange to so agitate the community to such a pitch that the natural result of such agitation would be riot, that would be inciting to riot."[39] Seawell contended that Cole's cross burning activities so agitated the community that the inevitable outcome was a riot or breach of the peace. Having incited the community, Cole persisted in holding the rally and members of his group "came prepared to do violence."[40]

The mere fact that some of the Klansmen were armed made the assembly unlawful since the North Carolina Supreme Court had ruled that "guns or other dangerous weapons cannot be used to terrify or alarm."[41] Asserting that the Klansmen's armed intent was to put "fear into the hearts of the Indian people," Seawell argued, that this made their assembly unlawful because they attempted to meet in an Indian community. The site was not remote or isolated, he contended, since

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[39] Commonwealth v Scuillo, 696.

[40] Brief for the State, 34.

[41] State v Huntley, 25 N. C. 418 (1842), hereinafter cited as State v Huntley.

Deputy Sheriff Ralph Purcell had testified that ten Indian families lived within a one mile radius of the field.[42]

Nye's second question on appeal charged inadequacy in the indictment. Defense attorney Nye had moved to quash the indictment in court on two grounds. Knowing that the North Carolina Supreme Court had held unlawful assembly as a necessary element in charges of riot, he argued that the indictment failed to so charge the defendants. He further asserted in Lumberton that if they were charged in the indictment with unlawful assembly then there was "duplicity in the indictment by the further charge of incitement to riot."[43]

In the appeal Nye again attacked the indictment. It failed to show that the defendants met with a criminal intent to do anything which would have made their assembly unlawful. They were not charged with "intent to mutually assist against lawful authority as apparently required in this state" and had in fact, attempted to obtain the cooperation of lawful authority.[44] The indictment did not "charge the defendants with any acts of violence committed for the purpose of putting any design into effect."[45] Nye argued that at most it charged Cole "with an attempt to hold a meeting which IF HELD, MIGHT cause violence and a breach of peace by a large number of armed Indians who

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[42]Brief for the State, 35.

[43]Trial Record, 6.

[44]Appellant's Brief, 26.

[45]Appellant's Brief, 26; State v Hoffman, 316.

intended to appear at said meeting."[46] He contended the indictment showed that two groups appeared at the site, one Indian group and one so-called Klan group. "Which group rioted and actively engaged in the disturbance?" Nye queried. "If the Indian group rioted or committed acts of violence, did Cole aid, abet and assist the Indian group?"[47] This was a valid question since the North Carolina Supreme Court had defined inciting as aiding and abetting.

The state court's only ruling involving the issue of incitement had been State v Hoffman in which they had interpreted inciting as aiding and abetting. Judge Williams' charge to the jury was based on principles established in this case. Nye based his arguments on this same case, but Seawell dismissed State v Hoffman saying, "We fail to find a North Carolina case in which the crime of inciting a riot is charged."[48]

Malcolm Seawell observed that both of the defense briefs "seem to be based upon the assumption that the charge against defendants is engaging in a riot, when as a matter of fact the bill of indictment charges INCITING A RIOT."[49] The two charges were distinct and separate. One may incite a riot and not be present at the actual site. On the

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[46]Appellant's Brief, 26.

[47]Appellant's Brief, 27.

[48]Brief for the State, 30; This statement while technically true, allowed him to disregard previous North Carolina rulings on the issues of riot and incitement to riot and freed him to rely on the Michigan and Pennsylvania cases which appeared to support his contentions.

[49]Brief for the State, 14.

other hand, one may participate in a riot and not be responsible for inciting that riot.

> The gist of the crime of inciting a riot is its tendency to provoke a breach of the peace and the crime may be committed even though the parties have assembled in the first instance for an innocent purpose. It means such course of conduct, by the use of words, signs or language or any other means by which one can be urged to action as would naturally lead or urge other men to engage in or enter on, conduct which, if completed, would make a riot.[50]

"Incite," Seawell argued, "means to arouse, stir up, urge, provoke, encourage, spur on or goad," not necessarily to participate in or even be present during acts of violence.[51]

The Attorney General did not discuss the issues of time and proximity thereby leaving his argument open to staggering implications. Since he would argue that the events of the week preceding the proposed rally actually incited the Indians, the mere presence of the Klansmen was sufficient catalyst to provoke action. Cole need not have appeared on the field that night. According to Seawell's argument he would have been responsible for inciting the Indians to riot regardless. His statements agitated the Lumbees therefore he was responsible for their actions. If the Indians had chosen to burn the home of C. A. Brown, Jr., the owner of the field, would not Cole have been responsible for that as well?

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[50]Brief for the State, 14-15.

[51]Brief for the State, 15; Commonwealth v Sciullo, 696; Commonwealth v Safis, 122 Pa Super. 333, 186 Atl. 177 (1936), hereinafter cited as Commonwealth v Safis; Commonwealth v Egan, 113 Pa. Super. 375, 173 Atl. 764 (1934).

Seawell went on to discuss symbols. The Michigan courts recognized in People v Burman that "certain signs or symbols, when displayed in public, may be sufficient to provoke a breach of the peace."[52] Seawell affirmed Nye's claim that the defendants had a right to propagate their political views. However, he argued, they had no right to do so in an unlawful manner. Their assembly was unlawful, he asserted, because they met "with the common intent to preach racial dissension and to coerce and intimidate the populace." An assembly for the "avowed purpose of frightening and intimidating any group of people is unlawful."[53]

Seawell's position was based on the general intent of the Klan members, which he argued was to "scare up . . . 30,000 half-breeds;" and the proposed rally was the means to achieve that end.[54] He ignored all testimony indicating the specific intent of the white men on the field was, in fact, exactly the opposite. Seawell's line of reasoning, unchallenged by the Supreme Court, was faulty in that it was used against Cole and Martin both. The trial record clearly showed that this statement was allowed as evidence only against Martin. The sheriff's testimony indicated that Cole did not wish to be present but had come at the insistence of others. If the possession of weapons indicated criminal intent, Cole was guiltless since he was not armed and did not urge others to bring weapons. The issue was whether or not

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[52]Brief for the State, 16.

[53]Brief for the State, 18.

[54]Brief for the State, 18.

the Klansman committed an overt act. Cole was not robed or armed, burned no cross, and made no inflammatory statements. One might therefore assume that the mere coming together on the field that night was the overt act which proved the general intent of the Klansmen.[55] At variance with this, the sheriff told Cole that he had the right to hold his meeting, a right which Cole was never permitted to exercise.

The third question Nye raised dealt with the conduct of the trial judge. Did Judge Clawson Williams, Nye asked, prejudice the jury by expressing his opinion through his remarks and questions during the course of the trial? The courts of North Carolina had recognized that when a judge expresses an adverse opinion on the facts in a case it prejudiced that case in the minds of the jurors.[56] Nye charged Judge Williams established his opinion through careful exclusion of evidence which might have damaged the prosecution's case while not permitting the defense attorney to introduce testimony which would have strengthened the defendant's position. Williams accomplished this by consistently upholding prosecution objections and overruling defense objections, Nye argued on appeal. At one point Williams did not bother to wait for a prosecution objection.[57]

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[55]Agreement to come together may constitute an overt act in a charge of conspiracy. The same is implied by Blackstone in his definition of Rout as when three or more meet to do an unlawful act, Blackstone, Commentaries, 4, 146.

[56]State v Canipe, 240 N. C. 60 (1954), hereinafter cited as State v Canipe.

[57]Trial Record, 20. Chapter 2, above note 13.

To substantiate his charge, Nye cited instances when Judge Williams had ruled that witnesses had answered questions, when in fact they had not. His examples dealt with Sheriff McLeod's testimony. The defense attorney asked the sheriff, "Did Mr. Cole not ask in your presence whom to call among the Indians so he could explain to them he meant no ill will?" McLeod responded, "I didn't hear it if he did." Nye knew that Cole made the request and it became part of the record in Sergeant G. D. Dodson's testimony.[58] Pressing the issue and attempting to impeach the sheriff's testimony, Nye demanded, "Didn't one of the officers state that there were four factions of Indians and they didn't know who to call?" The state objected, and Williams turned to Nye, "He said he didn't hear any such questions."[59]

In his brief Nye argued that McLeod had the necessary information to answer the question. The judge's ruling led one to conclude that Cole had not made the request. Moreover, this action "had the effect of prohibiting defense counsel of impeaching the testimony of the witness," a fundamental defense right.[60] Nye was attempting to prove the sincerity of Cole's efforts to pacify the Indians. The sheriff's denial with the judge's support prevented it. Clearly McLeod did not wish to appear unwilling to assist Cole in preventing trouble

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[58]Trial Record, 40.

[59]Trial Record, 25.

[60]Appellant's Brief, 29-30; State v Hart, 239 N. C. 709, 80 S. E. 2d 901, 41 A. L. R. 2d 1199 (1953); in this case the Supreme Court recognized that the defense had a substantial legal right to show bias in an opposition witness.

since that was his job as sheriff. The prosecution denied the defense contention that James Cole did not wish to agitate or arouse the Lumbees and therefore would not want it in the trial record. The judge obliged both. Since the other officers present at the meeting in Marion, South Carolina testified to Cole's statements, the sheriff's memory or hearing was highly selective. Furthermore, neither officer claimed responsibility for providing the answer, implying that the question was put to and answered by the sheriff.

Nye's second example under this error dealt with McLeod's testimony that he had gone to the site with only one deputy because he was not sure of the situation. He told the court that additional deputies and highway patrolmen were stationed two miles away. Nye asked, "Will you explain, if you thought a riot was going to occur, why you didn't have them [the deputies] present . . . ?" Judge Williams upheld a prosecution objection saying, "He has answered that."[61] In his brief to the court, Nye argued that Judge Williams' refusal to allow him to question the sheriff's preparations constituted a court endorsement of those plans, while the sheriff's responsibility remained unexplored. Throughout the trial Judge Williams lent veracity to prosecution witnesses by ruling that they had answered questions which they had not and by ruling areas of evidence immaterial which the defense felt were crucial.

Williams' comments during the course of the trial were also prejudicial, Nye contended. During Charles Craven's testimony, Nye

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[61]Trial Record, 24.

asked if anyone in the Klan group made any effort to harm him. Craven responded, "I say, no. I would like to qualify that, if I may. There were no overt offers to harm me, no open threat." At this point Judge Williams intervened and asked, "Say there were threats?" To this Craven replied, "There was implication of threat."[62] The witness answered the question without prompting from the judge when it was first asked. Williams' comment and the response it evoked gave a different interpretation to the simple fact that Craven had been upset and frightened, Nye charged, Williams again made a prejudicial statement during Paul Mason's testimony concerning a radio interview which he had taped with Cole. The defense objected when Mason quoted Cole but Williams overruled Nye on the grounds that Mason was "testifying from his recollection which he says has been placed on tape."[63] He implied that since the source was a tape it was therefore verifiably true.

On the basis of these two examples Nye asserted Judge Williams made remarks which tended to establish the veracity of a witness thus constituting a prejudicial error.[64] The North Carolina Supreme Court and the state legislature recognized as error a judge's statements "which tend to bolster the witness for the state . . . impair the effects of the defendant's plea of not guilty."[65] Nye continued,

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[62]Trial Record, 60.

[63]Trial Record, 62.

[64]In Re Holcomb's Will, 244 N. C. 391, 93 S. E. 2d 454 (1956).

[65]State v Shinn, 234 N. C. 397, 67 S. E. 2d 263 (1951); in this case the court expanded legislative protection, under General Statute 1-180, which covered the judge's charge, to encompass the entire trial.

"No judge . . . shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury . . . ."[66] Nye insisted that "the trial judge substantially controlled the verdict through the use of non-legal factors."[67] Pointing out that the prosecution was already "assisted by FIVE other able counsel," the solicitor needed no help from the judge, Nye argued.[68] Given "the pressures and prejudices attendant upon this trial," he concluded, "it would appear incumbent upon the trial judge to exercise diligence in the utterance of remarks which could be construed to bolster the case for the State."[69]

The criterion for deciding if a trial judge has deprived a defendant of a fair trial by improper comments or remarks is "the probable effect of the language upon the jury, and the utterance of the judge is to be considered in the light of the circumstances under which made."[70] Nye contended that a reading of the entire trial record revealed "a systematic design to preclude admission of evidence which might have presented the defendant Cole in a favorable light and expose the opposing force of Indians as being the perpetrators of and solely responsible for the disturbance."[71] Because of Judge Williams' remarks,

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[66] State v Canipe, 60.

[67] Appellant's Brief, 33.

[68] Appellant's Brief, 36.

[69] Appellant's Brief, 34; State v Smith, 240 N. C. 99, 81 S. E. 2d 263 (1954).

[70] Appellant's Brief, 36; State v Carter, 233 N. C. 581, 65 S. E. 2d 9 (1950), hereinafter cited as State v Carter.

[71] Appellant's Brief, 36.

Nye urged the State Supreme Court to find that he had "exceeded his discretion in the conduct of the trial and that the abuse of said discretion prejudiced the right of the defendant to receive a fair trial, before an impartial judge and jury in an atmosphere of judicial calm."[72] Conceding that no single exception was sufficient to warrant a new trial, Nye concluded that as a whole, the judge's comments went "beyond an effort to reach a proper understanding and clarification" of the issues but conveyed to the jury that the judge had "an opinion adverse to the defendant."[73]

Seawell ignored Nye's request for an overview of the record and chose to respond by dealing with each exception, out of context, as an individual incident. For example, Nye argued that the judge should have permitted the sheriff to respond to his question about Mayor Oxendine's statements prior to the proposed rally. Having previously established that Cole had said he felt no ill will toward the Indians Nye then asked,

> Did not the Mayor of Pembroke make a public statement on January 17, 1958, to this effect: "There will be no trouble at the Ku Klux Klan Rally scheduled here tomorrow night unless they, the Klan, insult somebody during the speech making. There will be no trouble unless the other side starts it."?[74]

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[72]Appellant's Brief, 36.

[73]State v McRae, 240 N. C. 334, 82 S. E. 2d 67 (1954); the brief for the state rephrased this defense summary and determined that a new trial was granted because of repeated incidents of questions that went beyond a mere effort to clarify the testimony. By stating the decision in this manner only one instance would be accepted, Charles Craven's implied threats. Brief for the State, 25.

[74]Trial Record, 19.

The defense had tried to establish doubt that Cole wanted trouble and with the mayor's statement sought to convince the jury that the Klansman had reason to believe a conflict could be avoided. The Indians, the mayor had said, would do nothing unless Cole insulted them in his speech. Perceiving Nye's contention the prosecution objected. Judge Williams sustained and ordered the jury to disregard the question. Seawell ignored the impact of the entire line of questioning as well as the issue of intent. His brief argued that since the mayor stated that there would be no trouble at the rally unless the Klan started it, it would have implied, if it had been allowed to remain as evidence, that since there was trouble the Klan must have started it. He further stated that since the question, so "distinctly unfavorable to the defendant Cole," came from defense counsel, "the trial Court did counsel a favor by sustaining the objection."[75]

By dealing with each exception as an individual incident Seawell was able to minimize the impact of Judge Williams' comments and actions to the point that he actually agreed with Nye in one instance. In the testimony of Charles Craven, the witness had expanded a response after prompting by Judge Williams. After stating that no threats had been made against him, Craven elaborated that threats had been implied by Klansmen. Seawell admitted that Williams' prompting "may have amounted to a slight invasion of the prerogatives of the jury," but not enough to justify a new trial.[76]

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[75]Brief for the State, 22.

[76]Brief for the State, 24.

Charles Nye's fourth question of error charged Judge Williams with admitting evidence that was irrelevant and prejudicial, while excluding relevant and material evidence. He hoped to show the systematic process by which the trial judge aided the state's case and prejudiced the defendant's cause.[77] On this issue the North Carolina Supreme Court would overturn the decision against James Garland Martin and grant him a new trial. Judge Williams allowed evidence concerning the visit to Marion, which the state contended proved that Klan members were forewarned, to apply to both defendants. After the initial objection by Martin's attorney the testimony was allowed to stand without any reminder to the jury that it applied only to Cole. As the high court would uphold the conviction of James Cole on the basis of People v Burman, the issue of the warning was crucial. Testimony about the Monday cross burnings which had been reported in the newspapers should also have been applied to Cole but not Martin. Since Judge Williams had allowed this evidence to stand against both men, the Court found a second error of admitting prejudicial evidence.

Nye listed several instances where evidence which would have reflected Cole's true intent was systematically excluded from the record. The first instance occurred when Judge Williams refused to allow the sheriff to read into the record a permit to burn a cross, which the Klan obtained from Lumberton Fire Chief, E. J. Glover. Nye reminded the court that the prosecution was allowed to introduce the cross burnings in the testimony of newspaper editor Bruce Roberts. If the

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[77]Appellant's Brief, 37.

court permitted the state to introduce these events as relevant, why was the defense prohibited from exploring the issue? The sheriff had testified that events of Monday, January 13, had been the cause of Indian agitation. The defense attorney wished to prove that the activities of the Klansmen that night had been within the law, but the judge ruled that such an effort was irrelevant. Relevance "is a term which applies to individual items of evidence as they relate to substantiating the charges alleged."[78] It is difficult to understand how evidence introduced by the prosecution regarding the Monday cross burnings could be admitted while information on the legality of the same activities would not be relevant to the trial.

Nye cited a second instance in the testimony of Charles Craven. The defense sought to establish during the trial that no one on the field attempted to incite the Indians. Each of Nye's questions raised a prosecution objection which Judge Williams sustained. Craven was not even allowed to testify as to what he saw and heard before the proposed rally. The witness was only permitted to testify that there had been no public speaking by any white person. Nye's appellate brief charged that Williams excluded evidence which would have shown that the defendant committed no acts "which might have agitated or incited others to violence."[79] Judge Williams also sustained a state objection to a question which helped to establish that the Klan members

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[78]Lawrence C. Waddington, Criminal Evidence (Encino CA, 1978), 120.

[79]Appellant's Brief, 37.

were behaving in an orderly manner "prior to the deluge of Indians."[80] Any evidence the defense attempted to introduce during the proceedings to enhance their plea of not guilty "suffered an early death in the trial."[81] This evidence, Nye argued, was competent and, as it described the behavior of the defendants and the atmosphere at the scene, was relevant. When evidence is competent it is an error for the trial judge to exclude it.[82] Nye was arguing he had been denied the opportunity to show a lack of specific intent to agitate the Indians. Certainly what Cole and Martin said and did at the scene had bearing on whether they incited a riot.

Nye also charged Judge Williams with admitting evidence which had no bearing on the Maxton riot and was highly prejudicial to his client. He cited his motion to strike a portion of Charles Craven's testimony which Williams had overruled. Craven testified that the man called Trent had made a statement about people being shot and that the man called Tex had been dressed like a cowboy, including holsters. Nye maintained that the actions of these two men were not authorized or condoned by Cole. Furthermore he argued, if the activities of the defendants on the field were not admissible as relevant evidence by Craven the prosecution should not have been permitted to question him concerning the activities of others not specifically charged in the indictment. Judge Williams denied defense counsel the

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[80]Appellant's Brief, 37.

[81]Appellant's Brief, 37.

[82]State v. Payne, 213 N. C. 719, 187 S. E. 573 (1937).

right to cross-examine the witness on the atmosphere at the scene or the actions of the Klansmen after allowing the prosecution to introduce this very type of evidence.

The trial court had also admitted evidence which depicted Cole as a violent man who would use force to implement his philosophy. It was clearly prejudicial, Nye contended, since it did not concern the Maxton incident. The testimony of Paul Mason, the radio announcer, had covered an interview with Cole at a rally held in Greensboro, North Carolina on December 21, 1957. All of the statements Cole made during the interview applied not to Indians but to blacks. Nye asserted that Cole's attitudes on the integration of black children into white schools and the possible extremes to which he might go to prevent it, had no bearing on the disturbance at Maxton. He concluded that the testimony was irrelevant and prejudicial. The North Carolina Supreme Court had ruled that if the effect of the evidence is to incite prejudice its admission may be grounds for a new trial.[83] By excluding relevant testimony which would have been favorable to Cole and admitting evidence which was irrelevant and served only to prejudice the jury against Cole, Nye asserted, the trial judge denied the defendant the right "to contest the existence of the necessary elements of the crime with which he is charged."[84]

Malcolm Seawell responded to Nye's argument by maintaining that Judge Williams had simply disallowed questions calling for opinions

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[83] State v Wall, 243 N. C. 238, 90 S. E. 2d 383 (1955).

[84] Appellant's Brief, 39.

or conclusions on the part of witnesses. The question asked of Charles Craven about whether the Klansmen did anything to incite the Indians fit in this catagory. Two questions which the judge had forbidden concerning any statements made by Cole in Craven's presence, Seawell admitted, were competent. However, the exclusion of these two questions was not sufficient to entitle the defendant to a new trial. Paul Mason's testimony, Seawell argued, was relevant "to show the attitude of the defendant Cole and his followers toward creating racial dissension and inciting a riot."[85]

The criterion of relevancy according to Francis Wharton's Criminal Evidence is "whether or not the evidence adduced tends to cast any light upon the subject of the inquiry."[86] It is difficult to understand how testimony about the activities of Trent and Tex could be considered relevant and competent when the same witness was not permitted to answer questions about the activities of one of the defendants. Nye's query to Craven, "Did he [Cole] say anything against the Indians in your presence?" was both competent and relevant to the case.[87] If one views it as an isolated incident then it is not a serious error on the part of the trial judge, not serious enough to warrant a new trial. However, Nye argued, it was not an isolated incident, but part of a pattern of exclusion of evidence that was crucial to his case and inclusion of testimony which served only to prejudice the jury

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[85]Brief for the State, 20.

[86]Francis Wharton, Criminal Evidence, edited by Ronald A. Anderson (Rochester, N. Y., 1955), 731.

[87]Trial Record, 58.

against his client. Furthermore, Seawell's individual examination of the defense exceptions was in direct conflict with previous North Carolina Supreme Court opinions. The court had ruled that judicial error "be considered in the light of the circumstance" not examined independently out of context.[88]

The fifth question concerned Judge Williams' charge to the jury. Nye argued Williams had committed no fewer than nine errors in delivering this charge. The judge committed the first error when he failed to explain the law "arising on the evidence, and not merely to declare the law in the abstract without limiting it to the jurisdiction and facts at hand."[89] The judge's duty was to fully inform the jury on the nature of the indictment and the previous position of the courts of North Carolina on all questions of law. Judge Williams committed prejudicial error, Nye maintained, when he informed the jury "that unlawful assembly was itself a common law misdemeanor . . . and not . . . explaining to the jury the constitutional and legislative protection of the right to peaceful assembly."[90] Williams made no distinction between the common law before and after the enactment of legislative and judicial safeguards of the constitutional rights of the individual. At no point in his charge did Judge Williams mention the rights of the Klansmen or any protection these rights might have afforded them. The constitution of North Carolina,

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[88]State v Carter, 583.

[89]Appellant's Brief, 40.

[90]Appellant's Brief, 40-41.

Article I, Section 25, protects the right of assembly. The jury heard only that unlawful assembly was a common law misdemeanor and that an assembly may become unlawful "although people may have assembled for a lawful purpose."[91] By omitting this crucial aspect of the law the judge "gave to the jury an erroneous view of the law, and an incorrect application thereof, and thereby committed prejudicial error."[92]

The Attorney General handled this very vital issue by ignoring constitutional rights entirely. His response was almost cavalier. "By implication at least, the defendant argues that because of the constitutional guarantee of freedom of assembly, there is no such offense as unlawful assembly."[93] Seawell disregarded the charge that Judge Williams failed to provide a complete explanation of the law. The judge acted properly, Seawell contended, by explaining the foundation of the law.

Nye argued that the judge confused the jury by citing the laws of various states on the issue of riot and failing to specify the North Carolina law applicable in the case. Seawell excused the judge saying, when the charge to the jury was read "carefully, it will be noted that the definition the court gave is a definition given" by the North Carolina Supreme Court.[94] This definition states that a riot is a tumultuous disturbance

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[91]Trial Record, 69.

[92]Appellant's Brief, 42.

[93]Brief for the State, 36.

[94]Brief for the State, 36.

> . . . by three persons or more assembled together of their own authority, with intent mutually to assist one another against all who shall oppose them, and afterward putting the design into execution, in terrific and violent manner, whether the object in question be lawful or otherwise. Indictment for riot always must charge defendants with unlawful assembly, mutual intent to assist one another, and execution of the intent by overt acts, before they can be convicted.[95]

The judge explained in his definition of inciting a riot that "although people may have assembled for an innocent and lawful purpose" they may be guilty of incitement if their "conduct tends to provoke a breach of the peace . . . by use of words, sign or language, or any other means . . . as would naturally lead or urge other men to engage in or enter upon action, which would create riot."[96] Seawell maintained that the constitutional rights of the Klansmen were not ignored in that the trial judge admitted that they might have originally met for a peaceful and lawful purpose.

Nye also argued that the Klansmen had a constitutional right to bear arms which the judge had failed to mention to the jury. Admitting that no one had the right to bear weapons for an unlawful purpose, Nye contended that the fact that some of the Klansmen were armed was not in and of itself unlawful. They had the right under the constitution until they used the arms for an unlawful purpose.[97] Seawell repeated that the right of peaceable assembly and the right to

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[95]Trial Record, 69.

[96]Trial Record, 69.

[97]Appellant's Brief, 41.

bear arms "do not give individuals the right to bear arms for unlawful purposes" such as the protection of an unlawful assembly.[98]

Nye went on to charge the judge with expressing an opinion by his manner of presenting the evidence to the jury. He "failed to give the contentions of this defendant equal treatment with those of the State, and thereby expressed an opinion."[99] Nye indicated the phrasing Williams chose lent an impression of truth to the prosecution's contentions. The entire case for the defense began "The defendants contend, on the other hand, you ought not find . . ." and constituted one brief paragraph of denials.[100] Judge Williams placed the defense in the position of denying the state's allegations apparently without offering proof. Evidence Nye brought out under cross-examination disappeared in Williams' charge to the jury. A reading of Judge Williams' instructions to the jury, Nye argued, showed bias for the state's case and was an expression of an opinion, a reversible error. Seawell did not argue the matter. He chose rather to dismiss the accusation saying, "All that is necessary for the Court to do to see that this contention is not supported by the record is to read the charge even casually."[101] This closed the arguments for both sides as presented to the North Carolina Supreme Court in the fall of 1958.

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[98]Brief for the State, 37.

[99]Appellant's Brief, 42.

[100]Trial Record, 94.

[101]Brief for the State, 37; emphasis added.

The rivals, Nye and Seawell, argued essentially two major themes, the first of which was the nature of intent. Charles Nye consistently argued that the specific intent of his client was demonstrated repeatedly throughout the trial. James Cole made every effort to pacify the Lumbees before the night of the riot. Personally disinclined to even attend the rally he was there at the insistance of others. Advising his fellows not to take actions which would agitate the Indians, he offered to revise the text of his speech and "tone it down." The Klansman took special care to assure that all actions of his group were within the law, as in leasing land and obtaining fire permits. No evidence admitted against Cole during the trial indicated that he had the slightest desire to join the Indians in a battle. Furthermore, no testimony, admissable against him substantiated Bruce Roberts' claim that Klan activity was aimed at the Lumbees. While James Garland Martin may have believed the purpose of the rally was to intimidate the Indians, all of Cole's actions and statements contradicted this contention. No testimony confirmed that James Cole either expected or desired a confrontation with anyone. His specific intent was simply to exercise his constitutional right to assemble with his associates and espouse his political philosophy. James Cole had every reason to believe that in his native North Carolina, noted and lauded as progressive, his constitutional rights would ultimately be protected.

Malcolm Seawell relied on the sweepingly vague concept of general intent. His basic premise, that the Ku Klux Klan sought to frighten and intimidate the entire Lumbee community, upon examination is not borne out by testimony. He offered to the North Carolina Court

a circular argument based on this assumption. The argument stated simply is that the Klan members were unlawfully assembled because they came armed and thereby forfeited their constitutionally protected right to peacefully assemble. They carried arms for an unlawful purpose, the protection of an unlawful assembly, thereby forfeiting their constitutionally protected right to bear arms. The record showed that Cole was denied police protection because members of his group had weapons.[102] Seawell admitted that the Klansmen had a right to meet and express their political views but not to do so in an unlawful manner which they had done since members of the group were armed.[103] Their general intent was to frighten and intimidate the populace by carrying guns and other weapons, therefor they assembled unlawfully. However, when Nye introduced the issue of their constitutional right to bear arms for self-protection,[104] Seawell argued they did not have the right to bear arms for an unlawful purpose, that is protection of their unlawful assembly.[105] Earlier he had argued their assembly was unlawful because they were armed. Nye had no opportunity to respond to this logic.

Secondly the lawyers argued over a prejudiced judge. In 1952, Judge Williams made public his personal commitment to punish Klan activities. In the six years between the Columbus County trials

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[102]Trial Record, 23.

[103]Brief for the State, 18.

[104]Appellant's Brief, 4.

[105]Brief for the State, 37.

that prompted the remark and the case of State v Cole, his commitment remained firm. The trial record certainly appears to indicate bias but perhaps the most telling indication was Williams' behavior toward Charles Nye afterward. When he appeared before Williams in later civil cases, the Durham attorney maintains, "I could do no wrong."[106]

Charles Nye was confident that the Supreme Court would overturn the verdict because, in his opinion, Judge Williams was openly biased and no proof of James Cole's specific intent to incite the Indians existed. As he left the country, Nye believed his client, if not completely exonerated, would at least receive a new trial.[107]

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[106]Nye interview.

[107]Nye interview.

CHAPTER 4

A DIFFERENCE OF OPINION: THE NORTH CAROLINA SUPREME COURT AND THE UNITED STATES SUPREME COURT

The North Carolina Supreme Court handed down its decision on March 25, 1959. The opinion, written by associate Justice Emery B. Denny, upheld the conviction of James Cole but ordered a new trial for his co-defendant, James Garland Martin. While separate appeals were submitted, because Cole and Martin were indicted and tried together, their cases were considered in a single decision. Since the charges of errors in both appeals were similar, Justice Denny answered the combined arguments of Charles Nye and E. L. Alston, Jr.

The first of these arguments was the effort to quash the indictment by both defense attorneys during the trial. Denny echoed Seawell's analysis that the defendants were arguing as if they were charged with rioting when in fact they were charged with incitement and the three elements of riot need not have appeared in the indictment. Riot and incitement to riot were separate and distinct offenses against the public peace though "both crimes have their origins in the common law."[1] Denny agreed that one need not be present or participate in violent action to incite a riot.[2] In the case of Commonwealth v Egan, the Pennsylvania court had ruled that incitement of a riot is a common law offense, "the gist of which is its tendency to provoke a breach

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[1] State v Cole, 740.

[2] Commonwealth v Safis, 178; 77 C. J. S. Riot Sec. 1 (b), 423.

of the peace, though the parties first assembled for an innocent purpose."[3] Citing another Pennsylvania case, Denny wrote, "if any man or set of men should combine and arrange to so agitate the community to such a pitch, that the natural, and to be expected results of such agitation, would be riot, that, would be inciting to riot, an offense at common law."[4] Having established that the common law crime of inciting a riot did not require active participation in the actual riot, Denny upheld the indictment stating that the defendants, while armed, assembled with the common intent of preaching racial hatred and coercing and intimidating the populace. The court held that the indictment adequately charged the unlawful purpose of the assembly. The prosecution had further proved that a riot had occurred since "they could not have been convicted of inciting to riot unless the incitement resulted in a riot.[5]

The second issue was Judge Williams' failure to sustain the motions for nonsuit and dismissal. Justice Denny spoke to the question of intent:

> The overwhelming weight of authority seems to be to the effect, in the absence of a statute to the contrary, that persons may assemble together for a lawful purpose, but if at any time during the meeting they act with a common intent, found before or during the meeting, to obtain a purpose which will interfere with the rights of others by committing disorderly acts in such a manner as to cause sane, firm, and courageous persons

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[3] 113 Pa. Super. 378, 173 Atl. 764; State v Cole 741.

[4] State v Cole, 741; Commonwealth v Scuillo, 696.

[5] State v Cole, 741.

> in the neighborhood to apprehend a breach of the peace, such meeting constitutes an unlawful assembly.[6]

Denny, after reiterating the facts of the Michigan court decision in People v Burman, concluded that the evidence showed the Klansmen

> under the leadership, control and direction of the defendant Cole, did by inflammatory speeches and cross burnings and reports thereof published in the newspapers, incense the Indians of Robeson County to such an extent that the proposed rally at Maxton would tend to provoke a breach of the peace and incite to riot.[7]

Sheriff McLeod had warned Cole. Both defendants knew the purpose of the proposed rally was to frighten and intimidate the Indians, Denny contended. Martin knew because he had told the sheriff about Cole's statements at Randleman. Cole demonstrated that he knew when he offered to "tone it down some" at the scene of the proposed rally. Denny wrote, "this we think is tantamount to an admission by Cole that he originally intended to make statements that would be resented by the Indians and likely cause them to riot."[8] The Justice concluded there was no justification for the Klansmen to attend the rally at Maxton carrying weapons "if their intent and purposes were legitimate and peaceful."[9] This show of armed defiance was calculated to cause a breach of the peace in an area where Cole had been preaching racial

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[6]"Unlawful Assembly," 58 A. L. R. 751, 93 A. L. R. 737; this viewpoint is supported by citations from various jurisdictions; State v Cole, 742.

[7]State v Cole, 743.

[8]State v Cole, 743.

[9]State v Cole, 743.

dissension and "conducting cross burnings for the purpose of frightening certain Indian families in the community."[10] The Ku Klux Klan had no right "to substitute themselves for the law enforcement officers of a community or the courts of the State."[11] The evidence was sufficient to carry the case to the jury against both defendants.

Justice Denny summed up his position on intent. The Monday night cross burnings were an usurpation of authorized police power. The Supreme Court ignored all statements made by Cole following the meeting with Sheriff McLeod in Marion, South Carolina. The Klan's vigilante activities showed their intent to place themselves outside the law. Their resolve to meet regardless of the consequences, regardless of the warnings from authorities, showed a mutual intent, a shared purpose. That intent, that purpose, was to insult and outrage the Indians of Robeson County. This intent, evident from their cross burnings and statements in the press, was reaffirmed by their very presence on the field that night, buttressed by the fact that many of them came armed. By disregarding all of Cole's denials from Marion and his lack of activity at the site of the proposed rally, Denny's argument showed that the meeting of Klansmen was never a lawful assembly. Their common intent to interfere with the rights of the Indians by usurping the authority of duly constituted law enforcement agencies of the county made the very attempt to assemble unlawful. Regardless of what they might have claimed as a mutual purpose, their

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[10] State v Cole, 743.

[11] State v Cole, 744.

previous actions had shown their true intent. Specifically the evidence showed:

> The defendants, armed with deadly weapons, encouraged and attended a meeting of the Ku Klux Klan in a neighborhood having a large number of Indian residents after inflamatory speeches, cross-burnings and newspaper reports thereof had incensed the Indians of the community to such an extent that the proposed meeting would tend to invoke a breach of the peace and incite to riot.[12]

At this point the two defense briefs varied. E. L. Alston argued for Martin that evidence had been admitted against both defendants which should have applied only to Cole and such evidence had not been properly identified for the jury. Conversations between Cole and law enforcement officials in Marion, South Carolina was one example. Alston also argued that the testimony of Bruce Roberts concerning the cross burnings and Cole's statements as to their purpose should not have been admitted against Martin as there was no proof he was there. The Supreme Court found in Martin's favor on both errors and granted him a new trial.

Nye's other arguments for Cole were answered individually by Justice Denny. His decision found no merit in these arguments. Judge Williams' charge to the jury was found adequate on all counts. Denny wrote that it was proper to define the law on riot as that was what the defendant was charged with inciting. The jury had to find that a riot occurred in order to find that Cole had incited it. Williams was also proper in his discussion of the Klansmen's right to bear arms. Denny stated that guns were not part of a man's everyday attire and

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[12] State v Cole, 734.

while one may bear arms "for the safety and protection of his country," in fact one has a duty to do so, one may not use weapons "to the annoyance and terror and danger of its citizens," that constitutes an "abuse of the high privilege with which he has been invested."[13] Guns may not be carried to "terrify and alarm a peaceful people."[14] Here Justice Denny implied the question of intent and thereby fell into the same circular argument that Seawell's appelate brief had used. The Klansmen met with common intent to intimidate and coerce the populace as demonstrated by the fact that some of them were armed. This intent made their carrying of weapons unlawful and caused them to forfeit their constitutional right to bear arms. Denny's argument, however, is stronger than Seawell's as he had already argued that common law general intent demonstrated by Cole's offer to tone it down made the proposed rally unlawful.

Denny concluded his opinion by responding to Nye's charge that Judge Williams' instructions to the jury were in error because they did not include a discussion of the defendants' right to assemble peacefully. Instead of answering Nye's question, however, he focused on the first element of riot, unlawful assembly. Agreeing with previous North Carolina court rulings, the justice stated that unlawful assembly was a necessary constituent to a charge of riot and "should be considered in connection with prosecutions for riot."[15] He continued,

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[13] State v. Cole, 745; State v Huntley, 418.

[14] State v Cole, 745.

[15] 46 Am. Jur. "Riots and Unlawful Assembly," Sec. 10, 103; State v Cole, 746.

however, that one may incite a riot "even though parties may have assembled in the first instance for an innocent purpose."[16] A group need not come together voluntarily to form a mob, "nor is the primary purpose for which they assemble material, if they in fact form and execute an unlawful purpose after they are brought together."[17] In agreement with Seawell, Denny concluded that this adequately covered the defendant's right to assemble in that it recognized that he might have come for a lawful purpose. He overruled the exceptions to the trial judge's charge to the jury.

Cole never filed a federal appeal. His attorney, who never received payment for his work on the state appeal, speculated that Cole simply could not afford it. James Cole turned himself in on April 7, 1959 to serve his sentence. On May 4, 1959, James Garland Martin appeared before Judge Hamilton Hobgood and pleaded guilty to charges of inciting a riot. Judge Hobgood suspended an eighteen month sentence on condition of good behavior for five years and payment of a $250 fine. When Martin told the judge he was unable to pay the fine because he only had $100, Hobgood allowed him to pay $100 if he would agree to pay the remainder in the June term of the court.[18]

An analysis of the arguments presented by both sides must always return to the constitutionally guaranteed rights of the twenty-five or thirty men who gathered on the field that night. Their right

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[16]77 C. J. S. "Riot," Sec. 1, 422.

[17]46 Am. Jur. "Riots and Unlawful Assembly," Sec. 10, 103.

[18]New York Times, May 5, 1959.

to be there and their intent are crucial issues. Two of their number stood trial for carrying out an unlawful purpose and were charged and convicted under common law incitement to riot. A legal necessity for such a conviction, recognized by Seawell, Nye and Judge Williams, was that the assembly was somehow unlawful or at some point became unlawful. If the assembly was lawful until the Indians attacked, then the Klansmen must have taken part in the riot. Otherwise they would not have been guilty of a breach of the peace. However, they were not charged with rioting and the state could not prove that Cole and Martin took part in riotous acts of violence.

The assembly might have become unlawful through the actions of the men gathered there before the attack, but no Lumbee testified that he was urged to action by anything said or done on that field. It could not have been legally determined, therefore, which, if any, word, action or sign led the Indians to riot. No testimony indicated that the Klan members did or said anything which would naturally lead others to violence. No specific intent to cause a breach of the peace had even been suggested by their actions that night. The evidence indicated the Klansmen were trying not to agitate or incite the Indians.

The state charged that the assembly was unlawful because the general intent of the Klansmen was to frighten and intimidate the populace or specifically because they were armed. Their meeting was never a lawful assembly because they met with an unlawful purpose. This, however, appears to be the common law charge of rout. Defined by Blackstone as "where three or more meet to do an unlawful act upon a

common quarrel," rout is ancillary to and usually preceeds riot.[19] It implies that the unlawful purpose would be achieved by the riotous acts. The evidence does not indicate, however, that the Klansmen intended to attack the Indians or engage them in riotous acts. They committed no overt act which might have urged anyone to join them or oppose them.

The issue of the overt act is important in North Carolina cases touching on riot and unlawful assembly upon which this decision relied. There were three such cases, State v Stalcup, Spruill v Insurance Company, and State v Hoffman. In State v Stalcup the North Carolina Supreme Court ruled that unlawful assembly was a necessary element in the charge of participating in a riot. This, wrote Justice Joseph J. Daniels, "must be (we think) proved on the trial, as well as subsequent riotous acts of the defendants."[20] The court reaffirmed this position in Spruill v Insurance Company when they accepted a modification of Blackstone's definition of riot. According to Blackstone a riot occured when "three or more persons do an unlawful act either with or without common cause."[21] Chief Justice Frederick Nash wrote that the parties must share unlawful intent as established in State v Stalcup, thereby agreeing with Chitty's note on Blackstone that "the intention with which the parties assemble, or at least act, must be unlawful."[22]

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[19]Blackstone, Commentaries, 4, 147.

[20]State v Stalcup, 23 N. C. 31 (1840)

[21]Blackstone, Commentaries, 4, 147.

[22]Blackstone, Commentaries, 4, 147.

The most important of the three cases was State v Hoffman. This case concerned a strike at the Clinchfield Mills in Marion, North Carolina in August of 1929. A group of strikers, fearing an influx of scab labor, had opposed local law enforcement officials. The Court's decision, written by Justice Willis J. Brogden defined the three elements of riot so often referred to by Nye and Seawell. More importantly, it was the only North Carolina case cited which dealt with the question of incitement. Several of the striking mill workers had been accused of inciting the riot by lending support to the rioters through their presence. Incitement then was taken to mean aiding and abetting. In his decision on this case Justice Brogden wrote:

> Mere presence, even with the intention of assisting in the commission of a crime, cannot be said to have incited, encouraged or aided the perpetrators thereof, unless the intention to assist was in some way communicated to him; but if one does something that will excite, encourage or assist the actual perpetrators of a crime, this is sufficient to constitute aiding and abetting.[23]

The North Carolina Supreme Court in 1929 recognized that mere presence even with criminal intent did not constitute incitement. The charge of incitement required

> . . . such a course of conduct, by the use of words, signs or language, or any other means by which one can be urged to action, as would naturally lead or urge other men to engage in, or enter on, conduct which, if completed, would make a riot.[24]

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[23] State v Hoffman, 316.

[24] 77 C. J. S. "Riot," Sec. 1, 422.

Both definitions require an overt act on the part of the accused. Since the evidence clearly indicated no such act was committed by anyone on the field after they arrived, the agreement to meet or assemble must have been the overt act.

There are then two questions. Did the Klansmen have a lawful right to meet protected by the Constitution and did the preaching of racial dissension constitute an unlawful purpose? More simply, did the Klan members have the right to exercise their constitutionally guaranteed right of free speech and free assembly?

The first amendment guarantees both freedom of speech and assembly and by extension the corollary freedom of association.[25] Neither the federal or state governments may abridge either freedom, the United States Supreme Court has said, without showing just cause.[26] Characteristically the court has upheld the individual's right to free speech except in cases where the speech constituted incitement, so-called "fighting words," or posed a "clear and present danger" to the nation.[27]

Two theories on the nature of free speech exist in a variety of forms. The first maintains that freedom of speech is relative but

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[25] NAACP v Alabama, 357 U. S. 449 (1958), the court expanded first amendment protections to include freedom of association.

[26] Gitlow v New York, 268 U. S. 652 (1925). In this case the court recognized that first amendment freedoms were protected, under the fourteenth amendment, from infringement by the states.

[27] Chaplinsky v New Hampshire, 315 U. S. 568 (1942). The court ruled that so-called "fighting words" were unprotected under first amendment freedoms; Schenck v United States, 249 U. S. 47 (1919). Justice Oliver Wendell Holmes authored the doctrine of "clear and present danger of substantive evil" as a test for inciteful speech not protected under first amendment freedoms.

should be guaranteed for its own sake. Oliver Wendell Holmes argued that ". . . the theory of our constitution . . ." is that ". . . the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."[28] The second theory of free speech would limit special protections to specific areas of free speech. Similar to Holmes' "marketplace of ideas" but narrower and absolute in protection was expounded by Alexander Meiklejohn. He asserted that the special guarantees of freedom of speech should always cover public discussion of any issues of political or civic importance.[29] The Supreme Court in DeJonge v Oregon, while maintaining that through free debate and free exchange of ideas the government remained responsive to the will of the people, expanded protection to include the right of assembly. Chief Justice Charles E. Hughes wrote, "The right of peaceable assembly is a right cognate to . . . free speech . . . and is equally fundamental. . . . Peaceable assembly for lawful discussion cannot be made a crime."[30]

Certain types of speech, however, are not protected under the first amendment. The first category of these falls under the "clear and present danger" ruling. The court has upheld legislation which curbs speech posing a threat to the government. Subscribers to the

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[28]Holmes' dissent in Abrams v United States, 40 Sup. Ct. 22 (1919)

[29]Alexander Meiklejohn, Free Speech and Its Relation to Self Government (New York, 1958), 18-19, 22-27, hereinafter cited as Meiklejohn, Free Speech.

[30]299 U. S. 353 (1937).

theory that freedom of political speech should be absolute assert that this test is a "peculiarly inept and unsuccessful attempt to formulate an exception to . . . [a] principle."[31] Even the author of the phrase recognized that the line between incitement and persuasion was thinly drawn. He attempted to refine and narrow the doctrine's construction in his dissent in Gitlow v New York. In this decision, Justice Holmes wrote, "Every idea is an incitement . . . . The only difference between the expression of an opinion and an incitement . . . is the speaker's enthusiasm . . . ."[32] But the most eloquent discussion of the scope and application of the theory appeared in Louis Brandis' concurring opinion in Whitney v California.

> Fear of serious injury cannot alone justify supression of free speech and assembly . . . . There must be reasonable grounds to believe that the danger apprehended is imminent . . . . The fact that speech is likely to result in some violence or in destruction of property is not enough to justify supression. There must be probability of serious injury to the state.[33]

In 1951, Felix Frankfurter rejected the Court's use of a clear and present danger test saying, "No matter how rapidly we utter the phrases . . . or how closely we hyphenate the words, they are not a substitute for the weighing of values."[34]

The second area of unprotected speech is so-called "fighting words." In Chaplinsky v New Hampshire, the United States Supreme Court

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[31]Meiklejohn, Free Speech, 50.

[32]268 U. S. 673.

[33]274 U. S. 357, 47 Sup. Ct. 41, 71 L. Ed. 1095 (1927).

[34]Dennis v United States, 341 U. S. 494 (1951).

upheld the conviction of a Jehovah's Witness for calling a city marshal a "damned Fascist" and a "God damned racketeer."[35] It upheld a statute that forbade the address of anyone in the street or public place by derisive or annoying words. The New Hampshire Supreme Court maintained that it applied only to words which had "a direct tendency to cause acts of violence by persons to whom individually, the remark is addressed."[36] The federal court agreed to this definition thereby accepting the judgment "that there is a nearly certain connection between some epithets and the outbreak of violence."[37] A short time later, in the case of Terminiello v Chicago, reluctant to employ their own limitation, the Court chose not to expand or clarify the fighting words doctrine. William O. Douglas wrote, a ". . . function of free speech under our system of government is to invite dispute . . . . Speech is often provocative and challenging."[38] However, "the Court avoided the problem of free speech when a threat to public peace and order is imminent" by ruling that the law under which Terminiello was convicted was too broad.[39]

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[35]315 U. S. 494 (1951).

[36]315 U. S. 573.

[37]Laurence H. Tribe, American Constitutional Law (Mineola, N.Y., 1978), 617, hereinafter cited as Tribe, American Constitutional Law.

[38]337 U. S. 1 (1947). Terminiello, a defrocked Catholic priest, spoke in a Chicago auditorium. He was known for his attacks on Jews, blacks and Communists. A crowd gathered outside and tried to storm the auditorium throwing ice picks, stones and bottles. Terminiello was arrested for causing a breach of the peace.

[39]Lucius J. Barker and Twiley W. Barker, Jr., Civil Liberties and the Constitution: Cases and Commentaries, 3rd edition (Englewood Cliffs, N. J., 1978), 78 hereinafter cited as Barker, Civil Liberties.

The Court came to grips with this issue in 1951, in the case of Feiner v New York. In this instance the court upheld the conviction of a Syracuse University student for making remarks about several politicians on a city street corner "that seemed to stir up much less excitement and disorder than that evoked by the Terminiello speech."[40] In fact, two policemen ordered Feiner to stop speaking before violence actually erupted from the hostile crowd of seventy-five listeners. The Court's opinion, written by Chief Justice Fred Vinson, read,

> We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and are also mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings . . . . But we are not faced here with such a situation. It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace . . . .[41]

Justice Douglas, in his dissent, argued that ". . . freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest."[42]

Likewise the government may not forbid a lawful assembly on the grounds that it may cause a disturbance. As Justice Brandeis wrote,

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[40]Martin Shapiro and Rocco J. Tresolini, American Constitutional Law (New York, 1975), 353, hereinafter cited as Shapiro and Tresolini, American Constitutional Law.

[41]340 U. S. 315 (1951).

[42]340 U. S. 315.

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty."[43] When a speaker's opponents threaten to break up a lawful assembly, authorities must attempt to prevent the disturbance by controlling the audience. Zechariah Chafee, Jr., wrote in 1942, "The sound constitutional doctrine is that the public authorities have the obligation to provide police protection against threatened disorder at lawful public meetings in all reasonable circumstances. It is their duty to make the right of free assembly prevail over the forces of disorder if by any reasonable effort or means they can possibly do so."[44] The right of free assembly does not end simply because members of the audience may disagree, no matter how violently with the speaker's political views. While police have a duty to maintain good order, they may not do so at the expense of free speech. They must first make every effort to prevent the disruption by supressing the violent actions of the speaker's opponents. If the right to tranquillity assumes predominance over the ". . . right of free discussion . . . a man can be denied freedom because of the intolerance of his opponent."[45] The United States Supreme Court ruled in 1939, that freedom of assembly cannot be denied simply on the grounds that the meeting might result in violence.[46]

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[43]Whitney v California, 274 U. S. 357 (1927).

[44]Zechariah Chafee, Jr., Free Speech in the United States (Cambridge, 1942), 425, hereinafter cited as Chafee, Free Speech.

[45]Chafee, Free Speech, 427.

[46]Hague v Committee for Industrial Organization, 307 U. S. 496 (1939)

Closely related to fighting words are the symbols of hatred recognized by the Michigan court and reaffirmed by Justice Denny in his decision in State v Cole. However, even if one accepts the notion that anything as subjective as a group's response to abstract symbols can be determined a priori, what were the symbols of the Ku Klux Klan that night? Since it was night and the generator was not working, the single man in a robe and the banner reading KKK were probably not visible at five hundred yards. The testimony indicated that the closest Indian residence was at least that distance from the site of the proposed rally. Nor did anyone on the field do or say anything to incite a riot. No fighting words were spoken on January 18, 1958. The words that incited the Indians were alleged quotes from James Cole that were printed in the newspaper. The statement said that the cross burnings were a warning to the Indian people who were breaking down the barriers of segregation. With three way segregation in force in the county this remark was directed at an extremely limited segment of the Lumbee population, those who were actively seeking to integrate with the white community. The remarks were not to the Lumbee nation as a whole. However, Cole made sincere efforts to deny in print that the Indians were, in fact, the targets of Klan activities in Robeson County. It is difficult to classify statements made against a small portion of the community and then retracted publicly as fighting words.

In the Feiner decision the court ruled that the speaker went beyond the bounds of persuasion and argument until the police were

". . . powerless to prevent a breach of the peace . . . ."[47] Charles Nye argued that the police could have prevented the violence at Maxton. The Indians showed respect for the Highway Patrol when it arrived. There appear to be substantial differences between Feiner v New York and State v Cole.

The two court cases cited by Seawell and Denny also vary from the case of the Maxton incident. Aside from the question of symbols, Charles Nye argued that the proposed site was not in a public place, but a privately owned field outside of any city or town limits. While it may have been true that Indians lived in the area, the evidence given during the trial showed that the Klansmen could not be heard at a distance of five hundred yards. In both cases, Commonwealth v Scuillo and People v Burman, those inciting the riots went into the midst of the people who directly opposed their views. Their respective march and demonstration were carried out in the very center of a climate of extant hostility. This proposed rally was not held in the city of Pembroke or even the town of Maxton. It would have happened on the farm of a white man and was hardly Indian territory. Furthermore, Nye persisted, James Cole had reason to believe that no action would be taken unless the Klan by their speeches provoked the Lumbees. He tried to deny ill will toward the Indians. Cole further demonstrated during preparations for the rally that he was disinclined to incite a riot when he advised against roping off the field.

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47 Feiner v New York, 340 U. S. 315.

James Cole had the right to be on that field. Nothing he did or said, that night or any other night, was unlawful. His statements to the press were not fighting words nor did they offer a clear and present danger to society. All of his statements were protected under the first amendment. He had a right to assemble with others and to make his political views known. He was indicted because his group was a political liability to the county sheriff. A biased judge and frightened jury convicted him. The attorney general had political aspirations and used an anti-Klan image to further his career.[48] The state Supreme Court ignored constitutional protections of first amendment freedoms recognized by the United States Supreme Court at the time and upheld the conviction. Their decision was in keeping with the general opinion that the presence of the KKK damaged the image of North Carolina; a progressive state in the reactionary South.

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[48]Seawell was unsuccessful in his bid for the governorship in 1960, despite support from Luther H. Hodges. The press speculated in 1966, that Seawell might try again in the 1968 election, as a strong anti-Klan candidate, News and Observer, June 12, 1966. The John D. Larkins Oral History Collection, East Carolina Manuscript Collection, Greenville, North Carolina.

CONCLUSION

The State Bureau of Investigation closely monitored Ku Klux Klan activities both before and after the Maxton riot. After the Lumbee incident, Governor Luther Hodges became an avid Klan watcher as well. From January to August 1958, Governor Hodges' administrative assistant, Robert Giles, received copies of SBI reports on Klan activities. According to these reports secrecy became a greater concern for Klan members. At a rally held on January 25, for example, "all KKK identification cards were taken up and destroyed . . . [and] numbers [were] . . . assigned to each member to designate their names."[1] While awaiting trial James Garland Martin ended his association with the Carolina Klans but James Cole remained active. Some Klan members, SBI informants reported, dissatisfied with Cole's leadership, felt that he and Martin had mishandled Klan funds.[2] Regardless of these charges the Knights collected $15.00 for Cole's appeal at a rally outside Greensboro on March 31, and Cole himself requested financial assistance from fellow Klan members at a rally in Greensboro the following June with some success.[3]

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[1]Agent L. E. Allen to Walter F. Anderson, Director of the Bureau of Investigation, North Carolina Department of Justice, January 27, 1958, Governors' Papers: Luther Hartwell Hodges, State Archives, Raleigh, hereinafter cited as Governor Hodges' papers. Part of a series of copies of SBI reports filed by Agent Allen on the Ku Klux Klan, File number M-24-361, forwarded to the Governor's office, from January 27, 1958 to August 10, 1958.

[2]L. E. Allen to Walter F. Anderson, February 8, 1958; L. E. Allen to Walter F. Anderson, February 14, 1958, Governor Hodges' papers.

[3]L. E. Allen to Walter F. Anderson, April 15, 1958; L. E. Allen to Walter F. Anderson, June 8, 1958, Governor Hodges' papers. The report did not specify the amount Cole collected.

After the Maxton affair, the North Carolina Ku Klux Klan maintained a lower profile but did not cease to exist. Power was shifting from Cole's Associated Carolina Klans to another group, the United Klans. In May of 1958, the United Klans boasted an estimated 1,000 members in North Carolina. The heaviest concentration of activity was in Union County which had a membership of 300.[4] One of the rising leaders of the United Klans, a young man from Salisbury, North Carolina, James Robert "Bob" Jones, participated in the power struggle between his group and the Carolina Klans.[5]

By 1962, the shift in power had been completed, and the United Klans emerged dominant in the state. Early in the year Bob Jones, a thirty-four year old former brick layer, lightning rod and awning salesman, accepted the position of Grand Dragon of the North Carolina Klan as an affiliate of the United Klans of America, Knights of the Ku Klux Klan in Tuscaloosa, Alabama. He established his headquarters in Granite Quarry and began to organize in earnest. During the summer of 1964 the Klan grew visibly in response to the recently enacted Civil Rights Act, voter registration drives and anticipated school integration. In August someone burned a cross on the lawn of the Governor's mansion and three major daily newspapers in the state published a series of articles on the group's activities.[6] By May of 1965,

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[4]L. E. Allen to Walter F. Anderson, May 25, 1958, Governor Hodges' papers.

[5]Agent J. N. Minter to Walter F. Anderson, August 18, 1958, Governor Hodges' papers.

[6]News and Observer, August 18, 23, 24, 1964; November 17, 1964; May 23, 1965.

organized in nineteen counties from Salisbury to the coast, the Klan estimated its membership at 5,000.[7]

The increased membership and publicity prompted governmental action on the state and federal level. The House of Representatives Committee on UnAmerican Activities announced, over protest from the American Civil Liberties Union, it would hold an investigation into Klan activities throughout the South.[8] On the state level, Thad Eure, North Carolina Secretary of State, requested that State Attorney General Wade Bruton rule on whether or not the North Carolina Klan required a certificate of authority to operate in the state as a foreign corporation. Bruton ruled affirmatively since the Georgia chartered corporation had filed franchise tax returns for 1963 and 1964 with the North Carolina Department of Revenue listing Jones as their agent. Eure denied Jones' first application because of a discrepancy between the name of the parent company and his franchise but accepted his second application. In July, 1965, the state granted the Klan a certificate of authority "to maintain the liberty bequeathed to us by our forefathers, and to preserve the American way of life."[9]

In late October, the testimony of congressional investigator Phillip Emanuel before the House UnAmerican Activities Committee stunned many North Carolinians. Emanuel stated that their state was "by far the most active . . . for the United Klans of America," with as many

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[7]News and Observer, May 23, 1965.

[8]The Daily Reflector (Greenville, North Carolina), February 16, 1965, hereinafter cited as Daily Reflector.

[9]Daily Reflector, June 23, 1965; News and Observer, July 8, 1965.

as 112 klaverns or units.[10] In North Carolina and in Washington, D. C. political leaders were first surprised then firm in their denials. Governor Dan K. Moore stated, based on SBI reports, there were only approximately "618 hard core members in the state."[11] Some politicians admitted that the Klan had grown, but their explanations differed. Lt. Governor Bob Scott cited Jones' personal organizing ability while others tied the growth to the second 1964 gubernatorial race involving Raleigh segregationist I. Beverly Lake. Luther Hodges blamed "poison planted by Republicans spouting Goldwaterism."[12] As the HUAC investigations continued the Klan gained strength in North Carolina, some of which was attributed to the hearings themselves. Some law enforcement officials expressed concern over the situation and politicians worried about the effect on North Carolina's image.[13]

This anxiety prompted Governor Moore to announce publicly the existence of a Law and Order Committee composed of the heads of various state agencies.[14] He appointed Malcolm Seawell, then chairman of the

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[10] News and Observer, October 20, 1965.

[11] News and Observer, October 28, 1965; Walter Anderson, Report No. 7 to the Law and Order Committee on the United Klans of America, Knights of the Ku Klux Klan, October 31, 1966, Governors' Papers: Daniel K. Moore, State Archives, Raleigh, North Carolina, hereinafter cited as Governor Moore's papers.

[12] News and Observer, October 24, 31, 1965; Daily Reflector, October 25, 1965.

[13] News and Observer, November 6, 1965; January 22, 1966; Charlotte Observer, February 27, 1966.

[14] According to the News and Observer, Commissioner of Motor Vehicles A. Pilston Godwin, SBI Director Walter F. Anderson, Attorney General Wade Bruton, Commissioner of Revenue Ivey Clayton, and Department of Administration Director Ed Rankin comprised this Law and Order Committee.

Board of Elections, to preside over the group. The governor formed the committee to coordinate information on groups like the Ku Klux Klan and Seawell stated that its charge was first to "prevent violence and second to see that every resource will be used in tracking down and bringing to justice persons responsible for violence."[15] While Governor Moore stressed that the committee would not limit its investigations to the KKK, he emphasized that it would conduct an exhaustive study of the Klan, particularly that organization's financial structure.[16] Malcolm Seawell put it in stronger terms. "The Klan," he said, "better not initiate any violence . . . we're through playing games."[17] Governor Moore stressed that although the committee intended to seek out anyone guilty of violence, they would respect "at all times the rights of the people involved under our constitution and judicial procedure."[18] The UnAmerican Activities Committee hearings ended February 25 and a week later seven Klan leaders were indicted for contempt of Congress for refusing to answer questions.[19]

Governor Moore's commitment to protect constitutionally guaranteed rights proved questionable during the month of March, 1966. Five days after the indictments were handed down in Washington, D. C.

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[15] Daily Reflector, January 3, 1966; News and Observer, January 4, 1966.

[16] News and Observer, January 4, 7, 1966.

[17] Daily Reflector, January 3, 1966.

[18] Charlotte Observer, January 7, 1966.

[19] Greensboro Daily News, February 25, 1966; March 4, 1966; Winston-Salem Journal, March 4, 1966; Durham Morning Herald, March 4, 1966; Charlotte Observer, March 4, 1966.

the Winston-Salem Journal broke the news that Grand Dragon Jones intended to hold a rally in Robeson County on March 27. The report indicated they planned to meet on the same field used in 1958.[20] Malcolm Seawell stated that he did "not consider it a wise thing for the Klan to hold a rally in that part of the state" but failed to mention he had already formulated a plan for state action.[21]

Seawell assisted in the orchestration of a strategy to deal with this threatened rally in late February. On February 25, after a conversation with Governor Moore, Seawell telephoned Robeson County Sheriff Malcolm McLeod to discuss the proposed Klan meeting. The sheriff speculated that one of two things might occur, the least likely being that no one would attend the rally because of the trouble in 1958. Most likely, the sheriff asserted, was a second scenario where a large crowd of spectators would attend and "the Indian citizens of his County would arm themselves . . . and there would be a riot and a massacre the likes of which this State has not seen."[22] Sheriff McLeod had three ideas for handling the situation. He considered blocking the highways to prevent people entering the area or requesting a contingent of National Guard. His first choice, however, was an injunction to prevent the Klan from holding the rally.[23] Seawell

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[20]Winston-Salem Journal, March 9, 1966.

[21]Winston-Salem Journal, March 10, 1966.

[22]Malcolm B. Seawell to Daniel K. Moore, February 25, 1966, Governor Moore's papers.

[23]Seawell to Moore, February 25, 1966, Governor Moore's papers.

immediately drafted a memo to the governor describing McLeod's concerns and suggestions.

Spurred by this memo Governor Moore initiated action. That afternoon his office requested an opinion from Attorney General Thomas Wade Bruton, "as to whether a meeting of the Klan on leased lands could be enjoined by our courts because of its threat to the people of the community and the possible loss of human life."[24] The Attorney General's response, drafted by Assistant Attorney General James F. Bullock, indicated that "the general rule is that equity will not interfere by injunction merely because defendant's conduct or threatened conduct" constituted a crime. There were, however, general statements that the process of injunction could be used against criminal acts "where the relief is necessary to protect the rights of the public or private individuals."[25] The opinion cautioned that it could not guarantee that the court would grant an injunction but because of the events of 1958 there was a strong possibility. Citing legislation which authorized the board of county commissioners to take action to supress riots and insurrections, Bullock and Bruton suggested that the district solicitor, the sheriff and the board of commissioners should seek the court action.[26] Nine days later SBI director Walter F.

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[24]Charles Dunn for Governor Daniel K. Moore to Attorney General Thomas Wade Bruton, February 25, 1966, Governor Moore's papers.

[25]Bruton and James F. Bullock to Moore, March 2, 1966, Governor Moore's papers.

[26]General Statutes of North Carolina, 153-9 (53), hereinafter cited as G. S.

Anderson told the press that the state had "some definite plans . . . something rather unique" but refused to elaborate.[27] Klan members were making plans for their own security forces to surround the rally site.[28]

It could have been eight years earlier when Seawell stressed the threat of violence in a statement on March 15. Saying he had received phone calls from whites and Indians, he insisted that the rally, if held, would "most likely lead to bodily harm and killings." Of the Klan's right to assemble he said, "We don't want to interfere with rights, but we can't allow killings."[29] The following day Robeson County Solicitor John B. Regan sent a telegram to Robert Jones warning him of possible violence and bloodshed, as history seemed to mandate.[30] In Pembroke a cross was burned at the predominately Indian First Baptist Church and several Lumbees reported receiving threatening cards in the mail.[31] Speaking to the Chapel Hill Rotary Club, Seawell echoed his 1958 Supreme Court argument when he said,

> It is not a peaceful mission that the Klan intends in Robeson County. Freedom of speech has nothing to do with the matter . . . . The state will not sit idly by and see the Klan . . . take the law in

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[27] Charlotte Observer, March 11, 1966; Winston-Salem Journal, March 11, 1966; Durham Morning Herald, March 11, 1966.

[28] Winston-Salem Journal, March 11, 1966; Greensboro Daily News, March 11, 1966.

[29] Winston-Salem Journal, March 15, 1966; Charlotte Observer, March 16, 1966.

[30] Winston-Salem Journal, March 17, 1966; Durham Morning Herald, March 17, 1966.

[31] Daily Reflector, March 17, 1966; Charlotte Observer, March 17, 1966.

> its own hands or do damage to the good order existing in North Carolina, and every means at the disposal of the state will be used.[32]

As the Maxton riot appeared destined to repeat itself the state government revealed its plan on March 17, 1966. District Solicitor Regan presented a petition carrying 175 signatures to Superior Court Judge William A. Johnson. It requested that the judge halt the proposed Klan rally and argued it would result in violence and death.[33] Simultaneously Robert Jones announced to the press that the Maxton meeting was postponed. Regardless of this new development, several hours later Judge Johnson issued a temporary injunction which prohibited the Klan from meeting within a twenty-five mile radius of Robeson County. Johnson set the hearing date for March 31. Jones then announced his own strategy, Imperial Wizard Robert Shelton would meet with Lumbee Indian leaders before the hearing.[34] This variation on a tactic that failed James Cole in 1958, would prove no more effective for Robert Jones. As if preordained, Governor Moore resurrected sentiments of one of his predecessors. At a news conference that afternoon reporters asked why, if the Indians were making the threats, an injunction had not been issued against them. Moore responded that unless the Klan met in the area there would be no violence.[35]

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[32]Durham Morning Herald, March 17, 1966; Charlotte Observer, March 17, 1966.

[33]The Sun-Journal (New Bern, North Carolina), March 17, 1966, hereinafter cited as Sun-Journal.

[34]Daily Reflector, March 18, 1966.

[35]Durham Morning Herald, March 18, 1966.

Klan leaders proceeded with their attempts to appease the Lumbees. Robert Jones and Robert Shelton attempted to establish a dialogue with Indian leaders. Two Klansmen reportedly approached Simeon Oxendine insisting that the Klan meant the Indians no harm. He rejected their overtures.[36] Jones scheduled a meeting for March 21, but the Lumbee leaders he invited chose not to attend. One Indian told reporters, "They told me they wanted our goodwill, but I notice the Klan's paper (The Fiery Cross) says Klansmen have to be white. I'm not white. I'm an Indian and I'm proud of it."[37] The Klan's strategy did not include appealing Judge Johnson's decision, and the press speculated that the rally was cancelled.[38]

The five month old North Carolina Chapter of the American Civil Liberties Union criticized the restraining order. Charles F. Lambeth, Jr., North Carolina Chapter president, stated their position. "We defend the civil liberties and rights of everyone, no matter how unpopular the cause might be."[39] In 1958, the ACLU expressed no interest in the trial of James Cole and James Garland Martin. Speaking of the case in retrospect, Lambeth, a member of the ACLU for six years, said, "It's easy to enjoy seeing the Klan chased out of Robeson County . . . to sympathize with the Indians, and comment that the Klan is only getting its due." However belatedly, he continued, "The law

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[36]Winston-Salem Journal, March 18, 1966.

[37]Charlotte Observer, March 22, 1966; Sun-Journal, March 22, 1966; Durham Morning Herald, March 22, 1966.

[38]Winston-Salem Journal, March 25, 1966.

[39]Winston-Salem Journal, March 27, 1966.

does not permit the suppression of unpopular views, presented in a peaceful and orderly fashion, merely because others resent those views and resort to lawless action." He urged Governor Moore to "stand with law and order."[40] Lambeth's statement was the only action authorized by the state's Civil Liberties chapter and he anticipated no participation in the hearing scheduled for March 31.[41] Lambeth also made it very clear that his organization did not condone the activities of the Ku Klux Klan.

Governor Moore received a number of letters supporting the ACLU position, so many, in fact, that a form letter was drafted as a response. The standard reply included Moore's own disclaimer, "let me emphasize that I am well aware of the right of assembly . . . . However, I insist that our laws be obeyed and that there be no violence. The facts . . . indicated that should the rally be held, the protection of citizens of North Carolina would virtually be impossible."[42]

The injunction hearing convened as scheduled. Judge Johnson heard two hours of arguments from Solicitor Regan and Malcolm Seawell in favor of a permanent injunction to prevent violence. Raleigh attorney, Lester Chalmers, lawyer for the Klan, argued that a permanent injunction would violate freedom of speech and assembly. Grand Dragon Robert Jones told the Associated Press that if the judge granted a permanent injunction the Klan would take the case to the Supreme Court.

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[40] Winston-Salem Journal, March 25, 1966.

[41] Greensboro Daily News, March 30, 1966.

[42] Dan K. Moore, unsigned form response, March 26, 1966, Governor Moore's papers.

Judge Johnson delayed his decision until April 18. He stated that "It appeared that what might be legal for the Klan in the rest of North Carolina would be illegal in Robeson." This, he said, was a very difficult point to comprehend.[43] After two and a half weeks of deliberation, Judge Johnson dissolved the temporary restraining order. At this second hearing, Durham attorney Anthony Brannon tried to speak as a friend of the court on behalf of the North Carolina Chapter of the ACLU. The group decided that action stronger than a statement by their president was in order. The judge refused to allow Brannon to speak, however. In doing so he sustained objections from both John Regan and Lester Chalmers, who stated that the Klansmen objected to having the ACLU as an ally.[44] The injunction dissolved, the Klan leaders declined to set a new date for a Robeson County rally.

Not yet defeated, Malcolm Seawell hinted that new legal action against the Klan might be forthcoming.[45] During the first week in May, Seawell unveiled his new attack and in the process alienated members of the Moore administration. He proposed to revoke the Klan's certificate of authority. In announcing his intention, he stated that it should never have been granted permission to operate in North Carolina as a non-profit organization. Thad Eure, Secretary of State, responded sharply to Seawell's implied criticism of his handling of the case.

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[43] Winston-Salem Journal, April 1, 1966; Charlotte Observer, April 1, 1966; Greensboro Daily News, April 1, 1966.

[44] Charlotte Observer, April 19, 1966; Greensboro Daily News, April 19, 1966; Durham Morning Herald, April 19, 1966; News and Observer, April 19, 1966; Winston-Salem Journal, April 19, 1966.

[45] Durham Morning Herald, May 1, 1966.

This prompted a public apology from Seawell.[46] He promised to provide the Secretary with a complete report on Klan activities and praised Eure's "willingness to receive, consider and appraise evidence and to take such action thereon as may be warranted."[47] Thad Eure, however, would not be bullied or complimented into a hasty action and requested a ruling from the entire Law and Order Task Force.

Temporarily halted on one front Seawell recalled his 1952 attempts to outlaw the Klan as a secret political society. Early in 1966, the Klan became active in state politics claiming member or sympathizer candidates in seventy-five counties across the state.[48] The Law and Order Chairman told reporters that the Ku Klux Klan was involved in illegal political activity by campaigning for Klansmen seeking public office in North Carolina. He explained, "The Klan is a secret organization and for them to engage in any type of political activity makes them a secret political society under the law in my view." In addition to the 1868 legislation he had applied in 1952, Seawell proposed to employ the Moore Act, passed in 1953.[49] The Klan candidates did not do well in the primaries and Governor Moore stated he planned

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[46] Charlotte Observer, May 5, 1966; Greensboro Daily News, May 5, 1966; Winston-Salem Journal, May 5, 1966.

[47] Greensboro Daily News, May 5, 1966.

[48] The News Argus (Goldsboro, North Carolina), May 26, 1966.

[49] News and Observer, May 28, 1966. In 1953, the state legislature passed Section 12.2, Chapter 14 of the General Statutes. Called the Moore Act, after Clifton L. Moore, it strengthened the 1868 law which outlawed secret political and military societies, (F. S. 14-10) by specifying what constituted political activity which was prohibited to secret societies.

no action to outlaw the Klan as a secret political organization. Citing press accounts of Klan members running for office, Moore said, "If that is true, there's nothing secret about it."[50] The governor lent no assistance to the anti-Klan crusader when he told reporters that Seawell's statements were no more than opinions of a private citizen. When asked if he had himself modified his position, Moore denied changing his previously firm stand against the Klan and reasserted his commitment to punish those responsible for violence. However, he pointed out, "crimes are committed by individuals, not by organizations."[51] Ignoring the governor's obvious slap on the wrist, Seawell continued to push for action under the Moore Act, stating, "If the 1953 state law was rigidly enforced, I believe it would cripple the Klan and render it virtually helpless."[52]

Nor had the crusader given up hope for his charter revocation scheme. On June 8, his committee met with Governor Moore to discuss his charges. Charles Dunn, Administrative Assistant to the Governor, forwarded Seawell's allegations to the Attorney General for an opinion. The Law and Order Chairman asserted that the Klan, in addition to illegal political activity, "was conducting a military buildup in North Carolina."[53] Governor Moore requested and received a full report from SBI director Walter Anderson. This report confirmed the formation of a

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[50]News and Observer, June 7, 1966.

[51]News and Observer, June 7, 1966; June 10, 1966.

[52]News and Observer, June 20, 1966.

[53]Daniel K. Moore to Walter F. Anderson, June 7, 1966, Governor Moore's papers.

paramilitary arm of the Klan, referred to as the Security Guard.[54] A copy of Anderson's findings accompanied Dunn's request for the Attorney General's opinion on the revocation of the Klan's authority to operate. Bruton's response, drafted by Deputy Attorney General Ralph Moody, said that there were "grave doubts as to the sufficiency of the evidence to revoke the certificate of authority." Moody went on to state that "if a secret political society committing acts contrary to the so-called Moore Act exists, then it is a matter for criminal indictment." However, evidence was not sufficient to insure such an indictment.[55] The Law and Order Committee considered the Attorney General's opinion and then issued a statement that they would not advise Secretary of State Thad Eure to initiate proceedings to revoke the Klan's permission to operate.

Seawell was clearly disappointed by the committee's decision and took it as a personal affront. He was not sure, he said, whether the committee ". . . had as its purpose the accreditation of the Klan or the disaccreditation of me." He disagreed completely with the committee findings stating, "There is every reason in the world to revoke the certificate . . . and . . . every reason under the law why it never should have been granted."[56] The next day Seawell resigned as chairman

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[54]Walter F. Anderson to Daniel K. Moore, June 9, 1966, Governor Moore's papers.

[55]Thomas Wade Bruton and Ralph Moody to Daniel K. Moore, June 23, 1966, Governor Moore's papers.

[56]News and Observer, July 2, 1966.

of the Law and Order Committee citing "the press of business" as his reason.[57]

No longer an administration insider, the crusader, his enthusiasm unabated, began to attack the Moore administration. Not three weeks after his resignation he appeared on a television news conference in which he charged that the SBI had withheld evidence from the Law and Order Committee in its Klan charter revocation investigation. Moreover, he accused Wade Bruton of indifference to Klan activity and failure to obtain all possible evidence on Klan paramilitary activities. Recurring to his constant theme, he insisted that the state had sufficient evidence to ban the Ku Klux Klan as a secret political and military society.[58] He argued that the Law and Order Committee's investigation had been hampered because in late March and early April, William O'Quinn, a member of the Attorney General's staff assigned to the committee, had been denied access to certain files.[59]

State officials reacted rapidly and angrily. Wade Bruton replied first stating emphatically all evidence in SBI files except the names of the informants had been turned over to Seawell's Committee.[60]

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[57]Fayetteville Observer, July 1, 1966. The split between Moore and Seawell had already led to speculation that Seawell was considering a 1968 bid for the governorship. New and Observer, June 12, 1966.

[58]Charlotte Observer, July 19, 1966; Winston-Salem Journal, July 19, 1966; Durham Morning Herald, July 19, 1966.

[59]Charlotte Observer, July 20, 1966.

[60]Greensboro Daily News, July 20, 1966; Winston-Salem Journal, July 20, 1966; Durham Morning Herald, July 20, 1966.

SBI Director Walter Anderson's statement declared the former chairman's allegations were "wholly and completely without foundation." All pertinent information, he continued, had been turned over to the Attorney General and the Law and Order Committee.[61] Charging that Anderson's response was evasive Seawell queried, "Who is to say what is pertinent?"[62] Governor Moore told the press that the Attorney General had access to all of the information when he wrote his opinion.[63]

When it appeared that Seawell stood alone against a united front, a new voice entered the argument. William O'Quinn, a key figure in the former chairman's allegations, resigned from the Attorney General's staff protesting Wade Bruton's failure to correct what he termed false impressions created by Anderson's statements to the press. O'Quinn further charged that Anderson withheld information not only from the committee and the Attorney General but from Governor Moore as well.[64] Two days later Anderson admitted to reporters that he had closed certain files to O'Quinn but denied he had withheld information from either the Attorney General or the Governor. Seawell was not "a constituted officer of the government," he said, and therefore had no legal right to see confidential SBI records.[65] Malcolm Seawell's official relationship

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[61] News and Observer, July 21, 1966; Charlotte Observer, July 21, 1966; Greensboro Daily News, July 21, 1966.

[62] Durham Morning Herald, July 23, 1966; Greensboro Daily News, July 23, 1966.

[63] News and Observer, July 27, 1966.

[64] Charlotte Observer, July 26, 1966; News and Observer, July 26, 1966.

[65] Greensboro Daily News, July 28, 1966

with the administration ended the next day when he resigned as chairman of the State Board of Elections.

Seawell's resignation did not end government attempts to curb non-violent Klan activities in North Carolina. Governor Moore opposed Seawell's impetuosity, not the end result he sought. In November, four months after Seawell left Raleigh, the Governor requested a confidential opinion from Wade Bruton on possible prosecution of the Ku Klux Klan under the same secret political societies legislation that the former chairman had tried to enforce. Bruton's opinion stated that to obtain a conviction under the Moore Act, he required evidence that the Klan was engaged in political activities which either violated or circumvented the laws of the state.[66] He continued, "From our examination of the SBI reports, it is doubtful that the political activities of the Klan constitute a criminal offense under the Corrupt Practices Act or a violation of . . . the Moore Act."[67] Bruton's negative response sent Dan Moore to his personal counsel, George R. Ragsdale, with the task of finding sound legal grounds for banning nonviolent Klan activities. Ragsdale, like Bruton, failed to achieve the desired results.[68] In the end, Moore was as unsuccessful as Seawell had been, only quieter.

During the sixties, the United States Supreme Court dealt with the question of assemblies which threaten to result in violence. In

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[66]G. S. 14-12.2.

[67]Thomas Wade Bruton to Daniel K. Moore, November 28, 1966, Governor Moore's papers.

[68]George R. Ragsdale to Daniel K. Moore, December 22, 1966, Governor Moore's papers.

Garner v Louisiana in 1961, and Taylor v Louisiana in 1962, the Court overturned breach of peace violations against blacks engaged in apparently peaceful demonstrations.[69] They did so because "the only justification local authorities could ultimately offer to support their belief in the imminence of white spectator violence was the assertion that the very sight of blacks attempting to make use of . . . [previously segregated] facilities would stir anger."[70] The Court ruled that even if true it was constitutionally irrelevant since "such activity . . . is not evidence of any crime and cannot be considered either by the police or by the courts."[71] The Court consistently reversed convictions of civil rights demonstrators even when police could not apparently handle the hostile crowd.[72] Justice John Marshall Harlan writing for the Court in Street v New York stated, "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of the hearers."[73] The audience's hostility could be a factor only if the speaker went directly into their midst, in a sense held them captive. In all but the most extreme

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[69] Garner v Louisiana, 368 U. S. 157 (1961); Taylor v Louisiana, 370 U. S. 154 (1962)

[70] Tribe, American Constitutional Law, 621.

[71] Garner v Louisiana, 368 U. S. 157.

[72] Gregory v Chicago, 394 U. S. 111 (1969); the Court reversed disorderly conduct convictions against 85 demonstrators who refused to disperse when police ordered them to for fear the 100 officers would be unable to protect them from the mob of 1000 angry spectators.

[73] Street v New York, 394 U. S. 576, 592, reversing a conviction for words contemptuous for the American flag.

circumstances the police are expected to ". . . make all reasonable effort to protect . . . a lawful public speaker . . . ."[74] "Once it is clear that the constitutional guarantee of freedom of assembly [is threatened by violence and disorder] . . . the remedy open to the community is . . . to envoke emergency powers of martial law."[75]

Areas of unprotected speech have been redefined. The Court has narrowed the fighting words doctrine in a series of cases beginning in 1971. In Cohen v California, the Court ruled that even profanity is protected if not aimed specifically at an individual.[76] Even direct verbal assaults, the Court has found, lie outside the fighting words doctrine if aimed at police. The theory was that police should be trained to handle such situations.[77] In 1969, the Court ruled in Brandenburg v Ohio, that even the advocacy of violent overthrow of the government was protected as long as it did not constitute "incitement to imminent lawless action"[78] Justices Black and Douglas concurred separately stating ". . . that the 'clear and present

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[74] Feiner v New York, 340 U. S. 315, 326-327, Justice Hugo Black dissenting.

[75] Thomas I. Emerson, The System of Freedom of Expression (New York, 1970), 341.

[76] Cohen v California, 403 U. S. 14 (1971).

[77] Lewis v New Orleans, 408 U. S. 913 (1972).

[78] Brandenburg v Ohio, 395 U. S. 444; 89 Sup. Ct. 1827; 23 L. Ed. 430 (1969), the Court reversed the conviction of the leader of the Ku Klux Klan under a criminal syndicalism law very similar to the one upheld in Whitney v California.

danger' doctrine should have no place in the interpretation of the First Amendment."[79]

While narrowing the field of unprotected words, the Court has also recognized that "certain acts constitute symbolic speech" protected under the first amendment.[80] Beginning in 1931, the Court upheld the right of the individual to express himself through actions, such as the display of a flag.[81] The justices appeared to reaffirm this position in 1966, in Brown v Louisiana, when they reversed the convictions of a group of blacks arrested for standing silently in the public library to protest a segregated reading room.[82] Three years later the Court ruled that the wearing of black arm bands to protest the Vietnam War was an act of symbolic speech protected under the first amendment.[83] The doctrine of protected symbolic speech was finally openly acknowledged in 1974, in Spence v Washington.[84]

Today the battle for freedom of expression, of even thoughts we might hate, appears to be won. "No idea is too hateful to be

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[79] Brandenburg v Ohio, 89 Sup. Ct. 1827, Justice Hugo Black's concurring opinion.

[80] Martin Shapiro and Douglas S. Hobbs, American Constitutional Law, Cases and Analysis (Cambridge, 1978), 411.

[81] Stromberg v California, 283 U. S. 359 (1931), the court held unconstitutional a California law prohibiting the flying of a red flag "as a sign, symbol or emblem of opposition to organized government."

[82] Brown v Louisiana, 383 U. S. 131 (1966).

[83] Tinker v Des Moines School District, 393 U. S. 503 (1969).

[84] Spence v Washington, 94 Sup. Ct. 2727 (1974).

expressed, not even Nazi doctrine in [predominately Jewish] Skokie, Illinois."[85] Lawyer for Frank Collin and the National Socialist Party of America, David Goldberger, argued against the prior restraint sought by the Village of Skokie in the Illinois Supreme Court. "If free speech is to have meaning," Goldberger asserted, "it must have meaning for precisely these circumstances and this client--if it does not protect the most unpopular, it protects nobody."[86]

The Ku Klux Klan of the seventies is in the midst of a revival. In November 1977, the Anti-Defamation League of the B'nai B'rith warned that for the first time since the mid-nineteen-sixties the Klan was growing. The largest of the three major factions of the group is the Alabama based United Klans of America, still headed by Robert Shelton. The Confederation of Independent Orders of the Invisible Empire, Knights of the Ku Klux Klan, headquartered in Illinois, is the second largest. The third faction, headed by twenty-nine year old David Duke of Louisiana, is the Knights of the Ku Klux Klan. Irwin J. Suall, director of the Anti-Defamation League cited exploitation of a number of race related issues, such as busing, crime, unemployment and affirmative action, as the reasons for Klan revitalization.[87]

Viable chapters of all three factions exist in North Carolina. While David Duke argues that the Ku Klux Klan is the white Protestant's

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[85] New York Times, November 11, 1979.

[86] David M. Hamlin, "Swastikas and Survivors: Inside the Skokie-Nazi Free Speech Case," The Civil Liberties Review, 4 (March/April, 1978), 25, hereinafter cited as Hamlin, "Swastikas and Survivors."

[87] Daily Reflector, November 11, 1977.

equivalent of the B'nai B'rith, the NAACP, and the Knights of Columbus, the North Carolina Klans have expanded on the idea. They have formed an alliance with other right wing groups called the United Racist Front, which includes the North Carolina Chapter of the Nazi Party. The aim of the group is reestablishment of white supremacy through political action. Harold Covington, Nazi leader, was a candidate in the 1979 mayoral race in Raleigh, North Carolina. David Duke has already announced his intention to run for President of the United States. It remains to be seen if the new Klan can forge itself into a powerful political entity.[88]

In light of the Court stands on first amendment rights and the new image the Klan is marketing, it does not appear likely that the events of 1958 or 1966 would repeat themselves. It remains sufficient that they occurred at all. When Frank Collin won in the Illinois courtroom, a "fascist . . . secured a ringing victory for democracy."[89] Everyone in this nation, no matter how vile his ideas, has "the right to peaceably assemble, to speak, to air his ideas." If Skokie had prevailed in denying Collin that right, he "would have accomplished the one thing that even he dares not hope for: The principles of totalitarianism would have been affirmed in America."[90]

In 1958, the Supreme Court of North Carolina upheld the conviction of James Cole in contradiction to existing higher Court

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[88]Daily Reflector, September 25, 1979; October 24, 1979; News and Observer, October 7, 1979.

[89]Hamlin, "Swastikas and Survivors," 33.

[90]Hamlin, "Swastikas and Survivors," 33.

rulings. At a time when the United States Supreme Court was entering a new phase of protection of first amendment freedoms, the state court allowed local concerns for order to prevail over the constitutional rights of two individuals. The conviction of James Cole and James Garland Martin was unconstitutional in that the Klansmen were tried, not for anything they did or said on the field in Maxton, but for the earlier cross burning activities. As an expression of symbolic speech these actions were protected under the first amendment. Their conviction was also unconstitutional in that it provided a "chilling effect" or prior restraint by frightening potential speakers into silence.[91] It was done in the name of good order and public tranquillity.

North Carclina has long been lauded as atypical among her southern sister states. In his 1978 commencement address at the University of North Carolina in Chapel Hill, Governor James B. Hunt, Jr. spoke of "North Carolina's hard-earned and priceless reputation . . . as a politically progressive state."[92] Several scholars have argued that the state's progressive image is now a myth, that the issue of desegregation caused complacency in the area of civil rights.[93] However, they argue the "heritage of the state reflects a deep-rooted respect for civil liberties," using Senator Sam Ervin to exemplify a manifestation of this continuing attitude toward constitutionally guaranteed

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[91]Shapiro and Tresolini, American Constitutional Law, 360.

[92]News and Observer, May 21, 1978.

[93]Peirce, The Border South States, 113-114.

rights.[94] North Carolina's last truly progressive administrations they argue were under Governors Luther Hodges and Terry Sanford. In fact, however, Luther Hodges' progressivism included the abridgement of constitutionally guaranteed rights of free speech and assembly.

At least twice in the past three decades the state government allowed the civil liberties of individuals to be abridged by narrow community concerns. In 1958, North Carolina employed vague anachronistic common law doctrine to effectively silence unpopular political opinions. Again in 1966, the state through injunction tried to deny the same group their constitutionally protected right to assemble. State officials permitted local authorities to dictate who may or may not exercise their constitutional rights. It appears then that North Carolina has been progressive only when it concerned the broad middle of its population. Justice did not extend to groups on the fringe. Governor Moore summed up this position in October of 1966 when he said of the Klan, it was ". . . a sorry organization . . . and has no place in North Carolina."[95] John P. Roche once wrote, "Colonial America was an open society dotted with closed enclaves, and one could generally settle in with his co-believers in safety and comfort and exercise the right of oppression."[96] In 1958, North Carolina, in

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[94] Bass and De Vries, The Transformation of Southern Politics, 227.

[95] Charlotte Observer, October 26, 1966.

[96] John P. Roche, "American Liberty: An Examination of the 'Tradition' of Freedom," in M. R. Konvitz and C. Rossiter (eds.), Aspects of Liberty (Ithica, 1958), 137.

addition to employing eighteenth century common law, maintained this colonial tradition of allowing freedom only within the confines of locally imposed strictures.

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