LEGAL MISCELLANY.

THE HIGH COURT OF ERRORS AND APPEALS AND NEGRO SUFFRAGE.

To the Editors:

The American Law Register of January, 1858, contains an opinion of the Supreme Judicial Court of the State of Maine, "*on the right of suffrage of persons of African descent.*" I have not yet read this opinion, and have nothing to say in regard to it.

At the end of it you subjoin the following note: "This question arose in *Pennsylvania* under the constitution of 1790, which gives the right of suffrage to 'every FREEMAN above the age of 21 years,' and it was held by the Supreme Court of that State that free negroes were not comprehended in those words. *Hobbs* vs. *Fogg*, 6 Watts, 553, decided in 1837. The course of reasoning adopted by Chief Justice Gibson, in delivering the opinion of the court, is substantially the same with that employed by Judge Taney in the famous *Dred Scott* case. The same point had arisen and been decided in 1795, at Philadelphia. See 6 Watts, 555. The present constitution uses the words 'every *white* freeman.'"

You have fallen into *two* mistakes in the matter of this note, as I think I shall be able to show. The mistakes are not properly your own. You have derived them from others.

The *first* of these mistakes is in the *date*, which you assign to the decision of *Hobbs* vs. *Fogg*. It was decided, you say, in 1837.

This is a very natural conclusion, for at the top of several pages of the report it is distinctly printed in *italics*, "*Sunbury, July*, 1837," and a foot note of the reporter reads: "The report of this case was *received* too late for insertion among the decisions of the Sunbury term, *to which it appertains.*" The truth is, however, that the decision was not made in the year 1837. It was not made as early as February 22, 1838. The true date I believe to be the 26th or 27th of that month.

On the face of the opinion itself, it is plain that it was not made till *after* the *new* constitution was promulgated. The signatures of the delegates were affixed to this, February 22, 1838.

Now, *Chief Justice Gibson* speaks of the PROPOSED *amendments* as then

before the people. The Convention, therefore, had adjourned *sine die*, (see the last paragraph of the opinion, page 560 of 6 Watts.)

The case of *Hobbs* vs. *Fogg* was *argued* before the court at *Sunbury*, for it belonged to that district. The count of error was on a judgment of the Common Pleas for *Luzerne* county; but the members of the Supreme Court were so divided in opinion that the case was held under *advisement*.

The court met at *Sunbury* on the second Monday of July, 1837. At that time the convention to propose *amendments* to the constitution of 1790 was sitting at *Harrisburg*. A large number of amendments had been submitted to the convention by *Mr. Sterigere*, of Montgomery county, on the 12th of May, 1837. Among these was one to restrict the right of suffrage to *whites*. The whole were *laid on the table*. On the 23d of June the same restriction was proposed, as an amendment to another pending proposal of amendment. This was *negatived*. A few days afterwards, (June 28,) an appeal similar to the last brought the subject again before the convention. It was *disagreed to*.

An interval of upwards of six months had elapsed, within which the sittings of the convention were transferred to *Philadelphia*, before the subject was again stirred. The labors of the convention were drawing to a close, when, on January 17, 1838, the question of restricting suffrage to *white* freemen was, for the *fourth* time, brought before the convention. It excited a long debate, but was in the end carried by a decided majority.

The Supreme Court was then in session also at *Philadelphia*. *Hobbs* vs. *Fogg* was still *under advisement*. This was well known to the convention. It was alluded to in the debates between the 18th and 23d of January, 1838, as still pending, by *Mr. Agnew*, *Mr. Wm. Reyart*, *Doctor Darlington*, and *Mr. Konigmacher*. See 9 *Debates of Convention*, 368, 375, and 10 *Debates*, 46, 133. *Judge Hopkinson*, also a member of the Convention, had, as was said by *Doctor Darlington*, also referred to the pendency of this cause before the Supreme Court. He had stated that the Court was *divided* upon it.

But there is further evidence on this subject, evidence which must be regarded as *decisive*. It comes from *Mr. Watts*, the reporter of the decision. The newspapers of the day contain a letter from Mr. Watts, dated *February* 27, 1838, in which he says "the opinion was written by *Chief Justice Gibson*, and delivered to me *too late* for the volume which has just left the press;" and he adds, "*I send it to you for publication.*" This

letter, and the *opinion* as it stands now in 6 *Watts' Reports*, 553, may be found, probably, in every newspaper of that period. Both may be seen in the *Philadelphia Gazette* of March 7, 1838, now at the Philadelphia Library.

After he had thus sent the *opinion* to the newspapers, the reporter discovered, no doubt, that it *might* be added to the "volume which had just left the press," and this was accordingly done. The case is the *last* in the volume.

By this means a *speedy*, as well as *authentic* publicity, was imparted to the document. The natural impression of every one, on finding it *where it is*, with the accompanying denotement, "*Sunbury, July*, 1837," and the superadded foot note of the reporter, is that the decision was given forth more than half a year *earlier* than the actual time. The truth of juridical history requires the removal of this erroneous impression.

The *second* mistake which I desire to correct is of much greater moment. It is found in this statement in your note: "The same point had arisen and been decided in the same way in 1795, at Philadelphia."

You had authority for this assertion quite as strong as that which existed in respect to the *first* mistake. You refer to that authority, and I proceed, therefore at once to examine it. *Chief Justice Gibson's* published opinion in *Hobbs* vs. *Fogg* constitutes your authority. He there states: "About the year 1795, as I have it from *James Gibson, Esq.*, of the Philadelphia bar, the *very point* before us was ruled by the *High Court of Errors and Appeals* against the right of negro suffrage. Mr. Gibson declined an invitation to be concerned in the argument, and therefore has no memorandum of the cause to direct us to the record. I have had the office searched for it, but *the papers* had fallen into such disorder as to preclude a hope of its discovery. Most of them were imperfect, and many were lost or misplaced. But Mr. Gibson's remembrance of the decision is perfect, and entitled to full confidenee. That the case was not reported is probably owing to the fact that the judges gave no reasons." 6 *Watts*, 555.

Here a great *constitutional* question is made to depend upon the precarious memory of an individual far advanced in life, in respect not to some startling fact, but to an isolated *opinion* expressed nearly half a century previously.

Is there good ground to believe that such a decision, as Mr. Gibson spoke of, was ever made?

I maintain the *negative* of this proposition.

1. Mr. Gibson remembers but a single incident which by possibility could assist his recollection. He can recall no other. "He declined an invitation to be concerned in the argument." Who invited him? He does not know. Why did he decline the invitation? He gives no reason. He was a young man, with a fair share of practice, but who could not certainly plead the *pressure* of business as an excuse.

2. At the time when *Mr. Gibson* brought forth this recollection, he had been *out of practice* as a lawyer for a *very long* space of time. His mind, in that interval, had been devoted to a harassing, distracting, and unfortunate business, wholly alien from the solution of questions of jurisprudence. And it is matter of general observation, that such a retirement is fatal to accuracy of knowledge, if not in the *principles* of the law, yet certainly so of solitary decisions of the courts. When that profound jurist, *Sir William Grant*, a year and a half after he was made *Master of the Rolls*, was asked his opinion on a point of *law*, his reply was, "Probably the law is so and so. But my opinion is not worth a rush, I have been above a year out of practice."

3. When *Mr. Gibson* mentioned *the* decision, a considerable number of members of the bar were living, whose age and habits of life placed them on a level with him, as to the knowledge of judicial decisions of the period he referred to. Not one of these appears to have heard of it. *Judge Hopkinson*, in particular, who was born in 1770 or 1771, was a member of the convention which proposed the amendments to the constitution of 1790. One of these was on the very subject of the elective franchise. It restricted the right to *whites*. The debates of the convention show that he participated earnestly in the discussion of this amendment. He adverted to the pendency of *Hobbs* vs. *Fogg*, then in the Supreme Court. Yet his recollection could not be quickened in respect to any similar question authoritatively ruled in the High Court of Errors and Appeals. *Mr. Cope*, though not a lawyer, was also a member of the convention in 1837–8, and he was keenly alive to the question of negro suffrage. He was of such an age when the constitution of 1790 was formed, and had taken so much interest in the proceedings of the convention then, that he remembered and recounted a memorable incident of the debate connected with an effort *then* made to limit suffrage to *whites*. He was a resident of the City of Philadelphia

from that period to the day of his death, which occurred but a few years ago. Yet he had no knowledge of the decision in 1795, which *Mr. Gibson* recollected.

But I shall recur to this topic again.

4. I come now to a source of information which is more direct and wholly unimpeachable.

When, as sometimes happens, reference is made by counsel to *unreported* cases, the practice of the courts is to have the records examined. Chief Justice Gibson considered this course a necessary one, in order to verify or disprove the recollection of *Mr. James Gibson.* Accordingly, as he says, he had the *office searched.* But the effort was unsuccessful. Hear the reason which he assigns for the inauspicious result: "*the papers* had fallen into such disorder as to preclude a hope of its (Mr. Gibson's case) discovery. Most of them were imperfect, and many were lost or misplaced."

The *Chief Justice* seems to have directed this search without reflecting upon the functions and purpose of the *High Court of Errors and Appeals.* What kind of *papers* could he have expected to find among the records of a court, instituted as a Court of *Revision, and for nothing else.* The Act of Assembly of 1791, by which the court was constituted, *required* the records of all cases, after an affirmance or reversal of a judgment of the court below, to be *remitted* to such court. This is the common and necessary practice of all common law courts of review. If, therefore, any such decision had been made by the High Court of Errors and Appeals, as Mr. Gibson spoke of, and full and authentic information in regard to it was desired, the proper office to be searched was not in the High Court of Errors and Appeals, but in the *Supreme Court,* on whose judgment the writ of error must have been taken; or if the cause had *originated* in a Court of *Common Pleas,* the record would most probably be found there. The reason, therefore, assigned by the *Chief Justice* for dispensing with *authentic* evidence to corroborate the recollection of Mr. Gibson, is inadequate and inapplicable.

But a search in the office of the Prothonotary of the *Supreme Court* (which by the Act of Assembly abolishing the *High Court of Errors and Appeals,* is made the depository of all books and papers which had belonged to the High *Court,*) would have brought to light in a moment, *an authentic record of all the business ever transacted there.*

This book is labelled "*Docket of the High Court of Errors and Appeals*," and contains not only the names of all the cases brought into the court, but *full minutes* of all the proceedings which took place in relation to them. The day or days on which each case was argued—what counsel spoke, and in what order, are carefully set down.

A court bearing the name of the *High Court of Errors and Appeals* was established under the constitution of 1776. Its principal business was of *admiralty* jurisdiction. Upwards of *sixty* pages of this book are occupied with the proceedings of that court.

On the 13th of April, 1791, a court with the *same name* was erected under the constitution of 1790. Its jurisdiction was restricted to *writs of error* on judgments of the *Supreme Court*, and to *appeals* from decrees of the several *Registers' courts* of the Commonwealth. The *first* session was directed to take place, and did take place, on November 1, 1791. A *stated* session was prescribed every year, to commence on the 2d Monday of July, and *adjourned* courts might be held by appointment of the judges at any other time. It consisted at the time of *twelve* judges, namely, *four*, (being the whole number), of the judges of the *Supreme* Court—the Presidents of the Courts of *Common Pleas*, which at the first comprehended but *five* —and *three* judges were specially appointed by the Governor. One of the provisions of the act of Assembly was, that a judge who had taken part in the decision of the case in the *subordinate* court, was incompetent to assist in a *review* of the same case.

A necessary result of this last provision, was, that a *quorum*, although but *five* were requisite for this purpose, was difficult to be obtained. Pages of the minutes consist of the names of the judges who were in attendance, but who, without transacting *any* business, adjourned from day to day; on a few occasions, for as many as nine or ten consecutive juridical days. Even when a *quorum* was in attendance at the *opening* of the court, it sometimes happened on the calling on of a particular case, that *one*, *two*, and perhaps *more* of the judges then present, were incapacitated to participate in the hearing. In the early years of its existence, the practice was in such circumstances for the *disqualified* judges to retire, and thus the court would be broken up for want of the *quorum*. But subsequently, as appears from a note to *Hannum* vs. *Spear*, 1 Yeates, 569, the *disqualified* judges *sat* when necessary to make the *quorum*, but took no part in the decisions.

I have entered into these details, to prevent the *surprise* which the reader must otherwise feel, in being told that *very little business* was *ever*

transacted by this court. From the careful manner in which the *minutes* were kept, there is no difficulty in ascertaining whether a particular case was ever before the court, and if so, what disposition was made of it.

I have, on at least *four* occasions, carefully examined the contents of the *docket* and minute book of this court. Within the last fortnight, I have looked at *every* entry it contains, from the *first* meeting of the court, on November 1, 1791, to the *final* one, July 2, 1808.

The constitution of 1790 was signed by the delegates, September 2, 1790, and the first election under it was held on the 2d Tuesday of October, in that year. Although *Mr. Gibson* names "about the year 1795" as the date of the alleged decision, I have thought it best, in order that no doubt might remain on the subject, to begin my examination with the *first* meeting of the court, November 1, 1791. The commission of *Benjamin Chew*, appointed by the Governor as one of the *three* special judges of the court, is there inserted at length. Mr. Chew was the *President* of the court.

Only *two* cases were then docketed. Both of these were appeals from the *Register's* Court. Mr. Gibson's case, of course, was not one of these.

The next meeting was at an *adjourned* court, March 30, 1792. No cases, except the *two* before mentioned, from a Register's Court, are mentioned, and these were *continued.*

July 9, 1792, (page 67). The same *two* cases from Register's Court are again noticed.

Two additional cases here appear. 1. The *Commonwealth* vs. *Lecaze,* which was argued at great length. It is reported in 1 Yeates 55, under the name *Republicas* vs. *Lecaze,* and in *Addison's* Rep. 59, entitled *Pennsylvania* vs. *Lecaze.* The title of this case, as well as the reports, prove that this was not Mr. *Gibson's* case. The remaining case, *Cummins* vs. *Dunn,* is an *ejectment.* Court adjourned to *Sept.* 17*th,* 1792, when it again met.

Two cases were here finally disposed of, viz., *Peirce* vs. *Eachus,* and *Lawrence* vs. *Morrison.* Both were *appeals* from *Register's* Courts.

The decision in *Commonwealth* vs. *Lecaze,* was postponed to July, 1793, there not being a *quorum* present of those competent to decide it. Nothing else was done but the assignments of errors—or rather rules on plaintiffs in error, to assign the errors.

Eight cases here *mentioned,* (*none* of which, however, were *argued,*) may be put aside by stating that *three* were from *Register's* Courts. *Two* were *ejectments—one* a *foreign attachment—one* is marked *settled,* and the *last,* affirmed by CONSENT, without any argument.

Four were argued, viz., *Josephson* vs. *Rogers*. In this the case was docketed, errors assigned, argument had, and the *judgment affirmed* on the same day. The counsel were Mr. *Heatly* and Mr. *Todd*. There is enough here to satisfy any one that this was not Mr. *Gibson's* case. Besides, it was two years earlier than the time he fixes. *Gibbs* vs. *Walker*, the *foreign attachment*, is reported, (when before the *Supreme Court*) as *Walker* vs. *Gibbs*, 1 Yeates, 255 ; 2 Dall. 211.

Fitzgerald vs. *Caldwell*, (reported in 1 Yeates, 274; 2 Dall. 215, and Addison, 119,) was before the court at this term.

Dunlap vs. *Flanagan*, from the Register's Court, was also argued; and *Stone* vs. *Fury*, (reported in 1 Yeates, 186, 187; 2 Dall. 184; Addison, 114,) was then decided.

This comprises the whole business of the court at that session.

July, 1794. No case was *argued* at this court. An *appeal* from a *Register's* Court, and *two ejectments*, are noticed on the docket; and a *judgment* was *confessed*, or, rather, a judgment for a specified amount in *pounds*, *shillings* and *pence*, was *agreed* upon by counsel, according to the minutes. Properly, I suppose, the judgment in the court below ought to have been *affirmed*; but this was not done, and I find, in the next year, the case was *non-prossed*. Beyond all doubt, this was not *Mr. Gibson's* case.

July 14, 1795. The court again met. This is the year named by *Mr. Gibson*. Not a single case was then argued; *seven* cases only are mentioned at all. Of these, *two* were appeals from a *Register's* Court, *three* were *ejectments*, the *sixth* was against an *executor*. The remaining case is *Hannum* vs. *Spear*, a case well known to the profession. It is reported in 1 Yeates, 553, and 2 Dall. 291. At an *adjourned* court, on *September* 17, 1795, it was decided.

In 1796, the court met on 11th July, and there are entries of adjournments from day to day, on every juridical day to the 25th of the month, without the transaction of any business. When, at last, it proceeded to business, there *is no trace of any argument* having taken place. In twenty cases, judgments are stated to have been affirmed BY CONSENT. *Three* are marked *settled*. In *one*, the *Commonwealth* was a party. *One* is against an *executor*, and is, besides, a contest upon a *will*—an appeal from a Register's Court.

It is abundantly plain that *Mr. Gibson's* case was not among these.

In 1797, *Ball* vs. *Vasse*, an insurance cause, reported 2 Yeates, 178, and 4 Dall. 270, is mentioned.

Twenty-one judgments were affirmed *by consent; two* marked *settled; one*, "not to be brought forward;" *one* is against *a husband and wife; one*, a question as *to costs* merely, and in *one* a party is styled a *devisee. Three* cases were argued—1. *McPherson* vs. *McPherson*, reported in Addison's Rep. 327, the parties to which were numerous, and most of them *ladies;* 2. *Ball* vs. *Vasse*, before mentioned, and the case against *husband and wife.*

In 1798, the court sat but one day, and affirmed numerous judgments. In many of these—and such is the case throughout the minutes—one or both of the parties are styled, *indorser, indorsee, surety, devisee, executor, surviving partner*, and the like. Such designations exclude Mr. Gibson's case.

No argument was had at this court.

In 1799 a single case was argued. This was *Livezey* vs. *Gorgas*, in which the judgment was reversed at the next court. See 4 Dall. 71. Several judgments were affirmed *by consent.*

1800, *January* 15. An *adjourned* court was held. *Ewing, who survived his wife*, (says the docket,) vs. *Houston.* The judgment was *affirmed*, and this, with the *reversal* of the judgment in *Livezey* vs. *Gorgas*, above noticed, constituted the sum of the business then transacted.

1800, *July.* The court sat but one day. Some judgments were affirmed by *consent;* but no argument took place.

1801. The court sat but *two* days. A considerable number of judgments were affirmed *by consent;* but there was no argument. Court adjourned, says Mr. Dallas, from July, 1801, to January, 1802, for want of a quorum. See 4 Dall. 76, note.

1802, January. An *adjourned* court. *Three* causes were argued, namely, *Burd* vs. *Smith's Lessee*, reported 4 Dall. 76; *Bank of North America* vs. *Norris*, and *Negro Flora* vs. *Graisberry's Executors.*

1802, July. *Three* cases, in each of which the plaintiffs were the same, were very numerous, and *ladies.* In two of these cases the defendants were also *ladies.* The cases may be given briefly as *Hassenclever* vs. *Maria Clifton, The Same* vs. *Francis Clifton*, and *The Same* vs. *Elizabeth Tucker.*

With the exception of these *three*, which were argued, nothing special took place at this session.

1803, *January*. An *adjourned* court, at which an ejectment cause, *Potts* vs. *Harris*, was argued, but no other case.

1803, *July*. *Two* cases, *Davis* vs. *Commonwealth*, and *N. American Bank* vs. *Jones*, were *partially* argued. No other business of a special nature.

1804, *January*. An adjourned court met on the 9th inst., and met and adjourned from day to day, without doing any business, till the 20th inst., when *Davis* vs. *Commonwealth*, and *North American Bank* vs. *Jones*, were again before the court, and the arguments *concluded*.

Three other cases—*Hazlehurst* vs. *Dallas*, *Hazlehurst* vs. *Lea*, *Hazlehurst* v. *Yard*, were also argued.

The names of the parties, and the grouping together of these *three* cases, is a sufficient reason for saying that *Mr. Gibson's case* was not one of them.

1804, *July*. The court sat but one day, and no cause was argued.

1804, Dec. 31, and Jan. 2, 1805. The minutes show nothing more than that a *rule* of court was then adopted.

1805, July. Only *three* judges met; after several adjournments, for want of a *quorum*, adjourned *sine die*.

1806, July. Chief Justice TILGMAN took his seat. Nothing was done, except the granting of a few motions, and the entry of a *non pros*. There was no argument. Adjourned to *Dec.* 29, 1806.

1806, December. An adjourned court. But no *quorum* appeared.

1807, July. HON. BIRD WILSON, as President of the Court of Common Pleas of *Montgomery*, *Bucks*, &c., took his seat.

Nine cases, to wit,

1. Summer *vs.* Ritchie;
2. Dempsey *vs.* Insurance Co.;
3. Ritchie *vs.* Summers;
4. Commonwealth *vs.* Rittenhouse;
5. N. American Bank *vs.* Jones;
6. Hauer's *Lesseevs.* Scheetz;
7. Gallagher *vs.* Hamilton, 4 Yeates, 202;
8. Guier *vs.* Pearce;
9. Miller *vs.* Pearce,

were severally argued at this session. *Dempsey* vs. *Ins. Co.*, is reported 1 Binney, 300; *Ritchie* vs. *Summers*, reported in 3 *Yeates*, 531, and *Summers* vs. *Ritchie*, probably a *cross* action; Hauer's *lessee* vs. Scheetz, was an *ejectment*, and is a memorable case, reported 3 *Yeates*, 205, 2

Binney, 532; *Gallagher* vs. *Hamilton*, see *Hamilton* vs. *Gallagher*, 4 Yeates, 202.

As to *Guier* vs. *Pearce*, and *Miller* vs. *Pearce*, the defendant being the same in these cases, there is no probability that either of these was Mr. Gibson's case. In point of *date*, this was twelve years *after* his case.

No other cases were argued.

1808, June 20. An *adjourned* court.

Dempsey vs. *Ins. Co.*, was again partially argued, and *Miller* vs. *Nichols*, in which counsel appeared for the *United States*, were the only cases argued.

The *final* sitting of this court took place July 2, 1808, at which several judgments were entered. And an Act of Assembly, passed February 24, 1806, having forbidden the Judges to entertain any *new* cause after its date, and required them to determine all the causes then depending within two terms, the functions of the court ceased. The requirement to determine the causes depending, will account for the argument of the *nine* cases above mentioned, at July term, 1807. Even including this term of *extra* diligence, it will be found that during the whole period of its existence, from Nov. 1, 1791, to July 2, 1808, nearly seventeen years, the entire number of causes which were *argued* before it, was but *thirty-three*. The *names* of these cases are comprised in the subjoined list:

1. Commonwealth *vs.* Lecaze.
2. Lawrence *vs.* Morrison.
3. Josephson *vs.* Rogers.
4. Stone *vs.* Fury.
5. Grubb *vs.* McCullogh.
6. Hannum *vs.* Spear.
7. McPherson *vs.* McPherson.
8. Ball *vs.* Vasse.
9. Livezey *vs.* Gorgas.
10. Ewing's Lessee *vs.* Houston.
11. Burd *vs.* Smith's Lessee.
12. Bank of N. America *vs.* Norris.
13. Negro Flora *vs.* Graisberry's Executors.
14. Potts *vs.* Harris.
15. Davis *vs.* Commonwealth.
16. N. American Bank *vs.* Jones.
17. Hazlehurst *vs.* Dallas.
18. Hazlehurst *vs.* Lea.
19. Hazlehurst *vs.* Yard.
20. Hassenclever *vs.* Clifton.
21. Hassenclever *vs.* Clifton.
22. Hassenclever *vs.* Tucker.
23. Summers *vs.* Ritchie.
24. Fitzgerald *vs.* Caldwell.
25. Dempsey *vs.* Ins. Co.
26. Ritchie *vs.* Summers.
27. Commonwealth *vs.* Rittenhouse.
28. N. American Bank *vs.* Jones. (*See* No. 16. Probably this was a *re*-argument.
29. Hauer's Lessee *vs.* Scheetz.
30. Gallagher *vs.* Hamilton.
31. Guier *vs.* Pearce.
32. Miller *vs.* Pearce.
33. Miller *vs.* Nichols.

Eleven of these, it has been shown, have been *reported*.

It is not likely that any one, after a proper examination of the evidence which I have adduced, will *continue* to believe that *Mr. Gibson's* recollection was at all reliable.

But there is another kind of evidence which, under the circumstances, possesses a strength, not to say a positiveness, which must lead the mind to the same conclusion.

In 1817, an election for Governor of this Commonwealth occurred, which was contested with great earnestness. The majority for the successful candidate was unusually small.

The vanquished party, encouraged by the smallness of this majority, was induced to question the fairness of the election. It was openly alleged, and this the newspapers of the day avouch, that in one election district in particular *fifty* votes had been given by *colored* persons. They were known to have been particularly friendly to the successful candidate. The fact of such persons having been in the practice of voting at that district for years before, was conceded. It was well known, too, that to some extent similar voting had been allowed in several other places. In Philadelphia, and in the greater part of the State, no such practice had ever existed. Indeed, with the exception of an inconsiderable number of colored persons, who were the owners of *real* estate, the whole class was effectually excluded by the *purposed* omission of the assessor *to tax* them. Without having been assessed, no one, be his color what it might, could claim a right to vote. *Negroes*, as a body, FOR THE VERY PURPOSE, *openly avowed* and *generally approved*, of preventing them from claiming this right, were passed over by the assessors. The few who, as owners of real estate, were, I believe, assessed, were considerate and respectable men, who were guided by the counsel of the true friends of their color, in never presenting themselves at the polls.

At the time of the election referred to, there must have been some thousands living in the State, and in full vigor of intellect, who were in the prime of life in 1795, only 22 years before.

Of the bar alone in this city there were, falling within this category, *Jared Ingersoll, William Lewis, William Rawle, Peter S. Duponceau, Joseph B. McKean, Joseph Hopkinson, Benjamin R. Morgan, Moses Levy, Jonathan W. Conly, William H. Todd, John Hallowell, Walter Franklin, John Read, Joseph Reed,* and in other parts of the State *James Ross*, of Pittsburg, *Samuel Sitgreaves* and *John Ross*, of Easton, *Thomas Duncan, Charles Smith* and *James Hopkins*, of Lancaster, *John Marks*

Biddle and *Charles Evans*, of Reading, *Thomas Ross*, of Montgomery county, and *Abraham Chapman*, of Bucks county, nearly all of whom had a large practice in their day.

Not one of all these, (although many of them were decided politicians, and most of them of the party opposed to the successful candidate for Governor in 1817,) ever, so far as I have heard, pretended to the least recollection of such a decision as *Mr. Gibson* mentioned. If any thing could have quickened their memories, the universally conceded fact that negro votes had been then given, and had contributed to the defeat of one of the candidates, would certainly have been sufficient.

I have a vivid remembrance of a conversation on the very subject of negro suffrage, growing out of the election of 1817. It occurred in the interval between the election and the inauguration of the Governor, or very soon afterwards. *James Ross*, of Pittsburg, *Judges Gibson* and *Duncan*, and *Judge Hallowell*, were all present, and participated in the conversation. They all agreed there could not be a question as to the right of negroes to vote under the then constitution. They all agreed, too, that the right had been occasionally exercised—that in a few counties it was constantly exercised. *Judge Gibson* stated that he knew an old colored man who had voted at the general election year after year, and he said his right was unquestionable.

James Ross had been a member of the Convention which formed the constitution of 1790. He was, besides, an intimate friend of *Judge Addison*, who had been a member of the same convention. *Judge Addison* appears to have attended at most, if not all, the sessions of the High Court of Errors and Appeals from 1791 to 1803. If a question *on negro suffrage* had come before that court, is it not likely that *Judge Addison* would have mentioned it to *Mr. Ross*, his co-laborer in forming the constitution? They both resided at Pittsburg.

But *Mr. Ross*, had no knowledge, in 1817, of such a decision.

The name of *Judge Duncan* appears on the minutes of the High Court of Errors and Appeals, as counsel for an appellant in 1792, and the cause was not decided for several years. He, however, had never heard of *Mr. Gibson's* case.

Is it credible that such a question could have occurred, that such a decision could have been made in the city of Philadelphia, and yet no one have ever heard of it but *James Gibson?*

What explanation can be given, then, it may be asked, for the *belief* of *Mr. Gibson*, that such a decision was made.

It is freely conceded, that Mr. Gibson had such a *belief*—that he was entirely sincere in communicating it to the *Chief Justice*, as a verity. I am equally certain, however, that he was mistaken, and his mistake I think, may be satisfactorily accounted for. In the year 1795, the very year which *Mr. Gibson* mentions, a writ *de homine replegiando* was brought into the *Supreme Court* of Pennsylvania. It was entitled *negro Flora* vs. *Joseph Graisberry*. On the 15th of December, 1797, the trial came on when a *special* verdict was found, and at March Term, 1798, judgment was entered for the *defendant*, on the verdict "for the purpose as it is stated on the record, "of an appeal to the *High Court of Errors and Appeals*, and that the justices of this court may there assist in hearing and determining it." The case was accordingly carried up to the *High Court of Errors and Appeals*, and was there argued, as the minutes show, for four sittings of the court. The counsel for the plaintiff were *Jared Ingersoll, William Rawle, and William Lewis*, Esquires. The argument began January 20, 1802.

The judges of the Supreme Court, (who it would appear by the record of that court, as above cited, had supposed that by giving a judgment *pro forma*, they would not be precluded from taking part in the decision in the *High Court*, judged it not proper afterwards to do so,) although their presence is noted, did not as is mentioned, participate in the decision in the *High Court*. *Five* judges, most of them Presidents of the Courts of Common Pleas, AFFIRMED the judgment of the Supreme Court.

The minutes of the *High Court of Errors and Appeals*, show that no reasons were given for their opinion, but it was announced by the President, "that it was their unanimous opinion, slavery was not inconsistent with any clause of the Constitution of Pennsylvania."

The ground upon which this *replegiando* was taken, was, the *first* section of the "*declaration of rights.*"

On first blush, this declaration seems to require a *contrary* decision to that which was given. And so in 1780 it was considered in *Massachusetts* —the bill of rights of which, is in nearly the same words. *Winchenden* vs. *Hatfield*, 4 Mass. Rep. 129. Many years ago, when the case of *negro Flora* vs. *Graisberry* was first brought to my notice, I thought, and so expressed myself, that the decision of the *High Court of Appeals* was wrong. On a more deliberate consideration, now at a more mature age, I see great reason to doubt the soundness of my earlier opinion.

The circumstances of this case, as I have said, will explain the *mistake*