Hard-Scrabble Calendar.

REPORT

OF THE TRIALS OF

Oliver Cummins, Nathaniel G. Metcalf, Gilbert Humes and Arthur Farrier;

WHO WERE INDICTED WITH SIX OTHERS FOR A

RIOT,

And for aiding in pulling down a Dwelling-House, on the 18th of October, at

HARD-SCRABBLE.

PROVIDENCE:
Printed for the Purchaser.

1824.

RHODE ISLAND HISTORICAL SOCIETY PROVIDENCE, R. I.

INTRODUCTION.

For the information of those who may not have heard of the circumstances connected with the following Indictment, and who may never have met with the name of *Hard-Scrabble*, in any Gazetteer ancient or modern, it may be proper to state that the village or hamlet of this name, is situated in the North West part of the town of Providence, in a romantic glen, and consisted, previous to its destruction, of about twenty buildings, inhabited by people of colour. Here were held the revels and midnight orgies of the worst part of this class of the population of Providence. Owing to the difference in the severity of our Police and that of the neighbouring cities in relation to the blacks, the number had increased in this town, as ascertained by a recent enumeration, to upwards of 1200 persons. Among this number there are a great many industrious and honest individuals, who in their departments render themselves useful members of society; but the mass, as might be inferred, can hardly be considered a valuable acquisition to any community, and their return to the respective places from whence they came, probably would not be considered a public calamity. Between this class and the whites bickerings and antipathies would naturally arise. This had long been partially the case, until on the evening previous to the Riot, a sort of battle royal took place between considerable parties of whites and blacks, in consequence of an attempt of the latter to maintain the inside walk in their perigrinations through the town. Under this excitement, on the following evening a large number of the white population assembled on the great Bridge, and after some consultation, the greater part repaired to *Hard-Scrabble*, which they laid almost entirely in ruins.

Our neighbours abroad may perhaps be surprised that such a transaction should have happened, apparently under the eye of the Police, without their interference; and our own citizens may be led to infer that there is a tardiness and inefficiency in the nature of our municipal *government* (we do not refer to its officers who have uniformly discharged their duties with vigilance and ability) which, as we increase in population, it may become necessary to exchange for a form that will not in fact be more despotic than the undefined powers of a Town Council, but which is fitted to carry those powers into speedy and efficient operation as exigencies may require If such had been the case heretofore, the moral and orderly town of Providence would not have been disgraced by the existence of a *Hard-Scrabble*, or of a mob to demolish it.

TRIAL, &c.

Indictment of the State against Oliver Cummins and others.

PROVIDENCE sc.

At a Court of General Sessions of the Peace, holden at Providence, within and for the County of Providence, on the fourth Monday of November, 1824.

The Grand Jurors for the county of Providence, &c. upon their oaths present—that Oliver Cummins, Joseph Butler, Jun. Nathaniel G. Metcalf, Amos Chaffee, John Sherman, Gilbert Humes, Arthur Farrier, James Gibbs, Ezra Hubbard and William Taylor, all comorant of Providence, &c. gentlemen, alias labourers, alias traders, together with forty other evil disposed persons, and more to the Jurors as yet unknown, on the 18th day of October, 1824, with force and arms at Providence aforesaid, unlawfully riotously and routously did assemble and gather together to disturb the peace of the State, and being so assembled and gathered together, armed with clubs and axes, a certain dwelling-house situated in Providence, aforesaid, occupied by, and owned by Henry T. Wheeler, of Providence, aforesaid, then and there unlawfully, riotously and routously did pull down and destroy, and other wrongs and injuries to him, the said Henry T. Wheeler, then and there unlawfully, riotously and routously did; to the great damage and injury of him, the said Wheeler, in contempt of the laws of the State, to the evil example of all others in the like cases offending, against the form of the Satute in such case made and provided, and against the peace and dignity of the State. Preferred by Dutee J. Pearce, Attorney General, and returned by the Grand Jury a true bill.

[Upon this Indictment, Oliver Cummins, Ezra Hubbard, Nathaniel G. Metcalf, Amos Chaffee, Gilbert Humes, James Gibbs and Arthur Farrier, were severally arraigned and plead not guilty. Joseph Butler, Jr.

John Sherman and William Taylor, were not apprehended, not having been found by the Sheriff.

On the 13th of Sept. the Prisoners were again arraigned and persisted in their former plea of not guilty.

The Court for the trial of the Prisoners, consisted of

Hon. Thomas Mann, Chief Justice of the Court of Common Pleas.

Hon. Robert Hopkins, } Associate Justices.
Hon. Josiah Westcott, }

William H. Smith, Esq. } Justices of the Peace associated with the Court.
William S. Patten, Esq. }

After hearing the argument of Counsel, the Court decided that the Prisoners were entitled to claim a seperate trial.

Oliver Cummins was then put upon his trial. The Jury empannelled, were

Bani Bartlett, *foreman*, Benjamin Coe, Ezekiel Bishop, Thomas J. Whipple, Moses Taft, Caleb Allen, John Newman, Arthur Greene, Oliver Holmes, William R. Greene, William Snow and William Andrews, Jr.

INDICTMENT;

State of Rhode-Island vs. *Oliver Cummins.*

Counsel for the State, Dutee J. Pearce, *Att'y General.*

Counsel for the Prisoner { Welcome A. Burges, Esq. Joseph L. Tillinghast, Esq.

The Jury having been empannelled and the Indictment read, to which the Prisoner pleaded not guilty, the Attorney General opened the case on the part of the State by stating the nature of the offence with which the prisoner stood charged, and reading the authorities to show what constituted a riot at common law, viz: the unlawfully assembling together of three or more persons to do an unlawful act; or when assembled for a lawful purpose carrying that purpose into effect in a frightful and turbulent manner: see Tomlin's Digest of Criminal Law, 155, 1 vol.; Russell on Crimes, 350.

The Attorney General then proceeded to call the witnesses on the part of the government, when 33 persons were called, and severally sworn.

The first witness examined on the part of the Government, was *Jesse B. Sweet.* He stated that he was at a place in the northwest part of the town of Providence known by the name of *Hard-Scrabble.* on the evening of the 18th October, about seven or half past seven o'clock. That great number of persons were assembled there, and he saw about 40 at work upon Wheeler's house, tearing it down; that he did not go very nigh, fearing there might be danger in doing so: that after the building was partly demolished, the people who had been to work upon it, left it and went further down into the hollow: that he did not at this time know any person who was at work upon the house. When they went into the hollow he went nigher, and saw them pulling down some other buildings: Knew Nathaniel Metcalf: he was very active, sometimes chopping and helping push the houses down and made himself very busy. Soon after, the mob returned to Wheeler's house, and finished tearing it down. He saw Cummins (the Prisoner) among those at work—heard him say that when he went into the house (Wheeler's) somebody shot a pistol at him and hurt his mouth. He saw him standing off with a club, said he was keeping guard. He also saw him sometimes assisting in pulling down the house. When he said he was keeping guard he had a large club, larger than any one would need to walk with. When the mob returned the second time to Wheeler's house (or the Hall) witness supposed there were 50 or 60 persons actively engaged. There were a great many spectators standing around looking on—might have been a thousand. He understood Cummins, the prisoner, to say that when he first entered Wheeler's house he was shot at. Saw him take an active part in pulling down the house and chop with an axe.

Being cross examined, witness said he did not go there to tear down any buildings. At the first attack upon Wheeler's house he was ten or twelve rods off. At the second attack he was very nigh. Took Metcalf by the

shoulder and asked him if he knew what he was about? He was close to the persons engaged in tearing down the building, and a great many other persons were nigh. He saw one other person engaged in the affair that he knew, named Taylor, and also saw Humes (both of whom were indicted). He was on the hill when he heard the pistol fired. Did not know whether it was fired by a black man or a white man. Being asked what business was usually carried on in this house, which was said to be Wheeler's, replied he could not tell.

The Attorney General objected to any inquiry respecting the house; he said the character of the house was not on trial. The witness said he did not know the character of the house or hall, he never went there. It was not a very dark night, but no moon. The persons engaged in the riot had plenty of lamps lighted.

Edward S. Tripp was next called. He was at *Hard-Scrabble* the evening of the 18th. Saw about 40 or 50 persons assembled, engaged in tearing down the houses. Witness did not see Cummins there.

The witness was then cross-examined as to the character of the house or hall that the indictment alledged had been torn down.

The *Attorney General* objected to the inquiry, it being immaterial to the trial.

Mr. Tillinghast, for the prisoner, said they had a right to inquire what sort of a building it was, whether it was a house or a pig-stye; as he was persuaded the gentleman would not contend the prisoner could be indicted for tearing down a pig stye. He wished to show that this Hall was a nuisance—that it was a place where a crowd was usually collected. The jury had a right to decide upon the law and the fact and all the circumstances ought to be laid before them that they might judge whether this house was not such a nuisance as justified the prisoner in aiding in destroying it, admitting he had done so.

The *Attorney General* replied that neither the house nor its inhabitants were now on trial. If it were a nuisance there was a legal way to have it removed, not by violence. He presumed the gentleman would not say that the young men who were charged with having been engaged in this riot were the proper persons to take the law into their hands and direct the morals of the town of Providence.

[The Court, after consultation, decided the prisoner's Counsel had no right to inquire about the character of the house.]

——— *Whipple* then took the stand. He was present on the evening of the 18th, but could identify no person engaged in the riot.

Mr. Tillinghast inquired who built this house and whether it did not belong to John S. Parks?

[*Attorney General* objected to the inquiry.]

Mr. Tillinghast insisted on the question. It was material to whom the house belonged. If it was in fact the house of Parks and not of Wheeler, as laid in the indictment; then a verdict in the case of acquittal or condemnation for pulling down a house belonging to Wheeler, would be no defence against another indictment for pulling down a house belonging to John S. Parks. and the defendant might be twice tried for the same offence.

The *Attorney General* contended it was immaterial to whom the house belonged. The defendant was charged with having been engaged in a riot, in which riot a house was destroyed, and the ownership of the house could not affect this indictment.

Welcome A. Burges, for the prisoner, contended that even if the ownership and occupation were immaterial in constituting the offence charged, yet if the Attorney General chooses to insert that ownership and occupation in his indictment, the moment he does so it becomes material and he is bound to prove it as alledged. But in this case he was compelled to insert it in his indictment, and an omission to do so must have been fatal. To this point he cited 3d of Chitty's Crown Law, 882. 1 Leach, 253, in which it is stated in a note, that in an indictment on the Statute for a trespass in cutting down two elm trees, the name of the owner of the trees is material and must be inserted; and the same doctrine would apply to an indictment for pulling down a house, both

indictments being founded on Statute. The defendant was indicted for pulling down a house belonging to Henry T. Wheeler, and if it turned out that the house did not belong to Wheeler, he might again be indicted for destroying the same house belonging to John S. Parks.

The *Attorney General* replied, that in the case cited by Mr. Hazges, the proof of ownership was material becouse the Court not only punished the defendant for the crime if convicted, but were also bound to award to the owner of the trees damages for their being destroyed.—But in this case the Court could not award any damages and consequently it could not be material to prove to to whom the house belonged. The particular day of the riot was specified in the indictment and this was sufficient to protect the prisoner from any other indictment found against him for a riot at that particular time. [The Attorney General was about to proceed in the discussion, when Mr. Tillingnast withdrew the motion to be permitted to go into the inquiry of the ownership and occupation of the house.]

James Rounds was then called on the part of the government. He was present on the evening of the 18th—saw about 50 persons engaged in pulling down houses. He was within three or four rods of Wheeler's house.—Saw no one at work that he recognized.

Dresser Bacon saw about 50 persons engaged in the riot. Saw no one that he knew except Humes and Metcalf—did not see Cummins.

Charles Holden, 2d, was there, but did not see Cummins nor any he knew at work on the houses.

Joseph S. Angell was present when John S. Parks' house or hall was torn down, about 20 rods off; he knew Cummins, but did not see him there.

William Angell.—Seven houses were pulled down, and 3 or four others badly shattered. Did'nt know who occupied the hall said to be Parks'. Being cross questioned as to what was usually carried on there, said he supposed the character of the house was very well understood, and that it was not necessary to tell what use it was put to. He did not see Cummins—kept at a distance from the scene.

David Burr and *Josiah Snow* were there, but did not see Cummins. Snow saw Wheeler's house pulled down but did not remember any he saw engaged in it.

Charles Curtis saw Cummins there, 9 or 10 o'clock. Wheeler's house had been torn down before he got there. Cummins passed him on the side hill, where witness stood, about ten rods from those at work on the houses—he had no club—did not hear him give any orders. Saw no one do any thing he can recollect in particular.

Cyrus Cleaveland was there at half past eight, understood the first attack had been made on Wheeler's or Park's house. Did not see Cummins nor any one engaged in the business whom he knew.

Samuel Staples, jun. was not there.

George W. Bowen, got there about ten o'clock. He saw Cummins. Cummins was then doing nothing. He tried to show witness a wound in the mouth, where he said he had been shot in the mouth. Witness could see no wound. Cummins told witness he was not going to do any thing more. Witness being cross questioned said he saw some others he knew, at work on the buildings, but as they were not on trial he was not obliged to tell their names.

George Ormsbee saw Cummins that evening with a club in his hand. he said he was on guard, this was about 9 o'clock. saw him near the place where wheeler's house was pulled down. Cummins told witness he stood there for fear the blacks would come upon those who were at work upon the houses. Witness had seen prisoner several times before he saw him this evening, and could tell him distinctly. There were several lights around.

George W. Fox was there about 9 o'clock, saw about 20 or 30 persons engaged in the riot, but knew no one.

Abraham Bennett did not see Cummins there.

Lyman Cady was present that evening, he knew Cummins well: saw him 20 rods from Thurber's building looking on just as any other spectator. This was while Wheeler's house was pulling down. There were about a thousand spectators present. No means were used by them to prevent the mob from tearing down the buildings.

James M. Olney and *David Burt* were there, but saw no one they knew. Did not see Cummins.

Lyman Parr saw Cummings go into a house, believed 'twas Wheeler's. Understood he was the first that went in. Somebody fired a pistol but he did not know who. He also saw Cummins with a club while on guard.

John L. Johnson saw Metcalf at work, but did not see Cummins.

Samuel Lynden was there, but did not see Cummins.

Samuel V. Allen did not know much about the subject matter. He had the honour of being one of the Town's watch and he went there in consequence of the riot being anticipated. He went as far as the *Hall*, perhaps the Attorney General knew where it was! Being questioned if he was in the habit of going to the Hall? witness replied he had been there frequently, but only in the capacity of a watchman. He went as nigh the scene as from the Court-House to the jail. Could not tell how many were at work in the Hollow. There was noise enough to be a thousand. The place was celebrated in the annals of Constables and Watchmen; he always kept as far from it as possible and only went there when his duty *imperiously* called him. He never flinched from his duty as a watchman. Next morning he visited *Hard-Scrabble*. It was a complete ruin. the houses demolished, the inhabitants without shelter and every thing in ruins. Being cross examined, witness said none of the spectators interfered to stop the proceedings. He went there with Mr. Mann his file leader, and they did not think it proper or prudent to interfere. Considered he was doing his duty by going there and keeping as still as possible. Some of the Town-Council were there—went backwards and forwards but did not interfere. Being asked his reasons for not interfering. replied when he saw a house on fire he usually tried to put it out. but if it had got so far in flames that it would scorch him if he went near, he should think it was best to stand back.

Daniel Weaver, the next witness, was not there; saw a party going up to Park's Hall. Jonas Ball, and Metcalf appeared to be the most noisy among them.

Newell Stone, was next sworn. The day after the riot, Cummins, him that sits there, comes into the cellar like where I was and said he went up to *Hard-Scrabble* that night, and he had worked like a good fellow—jist in that manner. He said he got shot there and showed me the place in his mouth, but I could'nt see nothing but a scratch like, and I thought if he had been shot in the mouth the wound would have been more injurious—that was what I thought. On cross examination, witness declared 'twas all he knew in any shape or fashion—Cummins said he worked like a good fellow.

Hirum Davis saw Cummins in company with about twenty others going over to Hard-Scrabble. Many of them had clubs—he knew no one but Cummins, who passed close by him. He had seen Cummins often before. Saw him afterwards at Park's Hall. This was the first house attacked. Did not see Cummins doing any thing on the house, nor any one he knew. The night after the riot he heard Cummins say he was shot in the mouth and that he had worked like a good fellow.

Walter R. Danforth, member of the Town-Council, stated that he went towards the scene of riot; stood some distance off. Saw no one engaged in the affair he knew. About fifty persons appeared to be actively engaged.—He was the only member of the Town-Council present. While he was there the rioters were attacking a building in N. Providence. Did not think it safe for him to interfere.

[*The Attorney General here closed the opening on the part of the State.*]

No witnesses were called on the part of the Prisoner.

W. A. Burges, Esq. for the prisoner, in opening the defence stated to the Jury that the circumstances under which he appeared were highly embarrassing. The case was of a nature to preclude the possibility of preparation and he knew nothing of the facts until the witnesses disclosed them in cou t

Under this Indictment, (admitting the evidence to be sufficient) the prisoner cannot be convicted. In it the riot is stated to be the unlawfully assembling &c. of a number of persons and the demolishing of a house *owned and occupied* by one Henry T. Wheeler. The name of the owner being thus inserted, must be proved, and no proof has been offered to that effect. In 3 Chitty's Common Law 1116, and 1 Leach, 253, it is said that an aver-

ment of the name of the owner is material, and by the best established principles of criminal law a failure to prove any material averment in an indictment is a fatal neglect.

Neither is the evidence sufficient to convict the prisoner (allowing this legal objection to be ill founded.) From the 47 witnesses produced by the Government, 6 only swear they saw the prisoner on that evening, and of these Sweet alone testifies that he saw him use any violence. If he had been conspicuous, active and a leader, some of the remaining 46 would have seen it. It is submitted that Sweet testifies at best under very doubtful circumstances. He is the owner of a house in that vicinity which on the night of the alledged riot was injured. His feelings are all hostile to the prisoner and if a conviction "will feed nothing else it will feed his revenge." He confesses when the attack commenced upon Wheeler's house his apprehensions kept him at some distance but after the persons engaged had departed from this house and gone into the Hollow. and the riot, (if there was one) consequently increased his fears for his safety subsided and he went near enough to see Cummins chopping with an axe, &c. In the hurry and confusion of the moment, where every thing was tumult—when he was wedged in on every side by a crowd and his feelings excited for the safety of his own property, it is highly improbable that he would so closely observe the face of a man, confessedly a stranger to him, as to be able to identify him at any subsequent period. Besides in this he is expressly contradicted by the evidence of Cady, who swears that during this time, Cummins was standing by his side at the distance of twenty rods from the place of the riot.—Curtis also saw Cummings, between 9 and 10 o'clock standing on the hill, entirely disengaged from the actors below. The evidence that he "stood guard" as the witnesses express it and that he marched forward and back with a stick in his hand, is undeserving the notice of the jury. To suppose any man thought he alone could protect a body of men against another, would be to suppose him a fool indeed. The act should be taken as it was intended a sportive one and not designed to afford assistance to the rioters.

The fact that the prisoner said he was shot is no evidence against him. He was doubtless in the crowd as a thousand others were who were not concerned in the riot, and a ball discharged from a pistol or a musket would as probably hit him as any other. His subsequent declaration to Newell Stone, "that he was there and worked like a good fellow," is inconclusive. He was there, but this fact is no proof of his guilt; and the remaining part of the declaration is too indefinite to convict him.—It might refer to a concern in the riot and it might refer to any thing else. The testimony of Davis, that he saw the prisoner with twenty others, armed with sticks, going in the direction of Hard-Scrabble, without *more,* is insufficient, and he swears that after this he saw no more of him. There is then no evidence of any act of violence committed by the prisoner upon this residence of the *graces*, or any assistance afforded by him to the rioters, save the evidence of Sweet, who it is submitted swears against all the probabilities of the case and is contradicted by the express testimony of Cady.

Joseph L. Tilinghast, Esq. closed the defence. Gentlemen of the Jury.—The renowned city of *Hard-Scrabble* lies buried in its magnificent ruins! Like the ancient Babylon it has fallen with all its graven images, its tables of impure oblation, its idolatrous rights and sacrifices, and my client stands here charged with having invaded this classic ground and torn down its altars and its beautiful temples! I might, gentlemen, be pathetic on this subject, but I spare your feelings. The name of this celebrated city must give you some idea of its character if you have not been sufficiently conversant with *history* to have become acquainted with it; *Hard-Scrabble!!* The origin of this name I cannot pretend to trace. It must hereafter remain for the researches of the antiquary. Whether it is because you have to scrabble hard to get there, or to scrabble hard when you are there, or to scrabble hard to get safe away, I cannot take upon me to determine.

It is much to be regretted that among the thirty or forty witnesses the Attorney General has examined, some of them have not explained the etymology of this name.—Perhaps after all it is only meant as descriptive of the

Pr-
C57

shuffling, which is there practised in the graceful evolutions of the dance, or the zig zag movements of Pomp and Phillis, when engaged in treading the *minuet de la cour!* But be that as it may, we must all agree the destruction of this place is a benefit to the morals of the community. I admit it has been done somewhat in an improper manner, which I hope may never be repeated, not because any evil has been done, but because such modes for the redress of public grievances are dangerous, and those engaged in redressing the wrongs of society in this manner, are liable to go to greater extents under the excitement of the moment than they intend. Such, perhaps, has been the case in the instance before you, but with any such excess my client, even if I admit he was at all concerned in this transaction, does not stand convicted by the evidence you have heard.

The Counsel then went into the consideration of the law as applied to the Indictment against the Prisoner.—He contended that this was an Indictment founded on the Statute of Rhode-Island (R. I. Laws, p. 417.) and had nothing to do with the common law. The Indictment described a specific Statue offence, and not the common law offence of a riot, and concluded against the form of the Statute in such case made and provided; and as the pulling down a dwelling house was not an indictable offence of this description, at common law, but was made so by Statue, (which Statute was taken almost verbatim from the Statute of George I. which made this an indictable offence, punishable by death, though in this country it was punished by both fine and imprisonment,) the Jury must confine themselves to this Statute, and if they convicted the defendant at all, must find him guilty under the Statute. The terms of the Statute, commonly called the Riot Act, required that there should be twelve persons, unlawfully assembled, with arms or thirty persons unarmed, engaged in destroying any dwelling house or other house, any house for public uses, barn, mill, malt house, store house, shop or ship, in order to render any one liable to the penalties imposed by that Statute.

The Attorney General here interposed, and read the authorities on which he relied to show that although the

indictment concluded against the form of the Statute, yet a riot was charged in the indictment as an offence distinct from the pulling down the house which was inserted as an aggravation of the circumstances attending the riot, and if the facts proved did not come up to the offence created by statute, yet the proof of the lesser offence of a riot at common law, was sufficient to convict the prisoner, and the conclusion of the indictment must be rejected as surplusage. To this point he cited 1 Leach's Crown Law, 368, 374; 1 Chitty's Crown Law, 196; 5. Term Reports 162; Tomlin's Criminal Law 93, 202.

Mr. Tillinghast still contended that the indictment was founded on the Statute and not on common law, and that as there was no evidence that twelve persons were unlawfully assembled with arms, or thirty without arms, the jury could not convict the prisoner on the indictment which had been preferred against him, and that the Attorney General having concluded against the Statute, without having charged a distinct riot at common law, had made it an offence under the Statute, and that he could not, to suit his convenience, take back what he had done and say he only meant to indite the defendant at common law.

Another point made by the counsel for the prisoner was, that the indictment alledged the house torn down was the property of one Henry T. Wheeler, and was occupied by him, but, as on the contrary it appeared from the evidence to be the property of John S. Parks, the jury could not, on this indictment, convict the prisoner of pulling down the house of Henry T. Wheeler; neither was there any evidence that it was a dwelling house, or such a building as would bring it within the Statute. But it was in evidence that it was not a dwelling house, but a *dancing hall*, where the party-coloured votaries of pleasure assembled together, and the noise and the smoke of their incense went up to Heaven!

[The Attorney General here offered a deed to prove the house belonged to Henry T. Wheeler. This was objected to on the ground that the evidence had been closed on the part of the government, and in this stage of the trial, no further testimouy could be produced. A

discursive dialogue ensued between the Attorney General and the prisoners Counsel, which the gentlemen were left to settle in their own way without the assistance of the Court. The Attorney General handed the deed to the jury; the defendant's Counsel quietly took it away, and proceeded in his defence.] He stated, as a third point in the defence, that there were two modes of destroying or removing a nuisance. One was by the slow process of the law in an indictment, the other by abatement or tearing it down. This last is resorted to when individuals or the public are suffering from a nuisance which the tardy operations of the law will be too long in removing, or which perhaps it cannot effectually reach, as in the case before the jury.

The house, or rather hall which the defendant was charged with having assisted in demolishing, had long been a notorious nuisance in the town of Providence. It was the resort of the most corrupt part of the black population, who supported their debaucheries and riots by carrying thither the plunder of their masters and pawning it for a participation in these disgusting scenes. The authority of the Town Council, as far as it could go, and the terror of several indictments against the occupants for a disorderly house had been resorted to in vain. The populace at length took it into their hands and destroyed this sink of vice; and there was not a sober citizen in the town who could regret it. Under these circumstances he put it to the jury whether they would convict his client even if they believed he had some hand in demolishing this nuisance?

The Counsel then went into an examination of the testimony and inferred that it was not proved his client had participated in what was called the riot, any more than the thousand spectators who were there.

[Mr. Tillinghast closed the defence having spoken an hour and three quarters. The limits of this report will only admit of a brief transcript of the arguments of the gentlemen engaged in the trial, and we trust this will be considered a sufficient apology for any omission, or apparent injustice which any of them may inadvertently suffer at our hands.]

The *Attorney General* closed for the government. He said he had nothing to do with whites or blacks in this prosecution. He had only to discharge his duty to the State. The insults which the whites may have suffered from the numerous black population in this town, had no connexion with the offence charged upon the prisoner at the bar. The question is what part did Cummins the prisoner take in the riot of the 18th of October? And if the jury were satisfied he was actually engaged in that affair, he was convinced they would not screen him from justice though the house he aided in pulling down happened to belong to a black man instead of a white man. The Attorney General urged upon the jury the danger of sanctioning the doctrine that had been advocated by the counsel for the prisoner, which went the length to authorize individuals to combine together and destroy any house or building they might choose to consider a nuisance. Encourage this doctrine and no man in the community is safe. We live in a land of law, and there are no evils existing at Hard-Scrabble or any where else that a remedy may not be found for them in the law of the land. If these evils existed at that place, why were they not complained of? The law was open, and as an officer of the law, he was ready and always had been so, to bring these offenders within the reach of justice.

There were two principal grounds assumed by the Counsel in the defence of the prisoner. One that this is an indictment under the Statute, and that consequently the prisoner cannot be found guilty of a riot at common law; and the other, that the evidence is not sficient to convict him of either offence. The Attorney General contended that the offence charged in the indictment was a distinct and complete offence at common law. The indictment charges the defendant with unlawfully and riotously assembling with other persons to the number of more than three, and this is a distinct offence in itself. The circumstance of pulling down the house was merely carrying into effect the intent of the unlawfully assembling together, and was an aggravation of the riot. The riot was complete whether any building had been destroyed or not. and the indictment was not affect-

ed by the conclusion against the Statute, which might be rejected as surplusage if the evidence did not bring the offence up to the Statute. Where an offence existed at common law, it is no error to conclude against the Statute, but if it was created by Statute alone, it would be error to conclude at common law.

The Attorney General then commented on the Statute of Rhode-Island. The design of this was to *prevent* riots and unlawful assemblies, not to define what constituted a riot, nor did it affect the offence which previously existed at common law, but rather recognised that offence. The jury must be satisfied this Statute merely provided a summary process to disperse riotous assemblies, and prevent their proceeding to acts of violence.

The drift of the gentleman's argument, seemed to be that because the prisoner was guilty of *more* than the common law required to constitute a riot he therefore could not be punished for a riot. An appeal to the common sense of the jury, without referring to the clear doctrine of the common law, which always included the lesser offence within the greater, was a sufficient answer to this part of the argument.

In relation to the ownership of the house the Attorney General repeated to the jury the agument advanced to the Court on this point, [see page 10.]

He then proceeded to the examination of the testimony. The gentleman says we are pushed for evidence. But this difficulty arises not from the want of the existence of the evidence but from the apprehensions which are entertained by those who are called upon to testify; and let me tell you gentlemen of the jury if these young men who are said to be mere puppets in the hands of some persons behind the scene are not to be convicted because the populace do not wish it, there will indeed be danger in any one's testifying in cases similar to this. The witnesses will be proscribed by this mob, and their houses pulled down.
If the blacks are riotous and keep disorderly houses the law is open to punish them. But if they live here and are not outlawed they have a right to be protected by the law in their persons and property.

If gentlemen of the jury, in the town of Providence so much celebrated for its morals and for orderly conduct, a mob of this description could collect together and proceed in a systematic and uninterrupted manner to tear down a number of dwelling houses, you must be pretty well satisfied it is time some effectual measures were resorted to to put a stop to there high handed proceedings.

The ground assumed by the counsel, who are compelled to resort to any thing for a defence, that this house was a nuisance and that the prisoner had a right to assist in tearing it down, is not supported by a single case in the books. The gentleman, themselves had no confidence in the position, and I apprehend have employed it rather as an appeal to you founded on popular prejudice, than as having any existence in law. The recognition of a doctrine of this kind would tend to the subversion of all order in society.

[The Attorney General having concluded his remarks, which occupied an hour and five minutes, at 8 o'clock in the evening the jury retired to their room, having as usual been charged by the Court *sub silentio*, and in about three quarters of an hour returned with a verdict of **NOT GUILTY.**]

Note. The authorities cited by the Counsel, to show the right of individuals to abate a nuisance, and that this house came within the rule of Law, and also those cited against this doctrine, were 2d Salkeld, 258; 3d Blackst. Comm. 5; Comyns Digest, 459, 307; 2d Chitty, 272.

INDICTMENT;

The State vs. *Nathaniel G. Metcalf.*

On the day following the above trial, Nathaniel G. Metcalf, was arraigned and tried on the same indictment.

Counsel for the State. *Counsel for the Prisoner.*
The Attorney General. Welcome A. Burges, Esq.

Names of the Jury.

John H. Clark, *Foreman;* Benjamin Coe, Ezekiel Bishop, Bani Bartlett, Thomas J. Whipple, Moses Taft, John Newman, Daniel Smith, Arthur Greene, William Snow, Augustus Winsor, Joshua Smith.

As this case was founded on the same principles with the former, to avoid repetition, the evidence as applicable to the defendant, and the new points urged by the Counsel, will only be stated.

The Attorney General stated the nature of the offence and cited the same authorities as in the trial of Cummins; also, Tomlin, 155. C. C. Companion, 427. 2 Chitty, 273. He further stated from the authorities that in order to constitute a riot it need not be attended with any personal violence. That in petty felonies of this description the law recognized no accessaries but that all engaged in aiding in the riot or even those who were found wearing the badges of the rioters must be accounted principals and were punished as such.

Jessee B. Sweet was then called. He stated the circumstances of the riot with no material variation from his former testimony. He understood the house alluded to in the indictment was owned and occupied by Henry T. Wheeler, a man of colour. He saw Metcalf there and knew him perfectly well—saw him engaged in chopping off the studs of Wheelers House with an axe, and afterwards assisting in pushing it over; should think this was after 9 o'clock. There were three or four axes which were used alternately by the persons at work—there might have been five or six axes among them but he could not distinctly tell. Went so nigh Metcalf as to take hold of his shoulder and ask him if he knew what he was about—Prisoner made no answer but dropped a stick of

timber he had hold of. Witness saw nothing more done by Metcalf; he headed the mob that went from there up to Olneys Lane. [The prisoner's counsel objected to any investigation relating to what was done in Olney's Lane on the ground that it was a separate offence for which the defendant might be again indicted. The Att'y Gen contended that as the riot was alleged to have happened on the 18th of October it was competent to give in evidence any riotous acts of the prisoner on that day, which position was sustained by the decision of the Court.]

The witness then proceeded to state that he heard Metcalf say if they would go up to Olney's Lane he would go ahead, and he according went with several others.—witness followed them up there but they did not do much damage, only some stones were thrown and windows broken. The mob then took a vote and finally concluded to adjourn until Saturday evening—He also saw Metcalf at work pulling down a house belonging to Christopher Hall, at Hard-Scrabble and engaged upon one other house there.

Witness being cross questioned said he owned a house at Hard-Scrabble which was attacked and injured. It was pretty hard work to pull the houses down. Those engaged appeared to labour hard. Soon after the mob went to Olney's Lane they dispersed, should judge twas between 2 and 3 o'clock. In reply to a question from one of the jury said Wheeler's house was used a dancing hall by the blacks; Wheeler lived in the upper part. Witness saw Metcalf at Hall.s house cutting one of the posts with an axe. He saw Farrier with an axe, and one or two others who were not on trial as well as several he did not know who were using the axes. Should think it was nearly 12 o'clock when they started for Olney's Lane.

Dresser Bacon saw Metcalf and knew him distinctly—he had an axe chopping away upon a building in the centre of the village, this was after 9 o'clock. Saw him at more than one house actively engaged with several others in pulling them down.

John L. Johnson saw Metcalf with an axe or stick in his hand. When they got to Olney's lane twas 10 minutes past 12.

George W. Bowen saw Metcalf about 10 o'clock chopping with an axe a post the S. E. corner of Wheeler's house, he also saw him in Olney's lane. Witness owned a house there which was injured by the mob.

George Ormsbee and William Field Testified to the same facts; they knew Metcalf distinctly.

John S. Parks Was then called for the purpose of proving that Wheeler owned the house, the deed of which to Wheeler was offered in evidence. Mr. Justice Patten thought the deed was irrelavent to the case, and the Court decided that the ownership or occupationof the house need not be proved.

The Counsel for the prisoner then attempted to prove an *alibi*.

Jessee Olney Stated Metcalf attended his evening school: was there that evening until half past eight: after the school broke up he went up to Hard Scrabble. Metcalf was with him until a quarter before 9; did not see him afterwards. The prisoner was not remarkable for his brightness.

Godfrey Wheaton was at Mr. Olney's school. He walked with him towards Hard Scrabble, after the school was out. As they *approximated the scene of desolation*, Metcalf followed them. He saw him until about 9 o'clock but not afterwards.

Sylvester Wheaton testified to the same facts, and also that the prisoner was sowewhat deficient in capacity.

[The evidence being so clear in this case, the counsel for the prisoner put his defence almost exclusively on points of law. These points as well as the grounds assumed by the Attorney General in reply are fully stated in the arguments on the final motion in arrest of judgment, to which the reader is referred. The Attorney General also stated to the jury that if they did not consider the facts in the case warranted a conviction under the Statute, they might find the prisoner guilty of a riot, at common law; which doctrine appeared to be sanctioned by the Court, who, in a brief and comprehensive charge of one sentence, informed them they were at liberty to find a general verdict, or such a verdict as they thought proper. The trial occupied from nine o'clock, until half past one. The Court adjourned at half past two. When they met again

the jury came in with a verdict of GUILTY of a riot, at common law, but not guilty, under the Statute; and the Foreman stated that in consideration of his personal appearance, the circumstances under which he had committed the offence and his acknowledged deficiency in abilities, the jury had thought proper to recommend the prisoner to the most lenient and merciful consideration of the Court.*]

INDICTMENT;

The State vs. *Gilbert Humes.*

Counsel for the prisoner Joseph L. Tillinghast, Esq.

Jesse B. Sweet, again took the stand. He saw the prisoner while the mob were pulling down Wheeler's house, with a joice in his hand that appeared to have been torn from the house, pushing against it. Also saw him holding a light. Had long known the prisoner. He was about 18 years old.

George W. Bowen, testified to the same facts. Did not see him chopping, nor at any other house except Wheeler's.

William Field, likewise saw Humes pushing with a board or joice, at Wheeler's house. Witness saw him with one other person go into another house, and thump round and make a noise. None but these two were at that house at this time. He saw nothing more of Humes.

Dresser Bacon, saw Humes—he appeared to be pretty busy. Saw him come out of a house with his arms full of something like furniture, which he threw down. He did not see him either pull down or build up, or use any violence.

[The evidence being closed, *Mr. Tillinghast*, for the prisoner, went, at considerable length, into nearly the same arguments that had been used in the former trials.

* It being ascertained that Augustus Windsor one of the petit jury had served on the grand jury, in this trial, he was directed to retire, and Caleb Allen took his place.

He referred to the youth of the defendant, and contended that from circumstance of neither the numerous spectators, the constables, or the members of the Town Council who were present, attempting to interfere with the proceedings or making any effort to have the Riot Act read, this young man might well have supposed the destruction of *Hard-Scrabble*, instead of being a crime, was a meritorious and praiseworthy act. The Counsel also urged that the evidence was by no means sufficient to contract the prisoner even of a riot at common law. The jury retired at 5 P. M. and soon returned with a verdict of Not Guilty.

INDICTMENT;

The State vs. *Arthur Farrier.*

Counsel for the prisoner, W. A. Burges, Esq.

The witnesses examined were. *J. B. Sweet.* who saw Farrier cutting a post of Wheeler's house with an axe. Saw him also on the roof of Prince Congdon's house, pushing the chimney off. Said he was going to take a launch: Witness knew him perfectly well.—*William Field*, who testified distinctly to the same facts, and *George W. Bowen* who saw Farrier on the roof of Prince Congdon's building, hallooing and telling them to cut away, also saw him at Wheeler's house. [At the close of the evidence the Foreman wished the Counsel would argue the law *to the Court*, and let them instruct the jury. The Court, however, did not recognize this doctrine. and the points were argued to the jury as in the former trials. The Attorney General, to shew the jury might find a special verdict, quoted 1 *Chitty. C. L.* 196. 5. *East C. L.* 254. 257. 2 *East.* 661. 1. *Chitty.* 520. 2. *Sargent* and *Rawles, Penn. Rep.* 298.] The jury were out half an hour and returned with a verdict of **GUILTY** of a riot at common law, but not guilty under the Statute, and left it to the Court to say whether they could pass sentence under the verdict or not.]

On the 17th the Counsel for the prisoner, filed a motion in arrest of judgment which was argued at great length by Messrs. Burges and Tillinghast, in favour of the motion, and the Attorney General, against it.

Mr. Burges, opened the motion in arrest of judgement. He commenced by considering how far the common law is binding in this State, as it respects its civil branches, the common law is a part of the law of the land so far as it is consistent with the nature of our institutions and where it is not contradicted by positive Statute. But the criminal part of the common law obtains only so far as it is enacted by Statute. The common law respecting riots is no where expressly introduced in our statutes (and if at all it is merely by implication) although most of the criminal common law code is adopted with mitigated penalties.

Mr. B. referred to the Statute of R. I. concerning riots which he contended had abrogated the common law doctrine on this subject. and that agreeably to the 59th Section of the act concerning crimes, whatever offence existed at common law that was not made punishable by this act if at all punishable, must be prosecuted as well as punished at common law and that for a conviction at common law a common law prosecution is necessary, which was not the case in this indictment. But 2d if the Court are of opinion the common law doctrine of riot exists in this state yet where a prisoner has been indicted upon a statute offence and where the indictment follows the language of the Statute and concludes '*contra formam Statuti,*' he cannot upon such an indictment be convicted at common law.

To this point see *Croke E. Rep.* 251. Penhall's case. He was indicted upon the Stat. 5 *Ed.* 6. *ch* 4. for drawing his dagger in the church of B. against J. S. and doth not say with intent to strike him (according to the Stat.) and for this cause it was void—But then it was moved if this were not good for an assault that he might be fined upon it. But *per Curiam it is void in all for being indicted upon the Stat. It is void as to an offence at common law.* The same doctrine was held in the case of Hall. Gaven and others *Cro. E.* 307. 8. In which the Court held that the indictment begining with the Statute, and concluding "*contra formam statuti.*" this can have no relation to any offence except upon this Statute, and the Indictment was awarded insufficient and discharged: also see *Eden's case Cro. E. Rep.* 697. *and Cholmley's case Cro. Chas. Rep.* 465.
5 *Co. R.* 99. 2 *Roll. R.* 253. 6 *Mod.* 17. 2 *Hale P. C.* 170.

192. 1 *Salk.* R. 212. If these authorities be law there is an end to this question.

The opposite rule laid down in 1. *Chitty C. L.* 638 is founded on the authority of *Hawkins Book 2 ch.25.Sec.*115 who cites 2 *Hale* 191. *Salk R.* 212. 1 *Cowpr.* 648. *Douglas* 441. 5. The case in Salkeld is an authority directly against him, and the cases in Cowper and Douglas have no relation to the question the point nothaving been raised in either case.

If there be any cases where upon an Indictment on a Stat and concluding against a Stat. the conclusion has been rejected as surplusage and the deft. convicted of an offence at common law, they may be reduced to two classes. 1st *Where the facts alledged upon the face of the Indictment do not amount to a Statute offence. As was the case in* 16. *Mass. R.* 384. 2d. *Where the Statute creates no new offence but only adds new penalties to a common law offence.* Such was Page's cases 2 *Hale.* 191. on which case solely Hawkins grounds his rule. It was contended the present case came under neither of these classes, as the facts alledged in the Indictment were sufficient if found to amount to a riot under the statute and, as no new penalty was annexed by the statute to an old offence but a new one created.

The statute created the compound offence for which the Dft. is indicted out of two common law offences. The one, trespass for demolishing a man's house, the second, a riot as defined at common law. The offence created by the statute is entirely distinct from a riot at common law, and if the Dft. because riot is one ingredient of this offence may be convicted of riot, he may by the same rule be convicted of *trespass* under this indictment, which is another ingredient of the statute offence.

Another point urged was that no judgment could be entered on the verdict. The law knows but two kinds of verdicts, general and special, and this is neither. The jury can render a general verdict guilty or not guilty, on the whole. Or upon two counts, convict on one and acquit on the other, or where there is but one count which is seperable, convict on one part and acquit as to the rest. 1. *Chitty.* 633.

But this Indictment has but one count, and that incapable of division. Neither is this a special verdict, for that must set out all the facts in the case. It cannot be amended and the court can make no inferences from it. *Ch. C. L.* 644. *Hawk. B.* 2. *Ch.* 7. *sec.* 9. 1. *Wilson. R.* 56. 4. *Burrows. R.* 2077. *Kelynge.* 78.

Upon any view which can be taken of this subject, the conclusion is irresistable that the Defendants must be discharged.

The *Attorney General* against the motion, said the Court were about to decide a question of the utmost importance to the people of this State—whether in fact it was an offence in this State for *eleven* armed men, or *twenty-nine* unarmed, to assemble together and tear down a dwelling house. For if our Statute abrogated the common law offence of a riot, then it was nothing but a private trespass for any number of men armed. under eleven, or unarmed under thirty, to proceed to this extremity whenever they thought proper, and if they happened to be worthless persons hired for the purpose, they could not be punished, and the citizen whose rights were thus outraged had no remedy whatever. The 54th section of the Statute on Crimes, R. I. Laws, was cited, which provides that the petit jury may convict a prisoner of a lesser crime where the evidence does not warrant a conviction for the greater offence charged in the Indictment, when the prisoner is found guilty of so much of the crime charged as amounts *substantially* to a crime of a lower nature ; and on this Statute the Attorney General contended the defendant could be convicted of a riot, though charged with a greater offence of pulling down a dwelling house, the riot being substantially set forth in the Indictment.

It was also contended that the Statute of 1798 was in affirmance of the common law, and that where the Legislature had not expressly defined the offence at common law it still existed in full force (see R. I. Laws, p. 65, sect. 5) consequently if previous to 1798 a riot at common law was an indictable offence in this State. it still remained so.

2nd. To show the conclusion against the form of the statute did not affect the indictment as at C law. The

Attorney General cited. 1. *Leach* 374. 103, and the authorities read to the jury on this point. (see page 17.)

To overrule the decisions cited by the opposite counsel from his old Books that went back more than 150 years, he read from. 2 *Hawkins P. C.* 350, 1. *Hawkins* 158, *Douglas* 441. 5. *T. Rep.* 162. *and* 16. *Mass. R.* 385. which went to shew that where the defendant was indicted on statute he might be found guilty of a lesser offence at common law. The Attorney General also read from 1 *Chitty* 520. where the doctrine is laid down that where the dft is indicted on the statute against stabbing the jury may find him guilty of felonious homicide at common law. These authorities it was contended were sufficient to overrule the motion in arrest of judgment, and to sustain the verdict of the jury as being sufficient according to the established doctrines of the common law to authorize the Court to give judgment thereon.

Mr. Tillinghast closed the motion. He said there was no attempt made to show the Attorney General had not brought his Indictment correctly. It was technically correct, and no doubt drawn up to correspond to the facts expected to be proved. If the grand jury had returned the Indictment a true bill and the petit jury had not found the facts were sufficient to convict the accused it certainly the facts were sufficient to convict the accused it certainly was no fault of the Attorney General, and this was the amount of the motion before the Court; not to quash the Indictment but to arrest the judgment on the ground of the insufficiency of the verdict. The gentleman then commented on the authorities read by his colleague, as well as those opposed to them by the prosecuting counsel, and argued at length upon the positions assumed in the opening of the motion before the Court, We regret extremely that our types, which like facts are stubborn things, will not admit of a full report of this argument as well as the able one which preceded it.

Mr. T. contended that the statute of 1798 did in fact abrogate the doctrine of a riot at common law, and that the intention of the legislature was to abolish that offence and to make a riot consist of 12 persons unlawfully assembling with arms, or 30 without arms. He admitted a lesser number so assembled might be indicted for an affray

or a misdemeanour at common law, but not for a riot. and if, as the gentleman had urged it was important offences of this nature should not go unpunished it was equally important that the principles of the criminal law should be distinctly defined, and that a person indicted for one offence, should not be liable to be convicted of another offence of a different nature which he had not come prepared to defend himself against. He further argued that though a prisoner indicted for a greater offence might be convicted of a lesser, yet the lesser offence must be a distinct component part of the crime charged, and that in the present case a riot was not the lesser offence of pulling down a house but a totally different offence.

Thus in the case cited of an Indictment for stabbing.—Killing, which was an offence at common law, is a component part of stabbing (the penalties of which had only been increased by Statute, not a new crime created as in the present case) and also of felonious homicide; hence the prisoner was found guilty of the lesser offence. The Attorney General could not avail himself of the 59th section of the Statute, p. 353, because that expressly provided that offences at common law not included in the Statute should be *prosecuted* at common law, as well as tried and punished: and as this was not an indictment at common law, the position failed. The law was imperative as to the *mode* of trial. Suppose the Indictment were at common law for a riot, and the jury did not find the evidence came up to that charge, will it be pretended the defendant could be convicted of an affray? (2d Chitty, 275) To constitute an Indictment for a riot the word *Riot* must be inserted. The qualifications riotously and routously, the only words used in this Indictment, are insufficient (2d Chitty, 201) "the word riot must be inserted in all Indictments for Riot."

The authority in 16, Mass. R. M. T. argued did not apply. In that case there was no Statute existing, on which the defendant was indicted, but at common law, and the Court decided it on that ground.

On these grounds it was contended the prisoner having been charged with a Statute offence could not be convicted of a different and distinct offence at common law, and

consequently that the Court could not enter judgment upon the verdict.

[The Court took time for consultation and the following morning gave their opininion that the motion in arrest of judgment be sustained, that judgment be arrested, accordingly and the defendants, Farrier and Metcalf be discharged.

Justices Smith and Patten, dissented from the opinion of the three judges of the Common Pleas.

The Attorney General, entered a *nolle prosequi* as to all the other persons named in the indictment.