THE UNION CLUB SUIT.

(Continued from Fourth Page.)

I propose to show your Honor by that record, that what he was expelled for was something different from what it is now pretended by the counsel of the club he was expelled for.

It is now pretended—I think for the first time in the history of the case—that he was expelled for words spoken in the club house in November. If he was, he was expelled without *any* notice, without *any* charge, without *any* inquiry. I believe that to be an afterthought, and there are various circumstances which confirm this belief. In the first place, the words spoken never would have been heard of outside of the ears in which they were uttered, if it had not been, first, for Henry Turnbull, and then, for the action of him and his friends in distributing the circular, and, then, for the counsel of the Union Club in spending nearly a whole day, in trying to fill their newspapers with a description of those words and of the parties concerning whom they are supposed to have been uttered, almost calling them by name.

I have endeavored to try this case with a view to the suppression of all possible scandal, and I am sure I was not less surprised than shocked to hear my learned friends on the other side try to fill not only the ears of this court-room, but of this whole city, with a revival of that unhappy circumstance—pointing directly at parties, as good as naming them.

Don't charge that to Mr. Loubat. That is the action of the counsel of the Union Club in defence of their case.

The words were uttered on the 28th day of November. What does my learned friend say about them? He says that those words should not have been made the subject of inquiry, should not have been made the subject of expulsion.

Mr. Carter—I did not say that.

Mr. Choate—He said what I understood to be that.

THE QUESTION OF CLUB MORALITY.

Now, there is a club morality and a public morality bearing directly on this question, which sustains the suggestion that I said Mr. Carter made, and which if *he* did not make, I do. And here I differ from both my learned friends on this subject of private language between gentlemen in a club, or in a parlor, or in a counting-room, or in the street.

My proposition is this, that if such language is uttered, there is the end of it. It should go no further; and any code of morals by which gentlemen are bound will see that it goes no further. The learned counsel on the other side have two different views, both opposed to mine. Mr. Robinson says: Why, nobody asked Turnbull not to repeat the words; therefore he repeated them; there is no great offence in that. If your Honor please, that strikes at the very foundation of social morals and of public decency. That is Mr. Robinson's doctrine; but it is not the code of the Union Club. Where did he bring it from? From Philadelphia, or from Virginia? Where did this idea come from—that if you do not ask your dining companion, or your friend, in whose ear you whisper a remark, *not* to repeat it, he is under no obligation to keep it still?

My brother Carter has in the course of this argument had occasion to reject a good deal that his associate has said. He could not stand that, not he. But he says: Why, Turnbull repeated it all about the town, and thousands of gentlemen have done that before. I deny that that has ever been done by a gentleman anywhere.

Now your Honor begins to see where the difference between Loubat and Turnbull, when this club investigated, began. If it was an offence against club morality, what was the offence? Ah, your Honor, the club is never to know what one private gentleman after dinner whispers in the ears of another; the club is never to inquire into that subject. I scout the idea, that *that* was cause for expulsion. And what is more, I don't believe you can find a corporal's guard of men in the Union Club to say that it was cause for expulsion.

See what comes of it, if it is. Then every indiscreet and improper word uttered after dinner by one gentleman in the ears of another gentleman, if the hearer adopts Mr. Robinson's rule and goes and spreads it on the wings of the morning, because he is not requested not to; or if he adopts Mr. Carter's rule, following the *supposed* gentleman, somewhere or other, who repeats such remarks—I don't know where such gentlemen are found, certainly not in the Union Club, for the only gentleman that I ever did hear there has left—what comes of it? This comes of it—exposure once of it. Is that the Union Club theory of the protection of innocent reputations? Is that the Club theory of confidential communications between gentlemen? I don't want to live as a gentleman in this city, if that is the code of morals to be administered in society, in clubs, in churches, or in courts. The eternal seal of silence was on that remark by every code of morals that I ever heard of, or can ever imagine.

WHAT THE RECORD SHOWS.

The club did not take notice of it and did not call him to account for it, and nobody ever brought it to the attention of the Governing Committee. Why do I say that? Because the record shows it. If you are going to hold that he was expelled for that, or that that was a part of it, show it to me in the charge which he was called upon to defend.

I am not scrupling now about the form of summoning him. I say that when he got the resolution appointing the sub-committee, he ought to have known that it looked or squinted at expulsion. Expulsion for what? Let us see what the record says. Let us see if this was a committee appointed to investigate that remark, or if it had anything whatever to do with the remark. I say it had not.

"The president stated that the object of the meeting was to obtain the sense of the committee as to the propriety of the club investigating the recent difficulties which have taken place between two members of the club, Messrs. J. F. Loubat and Henry Turnbull."

Recent difficulties! This remark was made away back in the year before. Mr. Loubat had spent the whole winter in California. He returned on the 29th day of April, and then difficulties for the first time arose between them.

"Resolved, That a committee of five be appointed by the president to investigate and report to this overnight Committee, at a future meeting, to be called by the president, an exact statement of facts in relation to the difficulties existing between Messrs. J. F. Loubat and Henry Turnbull, with instructions to inform Mr. Loubat and Mr. Turnbull of the resolution and giving them an opportunity to appear before them."

Well, is there here any warrant to investigate that remark on which the eternal seal of silence should have rested, and would have rested but for the improper action of Turnbull? Where is it? I do not claim that you shall charge us with the particularity of an indictment, but there must be something in the charge to indicate what the defendant was that they intend to inveigle; and if it looks to expulsion upon what charge they propose to expel him. Isn't it something about his conduct toward Turnbull and the existing quarrel between them?

When the report came in, what did that say? It is entitled: "*Investigation in re Henry Turnbull and J. F. Loubat*"; and then the report continues as follows: "The Committee appointed to investigate the facts that led to the *late unpleasant occurrence* between Mr. Henry Turnbull and Mr. J. F. Loubat met at the Union Club at 5 p. m., May 19, 1884."

What was the "*late unpleasant occurrence*"? It about came to blows. It began after the return of Loubat from California; it culminated in the Belmont circular. That was the unpleasant occurrence between them. The letter carried by Mr. King was of still more hostile consequence, apparently threatening the other side, and requiring the intervention of experts. Then you come to the action of the Committee itself:

"The Committee appointed pursuant to the resolution of the Board to ascertain and report the exact facts connecting the *late* questions between Mr. Loubat and Mr. Turnbull respectfully report."

MR. LOUBAT'S REMARK NOT THE SUBJECT OF THE CHARGE.

Now what I have to say is that this suggestion of Mr. Loubat's remark ever being made the subject of the charge which he was summoned to answer is a pure afterthought. It was never thought of by the sub-committee or by the Governing Committee. What further is there? Why, there is this, that when the committee took the evidence they left out the remark! When they made their report, they left out the remark. They reported it in blank, and the Governing Committee never knew what it was.

Your Honor to this moment knows not what it was. My learned friend says: Oh, it was some big fearful beyond expression, and that he can indulge the imagination, and that you can indulge your imagination, to find it and spell it out.

Well, the Governing Committee did not have it spelled out to them; they did not act upon it. If there was an indecent word used, there is no such word in the evidence or the report. It is the first time I ever heard that judges whether in the form of Governing Committees or judges of the Supreme Court, were to decide a case purely upon their imagination.

The remark was left blank with a purpose; it was left blank for a reason. Because it was no part of the charge; because it had nothing to do with the charge; because it did not come within the scope of the Committee's authority to inquire, or to report thereon; and because it was beyond the Governing Committee did not care to know.

Every rule of club morals, and of public morals, and of public decency, constrained them from inquiring and precluded them from knowing what the remark was. In contemplation of my statement, that from the whole tenor of their action it was perfectly obvious that the Governing Committee did not intend to make the remark a subject of inquiry, I say that they did not instruct the sub-committee to inquire what it was, and that the sub-committee did not take any evidence or make any report on that subject. The only matter referred to them was the controversy between Loubat and Turnbull. Certainly the controversy did not begin with the remark, and the remark formed no part of the controversy, in any view of the case, upon anybody's evidence. I don't care whose or what.

The Court—Allow me to make a suggestion. They were to investigate and ascertain an exact statement of facts in relation to the difficulties. The committee was to investigate the facts that led to it.

Mr. Choate—Undoubtedly. The scope of their powers is an exact statement of facts in relation to the difficulties existing.

The Court—The report says the facts that led to it.

Mr. Choate—I am going to show your Honor what led to it. There is no dispute about the scope of their inquiries. It cannot be tortured or enlarged so as to include the remark, when Your Honor comes to see the other facts as to what the controversy really was.

Mr. Loubat and Mr. Turnbull had no quarrel on the occasion of the remark. It after the remark, begins the disputes between them and how a difficulty arose. According to Mr. Turnbull, so, after that, denounced and attacked the plaintiff in personal character for manliness and honor.

I need not repeat what he claims to have said. I am not so fond of that kind of language as my friends on the other side seem to be. They made the room ring with it all yesterday. Mr. Loubat says that Mr. Turnbull said it was an unpardonable remark, which no one but a Frenchman would have made. They parted pleasantly enough, and nothing occurred, to further step in the controversy between them, until Mr. Loubat had gone to California. Now arises the next step in the controversy. What was that? About this, it is conceded upon the other side, that it was a step taken by Turnbull and not by Loubat—a step worse than anything Loubat ever did, or spoke of, or dreamed of speaking or doing, because the remark was received by Turnbull under that seal of confidence which is necessarily implied in the conduct and intercourse of gentlemen. After Mr. Loubat had gone to California, it is agreed on all hands that Mr. Turnbull went out in the world and published the remark. If there ever was a flagrant sin against private decency, and club morality, and public morality, it was that circulation and publication of the remark by Turnbull. Nothing has ever been hooted or suggested in Mr. Loubat's conduct or language that begins to approach the infamy of that act. Every intelligent gentleman and every intelligent judge, will agree with me in this statement. But besides publishing and repeating the remark, Mr. Turnbull coupled it with what Mr. Loubat, when he heard it, said was an absolute falsehood, namely, that upon hearing him, he denounced him for what Mr. Robinson repeated so many times yesterday; and Mr. Turnbull further stated that Mr. Loubat, instead of repelling the gross imputation, had run away.

If there is anything that can wound the feelings of a sensitive and chivalrous man like Mr. Loubat, I suppose it is a charge like this: That his character for manliness and honor had been attacked to his face, that he had made no reply, but had put his tail between his legs and run away. Cowardice, poltroonery—all the most degrading attributes put upon him in his absence by this man with whom this controversy was afterward, the thing to be examined. That is undisputed. I asked them on the other side, as they were arguing it, if they admitted it, and they said yes, they did. In the report, the sub-committee stated it. Mr. Loubat, it appears, heard of this in California; he was told that this story, in all its glaring proportions, was being circulated in New-York society, and he came home. What did he do when he came home, according to his own story? He went to a gentleman friend of his and told him all about it. What did he do next? My learned friend says, Oh, he ought to have apologized. Good Heavens! apologize to whom? Who was there ever to apologize to? Apologize to the club, and thereby publish the original remark? Is that Union Club morality? That cannot be. Apologize to the gentleman to whom it was uttered, who had been making it public property and public infamy? That cannot be. There were certain persons concerned to whom he owed an apology. How did he come to owe an apology to them. By making the remark in the private ear of another gentleman? Never! Is that Union Club morality? It cannot be. He owed them the apology because of this infamous, *publication* of the story, a most grateful obligation. But he recognized the obligation at once and discharged it. His apology was accepted by the parties concerned. And to-day he presents the wonderful spectacle of being himself on the best of terms of ancient and abiding friendship with every one of those persons supposed to have been injured, and the Governing Committee of the Union Club as champions of Henry Turnbull, who had *published* the remark, calling him to account.

TURNING TO MEET HIS ACCUSER.

What was the next step according to his own story? Having done what he could—which of course he ought never to have been brought in the position to do—he turns to meet his accuser. He knew what Turnbull had said, and he got the report that Turnbull was circulating. He incorporates that in a letter and addresses it to one of the gentlemen who was present; and he receives the reply that such language was not used, that his personal character was not attacked, that he was not denounced as a blackguard or charged with running away; and thereupon he writes the letter to Turnbull, giving him the lie, and addresses it to the gentleman to whom, as he understood, Turnbull had told the story. Now, that may have been an offence in somebody's view. I don't know whose. That, so narrated, may have been wrong on Loubat's part.

This brings me to the application of the law to the facts of the case. Because, if your Honor has followed me, you will begin to see the gross iniquity of this judgment of expulsion. My learned friend says, Why, he admitted everything. If your Honor please, he admitted *other* things. They say that there was nothing, in conflict between the evidence which *he* gave and that which *the other* gave. If your Honor please, the two statements are as wide apart as the poles. You detected my learned friend Mr. Robinson, or observed him—he never needs detection—in his argument putting it in this way: That Loubat went to Mr. Willing, the party who had heard the conversation, and found out from Mr. Willing that he had not heard Turnbull denounce him as a *blackguard*, but had heard that the remark of Loubat was made to and by Turnbull as the most *blackguard* remark he had ever heard, and then, knowing that, and knowing that he could not answer an inquiry as to what he had said, or had heard said, without calling that out, he said to Mr. Willing, I will write you a letter putting this remark, as stated by Mr. Turnbull, in quotation marks, and asking you if he said it, and you will answer by letter that you did not hear it, and then I will have the written proof to convict Turnbull of lying. Mr. Robinson said that. I challenge him to show any such thing. He could not do it. Now watch here and see how our law applies to our case. Mr. Loubat was examined before the investigating committee, and made his statement. He stated his case substantially as I have recited it to your Honor; and it absolutely excludes the possibility of any such conversation with Willing.

I will read it. At folio 128 he says: "This silenced Mr. Turnbull, who broke out as follows: Nobody but a Frenchman could make such a remark. And after a few seconds more of silence added, 'It is the most unpardonably manly remark I have ever heard.'"

Then he speaks of his return from California and his writing his letter to Willing and getting the answer of Willing as appears in the circular.

Then on page 35 he is examined by Mr. Cadwalader in this way:

Q.—I notice in this correspondence there is a great difference between Mr. Willing's two letters; that in one letter of his to you he says a certain conversation never occurred, and that in the second letter, addressed to Mr. Turnbull, he gives another conversation. Now what I want to ask is this: Was this letter of Mr. Willing's addressed to you, the result of conversation between you and him, or does the correspondence show the whole story?

A.—I told him that he had made a mistake; he remained talking to Mr. Turnbull after I left; I cannot remember anything except that these gentlemen remained talking together, and they must have got the conversation mixed up. Mr. Turnbull said it was a most unpardonably manly remark; he remained there talking with Mr. Willing.

Q.—There was no animosity between you?

A.—We are not on speaking terms at present.

Not an intimation of any such conversation with Willing as Mr. Robinson imputed to him and found against him. If the Governing Committee had removed him on his own statement, he would have been out in the cold. But I don't think there is any man of sense or intelligence that would have removed him on his own statement, or would convict the Governing Committee of being such stupid blockheads as to have removed him on that ex parte statement. If it included the original objectionable remark, which had become public by no act of his, but by the treachery and infamy of Turnbull. If after Loubat made his own statement, they had convicted him—however unreasonably, as I think—perhaps he could have had no redress.

What happened? They bowed him out; they bowed Mr. Platt out. Now they say that Mr. Platt was his counsel; and very respectable gentlemen have been called to impeach Mr. Platt by not remembering what he remembers. That is a new way of impeaching a witness; novel, at any rate, for my learned friend Mr. Carter to use to the evidence is overwhelming against Mr. Platt. I don't know what he means by overwhelming. I have always heard that one man who has heard a thing and remembers it is worth half a dozen who did hear it and don't remember, or didn't hear it and don't remember.

Mr. Platt says that they told him: Mr. Loubat has asked that you come in here as his friend, make no remarks, no talk—you just sit here and listen.

Mr. Carter and Mr. Sheldon says he don't remember that; and Mr. Sheldon says he don't remember that or anything else—not another word that took place can he remember.

Mr. Carter—Do you mean to seriously say to the learned judge that that is Mr. Sheldon's testimony?

Mr. Choate—Mr. Sheldon is answer to my question. If he could remember anything said that day, said he could not. May 19, 1882?

"*Cross-examination*, by Mr. Choate.

Q.—What do you recollect being said to Mr. Platt by any member of the committee?

A.—I recollect saying to Mr. Platt that he was sent for at Mr. Loubat's request.

Q.—Will you swear positively that it was not told him in substance or effect that the committee was not desirous of hearing anything from him?

A.—To the best of my knowledge.

Q.—Will you swear positively from recollection that no such thing was said?

A.—I could not swear that I was in the committee room. I refer to the best of my recollection and belief being of the sort took place.

Q.—Will you swear positively that no such thing was said?

A.—Yes, I will swear positively to the best of my recollection and belief nothing of the kind occurred.

Re-direct.

Q.—If such an observation had been made when Mr. Platt entered, or at any time during the course of these proceedings, is it likely it would have escaped your memory?

A.—I think not.

By Mr. Choate.

Q.—Came anything else that was said on that occasion by anybody?

A.—I can only state that I said to Mr. Platt we—

Q.—I don't mean that. State anything else that was said by anybody on that occasion?

A.—I don't recollect anything.

By Mr. Carter.

Q.—In stating you don't recollect anything that was said do you mean to intimate that you don't recollect testimony was given, a large amount or it taken?

A.—Not at all. I mean I cannot quote any particular words that were used.

Now there you have it. And I say that is utterly worthless as a contradiction of Mr. Platt. Did they think that he was Mr. Loubat's counsel, or that the case was being conducted and defended by Mr. Platt as his counsel? If so, why didn't they say Mr. Platt, we are going to take the rest of the evidence after Mr. Loubat is gone, you had better stay. No, they bowed him and Loubat out together. I was going to call your Honor's attention to what took place *after* they were bowed out; for now you come to the pith of the argument. Now you come to the substance of the crime for which he was expelled. It is perfectly hideous upon the proofs in this case to say that he was expelled for the original remark, or that the remark had any reference whatever to the expulsion.

EVIDENCE TAKEN BEHIND LOUBAT'S BACK.

Now comes up the point between men of honor. Loubat's evidence on one side, Turnbull's for what it is worth. Kimball's for what it is worth on the other side, and Willing hanging on the fence. The plaintiff is being tried in respect to his conduct in the *differences existing between him and Turnbull*. The question is whether the principles of natural justice required that before he was expelled for a crime, it should be informed what that crime was? No intimation of it yet. No intimation of it in the instructions to the sub-committee. No intimation of it in their letter to Loubat. No intimation of it in anything that passed while Loubat was before the committee. Mr. Turnbull had not been called, but they did not tell him a word of Turnbull's testimony, or ask him how the fact was. Afterwards, Mr. Kimball and Mr. Willing came and testified behind his back, without giving him an opportunity to hear them, to facts which, if true, might call a case against him. What was that? Just what Mr. Robinson was trying to tell. He said in substance that after Loubat came back from California he went to Willing, found out that Willing could stay literally, but not substantially what Turnbull charged him with, that would be obliged, if inquired of, to state what, as Mr. Carter says, came very near to the same thing, namely, that the remark was very "*disagreeably*," although there is a very wide difference between those two things—but that is a matter for the fair judgment of the Governing Committee, if they tried the case thoroughly. They got the evidence out of the combined testimony of Kimball, Turnbull and Willing. What did they report? They reported what Mr. Loubat had in substance denied, namely, that the imputation of him by Turnbull was manly, that he knew it was made, that he heard it, and knowing that Willing had heard it almost in substance, nevertheless proceeded to formal letter from him denying that he had heard it at all, and on that charged Turnbull with the lie direct. There was a fair question for the Governing Committee, upon which I think they might come to different opinions. It appears they did. Four of them voted against expulsion; one of them moved for a milder form of punishment. They differed upon it. But the idea of the thing was this—and your Honor put your finger upon it, and the weight of your finger almost brought my learned adversary to the ground—all the evidence tending to inculpate Loubat on the charge based upon the quarrel between him and Turnbull, was received by the committee behind Loubat's back, without any information that there was any such evidence, without any intimation that a part had already been taken, or that the rest of it was taken, after it had been taken, without any opportunity for him to know it, and without any opportunity for him to answer it. It appears by Mr. Loubat's testimony, that he left Turnbull and Willing talking together when he left the club that night. Nothing is more certain than that if such a report was made, charging the man who made the original remark with being a "*blackguard*" and so on, it was made *after* Mr. Loubat had left. From what we now know of Henry Turnbull, we can almost assume that it was made *after*, if it was made at all.

Mr. Carter—The circumstance is not in proof.

Mr. Choate—I accept the criticism. I stand corrected. I am putting my finger just as your Honor did, on the very vice of the proceeding. It was that evidence contrary to Loubat's that laid the foundation of the charge against him; it was that evidence which was the foundation of the charge in the report; and it was on that report that the Governing Committee acted, when they voted the plaintiff's expulsion. In his own evidence, there was nothing of the kind. His own evidence was inconsistent with it. Your Honor knows enough as a judge and a lawyer to know that it might well be, if he had been present, or if Mr. Platt had been there, it would have turned out just as Loubat had stated, and that the other witnesses were mistaken.

Now, what do you say to the doctrines I have cited from the adjudicated cases?

In *Dobson vs. Grove*, Lord Denman says that there is a "*sufficient objection*," when there is only "*a possibility that the arbitrator's mind may have been biased*." Is there was something more than a mere "*possibility*"? Is there is an *absolute certainty* that the minds of the Governing Committee were *biassed* by evidence taken in the plaintiff's absence.

So also in *Sharpe vs. Fitzbridge*, 3 *Dow's Rep.* 102, Lord Eldon says that an award cannot stand where the arbitrator hears one party without hearing the other, and that even if the arbitrator "*decided rightly, he had not decided justly*."

The decision of Judge Lawrence in the Stock Exchange case is based upon the same principle; and the principle is obviously fatal to the defendants.

In my view of this case, a charge was made on which the Governing Committee might consider whether to expel Mr. Loubat; he has manufactured an accusation of *falsehood* against a brother member of the club. That, if Your Honor please, is the charge upon which he has not had a chance to be heard; that is the crime for which he was expelled, a crime of which no intimation was given him, no, not one. They put it in their report; and then what should they have done with the report? That was the time to have given him a chance to answer. But the report came in at 9 o'clock and Mr. Bladgen moved that he be expelled, and the counsel of Turnbull who had no right to be there at all, seconded the motion, and they put it through.

WHY THE PLAINTIFF WAS NOT CALLED.

Now, if your Honor please, I want to reply to a little clap-trap jubilated in by my learned friends on the other side, of such eminent and distinguished counsel can be supposed to resort to that. But your Honor knows the various forensic arts.

They say: Why didn't you put Loubat on the stand; why didn't you deny something? That question was for the crowd and the newspapers, and the club men. Nobody knows better than my learned friends that your Honor cannot *retry* this case. It is held in all the cases on this subject that a Court cannot inquire into the *merits*, meaning of course by the "*merits*," the personal guilt or innocence of the plaintiff. The power of your Honor does not extend would a review of the *procedure*, or in other words, *whether substantial justice has been done in the method of trial*. To have put the plaintiff on the stand could therefore have been to no possible purpose. My friends on the other side know this as well as your Honor knows it, and they asked the question merely to tickle the ears of the groundlings from the Union Club.

Well, do I make out my case? Where are the principles of natural justice as laid down by Lord Eldon? You *could*, that the committee would have repelled the plaintiff on his own testimony. I defy them, or any other Governing Committee, to expel a man on such a story as that. No body of gentlemen in any club in this city could be found to expel him on that. They expelled him on the *whole* report—a report based, if your Honor please, upon the evidence of Willing, and Turnbull, and Kimball, *taken behind the plaintiff's back and absolutely concealed from him*.

We will take any of the alternatives you please. Did they expel him for the remark? Who can say so, when the remark alone was not admitted into their minds? This other flagrant charge was coupled with it. No judge or any man can say that if the original remark had anything to do with it, it constituted the plaintiff's whole offence. In the largest possible view of the testimony, the making of the original remark was all that was disclosed by his own testimony. They had to act and did act upon the *whole* evidence. My claim is, that if it had not been for the evidence of Willing, and Turnbull, and Kimball, which the plaintiff was not allowed to hear, and upon which this artificial charge of crime was based, and, as I believe, *poisoned condemned against him*, there would have been no expulsion, and no ground for expulsion.

What do these great judges say? They say that if a judge or arbitrator, having dismissed either party takes any evidence behind his back, no matter what, no matter how little, *it is absolutely fatal*.

What happened here? They took behind his back the *whole* of the evidence going to constitute at least one of the two substantive charges. Can you be heard to say, Why, we only used that as an original remark; our minds were not affected by his giving the lie unreasonably?

How can they be heard to say that? How can they be heard to say that, when Lord Eldon says: We will not hear an arbitrator or a judge come forward and say that he did not allow his mind to be affected by any evidence that he took? Human nature can't stand that, no judge, no arbitrator, no Governing Committee can be put to such a test. If I were to put one of these fourteen members upon the stand and ask him: Did you vote for or against the original remark, he could not say that he did, for there was mixed up with it another accusation supported by evidence taken behind the plaintiff's back, and by no other evidence whatever.

DID MR. LOUBAT HAVE A FAIR TRIAL.

That is the plaintiff's case. I leave it not only to your Honor, but to every member of the Union Club to say whether he had a fair trial. It needs only a clear exposition of the case to prove to anybody—I would leave it to the counsel on the other side—whether the plaintiff had a fair trial within the authorities which we have all agreed to. Compare it once more with the Hutchinson case.

You ought to have heard my friend's argument there. Hutchinson, said he, comes forward and complains because he was expelled for "obvious fraud"; he went before the Governing Committee on a charge of "obvious fraud," and presented his books and made a statement which showed him guilty of "obvious fraud" by a score and by the hundred; and now you want to set the proceedings aside because although he admitted *that*, they called in one or two witnesses on little trifling, unimportant matters that did not alter the case as stated it. What did Judge Lawrence say to that? Judge Lawrence said, just as Lord Eldon said, this Governing Committee for some reason or other thought it necessary—as this sub-committee thought it necessary, before they got all the facts which they were instructed to investigate, not to rely upon *Loubat's* admission—not to rely on *Hutchinson's* admission, and so they invited witnesses to come in and testify on the question, that it was not necessary to confirm his conviction, or add not to his conviction.

If your Honor please, we don't need to make any such arguments here. You will read Loubat's testimony before the sub-committee in vain for the least intimation, much less admission, of this flagrant offence. The sub-committee were not satisfied to rest upon what he did admit. The Governing Committee were not satisfied to rest upon that. If that had been, he might have been in a different place, although he should have been expelled. But there was no such thing. No, we are not content with Mr. Loubat's story, we don't expel him on that, we expel him on the combined stories of Loubat, Turnbull, Willing and Kimball. Yet my friends say that he was convicted on his own admission. I deny it. I say that no man of intelligence entitling him to be outside of Bloomingdale Asylum, can read the evidence, and say that he would convict the plaintiff on his own admission. And my learned friends will not say so. He was convicted on the report made up from the evidence of witnesses *shut out from hearing or answering*.

Now, if your Honor please, have I made out my case or not? If the principles of natural justice are to govern, how would you use to administer justice in that way? These remarks of Lord Eldon, and the Court of Appeals, and the Supreme Court, to which I have called your attention, refer to sworn judges, as to whom the people are protected in the performance of their duty by their solemn oath, and by the character that elevates them, after years of judicial trial, to the bench. Will you then permit such an *unsworn* Governing Committee to deprive a man of such valuable rights and put such stigma upon him by a purely *ex parte* trial.

Your Honor would never have another night's sound sleep, if, after receiving the same commission and authority which the Governing Committee received under the charter of the Union Club, to investigate this case, you had done as this Governing Committee did.

I wonder that they are alive to remember it. I wonder that they have not fallen into their graves from mortification and shame. And yet the secretary looks as robust and portly, as self-contented and self-complacent, as if he had rendered a great thing.

What would you say in your defence, if you were impeached, as you would have to be before the Senate at Albany, if you had conducted a trial like this? What answer could you make? You could not answer; you could not possibly escape conviction.

But the Governing Committee draw their answer and send their lawyers in here with all his *counter in-sado*, and we will meet Mr. Carter with all his *counter in-re* to come in here, and we will pull the wool over the eyes of the Judge, and we will hold on to this conviction and keep Loubat out.

THE MISTAKE WHICH THE GOVERNORS MADE.

One word personal to yourself. I agree to all that my learned friend said, but one thing, and that is, that we waited for your Honor. I deny it. I never waited for any Judge, and I never will. I take the judges as they come, but I am perfectly thankful that we came before your Honor. I put it to your Honor's conscience, that this being a *judicial* day which these men undertook to dispatch, you can not approve it. You would have an *extraordinary* nightmare until your term expired, if you had made up such a record as they have brought in here, and had condemned a man disheard, upon secret evidence taken behind his back.

Who are the defendants in this action? My learned friend says, Why, we are the Union Club! Well, I will tell you who they are, the Governing Committee—this very Governing Committee. They are a set of gentlemen, as good fellows as ever lived. But in this case they simply made a mistake. It is not their own fault. They ought to have consulted Mr. Cutler. Lawyers are never safe advisers in their own affairs. That is the trouble with Mr. Cadwalader. And Mr. Robinson—he would have lost this case, if he had not had the help of his senior associate—I mean he would have lost it before we had got half through; and it took his friend to help him lose it in the end.

Now it is not their fault that they made a mistake, because they thought they were omnipotent. The same error vitiated the proceedings in the Hutchinson case. It was stated by the chairman of the Governing Committee of the Stock Exchange, in explaining why they proceeded as they did, that they were advised by their counsel that the Governing Committee of the Stock Exchange were practically omnipotent. That was see the conviction and the severity upon which the learned Governors of the Union Club acted in this case.

But I have a further subject on which to address a few words to your Honor. I see that your patience is long enduring, but I don't wish to put it to too severe a test.

Your Honor now understands my theory perfectly, that insomuch as the substance of the charge, or half of the charge, or a part of the charge, or a *scintilla* of the charge, considered by this Governing Committee, upon which the plaintiff was expelled, was based upon evidence taken behind his back, of which he never had any notice, which he never had any opportunity to answer, and of which he had no possible knowledge until after his expulsion, inasmuch as it was based upon *that*, it cannot stand in the nature of things.

My learned friends concede that if there was bias, or partiality, the judgment ought not to stand. It is quite possible that these good fellows of the Governing Committee may have been a little *partial*. And when I call your Honor's attention to what, as it seems to me, demonstrates that they were partial, you will look a little further and see how it came about. Without meaning to commit any crime or offence, this bias, this partiality, is imperceptible and unknown, unfelt and unrealized. You put a partial committee-man on the stand, and he would swear that he was *not* partial. Put every one of these fourteen Governors on the stand, and they would say they had only the loftiest and most sacred judicial motives.

Now let us see—and here is where the "merits" of the case come under review, and the only point of view in which they do. I claim that this report and the action of the Governing Committee, *of themselves*, shows that they turned out the wrong man. That, I believe, is the general sentiment of the club to-day, although this is outside of the record, and I have no right to speak of it.

Your Honor has heard the story. Let me read it as it now appears in evidence, taking that which they had no right to consider, but did by mistake consider, taking also Loubat's statement in its strongest light against him. Taking it altogether, as it is hinted at in the report and would be stated by my learned friends on the other side, let us see whether they were *partial*? The remark was made, the offensive remark—which apparently never will go down to futurity in any form. Mr. Turnbull denounced Mr. Loubat as a blackguard for making it. That did not increase Loubat's offence, did it, or upon Mr. Carter's theory or mine make any call for expulsion?

Mr. Loubat goes to California. Turnbull publishes the remark, and his charge made in consequence of it, and the further accusation, that Loubat had run away. Loubat comes back, denounces it as false, gets the Willing letter, and sends it as proof of the falsehood, so far as it would go. Then, it being known as yet apparently to only twelve or fifteen persons, Turnbull and Belmont and Travers get together, and concoct the circular and distribute it broadcast through the boxes of the club to the thousand members; and the next week it gets out into the press.

There is the story. Here you have the respective elements of offence on one side and on the other. Loubat made the remark which ought never to have been repeated.

Mr. Carter—Ought never to have been made, you mean.

Mr. Choate—Yes, ought never to have been made. But the *public offence* in respect to it consists, as Mr. Carter and I agree, solely in its repetition.

Mr. Carter—Don't commit me to that opinion.

Mr. Choate.—The public repetition, the general publication of the remark, I hold up to your Honor as the greatest offence that has come into view in the case, and almost the greatest offence that one gentleman could commit in a betrayal of another. Loubat stinging under the whirlwind of passion, which must naturally have been excited by the charge of Turnbull, writes him a letter and gives him the lie—unreasonably, if you please. Well, that was an offence.

Then Turnbull—it being yet a matter within the control and grasp of a few gentlemen—he is inspired, I know not by whom, to publish it to the world. There, is another very great offence. The case is to these gentlemen, and their peculiar sensibility is then brought before the Governing Committee, who expel Loubat and *mildly censure* Turnbull. Guided by the moral standard, which says that Turnbull's offence was only deserving of censure, which would never go beyond himself and the committee—measured by that moral standard, tell me how expulsion could be visited upon the minor offences of Loubat? I would like to have any gentleman of the Union Club write an essay on that chapter of offence. Why, the partiality is of the gross[illegible] kind. Your Honor is not to pass upon the intrinsic merit of the censure, or on the intrinsic merit of the expulsion. You will look to see whether the committee was partial or impartial. If it was partial, their action cannot stand. They all agree to that.

HOW THE PARTIALITY IS ACCOUNTED FOR.

I call your Honor's attention to those insensible influences that work upon the minds of honest men meaning yet to do their duty. How do you account for that partiality, how do you account for that unequal, that grossly unequal result—keeping in a Club the man who had been guilty of the greater, and expelling the man who and committed the minor offence? Well, you find amongst the judges was a near relative of Turnbull, and that he urged the others to expel his enemy to keep in his kinsman. This he certainly did, for he seconded the motion. You find a man sitting there as judge who ought not to have been there, not only voting himself, but urging his associates by the force of his personal authority. You find a brother of Turnbull on the committee, a man concerning whom, in all the investigations of this case, nothing but good appears, a man who appears to have been exceedingly active, and his associates say an exceedingly influential member of the committee. What is the situation in which he was placed? Of course he did not say a word; of course they did not say a word to him. But anybody who knows William Turnbull, as well as I know him, knows that his associates in the committee would against themselves, almost against their consciences, and yet insensibly, do all they could to help him. They would labor to find some qualifying, some mitigating circumstances in favor of which they would not find, or Turnbull would. And then if you find that, three nights before, Henry Turnbull had been dining at the house of one of these fourteen men, one of his Governing Committee, and that another of the Governing Committee was a fellow guest, and that they had their legs under the same mahogany from 7 o'clock until 10, can you not perceive some insensible influence going on there? Would there not be a little involuntary, unintended, but inevitable inclination in favor of Turnbull and against Loubat? Then you find another of these Governors is represented to whom something has been said, and justly said, that might account for it. You find another of these Governors very active, very influential in the committee and in the club itself—*multum in parvo* of the Union Club itself. He is the whole incorporated. In one body—I mean for the purposes of government, for the purposes of influence, and for the purposes of control—lately named the King of the Union Club, who upon the stand admits a strong *present bias* against Loubat. You find his relations to Turnbull to be a little strained, and his relations to Loubat a little peculiar. That Loubat's letter had been carried at midnight from Turnbull to Loubat which formed a part of the circular—how came he to carry that? Well, at the request of Mr. Belmont. I need not say to your Honor that next to Mr. King himself Mr. Belmont is probably the most influential favor in the Union Club. Belmont, says Turnbull, wants you to take care for me to Mr. Loubat. Well, why? Because notes of such a character, as Belmont says, and he is great authority on the subject, are not to be trusted to messenger boys, but, on the contrary, carried by friend. "Can't you take it?" Of course I can. I can take up the letter. He asks it. The file of the books of it, smells of it, does not represent it, although it is unsealed. Said he: Is it hostile? No, no, says Turnbull, it is not hostile, it is merely demanding proofs, it is the first step toward hostility. Well, if it is not hostile, if it don't require me to back it up, I will take it. If it is not sealed, he will fire it off. He implied he would "not take a hostile note, one that he would have to stand by and second, but he would come as near to it as that in the service of his friend Turnbull. But he says he was in particular friend—and he only *happened* to be there, that was all.

The Court—Was not that neutralized the next day by his taking a message from Mr. Loubat to the other side?

Mr. Choate—No; because that is what he was sent by Turnbull to get. That was a service by Turnbull. That was complicating the midnight business. He says he did not get Loubat out of bed; but recollections might differ about that.

Well, the letter says, Oliver K. King, my friend—this letter I send you by the hands of O. K. King, my friend. It is very odd, Mr. King's recollection about that. Turnbull brought it out and asked him to deliver it in lieu of a messenger boy, because he *happened* to meet him, and you open the letter and you find "my friend O. K. King," already written in.

MR. KING'S RELATIONS WITH MR. LOUBAT.

Then Mr. King says he was a great friend of William Turnbull. Let that go for what it is worth. What were his relations on the other side, with Loubat, that I say were strained? He says they were not. He says, well, he was on about as good terms with one as with the other. Let us see. It appears that in March, 1880, Mr. Loubat was permitted to give a dinner at the Union Club in a private room to some Swedish officers whom he was entertaining. A gentleman, another member of the Club, was in another room. The doors connected, or the rooms were separated by folding doors, each having a door leading into the hall. While Loubat's dinner was progressing, there was a noise of shouting, and uproar in the other room. I don't know how it arose. Mr. Carter says it was one of the features of the Union Club to have the best things to eat and the best things to drink. At any rate, the uproar arose. Mr. Loubat sent down, finding that Mr. King was in the room below, the public room, at dinner, and asked that the door of Johnson's be kept closed. No satisfaction is obtained, although King agrees that that was the only remedy possible for the occasion that Loubat had. There was an active man on the Governing Committee, secretary of the club, in the house, who had authority to afford him the remedy that he sought to have had. Whereupon Mr. Loubat goes down and approaches him, and with gesticulations and with shrugs of the shoulders, and with manipulations of the eyebrows and all kinds of manifestations which only a Frenchman can produce, he frightened Mr. King very much, and says that if he does not order the door shut, he will hold him personally responsible. Now you get Mr. King twice over involved in a personal responsibility. Once when he was to carry that letter when he found it was not hostile, and then upon this threat of Loubat to hold him personally responsible for not doing his duty, as