JOHN BANNISTER GIBSON.
1780–1853.

BY

SAMUEL DREHER MATLACK,
of the Pennsylvania Bar.

To him whose studies have proceeded even a little way into the jurisprudence of the Commonwealth of Pennsylvania, the name of Gibson needs no praise. Few are the foundation stones in that great legal edifice without the marks of his powerful hands. A member of the Supreme Court for thirty-seven years, and Chief-Justice, in fact as well as in name, for a quarter of a century, in the constructive period of the law, when many of its parts were first laid down and all were vastly developed, it would be hard to overstate the influence of his clear intellect. Fifty years after his death, it is mainly if not wholly by his written words that he must be judged. His opinions run through seventy volumes of the reports; from first to last there is not a weak one among them. And, though judicial opinions ordinarily show little of the personal characteristics of the writer, yet from the time-stained pages Gibson’s words stand out with vividness and individuality, making it easy to understand contem-
porary testimony to his dominant personality and to his admirable qualities as a man.

Never poor in eminent lawyers and judges, Pennsylvania has few names worthy to stand beside Gibson's—none above it.

The Gibson family is traced to that hardy "Scotch-Irish" stock, with its abundant vigor of mind and body, its keen wit and its independence and courage of thought and deed, which has played so conspicuous a part in the history of the state.

About 1730, the neighborhood of the tavern of George Gibson was designated as the site for the city of Lancaster. The family had been in Pennsylvania some years before that; and this George Gibson, his house being practically on the frontier, must have seen much of the rough pioneer life. His wife, Elizabeth DeVinez, daughter of a Huguenot who had fled to Ireland after the revocation of the Edict of Nantes, is described as a woman of refinement and accomplishments; from her, her sons learned French and Spanish.

The two sons, George and John, seem to have been born soldiers, and both saw much service against the Indians. John was at one time in command of Fort Pitt. His aptitude for languages enabled him to acquire an extensive knowledge of the Indian dialects, which rendered his services peculiarly valuable to the colonists. The old-time favorite of the school reading-books, the speech of the chief Logan, is said to have been delivered with Colonel John Gib-
son as sole auditor, and to have been translated by him.

The younger George, the father of John Bannister Gibson, in 1770 removed to Cumberland County, and in 1772 was married there to Ann West, who was born in Ireland, and whose father, a colonial judge, was a cousin of Benjamin West, the famous painter. George then removed to Westover Mills in Cumberland (now Perry) County, where his four sons were born.

In 1776, at the outbreak of the Revolutionary War, George Gibson recruited a company at Pittsburgh, which was then under the control of the Colony of Virginia, and was commissioned as a captain in the Virginia line. Being sent by the governor of Virginia on a secret mission to New Orleans to obtain ammunition from the Spanish, he made the journey through the wilderness, and brought back the precious supplies, it is said, on flat boats up the Ohio. For this important service he received a commission as colonel, and served in that capacity throughout the war. His regiment joined Washington at Valley Forge soon after the Battle of Germantown. Upon the surrender of Cornwallis, Colonel Gibson was chosen to transport the prisoners to York, Pennsylvania. In 1791, as lieutenant-colonel and field commander, he led a Pennsylvania regiment in the ill-fated expedition of St. Clair. In the terrible slaughter in the Black Swamp region, where two-thirds of the troops were killed or wounded, Colonel Gibson
showed great courage. He was twice wounded, and died a few days later.

George Gibson had not been successful in business; his time had been spent in the service of his country. In a letter written in 1851, the Chief-Justice describes his father: "The little talent of the family came from my father's side; I should say genius, for he had no talent at all. He was celebrated as a humorist, and even as a wit, but though without a positive vice, he could never advance his fortune, except in the army, for which alone he was qualified."

John Bannister Gibson, the third son, was born November 8, 1780, and was only eleven years old when his father was killed. He was a namesake of Colonel John Banister \(^1\) of Virginia, member of the Continental Congress, signer of the Articles of Confederation, and an officer of the Virginia line.

The widowed mother was left with a poor mill property, in a sparsely settled region, and without any pension. But she was not lacking in the qualities of heart and mind needed in her difficult situation. Educated in Philadelphia, and always a great reader, she built a school-house and taught the boys herself. A devout church-woman, she traveled fifteen miles to the nearest church; and by her daily life she put before her sons a lasting ideal of moral purity. In the letter already quoted, Judge Gibson

\(^1\) The proper spelling; but in Gibson's name it has commonly been spelled with the double n.
says: "We had from one to two hundred volumes . . . and I read all of them so often that they are as fresh in my memory to-day as if I had read them yesterday. My poor mother struggled with poverty during the nineteen years she lived after my father's death, and having fought up gallantly against it, till she had placed me at the bar—died. She was certainly a noble soul."

This was the inheritance of the future Chief-Jus-
tice—the rugged and sterling qualities of his father's family with their splendid physical stature and strength, the refinement and linguistic ability of his French grandmother, the virtues and love of books of his mother. His early training was rude and inadequate, perhaps, but, with the free life in the open air, with constant hunting, fishing and the rough sports and occupations of the field and forest, it laid no bad foundation in health and strength for the long and arduous labors of a great judge.

In 1795 or 1796, he was sent to Dickinson College at Carlisle, where he remained about four years. Taney was graduated there the year before Gibson entered, James Buchanan several years after he left. Apparently Gibson did not take his degree, and the tradition is that he made very little mark as a student, though his latent abilities, or rather, his occasional and spasmodic indications of ability, were recognized by a few. Judge Hugh Brackenridge, of the state Supreme Court, who lived at Carlisle, took some notice of the tall and awkward young student, and
gave him the use of his library, the best in the town, which Gibson greatly appreciated. But no one seems to have seen any special promise in him; certainly no one would have prophesied that he was to be Brackenridge’s successor on the bench.

On leaving college, he began the study of law at Carlisle, in the office of Thomas Duncan, a lawyer of sound and thorough, if not brilliant ability, well versed in the learning of the time, and well calculated to be an admirable preceptor.

In 1803, Gibson was admitted to the bar in Cumberland County, and later in the same year at Pittsburgh. In 1804, he was admitted in Beaver County, and he also practiced for a short time in Hagerstown, Maryland. Some have taken these facts to indicate a moving about, due to lack of success. The obvious deduction seems rather to be that he had or hoped to have business in all these places.

In the sessions of 1810–1811 and 1811–1812, he served as a member of the state legislature, having been elected on the Democratic ticket. He acted as chairman of the judiciary committee, introduced and after considerable effort secured the passage of the Act of 1812 abolishing survivorship as an incident of joint tenancy, and was prominent in the impeachment proceedings against Judge Thomas Cooper, championing the cause of that unfortunate gentleman, whom his efforts could not save.

Gibson was married in 1812 to Sarah Work Galbraith of Carlisle, who was of the same Scotch-Irish
stock—a charming and excellent woman, who proved a most efficient and sympathetic helpmate.

In the next year, Governor Snyder appointed Gibson judge of the new Eleventh judicial district, and he took up his residence at Wilkes-Barre. The primitive condition of the country at this period is shown by the fact that Judge Gibson held court in a log-house.

While there is nothing to mark any conspicuous success in his ten years at the bar (it must have been very conspicuous for any record of it to remain), it is impossible to agree with those writers who say that he could never have succeeded as an advocate. One of them says: “The movements of his mind were not rapid enough; he had not patience enough to wade through the wilderness of dry facts which the thoroughly furnished attorney must tread.” 2 Even though this writer was a clergyman, as is supposed, it is hard to understand how he failed to see that he was describing essential qualities of a good nisi prius and appellate judge. And after all, to enter the legislature at thirty and to go upon the bench at thirty-three are not the marks of failure in the profession.

Gibson was well liked as a common pleas judge and was personally popular. At the time of his death, a Wilkes-Barre newspaper said:

2 Review of Judge Porter's Essay on Gibson, in the Mercersburg Quarterly Review, January, 1856, supposed to have been written by Reverend Joseph Clark.
His sojourn with us has left a deep and abiding respect for his commanding talents and civil virtues. His domestic and social habits, aside from the able and just discharge of his official duties, were highly exemplary and amiable.

Judge Porter, in his essay on Gibson,⁹ says:

The few survivors of those who practiced in his court describe him as exhibiting much energy in the transaction of judicial business, but too much impulsiveness in his judgments, both of legal affairs and of human nature. Even at that early day it is admitted that he attracted the attention of learned lawyers throughout the commonwealth, and that his opinions were held by them in high consideration.

The truth is that Gibson was a many-sided man, and perhaps it was not until after his appointment to the Supreme Bench that the law became the controlling intellectual interest of his life. He might have attained eminence in any of several ways.

On June 27, 1816, he was appointed by Governor Snyder as an associate-justice of the Supreme Court, to fill the place vacated by the death of his friend, Brackenridge. There he took his seat with Chief-Justice Tilghman and Justice Yeates. Placed, at the age of thirty-six, in so responsible and dignified a position, and brought into close contact with the wide learning and experience of these veteran judges, he quickly realized his deficiencies. In the laborious study which occupied the first years of his service on the supreme bench, his mind became en-

⁹ "John Bannister Gibson, as a Lawyer, a Legislator and a Judge," by Judge William A. Porter of the Pennsylvania Supreme Court.
grossed in the law—other things became mere diversions—and he furnished himself with that vast and accurate knowledge which gave him, as the years passed, a sureness and mastery, rarely equaled by any judge, in dealing with all questions presented.

In 1817, on the death of Judge Yeates, Duncan was appointed to the vacancy, largely, it is supposed, through the influence of Gibson, who had thus the unique benefit of the presence of his preceptor on the bench as his junior associate.

The long and useful career of Chief-Justice Tilghman was ended by death in 1827. Horace Binney, in his eulogium 4 concludes: "He merited, by his public works and by his private virtues, the respect and affection of his countrymen; and the best wish for his country and for his office is, that his mantle may have fallen upon his successor." That successor was Gibson, who was commissioned Chief-Justice May 18, 1827. Different as were the personalities of the two men, no one can say that Mr. Binney's wish was not amply fulfilled.

The constitutional amendment of 1838 changed the tenure of office of the Supreme Court justices from life to a term of fifteen years, and provided that the commissions of the judges then in office should expire at intervals of three years, in the order of their seniority as of January 1, 1839. Judge Gibson had opposed this change on broad grounds of

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4 See, 13 Sergeant & Rawle's Reports, 456.
public policy. At the suggestion of his associates, he resigned and was reappointed by Governor Ritner in 1838, thus prolonging his term by several years. This called forth much adverse criticism from the newspapers. But the provision of the amendment seems grossly unjust to the men who had given up their professional careers relying upon a life tenure of office; and his action surely harmed no one but those on whose suggestion he acted. In a letter written at this time, he sets forth his position; and in reading the following extract it should be remembered that his salary never exceeded $2,000, with an allowance of about $500 for expenses.

To me, who, for a bare subsistence, had given the flower of my life to the public, instead of my dependent family, a continuance in office of the longest period was a matter of vital importance; but the arrangement of the convention, unintentionally severe to me or anyone else, proposed to consign me to penury and want, at a time of life when I could scarcely expect to establish myself in practice, which, under the most favorable circumstances, requires several years. This was known to my brethren, and felt by them as men. The measure, since carried into execution, was proposed by one of them . . . and with the assent of another, whose term would be shortened by it. The assent of the other, who stood in the same predicament, was cordially given, as soon as it was mentioned to him. Feeling, then, that the personal interest of no one else was concerned; that it was an arrangement which contravened no principle of public duty; and that if any objection lay to it on the ground of public expediency, it would be enforced by the constitutional arbiter, I permitted a personal friend, with whom I have never coincided in party sentiment, to submit it to the Executive for his sanction or rejection.
The constitutional amendment of 1850 provided that the judges of the Supreme Court should be elected instead of being appointed by the governor. At the Democratic convention in 1851, the only member of the then existing court who was placed upon the ticket was Chief-Justice Gibson. "The nomination," says Judge Porter, "was an act of high homage to his character. It was the result of that feeling. He was more than seventy years of age, too old, if he had been willing, to accomplish by his own energy anything to promote his nomination, and as unacquainted as a child with partisan politics and with party leaders. In one sense, the nomination was a rebuke to himself. He had seldom lost an opportunity to express his want of confidence in popular action, and his disapprobation of every movement designed to enlarge the boundaries of popular power. He took as little pains to conceal his sentiments on this point as on all others, and while he expressed them decorously he uttered them boldly. It must, therefore, have cost him some surprise, if not compunction, to find that carrying into effect the very movement of which he had most horror, the people, through their representatives, chose to retain their hold of him as one of their most important public servants."

The judges drew lots for the terms, the law providing that one of them should go out of office every three years. Jeremiah Black drew the shortest term, and with it the office of Chief-Justice. Gibson was
thus commissioned as associate in the court where he had sat as Chief-Justice for twenty-four years. But, as Black himself said: 6

When he was nominally superseded by another as the head of the court, his great learning, venerable character and over-shadowing reputation still made him the only chief whom the hearts of the people would know.

His long service was nearly ended. Soon after his election, his health was broken by a severe illness, and while his mind remained unimpaired, the vigor of his body was abated. His opinions during this period are far from reading like the words of an old man, but they are few in number. And in the last years of his life he preferred to hold the nisi prius court, because it involved less labor after the usual court hours.

After his death, a member of the bar said: "At one time I heard the present chief-justice (Black) say, and he judged by the intuitive knowledge of a kindred spirit, that he was utterly astonished at the freshness and vigor of ‘the old chief’ in consultation; that his mind appeared imbued with all the elasticity of youth as well as the wisdom of age, and grasped the whole range of legal science. At another and more recent period, when he had known him longer and better, and as his admiration increased, he remarked that he regarded Gibson the greatest mind he had ever met; that, notwithstanding his age, and

6 See, 19 Pennsylvania State Reports, 10.
his *vis inertia*, of body, which constantly dragged him down, his intellectual powers were most brilliant and commanding."

In the spring of 1853, he went to Philadelphia, against the protest of his physicians, to attend the meeting of the court—and there died, May 3, in his room in the United States Hotel, on Chestnut Street, between Fifth and Sixth. He was buried at Carlisle, close to the graves of Brackenridge and Duncan. In those days epitaphs had not gone out of use, and the one upon his monument, written by his friend and successor, Chief-Justice Black, is worth copying:

In the various knowledge which forms the perfect scholar he had no superior. Independent, upright and able, he had all the highest qualities of a great judge. In the difficult science of jurisprudence he mastered every department, discussed almost every question, and touched no subject which he did not adorn. He won in early manhood and retained to the close of his life the affection of his brethren on the bench, the respect of the bar, and the confidence of the people. His intimate friends forgot the fame of his judicial career in the more cherished recollections of his social character, and his bereaved family dedicate this stone to the perpetual memory of the affectionate husband and kind father.

The eloquence of this cannot be denied, and, unlike most writings of its class, there seems to be no word of it which is not true.

The proceedings in the supreme court upon the

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*A Address of J. E. Bonham, Esq., at the Bar meeting in Cumberland County.*
announcement of his death\(^7\) consisted of an address by Thaddeus Stevens in moving to adjourn, and a reply by Chief-Justice Black, one of the finest eulogies ever pronounced, and an unmatchable appreciation of Gibson's character and greatness.

Similar proceedings were had in many of the county courts, and in the federal courts. Speeches of this kind necessarily contain nothing but praise, and usually convey little accurate information. To them, if to anything, the maxim, *De mortuis nil nisi bonum*, properly applies. But, under the tissue of superlatives, the genuine appreciation of his contemporaries and their admiration and affection for him as a man are plainly to be read.

The personal appearance of Judge Gibson, as shown by his portraits and as described by those who remembered him, was most striking. His stature was three inches above six feet; he was powerfully built, well proportioned, and of vigorous health. His head was larger than Webster's; his eyes were keen and penetrating; his mouth and chin were strong and determined. His bearing was habitually dignified, his manner often abstracted, the weighty problems occupying his mind making him at times even oblivious to acquaintances met on the street. He was mild and unostentatious in speech; in his personal and family relations he was genial, kindly and affectionate. At Carlisle, where he lived from the time of his appointment to the supreme court

\(^7\) See, 19 Pennsylvania State Reports, 10.
until his death, his hospitality and affability were well known.

As one would say to-day, he was a typical "big" man, in body and mind. 'To quote again from Judge Porter's essay:

He despised the anise and the cumin, and necessarily lost the respect of those valuable members of the state, outside and inside of the bar, who do the least important things first, and the most important last. Frank, generous and confiding, he spoke on the bench and elsewhere, of persons and things, with that impulse which none but an honest heart can know; and in doing so he occasionally lost in dignity as much as he gained in the pleasure of giving expression to his real sentiments in his own way. If, as a presiding officer, he had preserved order more rigidly, his court would have been a more solemn place, and if he had attended more directly to what was passing before him, the business would have been more efficiently despatched. But enough of what he was not. The qualities which he possessed were striking and peculiar. That which most impressed those who knew him best was the exceeding kindness of his heart. The knowledge of this was the key to his character. . . . He cherished no antipathies, and formed no prejudices, and this constituted one of his chief excellencies as a judicial magistrate.

Notable among Judge Gibson's friendships was that with Black, himself one of the great figures of the Pennsylvania bench. In the memorial of that friendship, for the quotation of which no apology is needed, Black describes Gibson as no one else can hope to do:

Next, after his wonderful intellectual endowments, the benevolence of his heart was the most marked feature of his character. His was a most gentle spirit; affectionate and kind to his friends,
and magnanimous to his enemies. Benefits received by him were engraved on his memory as on a tablet of brass; injuries were written in sand. He never let the sun go down on his wrath. A little dash of bitterness in his nature would, perhaps, have given a more consistent tone to his character, and greater activity to his mind. He lacked the quality which Dr. Johnson admired; he was not a good hater.

The eulogy concludes:

Doubtless the whole commonwealth will mourn his death; we all have good reason to do so. The profession of the law has lost the ablest of its teachers, this court the brightest of its ornaments, and the people a steadfast defender of their rights, so far as they were capable of being protected by judicial authority. For myself, I know no form of words to express my deep sense of the loss we have suffered. I can most truly say of him what was said long ago, concerning one of the few mortals who were greater than he: "I did love the man, and do honor his memory, on this side idolatry, as much as any."

Judge Gibson's versatility has already been mentioned. His was a well and variously stored mind, the law seeming to have been less a "jealous mistress" to him than to most. That he was a student of Shakespeare, apt quotations and allusions in his opinions testify. He kept up his Latin, and knew French and Italian. He was fond of the drama, and personally knew many of the actors of his time. He and Judge Rogers erected a monument to Joe Jefferson, grandfather of the Joe Jefferson of our day, for which Judge Gibson wrote the epitaph. He played the violin very well and found great pleasure in music. It is said that often, while working in
his library, he would lay down his book, play his “fiddle” for a while, and then as suddenly put it aside and go back to the opinion he was writing. In his youth he had a strong taste for painting, and a portrait of himself at the age of twenty-one, still preserved, is said to be an excellent likeness. This taste showed itself in later years in clever pen and ink caricatures of tiresome speakers that he sometimes made while on the bench. He was naturally skilful with his hands, and enjoyed, in his life at Carlisle, gardening, amateur carpentry, piano-tuning, in which he was expert, and, most curiously, dentistry. The story is that, his teeth having loosened and dropped out, though still sound, he requested a dentist to mount them on a plate. This the dentist said was impossible, whereupon the Chief Justice borrowed some of the dentist’s tools, did the work himself, and used the teeth all the rest of his life. And it is also said that after this occurrence he sometimes amused himself by dental work of various sorts. His knowledge of medicine was extensive, and he had considerable skill in diagnosis, so that physicians are said to have consulted him in doubtful cases. He also read widely in physical science, wrote articles for scientific journals, and in at least one instance wrote an article on geology far in advance of the views of that day.

In 1838, Judge Gibson received the degree of Doctor of Laws from the University of Pennsylvania, and later from Harvard; and in those days, when
honorary degrees were not so cheap as now, this meant much.

Of the integrity of such a man, it seems almost an insult to speak at all. The words of Judge Black will serve to show what those who knew him thought:

He was inflexibly honest. The judicial ermine was as unspotted when he laid it aside for the habiliments of the grave, as it was when he first assumed it. I do not mean to award him merely that common-place integrity which it is no honor to have, but simply a disgrace to want. He was not only incorruptible, but scrupulously, delicately, conscientiously free from all wilful wrong, either in thought, word or deed.

When Gibson began the study of law, the only American reports were three volumes of Dallas, and few law books of any sort were to be had. The student was compelled to go to the fountain heads; and the influence of a thorough knowledge of Bacon and Coke is apparent in Gibson's opinions, not only in substance but in form.

The law of real estate and pleading were then the most important branches. Commercial law was almost non-existent. Railroads were unknown, and corporations of any sort unusual. But the great development of commerce and industry during the fifty years of Gibson's legal work found him well prepared, by a complete and precise understanding of fundamental principles, to meet and dispose of the various and complex questions, many of them of first impression, coming before him.
To his profound knowledge of the common law, to his appreciation of its spirit, and above all to his treatment of it, not as a fixed and lifeless system, imported bodily from England to the new soil, but as an organism capable of adaptation to environment—and therefore alive—Pennsylvania owes, in great degree, the framework of her jurisprudence. With an unsurpassed learning in the old precedents, Gibson never joined a blind following of them. From well grounded premises, he reasoned with masterly logic, strong common sense and striking independence, always realizing that this commonwealth has a judicial system of her own—rooted deeply in the ancient customs of the English people, but growing and spreading in its own way and along its own lines.

This is best illustrated by a few extracts from his opinions.

On the question whether "months" for payment of a bill of exchange were lunar or calendar months, he held the latter, saying that the English rule to the contrary was founded on the common usage in that country.  

This tendency of the common law to adapt itself to the feelings and habits of men, as they actually exist in society, instead of moulding their transactions into forced and artificial forms by inflexible rules, is one of its most estimable qualities, and one which, alone, gives it, as a practical system, pre-eminence over every other that has prevailed. But however wise this particular rule may have been in its origin, the reason of it has long ceased,

8 Shapley vs. Garey, 6 Sergeant & Rawle's Reports, 539.
at least in this country, where the popular understanding on the subject is so entirely changed, that in all the transactions and business of life, the month is universally estimated by the calendar. The lunar month never enters into the contemplation of anyone.

Again, in the celebrated case of Lyle vs. Richards, he says:

A position has been taken by counsel, which, in its full extent, I think no one will concede: that on the arrival of our ancestors in the province, the whole common law of England was cast on them, as an inheritance is cast on the heir, without power on their part to prevent its descending on them; the whole or particular parts to be entered on and occupied in actual use, as occasion might from time to time require. It is undoubtedly true as a general rule, subject however to exceptions, that the first settlers of a colony carry with them the laws and usages of the mother country. . . . But to a greater or less extent, there necessarily exists in every country a species of legislation by the people themselves, which in England and in this country is the foundation of the common law itself, or in other words general custom obtaining by common consent; and this sort of legislation will be more freely used in the infancy of a colony, where an abrupt change of the circumstances and condition of the colonists must require a correspondent alteration of the laws and usages of the mother country to fit them to actual use, than in a country whose jurisprudence has been the gradual product of time and experience. In the infancy of this colony it produced not only a modification of some of the rules of the common law, but a total rejection of many of the rest. . . . It is said by Judge Yeates, whose personal experience extended half a century back and who was well skilled in the earlier traditions of the province, that the uniform idea had been that only such parts of the com-

9 Sergeant & Rawle's Reports, 322.
mon law as were applicable to the local situation of the colonists were received by them. . . I do not say that nonuser alone ought to be considered as conclusive evidence of universal assent . . .; but where to a clear and unqualified nonuser for more than half a century, we find subjoined positive acts of the whole community evincing a disclaimer of the existence of a particular law, it ought to be conclusive; for it is not to be credited that a law can be in force, and its existence, at the same time, be a secret to every member of the community, whether lettered or layman.

His attitude toward the civil law is shown by the following quotations. In the case of Lyle vs. Richards, cited above, he says:

No freeman would hesitate to prefer the hardy features of personal independence of this most excellent system of jurisprudence [the common law], notwithstanding the subtlety of its forms and the tediousness of its administration, to the civil law, the code of continental Europe, under which justice may be unceremoniously snatched by the hand of power.

In another case he said: 10

No man can withhold his praise of the civil law, as a wonderful fabric of wisdom for its day, or deny that it has contributed largely to the best parts of our jurisprudence; but all its materials of superior value have already been worked up in our more commodious edifice; and if the cultivation of an acquaintance with it is to beget a desire to substitute its abstract principles for the maxims of the common law — the accumulated wisdom of a thousand years experience — it were better that our jurists should die innocent of a knowledge of it.

And in speaking of a certain English decision he shows that his attitude is not one of prejudice: 11

10 Bayard vs. Shunk, 1 Watts & Sergeant's Reports, 92.
11 Hoopes vs. Dundas, 10 Pennsylvania State Reports, 75.
The whole case exhibits a determination, at any sacrifice of precedent, to get away from the doctrine of the civil law, though the facts before him were pregnant with proof of its superiority in this particular. . . . We are not going to overturn our own decision here, because it has pleased the Chancellor to overturn the old decisions there.

While he maintained constantly the importance of adherence to long-settled forms and the danger of departure from precedents, one of his most striking characteristics was his unswerving refusal to let mere technicalities stand in the way of the administration of substantial justice. "An adherence to form," he says, "is the only security for a due attention to substance;" 12 again, "The forms of the law are the indices and conservatories of its principles;" 13 "Precedents are the highest evidence of the law, and are to be followed implicitly where they do not produce actual injustice or some intolerable mischief." 14 But in this last case he goes on:

Where it is the business of a particular class of the profession to attend to the pleadings and prepare the causes for trial, slips are infrequent, and the injustice of applying strict rules of pleading . . . is consequently less annoying. But here, where the attorney is also the advocate; where an almost unlimited indulgence is extended to each other by gentlemen of the profession, and where, in consequence, the pleadings are frequently left unfinished, our sense of justice is perpetually shocked by exceptions like the present.

12 Withers vs. Gillespy, 7 Sergeant & Rawle's Reports, 10.
13 Fritz vs. Thomas, 1 Wharton's Reports, 66.
14 Sauerman vs. Weckerly, 17 Sergeant & Rawle's Reports, 116.
And apropos of this looseness of practice, he said, after many years of experience on the bench: 15

In Pennsylvania, it is true, agreements of parties or counsel have been recognized as the law of the case so far as regards questions of right; and they have had an influence even in overturning forms of law and making a Pennsylvania record, when sent into another state, a by-word and a jest. We have heard of one sort of action being turned into another, and money counts being filed in trespass or trover; but, though such a practice is simply barbarous, it supposes the existence of a proper form of action, with pleadings to admit the merits of the case. It is to the facilities afforded by these agreements, encouraging as they do laziness and inattention, that our exuberant ignorance of the principles of an action, and of practice, is to be ascribed, together with the teasing and profitless litigation which it produces.

In a case where the attempt was to sustain the ancient and long unused assize of nuisance, he alludes to the matter in terms showing that he must have read Washington Irving's "Sketch Book," then new. 16

I certainly have not been in favor of reviving obsolete forms, which, from the disuse of them by our forfathers, might well be considered as having been rejected at the settlement of the province. It is, however, too late to make a stand against them now, it having been established, by repeated decisions of this court, that all common law actions which have not been abolished by the legislature, are in force here precisely as they are in England. . . . This being so, we have nothing left for it but to adapt the action to modern use, by purging it of its subtleties in mere matters of form, without presuming, however, to meddle with essentials.

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15 Bellas vs. Dewart, 17 Pennsylvania State Reports, 85.
The ground on which it has been recognized is, that it was all along a living remedy, although dormant; and, like the man who awaking from a trance of twenty years in the Catskill mountains, was so altered that on returning to his native village his former acquaintances did not know him, the assize of nuisance is to be received with the same modifications in practice which time has impressed on the forms of our other actions. It would be a sad and sickening task to take it up now just as it was two hundred years ago, when the English courts laid it down, without extending to it the benefits of modern practice, or of the statutes of jeofails, or even of our own act of assembly for the amendment of slips in pleading.

In laying down that it was the rule in Pennsylvania, as contrary to the English rule, that mesne profits could be recovered in ejectment down to the time of the verdict, he takes a characteristic position: 17

Whatever force there may have formerly been in the assertion, that only nominal damages could be recovered of a nominal defendant, it is sufficient for the present to say, that under our statutes ejectment is an actual proceeding betwixt actual parties. . . . It would be idle to be restrained by want of form in an action which has no form; or to be guided in practice by forms which have been abolished. . . . Departing from the English practice in a single particular, it would be idle to stop short of full relief; and we are bound to allow profits for the whole time which has preceded the verdict.

And this attitude of mind, which, while careful to preserve all essentials of form, is impatient and scornful of captious objections and barren make-weight assignments of error, and turns instinctively

17 Dawson vs. McGill, 4 Wharton's Reports, 230.
to the substance of the case, is apparent in the very form of his opinions. Leaving the statement of the facts and the pleadings to the reporter (and it is properly the reporter's function, though often indifferently discharged), he plunges at once in medias res, and disposes with the utmost clearness of the real questions of law involved. Nor does he waste time in answering baseless arguments. The way in which he begins many of his opinions, by sweeping aside in a sentence or two all immaterial questions, clearing the ground for the vital ones, is eminently characteristic.\footnote{See \textit{Warren vs. Sennett}, 4 Pennsylvania State Reports, 114; \textit{Weitinger vs. Nissley}, 13 Pennsylvania State Reports, 655; \textit{Swartz vs. Swartz}, 4 Pennsylvania State Reports, 313.}

Of Judge Gibson's methods of work, Judge Porter says: "Both his mind and his body seemed incapable of exertion, even to the pitch of writing, unless urged by the excitement of a great subject. Of the practical inconvenience of this he frequently complained." This may be entirely true; but certainly there is no trace of it in the opinions, which by their carefulness and by their number bespeak a patience and industry of the highest degree. Judge Porter goes on:

It is believed that he took little part in the consultations of the bench, communicating his views usually in short, detached sentences, sometimes not at all, but when he did, hitting the exact point, and diffusing additional light on the principles in question.

In view of the undoubted preponderance of Judge
Gibson's opinions with his colleagues, one evidence of which is the striking absence of dissenting opinions during his time, and of his well-known brevity of expression, the words quoted may be taken to show that in most instances he had only to state his views to have them prevail. The same writer proceeds:

When appointed to deliver the opinion, he generally made an examination of the authorities, and sometimes, it must be admitted, much too brief an examination. His habit then was to think chiefly without the aid of his pen, and out of the reach of books. He did this in his chamber, on the street, at the table; sometimes, it is feared, on the bench, during the progress of other causes, and not infrequently in the public room of the hotel. . . . He did all the labor of thought before he commenced to write, and never wrote until he was ready. Before he began, it is believed, the very sentences were formed in his mind, and when he assumed the pen, he rarely laid it aside until the opinion had been completed. The bold, beautiful, and legible character of his handwriting, and its freedom from erasure, induced those obliged to read his opinions in manuscript, to suppose that he transcribed them, but this was very rarely, if ever done. . . . Such a method of writing undoubtedly possessed great advantages. It gave his fine logical powers full play. It contributed to that condensation which forms one of the distinctive features of his writings. It enabled him to proceed with directness right to his conclusion, and to make everything point to it from the first sentence to the last. . . . We see each idea but once, and need not count on seeing even the shadow of it, more than once. . . . He knew precisely where he was to end before beginning, and he avoided all the difficulties of those writers who begin to write when they begin to think, and sometimes before it."

While many contemporary judges wrote slovenly and verbose opinions (would that the evil had been
confined to his day), Gibson's English is not only pure, precise, idiomatic and forceful—it has, so far as such a quality can inhere in judicial opinions, positive and unmistakable literary merit. Its vigor, masculinity and freedom give to his writings a quality in marked contrast to the dry and colorless lucubrations of many of his learned associates. Buffon's trite saying must do duty again—of Gibson it is eminently true that "Le style c'est de l'homme."

If his opinions are examined in the order of their writing, one of the most noticeable marks of his increasing mastery of the law is the growing tendency to conciseness. While never long or diffuse as compared with those of the other judges, his opinions in the early reports seem so when placed beside his own later opinions. Yet, with all his remarkable condensation, there is no loss of clearness, but a decided gain.

It has been said that his brevity is due in part to his abhorrence of the physical drudgery of writing (opinions were not dictated to a stenographer in his day). If this is so, it is a fortunate thing for the profession. But it seems also to be true that he had a fixed ideal of a judicial opinion, one of the elements of which was condensation. In a case the facts of which were extremely complex and confusing—the reporter's statement of them and of the arguments of counsel occupying 67 pages of the report—Judge Gibson apologizes for writing an opinion eight pages long, saying: "It is difficult to
compress a decision of the leading points of this case in the old-fashioned limits of a judicial opinion."\textsuperscript{19}

One of the last opinions which he wrote is so excellent an example of the \textit{multum in parvo} which distinguishes his style, that it seems worth quoting in full:\textsuperscript{20}

"I do give and bequeath to my son John and his heirs," are the words of the first clause of this devise. No one could limit a fee simple more artistically and precisely. "With this proviso," he continues, "that my son John shall not have any right nor power to sell nor convey the said farm," an impotent attempt to give title to property without the incidents of ownership. Again: "But at his death, all the right, title, and interest shall be and remain perfect in his lawful heirs." That expresses, in other words, what he had expressed before, and signifies no more than his notion of the intended disability. But whatever his plan, he has used technical words without anything to qualify their meaning, except ignorance of his inability to prescribe an impossible condition; from which it would be unsafe to infer that he stumbled on them by chance, or to mould the fee so as to give effect to a conjectural intention.

Indeed, from his habits of thought and his method of writing, no other than clear and concise opinions could result, in the hands of such a master of the law and of the English language. There is never any groping in a fog of half-formulated ideas—never any fumbling with the tools—but always the assured touch of knowledge.

Nor does he, as has been remarked, profess "to

\textsuperscript{19} Commonwealth vs. Green, 4 Wharton's Reports, 531.

\textsuperscript{20} Reiffsnyder vs. Hunter, 19 Pennsylvania State Reports, 41.
give any history of the decided cases, from the creation of the world, from the reign of Richard I, or from the assumption of the reins of justice by Chief-Justice McKean." He "invariably puts the decision upon some leading principle of law, referring but to a few cases for the purpose of illustration, or to show their exception to the general rule." Neither does he go off on side excursions to explain the meaning of the terms he uses, or to write out large the processes of his reasoning, where the steps are obvious to the reader reasonably familiar with the established law.

Complaints are sometimes heard that Judge Gibson's opinions are not easy to understand. They are not milk for babes; and the real trouble is usually in the reader's habit of mind, produced by much reading of diffuse opinions of other judges, where the thought is diluted and spread out thin. Every word of Gibson's counts.

Objection has also been made to his fondness for Latin derivatives, or "long words" as the saying is. Undoubtedly, not only in his choice of words but in the structure of his sentences, the Latin influence is apparent. It was the fashion of the time—styles were formed on classical models. And after all, the desideratum in legal writing is precision, not purism or the exclusion of all but Anglo-Saxon roots. And these very Latin polysyllables are often the only precise terms available—to say nothing of the otherwise unattainable dignity which they give to the style.
But Judge Gibson's object was to express his meaning in words which could not possibly be taken to mean anything else. The last charge which could be brought against his style would be that of straining after ornament and high-sounding periods. And his sentences, even when long, are not involved or clogged with cumbersome dependent clauses, but are admirably clear.

In fact, it is surprising to find how free his style is from the charge of being "old-fashioned." Of course, some of his locutions are not those of to-day; but thoroughly good English does not go out of fashion.

The unexpected figures of speech, which seem to have worried those who have written upon Gibson's style, are the result of his fondness for reasoning by analogy, and of his natural freedom and vigor of expression. They are always illuminating, never merely ornamental or digressive, and while sometimes a trifle startling because of their originality, they are never undignified.

Perhaps a few illustrations of his forceful and striking expressions and of the range of his vocabulary, may be interesting to the reader. They have been chosen almost at random from the Reports. He speaks of the legislature having "demolished one horn of the dilemma at a blow;" 21 of the "concoction" of a will, and of "statutory metachronism," referring to the act of 1833 making wills pass after-acquired prop-

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21 Grant vs. Wallace, 16 Sergeant & Rawle's Reports, 253.
tery; of an inquiry not being "clogged by the authority of a precedent," of the application of a principle to "convergent propositions," of restoring the law to its "primitive symmetry," of a notion having "lingered in its embers through the succeeding cases." Speaking of a question which had long agitated the English courts, he said: "We feel surprise, in finding the knot deemed worthy of the legislative sword." In another case he speaks of "the magic of a seal," and of "trampling on the common law." In discussing gifts causa mortis, he says: "No one would hesitate to say that the gift of a man in the predicament of Paroles, when sportively doomed by his friends, in the guise of ferocious enemies, might be recalled." Referring to the English rule as to a married woman's powers under a separate use trust, he said that the principle was rejected in Pennsylvania, "and with what reason is seen in their restless and feverish course in respect to it." As to contrivances to deter bidders at a sheriff's sale, he remarked: "The law requires no more of them than fairness of purpose, and that no trick or artifice be used as a scarecrow." He speaks of the "shutting in" of the statute of limita-

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22 Roney vs. Stiltz, 5 Wharton’s Reports, 381.
23 Fritz vs. Thomas, 1 Wharton’s Reports, 66.
24 Kerns vs. Luxman, 16 Sergeant & Rawle’s Reports, 315.
25 Milliken vs. Brown, 1 Rawle’s Reports, 391.
26 Nicholas vs. Adams, 2 Wharton’s Reports, 17.
27 Hamersley vs. Smith, 4 Wharton’s Reports, 126.
28 Smull vs. Jones, 1 Watts & Sergeant’s Reports, 128.
tions, and says that the statute cannot be "cluded by a play of disabilities, compounded of infancy, coverture and insanity." 29 Again, he speaks of the "grumbling of the judges" in England, "at the earlier decisions;" 30 and, in discussing an appeal from an interlocutory decree, he refers to the "ragged and slovenly paper-book," and calls the proceeding "a monster." 31

In deciding that the employment of "puffers" invalidated an auction sale, he used this language: 32

Timid bidders are emboldened by decided ones; and to employ a decoy-duck to inspire them with false confidence, is grossly immoral. The very excitement of competition has its influence, and it is unfair to increase it by introducing a man of straw. It is wonderful how slowly the most obvious truths are perceived and admitted. The plain and simple morality of the gospel required a revelation. Even in my day at the bar, it was the constant practice of the orphans' courts to allow a charge in administration accounts for the price of strong drink, furnished avowedly to stimulate the bidders at the sale of the decedent's effects.

One of the longest cases reported in Pennsylvania was a controversy growing out of a protracted dispute in the Presbyterian church, and involving a plan of union. 33 In speaking of the "assembly" of the church, Judge Gibson says: "It is a segregated association, which, though it is the reproductive or-

29 Altemus vs. Long, 4 Pennsylvania State Reports, 254.
30 White vs. Fitler, 7 Pennsylvania State Reports, 533.
31 Lancaster County Bank vs. Stauffer, 10 Pennsylvania State Reports, 398.
32 Pennock's Appeal, 14 Pennsylvania State Reports, 446.
33 Commonwealth vs. Green, 4 Wharton's Reports, 531.
gan of corporate succession, is not itself a member of the body.” Again, he refers to the assembly as a “handmaid and nurse.” In other parts of the opinion he says: “There never was a design to attempt an amalgamation of ecclesiastical principles which are as immiscible as oil and water,” and: “Our public bodies, whether legislative or judicial, secular or ecclesiastical are too prone to forget the golden precept—‘Let all things be done decently and in order.’”

The characteristic vigor of his language is as apparent as ever in the last opinion he wrote. It begins:

In [cases cited] this court infused a drop of common sense into the law of slander; and it will do no harm to infuse another. Can it be endured in the middle of the nineteenth century, that words which impute larceny of a dead man’s goods are not actionable? For some inscrutable reason, the earlier English judges discouraged the action of slander by all sorts of evasions, such as the doctrine of mitiori sensu; and by requiring the slanderous charge to have been uttered with the technical precision of an indictment. But as this discouragement of the remedy by process of law was found inversely to encourage the remedy by battery, it has been gradually falling into disrepute; insomuch that the precedents in Croke’s Reports are beginning to be considered apocryphal.

That humor, of the dry and somewhat grim sort which does not seem out of place in a law report, is not lacking in Gibson’s opinions, is shown by the above quotations, and also by the following. In a case of an indictment for conspiracy to commit

34 Bash vs. Sommer, 20 Pennsylvania State Reports, 159.
adultery, he held that the indictment did not lie, saying: 35

If confederacy constituted conspiracy, without regard to the quality of the act to be done, a party might incur the guilt of it by having agreed to be the passive subject of a battery, which did not involve him in a breach of the peace. By such preconcerted encounters, it has been said, a reputation for prowess is sometimes purchased by gentlemen of the fancy. In the same way there might be a conspiracy to commit suicide . . . though no one could be indicted if the felony were committed. It may be said, such conspiracies are ridiculous and improbable. But nothing is more ridiculous than a conspiracy to commit adultery — were we not bound to treat it with becoming gravity, it might provoke a smile — or more improbable than that the parties would deliberately postpone an opportunity to appease the most unruky of their appetites. These are subtile premises for a legal conclusion; but their subtlety is in the analysis of the principle, not in the manner of treating it. It is impossible to lay down a rule for all cases; but it may be said that where concert is a constituent part of the act to be done, as it is in fornication and adultery, a party acquitted of the major cannot be indicted of the minor. . . . When an adulterous enterprise has been relinquished — and it ought, like every other criminal design, to have its locus penitentiae — it is impossible to believe that society has been so scathed by it, as to admit of no propitiation for it but public castigation. It has been said by unerring wisdom, that if a man look upon a woman to lust after her, he hath committed adultery with her already; but God alone may judge the offences of the heart. Its lust is not the adultery which the statute has bared to the temporal lash. The framers of it knew the futility of attempting to smother the instincts of our nature, or to cleanse our thoughts by an act of assembly.

Again, in holding that a condition in restraint of marriage was valid as to real estate, he remarked that the text writers asserted that it was void on grounds of public policy, and went on:

I know of no policy on which such a point could be rested, except the policy which, for the sake of a division of labor, would make one man maintain the children begotten by another! It would be extremely difficult to say, why a husband should not have liberty to leave a homestead to his wife, without being compelled to let her share it with a successor to his bed, and to use it as a nest to hatch a brood of strangers to his blood. . . . It may be the present policy of the country to encourage reproduction—though the time will certainly come when excess of population will be a terrific evil here, as it is elsewhere—but no political regulation, which looks no further than inducements to second marriage, will either advance or retard it.

In an action by an attorney at law for fees earned in a very important litigation, Judge Gibson says:

It is not to be doubted that responsibility, in a confidential employment, is a legitimate subject of compensation, and in proportion to the magnitude of the interests committed to the agent. The principle has not been directly controverted by the counsel for the plaintiff in error; indeed, it has been practically admitted by the elaborateness of their argument, which, had a few hundred dollars been in contest, instead of ten thousand, would have taken few more minutes for its delivery than it has taken hours. The single point in the cause was so minute, that its exact shape could scarce be made plainer by the magnifying lens of a speech, yet it is nevertheless so palpable as to be incapable of illustration. . . . A lawyer charged with particular preparations for a

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36 Comm. vs. Stauffer, 10 Pennsylvania State Reports, 350.
37 Kentucky Bank vs. Combs, 7 Pennsylvania State Reports, 543.
law suit, is not to be made responsible, or paid as a porter or a shoemaker."

Another characteristic of Gibson was his open-mindedness and readiness to admit frankly that he had been in error. In referring to a decision at the previous term, as "against the current of the former decisions," he says: "Although I felt myself bound by the authorities to dissent, I should be sorry to see the decision disturbed now, even if it were wrong in principle, which I do not admit." 38

Judge Gibson's name is signed to more than fifteen hundred opinions; and it is not only in these that his influence appears. Many per curiam opinions bear unmistakable indications of his style; and his domination in the consultations of the court may be seen in countless opinions bearing the names of his associates. No name among them ranks higher than Black's, and his reverence for the learning and wisdom of Gibson has already been shown. In the celebrated case of Hole vs. Rittenhouse, 39 Black delivered a dissenting opinion with a vigor worthy of Gibson himself. He said: 40

This judgment now about to be given, is one of "death's doings." No one can doubt that if Judge Gibson and Judge Coulter had been living, the plaintiff could not have been thus deprived of his property; and thousands of other men would have been saved from the imminent danger to which they are now exposed

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38 M'Lennahan vs. Commonwealth, 1 Rawle's Reports, 356.
39 25 Pennsylvania State Reports, 491.
40 2 Philadelphia Reports, 411.
of losing the homes they have labored and paid for. But they are dead; and the law which should have protected those sacred rights has died with them. . . . I claim nothing for the great men who have gone before us on the score of their marked and manifest superiority. But I would stand by their decisions, because they have passed into the law and become a part of it.

To indicate, even in outline, the influence of Gibson on the various departments of the law—to say, here his views have prevailed, here they have been departed from—would be to pass in review the whole law of Pennsylvania. All that is possible within the scope of an essay is to indicate a few among the many important decisions which he rendered.

His attitude toward the peculiar Pennsylvania system of administering equity through common law forms, a system growing out of the absence of a court of chancery in the state, is shown by the following quotation: 41

It is not the least among the evils of our mixed system, that it breeds a confusion of ideas, and consequent uncertainty, as to the rules of equity, and the nature and extent of the relief to be claimed, which would never occur, if the suit were viewed, as divested of the dress of an action at common law. Without keeping law and equity as distinct in the mind, as they are in practice, where they are administered separately by different tribunals, the principles of the latter can never be fixed or certain. For want of this, an equitable defence is often with us an undefinable something, which depends on a confused feeling of equity, but which is referable to no settled rule of a court of chancery."

41 Gochenauer vs. Cooper, 8 Sergeant & Rawle's Reports, 187.
It was not long after these utterances that the legislature gave certain powers of courts of chancery to the common pleas and to the supreme court, and this legislation was followed up by other acts extending these powers.

That he had the faculty of looking into the future and pointing the way to needed reforms in the law appears again and again in his opinions. In 1820, twenty-eight years before the passage of the married women's property act, and very soon after he went upon the bench, he said: 42

In no country, where the blessings of the common law are felt and acknowledged, are the interests of married women so entirely at the mercy of their husbands as in Pennsylvania. This exposure of those, who, from the defenceless state in which even the common law has placed them, are least able to protect themselves, is extenuated by no motive of policy, and is by no means creditable to our jurisprudence. The subordinate and dependent condition of the wife, opens to the husband such an unbounded field to practise on her natural timidity, or to abuse a confidence, never sparingly reposed in return for even occasional and insidious kindness, that there is nothing, however unreasonable or unjust, to which he cannot procure her consent. The policy of the law should be, as far as possible, to narrow, rather than to widen, the field of this controlling influence.

And when the opportunity came, Judge Gibson showed that these words represented his real convictions. In 1820, there came before him the question whether, under a conveyance in trust for the sole and separate use of a married woman, she had power

42 Watson vs. Mercer, 6 Sergeant & Rawle's Reports, 49.
to dispose of the land without any such power being specially reserved. The opinion in this case has perhaps been more frequently cited than any other which he wrote. He there said:

The true principle of these settlements [is] that instead of holding the wife to be a femme sole to all intents as regards her separate estate, she ought to be deemed so only to the extent of the power clearly given in the conveyance; and that instead of maintaining that she has an absolute right of disposition, unless she is expressly restrained, the converse of the proposition ought to be established—that she has no power but what is expressly given.

This overruled the only previous decision in Pennsylvania and was contrary to the English rule.

The principle established, so important for the protection of the property of married women from the influence and importunities of their husbands, is the law of Pennsylvania to-day, not having been affected by the statutes creating and giving married women power over a separate estate at law.

In no department of the law is the eminence of Gibson more pronounced than in constitutional questions. Of one of his decisions, Judge Porter says: "His memory would deserve well of the state if he never had delivered another opinion." In this case, the plaintiff had obtained a judgment which the supreme court had affirmed. Then an act was passed by the legislature ordering a new trial, and in pursuance of this act the court below stayed execu-

43 Lancaster vs. Dolan, 1 Rawle's Reports, 231.
44 DeChastellux vs. Fairchild, 15 Pennsylvania State Reports, 18.
tion. This order the supreme court reversed, holding the act unconstitutional, and thereby overruling a previous decision.\textsuperscript{45} The opinion is as follows:

If anything is self-evident in the structure of our government, it is, that the legislature has no power to order a new trial, or to direct the court to order it, either before or after judgment. The power to order new trials is judicial; but the power of the legislature is not judicial. It is limited to the making of laws; nor to the exposition or execution of them. The functions of the several parts of the government are thoroughly separated, and distinctly assigned to the principal branches of it, the legislature, the executive, and the judiciary, which, within their respective departments are equal and co-ordinate. Each derives its authority, mediately or immediately, from the people; and each is responsible, mediately or immediately, to the people for the exercise of it. When either shall have usurped the powers of one or both of its fellows, then will have been effected a revolution, not in the form of the government, but in its action. Then will there be a concentration of the powers of the government in a single branch of it, which, whatever may be the form of the constitution, will be a despotism—a government of unlimited, irresponsible, and arbitrary rule. It is idle to say the authority of each branch is defined and limited in the constitution, if there be not an independent power able and willing to enforce the limitations. Experience proves that it is thoughtlessly but habitually violated; and the sacrifice of individual right is too remotely connected with the objects and contests of the masses to attract their attention. From its very position, it is apparent that the conservative power is lodged with the judiciary, which, in the exercise of its undoubted right, is bound to meet every emergency; else causes would be decided not only by the legislature, but, sometimes, without hearing or evidence. The mis-

\textsuperscript{45} Bradlee vs. Brownfield. 2 Watts & Sergeant's Reports, 271.
chief has not yet come to that, for the legislature has gone no further than to order a rehearing on the merits; but it is not more intolerable in principle to pronounce an arbitrary judgment against a suitor, than it is injurious in practice to deprive him of a judgment, which is essentially his property, and to subject him to the vexation, risk, and expense of another contest. It has become the duty of the court to temporize no longer, but to resist, temperately, though firmly, any invasion of its province, whether great or small. We are bound to say, therefore, that Bradlee vs. Brownfield is not law, and that it was erroneously decided. As the act before us is null, the plaintiff ought to have been allowed to proceed on his judgment.

Anything more happily illustrating the characteristics of Gibson's opinions it would be difficult to find.

Out of many which might be mentioned, the following will serve to show Gibson's views of the true principles and functions of a republican government. In holding that the lien of a judgment in favor of the commonwealth is not lost by lapse of time, he says: 48

In a monarchy, the exemption of the sovereign from the operation of statutes in which he is not named, is founded in prerogative; and hence it is supposed, that no such exemption can be claimed, for a sovereign constituted of the people in their collective capacity. It is certain, that so much of the prerogative as appertained to the king by virtue of his dignity, is excluded by the nature of our government, which possesses none of the attributes of royalty; but so much of it as belonged to him in the capacity of pares patriae, or universal trustee, enters as much into our political compact, as it does into the principles of the

48 Commonwealth vs. Baldwin, 1 Watts's Reports, 54.
British constitution. Why should it not do so peculiarly where the maxim salus populi is the predominant principle of a government, to whose operations and well being, the prerogative is as essential as to those of a monarchy? The necessity of it, in regard to statutes of limitation, is peculiarly apparent. The business of every government is necessarily done by agents, chosen in a republic, by the people, it is true, but still no more than agents, and chosen certainly with no greater attention to the qualification of vigilance, than are the agents of an individual. . . . There is a perpetual tendency towards relaxation, where exertion is not invigorated by the stimulus of private gain; and this is the greater where the functions of the officer are to be performed, not under the supervision of an employer immediately concerned, but before the eyes of those who have no other interest in the business, than the remote stake which they have in the public prosperity. To some extent, therefore, and in proportion to the want there happens to be of systematic accountability in the respective departments, remissness of its ministers will be found in every government; and it is a principle, not only of great practical value, but of the first necessity, that the legislature shall not be taken to have postponed a public right to that of an individual, unless such an intent be manifested by explicit terms, or at least by necessary and irresistible implication.

In Commonwealth vs. Burrell, the decision was that a proceeding in the nature of a quo warranto did not lie against a judge of the common pleas except on the suggestion of the attorney-general. In this opinion, Judge Gibson speaks of the “slow and unwieldy march” of the common law remedy of quo warranto. “Though we are bound to take our law

47 Pennsylvania State Reports, 34.
from the statute books," he says, "we are at liberty, in doubtful cases, to go behind the curtain for the motives of the enactment." And the opinion, dealing with the important question raised by the case, proceeds:

The old common law right of prosecuting the higher felonies by appeal, which had sprung from a barbarous state of society, was left by our ancestors in the lumber garrets of the law at home; yet there is as much reason that a champion should be at liberty to enter the lists with a traitor as that a private citizen should be at liberty to close in legal conflict with the usurper of a public office. ... These are not the days to encourage individuals, or the masses, to snatch the reins from the constituted organs of the government. ... What induces the mind to pause ... as to the policy of the law, is the consideration that, as the governor controls the action of the attorney-general who is dependent on him for office, an unconstitutional appointment by the executive might be without remedy were his legal adviser in error, or regardless of his duty. But the same dependence on the predominance of a party must be felt, place the power of appointment where we may. In other words, a work of human hands is never perfect; but it is better to bear the ills we have than fly to those we know not of. The legal presumption is, that an officer will do his duty; or that if he do not, the representatives of the people will impeach him, and the senators convict him. The American who denies it, denies a political aphorism, that public virtue is the basis of a republic, and one that is a postulate of his own government. If the presumption is false, it was the business of the convention which framed the constitution on that basis without providing counter-checks to the disturbing forces of party conflict, or of the legislature which framed the statute before us, to dispose of the fallacy. It is our business not to dislocate the joints and articulations of the government, to correct errors of legislation, whether im-
mediately by the people or by their representatives; but to pronounce the law as we find it.

The case of Clow vs. Woods,\textsuperscript{48} decided very soon after Gibson went upon the supreme bench, is a leading case in Pennsylvania and elsewhere, and establishes a sound and salutary rule, for the want of which the decisions in some other jurisdictions are often far from satisfactory. The question was as to the validity, as against creditors of the mortgagor, of an unrecorded chattel mortgage with retention of possession by the mortgagor. Judge Gibson held the transaction fraudulent \textit{per se}, and said:

The inclination of my mind is, to give the statute (13 Elizabeth) a liberal, perhaps an enlarged construction, by putting the rule, requiring a change of possession, on grounds of public policy, and confining the exceptions to those cases, where, from the very nature of the transaction, possession either could not be delivered at all, or, at least, without defeating fair and honest objects, intended to be effected by, and which constituted the motive for entering into the contract. Where possession has been withheld pursuant to the terms of the agreement, some good reason for the arrangement, beyond the convenience of the parties, should appear. . . . Where, from the nature of the transaction, possession cannot be given, the parties ought in lieu, to do everything in their power to secure the public from that deception which the possession of property without the ownership always enables a person to practice. . . . In every case where possession is not given, the parties must leave \textit{nothing} unperformed, within the compass of their power, to secure third persons from the consequences of the apparent ownership of the vendor.

\textsuperscript{48} 5 Sergeant & Rawle’s Reports, 275.
His dealing with questions of evidence has the wisdom and practical view of justice shown all through his work. Upon the question whether a witness might state the substance of what was testified by a witness at a former trial, without stating his exact words, Gibson said: 49

I cannot discover the policy of a rule which should shut out the little light that is left, when it is all that is left, merely because it may not be sufficient to remove everything like obscurity.

His attitude upon the so-called "parol evidence rule" is shown by the following quotation: 50

Every day's experience must bring home to the conviction of all men, the insecurity of reliance on mere recollection; and I care not, therefore, how strictly the construction of written evidence may be protected from the insidious influence of parol proof. In this we have already relaxed too far.

This, written in 1821, is significant in view of the many subsequent decisions of the supreme court on the subject, which are beyond hope of reconciliation, and which seem to represent alternate periods of relaxation and restriction.

His theory of presumptions is stated thus: 51

Not only convenience but necessity calls for a definite rule to produce certainty of result in the determination of facts which must be passed upon without proof; and such can be obtained only from the doctrine of presumption, which, however arbitrary, is indispensable, and, when founded in the ordinary course of events, productive of results which usually accord with the truth.

49 Cornell vs. Green, 10 Sergeant & Rawle's Reports, 14.
50 Dennis vs. Barber, 6 Sergeant & Rawle's Reports, 420.
51 Burr vs. Sim, 4 Wharton's Reports, 150.
On a subject which is often discussed in these days of lynchings, it is of interest to hear the views of a great authority on the common law, pointing out the dangers incident to appeals in criminal cases. Under the law as it then stood, he held that a bill of exceptions to the admission or rejection of evidence on the trial of an indictment could not be considered on writ of error. In vindication of the reason of the law he said: 52

These bills of exceptions ... being destitute of the sanction of the statute, are not judicially before us. Nor is this a defect in our system; at least, whatever it may seem in theory, it is not a defect in practice; for the recollection of no lawyer can point to an instance of injustice suffered or conviction procured by straining the law against the accused; and as to injury from mistake, so rigid is the general observance of the maxim that it is better for ten guilty persons to escape than that one innocent person should be punished, that every doubt is universally resolved in favor of humanity. What more could a philanthropist desire? As to a severity of administration, the tendency to err is in the opposite direction; and the prisoner has an additional and an all-sufficient safeguard in the sympathies of the jury. But, though convictions of the innocent are unknown, acquittals of the guilty are abundant; and if it were an object to increase their number, it could not be denied that it would be promoted by the delay incident to a writ of error; for where the public has become indifferent to the event, and the anger of the injured party, which lent a temporary activity to the prosecution, has subsided, above all, when the principal witnesses are dead or dispersed, an acquittal on a second trial is pretty much a matter of course.

... Nor would the reversal of the judgment for a technical defect wipe off the disgrace of conviction, or exempt the accused from a renewal of the prosecution. Besides, it is proved by all experience, that the efficacy of punishment depends on its promptness and certainty, and that the more we multiply the chances of eventual escape, the more we take from its influence. ... We are unwilling to introduce into the administration of the criminal justice, disorders so prejudicial to the general weal, by departing from a construction which has prevailed without interruption for near two centuries.

Can it be denied that the statutory changes made since this opinion was written have given rise to the very evils which Judge Gibson in this opinion so clearly points out? His words might profitably be considered by those who, in England, are now earnestly advocating legislation by which the ruling on evidence in criminal cases may be reviewed by an appellate court.

During the period of Gibson's service, the judges of the supreme court held jury trials at nisi prius and sat in the oyer and terminer. Some of his charges to the jury have been reported, and among them are models of vigor and clearness, which might be followed with advantage to-day.

In Commonwealth vs. Mosler,53 where the defence to a charge of murder was insanity, he instructed the jury upon the doctrine of "homicidal mania." This is perhaps the earliest authority on the subject in America. While he recognized that such a thing might exist, he was not afraid to tell the jury in plain

53 4 Pennsylvania State Reports, 264.
terms that it was a dangerous doctrine and to be brought into play with the greatest care. The verdict was “guilty.” He said in part:

Insanity is mental or moral; the latter being sometimes called homicidal mania, and properly so. . . . It has been announced by learned doctors, that if a man has the least taint of insanity entering into his mental structure, it discharges him of all responsibility to the laws. To this monstrous error may be traced both the fecundity in homicides, which has dishonored this country, and the immunity that has attended them. The law is, that whether the insanity be general or partial, the degree of it must be so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action. But there is a moral or homicidal insanity, consisting of an irresistible inclination to kill, or to commit some other particular offence. There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees, but cannot avoid, and placing it under a coercion, which, while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance. It is seldom directed against a particular individual; but that it may be so, is proved by the case of the young woman who was deluded by an irresistible impulse to destroy her child, though aware of the heinous nature of the act. The frequency of this constitutional malady is fortunately small, and it is better to confine it within the strictest limits. If juries were to allow it as a general motive, operating in cases of this character, its recognition would destroy social order as well as personal safety. To establish it as a justification in any particular case, it is necessary to show, by clear proofs, its contemporaneous existence evinced by present circumstances, or the existence of an habitual tendency developed in previous cases, becoming in itself a second nature.
In ruling, at a trial a few weeks before his death, upon the admissibility of evidence of the insanity of members of the family of a testator alleged to have been insane, Judge Gibson expressed himself very positively. It will be recalled that he had, and prided himself upon a knowledge of medicine. He said: 54

What if the point had been ruled by the chancellor and law judges in the House of Lords? Profoundly learned in the maxims of the law, they were profoundly ignorant of the lights of physiology; yet, free from the presumptuousness of which ignorance is the foster-father, they refused to rush on the decision of a question to which they felt themselves incompetent . . . Every man has observed that there are families, through which insanity has been handed down for generations; and why should the probability of hereditary madness be excluded, when probabilities in other cases are weighed, especially when it is known that a proclivity to theft, intemperance, lying, cheating, and almost all other moral vices, are as transmissible as gout, consumption, deafness, blindness, and almost all other constitutional diseases? It is supposed by the million that insanity is a disease of the mind, not of the body. Ridiculous. If it were, it could never be cured; for the mind cannot take physic, or be separately treated; yet the statistics of the insane exhibit a great number of cures; and the time is fast coming when insanity will be considered the most manageable disease that flesh is heir to.

Among the very many other important decisions of Judge Gibson are numerous leading cases upon original titles to lands, the law of real property, pleading and practice, libel and slander, the interpretation

of statutes, and wills, it having fallen to his lot to pass upon many questions of first impression and to furnish the guides for his successors. Under the wills act of 1833, it is especially notable how many of the points of construction were established by Gibson and have been followed ever since.

That several of his opinions have been overruled cannot be denied. It would be no difficult task to show that in some instances his views were more sound than those which have since prevailed. As Judge Black said: "He committed errors. It is wonderful that in the course of his long service he did not commit more. A few were caused by inattention; a few by want of time; a few by preconceived notions which led him astray. When he did throw himself into the wrong side of a cause, he usually made an argument which it was much easier to overrule than to answer." And perhaps it may be added, that another reason for the overruling of his decisions oftener than those of some of his comparatively obscure associates lies in the fact that he never dodged the real questions, but met the issues squarely and delivered himself of clean-cut and unmistakable utterances—so that if at a later day the court found themselves unable to agree with his views, there was nothing else to do but to overrule him—his cases could not be "distinguished" away.\(^5\)

\(^5\) Owen Wister, Esq., in an article on "The Supreme Court of Pennsylvania," in The Green Bag, vol. III, \textit{et seq.}, includes some
It is related that Judge Gibson's brother, who was a general officer in the United States army, was a personal friend of President Jackson, and that the President often expressed to him a desire to make John Bannister Gibson Chief-Justice of the United States. Political exigencies led to the appointment of Taney instead. For those who delight in the "if's" of history, here is ample room for speculation as to what might have been the result upon the fate of the country had the great Pennsylvanian been chosen. As to the irreparable loss to Pennsylvania there can be no doubt.

At the bar meeting in Philadelphia at the time of the death of Judge Gibson, a member of the bar said: 68

In Great Britain, Lord Holt was considered the clearest mind in his legal views, and Judge Gibson would lose nothing by comparison with him. His opinions were remarkable for their simplicity and force. A single sentence would sometimes contain many of the most potential principles of the laws of Pennsylvania. He had not, like Marshall . . . been connected with the courts of the United States, but he shone with equal lustre in the courts of his own state. Story and Kent have furnished in their commentaries a judicial character for Judge Gibson which pos-

68 Address of Josiah Randall, Esq.
terity will never forget. His opinions are oftener quoted by them
than are those of any other man in the country. At Westmin-
ster, and on the continent, his name, as a judge, is heard with
respect and attention. . . . He was one of the greatest and
soundest jurists that ever lived.

“Abroad he has,” says Judge Black, “for very
many years, been thought the great glory of his na-
tive state.”

The inadequate effort of this essay has been to
show, in some degree, upon what foundation of fact
such statements are based. A complete realization
of their truth can be derived only from an exhaustive
study of Gibson’s opinions and of all the principal
departments of the law of the state, together with a
comparison of that law, as influenced by him, with
the laws of other states which grew up during the
same period. But the deeper the study goes, the
firmer will become the conviction that no state or
country has ever owed more to the labors, the wisdom
and the virtues of any one judge than Pennsylvania,
and through her every jurisdiction where the com-
mon law prevails, owes to John Bannister Gibson.67

67 For the facts of the life of Judge Gibson, the author is indebted,
besides the authorities already cited, to the “Memoirs of John Bannis-
ter Gibson,” by his grandson, Thomas P. Roberts.