THE UNION CLUB SUIT.

MR. CHOATE'S CLOSING ARGUMENT.

A POWERFUL PRESENTATION OF THE PLAINTIFF'S CASE.

REASONS FOR CLAIMING THAT THE TRIBUNAL WAS BIASED, THAT THE PROCEEDINGS WERE IRREGULAR, AND THAT INJUSTICE WAS DONE.

The brilliant argument of Joseph H. Choate in the suit of J. F. Loubat against the Union Club has been much talked about. Great interest has been shown in it both by lawyers and club men, and many persons have expressed a desire to see it printed in full. In response to repeated requests for its publication THE TRIBUNE presents a carefully revised verbatim report of the address, written out from the official stenographer's notes.

THE ARGUMENT.

If the Court please:

If the just expectations of my client permitted it, I should feel perfectly safe to rest this case with your Honor, without a single word in reply. Because the learned counsel who have conducted the argument on the other side have demonstrated that they have to go so far and claim so much in order to establish their supposed defence, that no judge who had any regard for justice could possible follow and accept their views.

The case has been argued at learned length, and with lumbering sound, by my learned adversaries. They promised to shorten it by a division of labor. The learned counsel who opened was to confine himself to the facts—about which we heard very little from him—and the learned counsel who followed him was to confine himself to the law. Well, he has discussed all the law about which there was not any dispute. But when your Honor drew his attention to the very point in the case, without which judgment cannot go against this plaintiff, without the most flagrant violations of justice, he had not a word to say. No; he had words to say, but not an idea to express—not one.

ATTACKS ON THE PLAINTIFF AND HIS COUNSEL.

Now, I protest against the spirit in which this case has been argued upon the other side.

In the first place, if for nothing but their references to myself I might well except. If they were not, as I have already had occasion to say in the course of this case, both very near and dear friends of mine, I might do more than protest against it. But a man can take anything from his friends. Mr. Robinson denounced my method of presenting the case as flippant; and Mr. Carter sums it all up as a genteel mode of pettifogging.

They would introduce me to your Honor as a flippant pettifogger who has nothing to present in behalf of his client but technicalities and possible flaws in the indictment. The learned junior counsel brought into the case, as it seems to me, a great deal of temper and feeling against this unfortunate plaintiff. He exhibited the peculiar disadvantages which always belong to the lawyer who is his own client, and to the client who tries to be his own lawyer. He has argued the case as a member of the Union Club, and, as I understand from the Treasurer, as the voluntary champion of the Governing Committee. In that attitude, he thought it necessary most grossly to abuse my client. He has applied to him epithets seldom heard in a court of justice, and seldom heard outside of the walls of the Union Club. No language that decency would permit him to use was left unsaid to vilify the plaintiff. That was altogether unnecessary and out of place here, just as much as denouncing his counsel as a flippant pettifogger, and trying to forestall your Honor's judgment and feelings against us both by similar means.

I have not held up my client as a saint. He is a man, like the rest of the members of the Union Club. He has his faults, and he has his virtues. If I should permit myself to go outside of the record, as my learned friend has done, to illuminate what he calls the character of the Union Club, I could show a long career of private life, and of public and charitable service highly creditable to the plaintiff. No doubt he has committed errors. Stated in their fullest enormity, they amount to this, that on one occasion he used improper language in the club house in private conversation. No practical harm came or could come from it except from its outrageous repetition and publication. On another occasion, under the most aggravated provocation, he gave the lie to a man who deserved it. I need not say to your Honor, that these are not offences which cast any permanent blemish upon the character of any gentleman, and that there are thousands and tens of thousands of gentlemen who have been guilty of similar conduct and suffered no punishment therefrom. But this man's punishment has been terrible, as every man in your Honor's presence will testify. He has been expelled without a hearing; without knowing for what he was expelled; without being permitted to hear the evidence upon which he was expelled; and without being permitted to know the conclusions of the committee which recommended his expulsion. They say that he has only a technical grievance, no substantial injury; that his reputation elsewhere from six cents to ten thousand dollars damages, says Mr. Carter. Why, millions would not compensate my client for the gross injury that has been wrongfully done him here!

THE OBJECTS AND PURSUITS OF THE UNION CLUB.

It seems to have been asserted, or believed, by the counsel on the other side, that is, the junior counsel—nobody else certainly ever had any ambition—that I had intended to cast some slur or reproach upon the Union Club. Your Honor could not have understood me in any such sense. Why, I might say, they are all my friends. I know the character and *desires* of the Club. I know that it embodies substantially the wealth and the character and the respectability of the City of New-York. I made some reference to it for the purpose, not of casting any reproach upon it. How could I cast reproach upon the Union club? I referred to it, as I had a right to refer to it, for the purpose of showing that a man's conduct in a club, so far as concerns his relations to the club, might not perhaps demand the application of as rigid a code of scrutiny and judgment as if the same words had been uttered, or the same thing had been done, in a church meeting, or in a Sunday-school conference, or in a ladies' assembly. I cannot go quite so far as Mr. Carter in extolling the sublimity of the final objects of the Union Club. They are undoubtedly highly commendable. I thought he was reading a chapter from Gibbon's "Decline and Fall," when he was propounding to your Honor the sublime objects and pursuits of the Union Club. They are great men; they are good men, all of them, I assume. But still they are not great men pursuing the highest possible objects of which humanity is capable; they are simply as they will themselves admit, great and good men at play. They are in fatigue uniform, and a little off their guard. Is there one of them within sound of my voice that can lay his hand upon his heart and say that it is a wholly unknown thing for language, not desirable to repeat, to be heard in private conversation within the walls of the Union Club? I think not. My learned friend says, and complains, that I said if the rule of morals asserted by him were strictly applied, the club might be decimated. No one knows better than he that that remark was perfectly true, and no man in this room could be found to deny it.

THE PLAINTIFF'S CASE NOT TECHNICAL.

I do not stand here to claim, and will not in the whole course of my argument, claim that you shall relieve this plaintiff on any technical ground. If he has not suffered a substantial injury, and if he has not substantial justice on his side, why, for Heaven's sake, decide the case against him. I should be ashamed of myself, if I recommended a suit. I should be ashamed of myself if I came into court to argue a case, to force a man back into a club such as this upon any technical ground. I intend to present only his substantial grievances and his substantial rights, and, I believe, in such a way that it will not only commend his cause to your Honor as one which makes it necessary for you to relieve him from the sentence of expulsion pronounced against him, but in such a way also, that if all the members of the Governing Committee were here, and he on your Honor's judgment were to go before them to-morrow on a new trial, they would necessarily say that he had done nothing worthy of expulsion.

I propose to argue the case coolly, because I am not capable of arguing it in any other way. I have not any of that fervent ardor of nature which my friend, Mr. Robinson, has brought from southern climes. I have not any personal interest in the cause, and I never yet saw a controversy between men in court in which he who appeared to advocate for either party was justified in introducing any temper or personal feeling. My friend would not have done so, if he had been only the lawyer and not a thousandth part of his own client. I have no doubt I shall present my client's case coolly from a long study and perfect understanding of it, and if I mistake not, I shall present it effectively, because the right is all upon his side, and I know the power of truth to prevail over the judicial mind.

BIAS IN THE GOVERNING COMMITTEE.

There are certain points of view which I wish to present preliminarily. First, I was going to argue as to what was the nature of the service or duty imposed by the constitution of the Union Club upon its Governing Committee in the case of an expulsion. But I think I am saved the necessity of that by the final admissions of the learned senior counsel for the defendant. Mr. Robinson is apparently of the opinion that the functions of the Governing Committee were not of a judicial nature. At any rate, he said, no matter for bias; there must be bias; it is in the nature of things; a club committee cannot get along without bias; you may rely upon it there will be bias on both sides; and so by a very haphazard sort of testering and balancing, as if they were balancing on a tight rope or slack rope, if you have got a half dozen biased on one side and a half dozen biased on the other, it would be balanced. But I believe Mr. Carter agrees with me, that the functions of the Governing Committee in this proceeding were of a *judicial nature*. At any rate, if he differs from me, I find your Honor has saved us the trouble of any discussion on this subject by one of those decisions in which you sometimes by half a dozen words express all that possibly could be said on such a point.

"Such investigations," meaning the investigation of a Governing Committee preliminary to an expulsion, *you say*, "*are in their nature judicial.*"

Well, then, we start on that basis—they "*are in their nature judicial.*" The next consequence that flows from that is that all who act in it act as somewhat in the nature of judges; they sit in judgment upon this man whom they have conducted unheard.

What is my last point of attack upon the judgment that has thus been pronounced? Your Honor shall say whether it is technical or not. I say that the fourteen men who voted against the plaintiff, and all whose votes must be conceded to be absolutely necessary to his condemnation and expulsion, technically one man who in the nature of things was incapable of being a judge in this case.

What was this case? Was it a simple case between the Union Club and Mr. Loubat? Why didn't they try it as such? Not at all so. It was ordered that a committee of five be appointed by the president to investigate and report to the Governing Committee at a future meeting to be called by the president an exact statement of the facts in relation to the difficulties existing between Messrs. Loubat and Turnbull. Now the question is, whether upon such an investigation and trial as that being of a *judicial nature*, as your Honor has said, a near kinsman of one of the parties inculpated and who proves to be a party convicted, can sit as a judge. I say he cannot; and that the presence of Mr. Isaac Townsend, the cousin of Turnbull, as a judge on that occasion was illegal in any possible aspect of the case; and at any rate, so far as he was concerned, nullified the proceeding and blot out altogether his vote, so that there were but thirteen votes cast against this man.

Is that technical? Is it a technical claim that a man shall not be tried for a crime by a judge who is interested in the case, or by a juror who is interested in the case, or, what the law says is the same thing, by the brother or the cousin of the party who is interested? If it can be done, this is the first time that any judicial functions have ever been permitted to be exercised by one so near of kin to a party to the controversy. Suppose a case. Suppose that Mr. William Turnbull the brother of Henry Turnbull had been allowed to sit upon the Governing Committee in this case, would any man or woman or child above the age of five years, in this city, have hesitated to say that it was a gross scandal and a gross injustice, and that of course the judgment could not stand?

Nobody knew that better than Mr. William Turnbull himself; a man whom I most highly honor and admire, and to whose mind and heart nothing would be so abhorrent as to have anything to do with an investigation like this in which his brother was directly concerned. You go one step further and you find the cousin of Mrs. Turnbull sitting in this case.

THE DICTATES OF NATURAL JUSTICE.

What is the rule of law on that subject? My learned friend says you are not bound by statutes. I agree to that. You are not bound by codes. Certainly you are not. He agrees, however, that you are bound by the dictates of natural justice. In this respect, that is all I claim. In our Revised Statutes, there is an express prohibition of this kind, of kinsmen sitting as judges. How did it come there? The revisers in their notes explain it, and they say that this is but an embodiment of the rule of universal justice—that natural justice which my friends want mixed to them in this case and which I hope your Honor will give them enough of before you get through. We have the *fiat* of the law makers of this State; and I will show you what the Courts of this State say, in a moment. It is merely the expression by the statute of the rule of universal justice by which my friends have agreed upon this argument, to be bound. From time immemorial wherever law has been administered by people speaking the English tongue, this rule, in every court, in every tribunal, in every body exercising judicial functions, has been uniformly, universally applied and enforced as a necessary rule without which justice cannot be done. The decisions of our own State on the subject are extremely pertinent. I wish to call your Honor's attention to one or two of the decisions. In the first place, to the case of *Lawrence vs. Russell*, reported in 21 *Wendell, page* 63. There Judge Cowen says:

"It is declared by statute that no judge of any court can sit as such in any cause to which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties"—which your Honor knows is within the math degree of affinity, extending to second cousins.

Judge Cowen, who certainly was a very respectable authority, gives the reason of the rule. He says:

"Such an act, would be nugatory and void for he cannot sit even to receive the return. The objection meets him at the threshold; and if he issue process and adventure, he might simply to withdraw himself from the cause. He cannot sit, says the statute. The meaning is, not merely that the interests of the parties are unsafe, but the general interest of justice."

Then he makes this forcible remark, which I ask your Honor and my learned friends to apply to this case:

"Decency forbids that he should be seen acting either for or against his father, brother or cousin, etc."

"Decency" forbids it. And it is because of this gross indecency permitted to be practised upon the plaintiff in this case, that I, in the name of outraged justice, protest against it.

The question came up again in *East vs. Morgan 1. Hill*, 654, where the same learned judge applied the same doctrine, extending it to a very much further degree of relationship, namely, to the case where the plaintiff and the justice who tried the cause had married sisters. But there is one case—*Bishop vs. Supervisors*, 3 *Comstock*, 547—which brings home to all the influence and authority of the court of last resort. There, a juror in the Court of Appeals, sitting as one of the five judges, proved to be a second cousin to one of the parties to the cause—a judge whose character was beyond all possible suspicion, Judge Selah B. Strong. I want your Honor to bear with the Court said, because they apply the doctrine of natural justice, and it is those cases that I want to read to you.

The Court say: "The first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality. He can not be both judge and partisan, arbiter and advocate, in the same cause. Mankind are so agreed in this principle that any departure from it shocks their common sense and sentiment of manhood."

I do not expect to alarm your Honor, or to shock common sense, that scandalous as judges, whom they say is known as such, and by which you, your Honor and all of us are governed.

As the Court say, in the same case: "Partiality and bias are presumed from the relationship or consanguinity of a judge to the party. This presumption is conclusive and *inexpugnable* the judge. A juror of the jury, who was a son-in-law of the plaintiff, insisted on retaining his station on a cause much troubling. It was objected by counsel for the defendant, and the Supreme Court held that this was of itself evidence that the trial was not fair and impartial."

I shall have something to say by-and-by about the partiality of judgment in this case below, as these two men.

The Court continue: "Chancellor Sanford declared that it is a maxim of every code in every country, that no man should be a judge in his own cause; that it is not left to his discretion or to his sense of decency, whether he shall act or not; which his own rights are in question he has no authority to determine for himself."

Then, after referring to the statutory provision disqualifying, as the judges who are called, as Isaac Townsend was in this case, the Court say:

"After so plain a prohibition, can anything more be necessary to prevent a judge from retaining his seat in the cases specified? He is not excluded by the *moral sense of all mankind.*"

Does your Honor want anything more than that? My learned friends are satisfied with "*the moral sense of all mankind*." "The common law" also, as the Court further say, "now denies him the right to sit, and then the revisers of our laws declared that they intended to embody this *universal* sentiment in the form of a statutory prohibition, and so they placed this express provision before the Legislature, who adopted it without alteration and enacted it as the law. The exclusion was made by the complete act as in the nature of the proceeding, the judge is removed from the cause and from the bench; or if he is without quitting the bench, it must be only as an idle spectator and not as a judge. *He cannot sit as such.* The spirit and language of the law are against it. Having disqualified himself sitting as a judge, the statute further declares that no man neither do not take part in the decision of the cause, as to which he is disqualified of the judicial functions. Nor ought he to wait to be put in mind of his disability, but should himself suggest it, and withdraw, as the judge with great propriety attempted to do in the present case. He cannot sit, says the statute. It is a legal impossibility, and so the courts have held."

The same doctrine are laid down and reaffirmed again by the Court of Appeals in the case of *Chambers vs. Crannemer*, 1 *Keyes*, 310.

Mr. Isaac Townsend may be, and I doubt not is, one of the purest and most upright of men like all the other members of the Union Club. But he sat as judge in this cause. Not only did he cast a vote, but it was on his motion to second the motion to expulsion that Mr. Loubat was expelled. I claim not only that it nullifies his vote, but upon the clearest principles of common sense and common justice that it nullifies the whole proceeding. My learned friend says this was only between the clubs and Mr. Loubat. Was it? Were we examined on any such case? Was the sub-committee appointed on any such case? Did the Governing Committee themselves profess to sit in judgment upon such a case?

No, from first to last, from the beginning to the end of the proceeding, it was all upon the existing quarrel between Mr. Loubat and Mr. Turnbull. And by the vote of this man who was near of kin to one of the parties to the suit itself, by his vote, his necessary vote, Loubat was condemned; without which vote there was no condemnation and no expulsion. If that is technical let my learned friends make the most of it. I say that it absolutely disposes of all this case even if we had not another single point of merit.

MR. BRISTOW NOT CALLED IN.

What next? I say that they purposely refrained from calling Mr. Benjamin H. Bristow, who was one of the Governing Committee, to sit in judgment on that occasion; and the exclusion of a judge entitled and qualified to sit, by failing to give him notice, to call him in, is just as flagrant a violation of justice as allowing one to sit who is absolutely incapable of being a judge in all.

Your Honor, by this time, is so familiar with the language of the constitution of this club that probably I need only refer to it. In 1879 or 1880 the constitution was amended so that it stands as it does now in this green book from which Mr. Robinson has read so freely. In the opening of the case, or in the early part of it, I had supposed that there was an attempt at the annual election on the 24th day of May, 1882, being the day before the removal of Mr. Loubat, to fill all the vacancies existing in the club. I find, however, by the proofs that the club purposely, of their own accord, instead of electing three men to fill the three existing vacancies, passed that over altogether and elected three new men for the full term of three years and not to fill the vacancies at all. So much of the point I then suggested disappears from the case. Not so in reference to Mr. Bristow. What is there about him? It appears that Mr. Evarts, who had been previously elected for a term which was to end in the spring of 1884, ceased to be a member prior to this annual election. What was done? What did the constitution provide in that case? There was a vacancy. Not a vacancy in an outgoing class but a vacancy in one of the enduring classes, and a single vacancy. What do the rules of the club provide?

I do not need to stand on the words "or when their successors are elected," in the second clause of the 3d article, but I look to the third clause of the 3d article. "Members to replace the outgoing class, and to fill vacancies in the other classes, shall be elected by the club at the annual election."

There were eight men to fill the outgoing class elected, and Mr. Bristow also was elected. By virtue of what in this constitution was he elected? It could only be by virtue of this. There could not be two elected at an annual election except the ninth was to fill a vacancy. And as I recently remember the original order was that he was to fill the vacancy in the place of William M. Evarts—that an election was to be held of the ninth man.

Now, when elected what did he fill? He filled the vacancy, didn't he? What authority was there under this constitution to cast ballots except to fill the vacancy? What possible room for any election whatever except to fill the vacancy? Does the constitution say to fill a part of the vacancy? How preposterous that would be. No, sir. He is to fill the vacancy, and the whole vacancy, and nothing but the vacancy. They say upon the other side, forsooth, that he was elected "for all that he could be elected for a part of the vacancy." That is where I join issue with them as a matter of law.

If under that clause of the constitution you could elect Mr. Bristow for a part of a vacancy, then on that annual election you could have elected twenty-five more, each to fill a separate month of the unfilled vacancy. But here on the constitution of this club and its members are sworn to live, how do they try to exonerate Mr. Bristow? Why, they say that Mr. Oliver K. King in putting out the ballots said that this vacancy was to begin on the second Wednesday in June, 1882, and that it is competent for them, and they have the power, to change their own rules, thereby to alter the constitution and elect him for a part of a vacancy. When I put Mr. King on the stand for that purpose, he did not understand that it was by any authority of the constitution. "How came you to say that the vacancy, which was the one thing to be filled after the other eight men were on the ballot for four years, was to begin on the second Wednesday of June?" "I did it at the request of the gentlemen who put Mr. Bristow in nomination." There is the source of constitutional authority. I meet them on their own ground. They say, Didn't everybody vote the ticket with this on it? They did. Isn't that universal assent? But they are still living under the constitution, are they not? I am fighting here for a man who is entitled to have all his judges notified according to the constitution of this club by which you say, and we say, they are bound.

The members of the Union Club cannot meet in mass meeting and alter their own rules, even although every one of them said Amen. Why not? Because of this provision: "Amendments to the Constitution may be made at any meeting of the Club, annual or special, by a two-thirds vote; alterations of any rule of the Governing Committee, by a majority. Notice of proposed amendments to the Constitution, or alteration of the rules, shall be furnished to the secretary at least fifteen days before the meeting at which it is proposed to consider them; and the secretary shall cause the same to be printed and distributed to members seven days before the meeting."

It is a frivolous idea that Mr. King had power to change the constitution of his own motion or at the request of gentlemen who nominated Mr. Bristow. It is equally frivolous that the members coming there and putting anything on the tickets could affect the legal result, seeing that the ballots were put in for the purposes of that election, as prescribed by the constitution, were put in only for the purpose pointed out by the constitution, which could only be to fill the vacancy.

The Court—Was he elected at all to fill the vacancy?

Mr. Choate—Of course he was. He could not be elected except for that vacancy; and he was elected by a vote of 300 to 20. At the time when that election was held, the constitution required it.

The Court—If your construction be correct the inspectors could have rejected the ballots.

Mr. Choate—They could not have rejected the ballots.

The Court—They did not, at any rate.

Mr. Choate—They did not. The language is peremptory. "*Shall be elected.*" And this ninth man could only under that constitutional clause be elected to fill the existing vacancy. What was of course the object of the constitution? That that the election to fill the vacancy should take effect immediately after the annual meeting! Now, we get rid of all suggestions about the article providing for an election of president and the distribution into three classes. Here is a vacancy existing, duties to be performed, responsibilities to be borne. As I said before, suppose this election had taken place in January, is it the object of this constitution that he shall come into office? Is it any fair reasoning that he shall come into office merely not. You cannot cut up the vacancy and fill it piecemeal until the constitution has so provided. It is the whole vacancy. And the moment that Mr. Bristow was elected he stepped into the shoes, the vacant shoes of Mr. Evarts.

A MISCARRIAGE OF JUSTICE.

What was the effect of that upon our rights? That was on the 24th day of May, 1882. They did not notify Mr. Bristow, and he did not sit upon our cause; and so there was a miscarriage of justice. Does your Honor suppose for a moment that Mr. Bristow would ever have concurred in such proceedings, in such a judgment; a man that has occupied high posts of responsibility, and at the bar, condemning a man upon evidence taken behind his back, and without the least intimation of what it was, or what he was accused of?

There is authority bearing upon this question. That is the case of *The People vs. McKinney, ex rel. I. S. Marshall*, 41 *Barb.* 515, where the suit was in relation to the election of a School Commissioner.

Section 7 of the Act of April 12, 1856, (Laws of 1856, p. 285) relative to public schools, directed that at the general election to be held in 1857, and every three years thereafter, "there shall be elected a School Commissioner for each Assembly District, who should enter into office on January 1, 1858, and should hold office for three years, and until his successor should have qualified, etc.

Section 9 of the same act authorized any Commissioner to resign his office, and for the appointment by the County Judge of a successor to fill the office until the next general election thereafter.

A vacancy occurred in the office of School Commissioner in Chenango County in September, 1862, by the resignation of the then incumbent whose term of office would have expired on December 31, 1863. The *relator* I. S. Marshall, was duly appointed by the County Judge of the county, to fill the vacancy thereby caused in the office. At the next general election held in November, 1863, the defendant McKinney was elected to the office, the notice having been given of the election, without, however, any specific mention in the notice, that the election was simply to fill a vacancy.

At the general election in the following year (1863), the *relator*, Marshall, was elected to the office; and upon the question was raised and carried to this court whether Marshall or McKinney was legally entitled to the position, or in other words, whether McKinney was elected merely to fill a vacancy, though there was nothing in the notice of the notice pursuant to which he was elected?

Upon these facts, the Court very properly held that under section 9 of the act McKinney's election was simply to fill an unexpired term or vacancy in the office. Such, manifestly, therefore, they decided that the mere form of the notice did not and could not overrule the plain provisions of the act itself. The defendant claimed that because the ballot did not contain words showing that the election was only to fill a vacancy, the defendant therefore did not take office immediately, but on the 1st of January following the election, as in the case of a person elected in the ordinary routine of the office. But the Court decided that the moment the defendant was elected, he stepped into the vacancy, and that nothing set on the ballots or omitted in the notice, could by any possibility affect the question, which was, simply one of construction, the scope and meaning of the legislative enactment.

So in the present case, nothing put on the ballot by Mr. King can, in any possibility change the express provisions of the constitution of the club, or create the conditions of the vacancy.

Again, take one very common case of the election of a judge under our Constitution. We will suppose, if you please, that there is a provision that in the case of the death of a judge before the general election his successor shall be elected to fill the vacancy at the general election, and the County Clerk seeing that the Governor has appointed a temporary incumbent, says, well, now I think this man ought to be elected so as to go into office on the 1st of January, when all other judges do, and so he prints the tickets for the term to begin on that day, and every citizen goes up and votes it, and the tickets are deposited, the ballots are received and counted, and the result is announced.

Would your Honor hesitate for one moment to say that that man went into the vacancy office which he was elected to fill the moment after his election was declared? How could it be otherwise, unless this theory upon which the Union Club acts, that their distinguished and amiable secretary is vested with powers superior to the constitution, shall prevail.

The Court—You regard that qualification on the ballot as merely surplusage.

Mr. Choate—That qualification is *surplusage*. Because ballots cannot go in or get out except under this constitution, which say that the election shall be held.

I don't think that he accused of questioning or belittling the powers of the secretary of the Union Club. But ought he to be permitted any such power as that, when the question of membership or no membership, expulsion or no expulsion, justice or no justice, is the question before you.

If your Honor shall find, as I think you must find, that the constitution was pushed out to the secretary, it must necessarily follow, from the uncontroverted fact of his resignation on the 24th day of May, the day prior to the action of this Governing Committee, was a member of the Governing Committee, and that he should have been made a part of the court, and that the failure to do so necessarily nullifies the whole proceeding. Not only was he entitled to sit, but the clubs was entitled to have him sit, and above all, the plaintiff was entitled to have him sit, and above all, the benefit of his wisdom and his judgment upon the consideration of the charge against him. I have said it is proved that the club did not attempt to fill the other three vacancies, but they elected three men for the term of three years and therefore I make no point upon that. But I do beg leave to call your attention to it in this regard. In the same spirit in which they failed to notify Mr. Bristow, so as to have all the members of the Governing Committee present, they caused the proceeding through without a moment's consideration of the consequences. And I invoke the Court's attention to their haste and the disregard of the just rights of the club and of the plaintiff in that regard.

THE REASON FOR THIS HASTY ACTION.

What was fair and decent under the circumstances? Here was a Governing Committee of whom at least one had just been voted out of office, Mr. Rice. His term at any rate was to expire the next week, and the club had just seen fit to fill all the existing vacancies with fresh men who had the entire confidence of the club. On the second Wednesday of June, at any rate, the Governing Committee would have been full with twenty four members. What need was there for these outgoing men to rush the proceeding through when their ranks were not full, and when the minority guaranteed by the constitution was not there to consider it. And they counted votes and found they had got just enough! Were they afraid to have twelve men in course and leave a full committee, who had just been drawn from the body of the club after all these occurrences were known and this investigation had begun, to decide the case? There is a very pertinent point for your Honor to consider.

I submit that if they had been actuated by that spirit of fairness and impartiality, desiring only to do justice, which is claimed for them by their learned counsel, in the regard to the opinions of their worthy colleagues, the thousand members of the club who had delegated their chosen representatives for the coming year, would have dictated that they should wait a few days for the consideration of this important matter until the full committee was in session, until these men who had just been drawn and were supposed more surely than any of the old members to represent the existing sentiment of the club were there to perform their duty. Instead of that, your Honor finds that the report of the sub-committee was made at 9 o'clock on the evening of the 20th of May, and that at 11 o'clock or half-past 11 o'clock, without a word of notice to the plaintiff, without communicating to him the report or letting him know even that the question of his expulsion was under consideration, they hustled him out.

Whereas if they had but waited for a few days more, there would have been four new judges freshly drawn, as they knew; and that was the reason they did not wait. And what a removal proceeding that was! With what undue haste to keep within the apparent limits of their own law and practice, the club of its just representation upon the trial! We have no quarrel with the club at large. This club at large is full of the friends of Mr. Loubat. They are ransacked by hundreds in its ranks. Our quarrel is with this Governing Committee, who proceeded in such flagrant defiance of the principles of common justice, and whose course was marked by this unseemly haste to put him out of the club before the full committee could have a chance to consider the subject.

THE NUMBER NECESSARY FOR EXPULSION.

That brings me to my next point of attack upon the action of this committee. Your Honor and my learned friends shall see whether this also is technical, or whether it is substantial. That is, as to the number of the Governing Committee necessary to compass the plaintiff's expulsion.

I think there is a very broad and clear question between us and my friends upon the other side on that. Nothing could be broader, nothing could be more absolute. They say they have the opinion of the two most eminent men that have stood at this bar for the last twenty years to justify their course. I defy them to produce an opinion of either of those gentlemen, that upon the facts as they appear upon this record, would show that these men were sufficient, or might in any case be sufficient to expel the other members of the club. That is what they pretend. Your Honor will mark again how we are. I say that by this clause of the constitution two-thirds of the Governing Committee described as consisting of twenty-four members are necessary to compass the expulsion of any member. That if not so, two-thirds at any rate of the legally existing members of the committee, twenty-one in number, were necessary to compass the expulsion. They say on their part that two-thirds of a quorum were necessary, and that a quorum might consist of a majority of the existing members of the Governing Committee; and there being now no longer any limit as to what should be a quorum, and although the Governing Committee should be reduced by death or otherwise to five members, that two-thirds of the five could exercise his enormous power, this arbitrary power, and as they claim it to be this absolutely unlimited power of expulsion.

What is the history of this matter? This constitution is the binding contract of these parties. Let me call your attention to what it was. I refer to the constitution as it existed in 1874. It prescribed that the Governing Committee might expel a member by ballot, a two-thirds vote of the meeting in favor of expulsion expelling him. And how small could a meeting be? Why, by the same constitution it was further provided that a quorum should consist of not less than thirteen members. "A quorum of the Committee shall not be less than thirteen."

This body met to alter that existing state of things, to alter the terms of the bargain by which they held their membership. And what did they then provide? Why, the constitution as it stands to-day was provided in its place.

If anything could be clear, it is that the club decided that no longer a two-thirds vote of the meeting in favor of expulsion should expel. Your Honor must necessarily compare these two clauses as they stood before the amendment and as they stood after. As they stood afterward it was: "The government and management of this club is committed to a committee of twenty-four of its members to be known as the Governing Committee."

"To admit members and to expel or to suspend them by ballot; one adverse ballot in ten excluding, and a two-thirds vote of the Governing Committee expelling or suspending."

It is no longer necessary that a quorum shall be not less than thirteen members.

The Court—Are you not mistaken about that? Look at Article 12.

Mr. Choate—Yes. Article 12 provides that a majority of its members shall constitute a quorum of the Governing Committee.

My learned friend says there is a general rule, that where there is a body constituted and clothed with powers it can exercise those powers by a quorum, and that in order to make anything more than a quorum necessary in the transaction of any business, there must be something expressed in the constitution to restrict its power. But what is express? Express that can there be than this express repeal of the provision that two-thirds of those present at a meeting, that is to say, of a quorum which shall not be less than thirteen, shall exercise the powers of expulsion. Necessarily your honor has to take these gentlemen administering their own affairs, altering the terms of the contract under which they held membership, and give them some credit for common sense and common meaning. There is the express limitation of their powers—the taking away from them by a constitutional vote of the club all the power to expel by a vote of two-thirds of those present at a meeting.

The Court—The Constitution of 1874 defined how many should constitute a quorum?

Mr. Choate—Yes, sir; that not less than thirteen should constitute a quorum. So that not less than nine members of a possible event, under the constitution of 1874, could have the power of expulsion.

The Court—How large was the Governing Committee then?

Mr. Choate—The Governing Committee was twenty-four.

Now, they said, two-thirds of those present at a meeting; and a meeting could not consist of less than thirteen. So it must have been at least nine. My learned friend says! Why, there can do it, it happens to be reduced sufficiently. Then we says, impossible and inconceivable extreme case. They may or may not happen. And he says if they could not act, the power of the Governing Committee would be postponed until the whole committee should be filled up, so that there could be two-thirds of the twenty-four or two-thirds of the twenty-one. I answer that by saying that it was in the power of the club at any time to alter their constitution just as it was in preparing for the annual meeting of 1882 they found it could not take place in the constitution for the annual election of Governors and passed, they altered their constitution immediately and provided a remedy at once. I submit that to your Honor's fair and candid judgment. A body living for years under a rule that two-thirds of the Governors present at a meeting shall expel repealed that, and prescribed that it should require two-thirds of the Governing Committee, that there is any possible state of things that can happen? The case is only between one or two things. They mean, as I claim, two-thirds of the Governing Committee elected and defined and prescribed by the constitution as composing the Governing Committee. Was it not the purpose of these members to provide reasonable safeguards against the arbitrary and unreasonable exercise of the power of expulsion? Would it facilitate expulsion and manifest purpose to protect the membership of members to compelle for a majority of those composing the Governing Committee? In the case of the constitution it consists of twenty four members. With two or three or more vacant places, two-thirds of the twenty-four are still necessary to constitute the power of expulsion.

I presented that to your Honor during my opening, and the only answer to it is, any two-thirds of a quorum is enough. I say that you cannot read into your constitution by implication that two-thirds of a quorum, that two-thirds of those present at a meeting no longer exist. They make an alternative between the power of acting by two-thirds of a quorum and the power of acting by two-thirds of twenty-four. That is what these gentlemen are meant. They had in their minds the power of expulsion. Now, how is it best to meet that?

Well, we have got a constitution which says that the Governing Committee shall consist of twenty-four members and we will say that two-thirds of twenty-four be and be necessary to expel a man, and when they say he must go, why he must go. That I believe to be the necessary logic of these constitutions as they stand.

But suppose that not to be so, then where do we stand? Two-thirds of the Governing Committee as distinguished from two-thirds of a quorum by this change of the constitution necessarily is the remaining. It is it any less than two-thirds of the Governing Committee as defined by the constitution, it is less than two-thirds of the Governing Committee as defined by the constitution? Suppose we count Mr. Bristow in or out, then they had twenty or twenty-one members, and two-thirds of twenty or twenty-one, which is fourteen, was necessary. And if there is any force or soundness in the proposition that I have presented to you as to the disqualifications, the absolute disqualification from *personal bias* of Mr. Isaac Townsend, they had only thirteen votes, which was less than the necessary number. These propositions are as plain simple as a pike staff. They are themselves the mathematical problem. I will not bore your Honor by extended arguments on this point. In that respect I will refrain from following the example of my learned friends on the other side.

MR. LOUBAT ENTITLED TO FAIR PLAY.

I come now to what my learned friend, Mr. Carter, says, and I say, is the gist of this case. And I proceed to my next point of attack upon the action of this Governing Committee, and that is, that they did not proceed according to the principles of natural justice.

I do not intend to follow my learned friend, the senior counsel on the other side through all the ramifications of his argument. I heard it once before in his own room before Judge Lawrence and I heard it in this room improved, enriched, it seemed to me, if it were possible, and Judge Lawrence at one fell blow demolished it utterly.

Are we going to have one law in January and another in April; one law in Room 15 and another in Room 16—one law by one Judge of this court, and another law by another? I cannot assume that. I will assume, however, and I will accept my friend's premises as they were accepted and acted upon by Judge Lawrence, namely, that you have got to have fair play—no matter about the form of the proceeding—no matter about the form of the notice—you have got to have fair play, and nothing else.

Now as to the supervisory power of this court over the action of the Governing Committee of a club, or the representative body of any unincorporated voluntary association of gentlemen. It was suggested to my mind recently, perhaps I should be excused for saying that I am to be the other side, that they who a little while before had the principle applicable to the Stock Exchange and those applicable to the Union Club, that his hoary-headed associate could not accept that. He says there is no difference; and I agree with him. He could not swallow anything so unreasonable as that—and I see your Honor can't. Well, the law is the same, no matter what the unincorporated association. They are bound by their own rules, and they are bound by the principles of natural justice, and if there is nothing in the rules specifying the matter, you have got to sit down according to the rules and laws and dictates of natural justice.

In the 84th, N. Y., the Court of Appeals applied this principle to an ordinary benevolent association. In the 52d, N. Y., they applied it to a musical association. And anything that is good enough for an association of doctors is good enough for their patients in the Union Club.

Now what is this supervisory power? When a man is turned out of a club or stock exchange, or medical association, or literary society, or any other, the right up to the Supreme Court to have his cause heard on the merits? Yes. We all agree, because all the books and all the cases and all the judges agree, that with the merits the court has not nothing to do. There is no legal standard by which you can measure out medicine to a medical fraternity, or club morals to a club fraternity, or stock exchange morals to a stock exchange—it there is any such thing as stock exchange morals. That is one reason. Another reason is that the parties have come into a different agreement. They have said that the Governing Committee shall be their judges.

Nevertheless I agree fully with my learned adversary, the senior counsel, that although the court cannot look into the merits or review the merits, it can look into the action sufficient to see whether the man had a fair chance, whether he was charged with an offence, had notice of the charge, had an opportunity to defend himself, knew what the evidence was on which he was about to be convicted, and had an opportunity to answer. If he had, there is no help for him this side of the grave; if he had not, the Court can and will help him.

There is a great deal of law on this subject. My friends are barricaded with law books. But I have stated the gist and sub-stance of the whole, as they and I have drawn it out and we agree upon it. What does it all amount to? That the Governing Committee can only remove for cause; they cannot remove arbitrarily; and in any event they can only remove upon an opportunity to be heard. That means fully heard, fully heard on the charges, fully heard on the evidence. If this Governing Committee had sinned in ignorance, I should not blame them so much, but they not only had a learned lawyer, Mr. Carter, who has appeared on the stand here, to guide their proceeding—and as to whom I join with Mr. Robinson in his eulogy upon him—but they also had, as one of the members of their own body, a layman who had just received from the Court of Appeals specific instructions upon the subject, and he at least ought to have known better—and I have no doubt did know better—and should have so advised his associates. I refer to Mr. Edward Cooper, then Mayor of the City of New-York. Mr. Cooper as Mayor was placed in exactly the same position in regard to the Police Commissioners, in which this Governing Committee was placed in regard to Mr. Loubat.

He had power to remove a Police Commissioner for *cause, upon an opportunity to be heard*. That was the language of the statute. That is exactly what Mr. Carter and I agree is the meaning of this Union Club constitution. He wanted to get rid of a Police Commissioner, and he gave him notice that he charged him with something to the charge. But when he came on such day he would be at the Mayor's office to hear him. The man came there and said, "I am ready. Where are your witnesses? I want to cross-examine them. I shall have some witnesses of my own. I want to present them." "Bless you, my fri