PERUVIAN CELEBRATIONS.

The Festivals of San Jose and Corpus Christi.

SANTA ROSA, THE ONLY FEMALE SAINT IN THE CALENDAR.

Strange Ceremonies on Fiesta Days in Arequipa—Bare-footed Monks With "Lean and Hungry Looks"—San Martin de Poras.

[Special correspondence of the RECORD-UNION]

AREQUIPA, Peru, 1890.

We arose with the lark on the *fiesta* day of Saint Joseph, so as to miss none of the strange ceremonials, having been assured that the best place to view them was the balcony of our own rooms in the hotel. Presently a deafening sound of church bells, every bell in the city being beaten, might and main, by boys up in the belfries, accompanied by a terrific fizzing of fireworks, announced that something was about to happen.

Down the narrow street came the procession; first a brass band playing lively airs, then an enormous crowd of priests, monks and nuns, men, women and children, completely filling the thoroughfare as far as the eye could see, and in the midst of all a number of life-size wooden figures, each borne upon a platform to which long poles were lashed, upheld on the shoulders of bare-headed Indians. Some of the images were carried with comparative ease, while others were so burdensome that the bearers were frequently compelled to lower them ignominiously to the ground, thus halting the whole multitude.

At the head, of course, came San Jose, in whose honor was the celebration, in a yellow brocaded gown to match his yellow curls, looking as meek and gullible as his character is generally portrayed. Then came a tall and stately virgin, arrayed in blue satin garnished with pearls and veiled like a bride, surrounded by billowy puffs of pale blue tulle, spangled to represent the starry heavens. Among a number of other saints and saintesses was a small female figure, to us unaccountable, but which received especial respect and attention. It was poised in the attitude of dancing, dressed in a very short, full skirt of white tissue like that of a ballet girl, with a golden crown upon the long curls of red hair, a pair of scales in one hand and a short, curved sword held aloft in the other. Each figure was preceded by a number of little girls strewing paper flowers in its path from silver baskets, while, crowding the pavement on both sides, marched a multitude of nuns, all with black mantas enveloping their bowed heads so that little of their faces was visible. Some of them wore blue ribbons over their shoulders, meeting on the breast, where a wooden cross was suspended; others had crimson ribbons arranged in the same way, with brass crucifixes. Some had ropes tied around the waist, some a long leather strap dangling at the right-hand side. One group was composed of elderly women, dressed precisely like the begging friars of San Francisco, with gowns, cloaks and cowls of rough gray woolen; while the good Sisters of Charity appeared in their usual frocks of coarse blue cotton with voluminous aprons of the same material and wide white bonnets starched stiff as shingles.

There were monks of all Orders, some bare-footed, and, like Cassius, "with a lean and hungry look;" others silk-stockinged and kid-slippered, triple-chinned, bow-windowed and oily. The habits of some were snowy white from top to toe, shirts, cloaks, hats and all, while others were as black as so many ravens. There was a multitude of gray friars from the Resoleta, and a few with large scarlet crosses sewn on their sable gowns. There was the Archbishop clad in cardinal, Bishops in purple and gold-brocade, and acolytes in scarlet and lace swinging burning censors. Several brass bands were placed at intervals along the line, and now and then the monks and friars chanted a *miserere*, assisted by the shrill voices of nuns and acolytes; while the rear was brought up by a regiment of soldiers with drawn bayonets, marching with a peculiar swaying motion of their bodies in time with the music.

Flags were flying from every housetop along the line of march, and a constant fusilade of crackers and other fireworks was kept up, accompanied by the incessant clatter of bells and the booming of cannon. On overlooking balconies and the flat roofs of the houses stood men and women with long poles in their hands. To the end of each pole was tied a small basket, the latter filled with dried rose-leaves, bits of tinsel and bright-colored paper cut into bits, and as the figures passed beneath, the poles were thrust out and the contents of the baskets emptied on their heads.

At frequent intervals along the route ropes have been stretched across the street, from house-top to house-top, a dozen ropes in a group, each closely hung with tiny flags of tissue paper in brilliant colors. The fallen images had a hard time of it to get under these ropes. The meek San Jose looked in imminent danger of being beheaded, and was more than once caught fast by the chin; while the stately Virgin had her crown knocked off, which was quickly rescued from the dust by a ragged Indian, who reverently knelt, kissed it, crossed himself and then climbed like a cat with his dirty bare feet, up over the pale blue satin train and spangled billows, to replace it. Thus; with all "pomp and circumstance," the sacred effigies were carried from their home in the in the church of San Domingo to the cathedral, where they were set down among the effigies of the latter sanctuary while mass was said; and then they were solemnly toted back again, reminding one irresistibly of the way children take their dolls and play "go-a-visiting."

Another procession, dependent upon no *fiesta* day, is often seen in the streets of all Peruvian cities, vis.: the Holy Host being carried to the bedside of some dying person. First comes a boy ringing a hand-bell as for an auction. Then comes an acolyte in scarlet and lace, swinging a smoking censor, closely followed by other acolytes, each carrying some sacred emblem or device, whose use or signification is known to all good Catholics. Then comes the priest, with the holy ark containing the sacrament, followed by more priests, more acolytes and burning incense, the rear being brought up by a squad of soldiers with drawn bayonets. Over the holy ark and the head of the officiating priest is held a gorgeous canopy of cloth-of-gold. When the first tinkling of the bell is heard men, women and children fall on their knees—in the streets, in the shops, on their balconies—no matter for rain or mud or whatever may betide, kneel you must, wherever you are, and as if you meant it, too, unless you do as some of the heretical "Gringos" (a derisive epithet applied to Anglo-Saxons), turn a corner, run down a side street, or dodge out of sight at the first tinkling of the bell.

To remain standing while the host is carried by, would certainly entail serious consequences, for man or woman, citizen or stranger, would probably be knocked down instanter, or marched off to jail, if not actually shot or stabbed by some fanatic. I have known a few such cases myself, from the cobbler who was killed in the City of Mexico because he knelt on his bench instead of on the floor—Roman Catholic though he was—to an American tourist right here in Arequipa not many days ago, who stood open-mouthed, wondering what the queer procession meant with tingling bell and band of music, when the priest, with a scowl on his face, merely glanced at the soldiers behind him, and two of them arrested the stranger and marched him off to jail. Arriving there, an officer demanded to know why in blankety blank he didn't kneel when he ought to! In the few words of broken Spanish which the gentleman could command, he finally succeded in making it understood that he had meant no disrespect to the church or its institutions, but was entirely ignorant of the character of the procession; when, after some dark threats and considerable bullying, he was released.

A party of jolly young English tars had a narrow escape here last year. Their ship lying at Mollendo, they came by rail over the mountains to Arequipa to see the sights. It happened to be an important fiesta day, and a procession was out in full feather. The Englishmen naturally stopped to gaze upon it, but never thought of kneeling or removing their hats, as, to use their own words, it was "none of their funeral," and signified nothing religious to them. But it came near to being their "funeral." As they stood still in a group, silent, interested, and doing nothing but stare, somebody stepped up and violently knocked off the hat of one of them, and instantly measured his length on the pavement, assisted by a brawny English fist. Immediately excitement spread like wildfire. The procession stopped, the priests scowled darkly, the people crowded around, and the soldiers rushed up with drawn bayonets. Things looked pretty dark for the five jolly tars, unarmed, against a howling mob; but they squared their backs against a wall, doubled their fists and prepared to fight till the last gasp.

At this alarming juncture a young Arequipean, more enlightened than most of his neighbors, and known to all to be a good and pious citizen as well as the representative of one of the "first families," sprang between the soldiers and the undaunted Englishman and proceeded to harangue the crowd. Said he: "I am ashamed of my country and my church for such a scene as this. Are we barbarians, that foreigners cannot come among us without being assaulted and perhaps murdered? These gentleman who have come to view our city know nothing of our language, have different religious customs in their own country, and are entirely ignorant of the purport of this procession. They do not know that they should kneel, or that their hats should be removed in accordance with our ideas. The constitution of this republic guarantees liberty of conscience and religion to all men within our borders; is this the way we carry out its principles?"

On the day of Corpus Christi (body of Christ) we went out to a suburban village to witness the celebration. Words can hardly do justice to the quaint and curious scene, for to fully appreciate it one should see the people, the blanketed Indians and equally earnest devotees of higher degree, the adobe-walled *casas* and big, dim church, the glorious sunshine, never too hot nor too cold in this favored altitude, and above all the snow-topped mountains. At one end of the street, named "The Devil's Pocket," a curious altar had been erected of trees and bushes, representing the hanging of Absalom by his long hair, a figure being absolutely suspended in that manner to a tree, while another image, dressed like a royal robber, appeared in the act of shooting him with bow and arrows. On the other side of the street was a huge cross, higher than the houses, upon which appeared all the emblems of the crucifixion, including a common two-gallon jug, a dice-box and a wooden rooster tied to the top. A little farther down the street was another wooden altar, upon which was dramatically depicted the history of Judith and Holofernes. The heroine was dressed in a gown of scarlet and yellow, of rather too modern make, having a looped-up polonaise and a suspicion of *panier*, while Holofernes looked as stolidly wooden, as he really was.

Every window and balcony was a decorated with wreaths of flowers, mostly artificial, and crowded with ladies dressed in their best—ball dresses to our thinking, being mostly of pale-hued silks, satins and muslins, low-necked, nosleeved, and set off with jewels and flowers. At length the procession issued from the church, taking both sides of the street at once, each person in it carrying a lighted candle. Then came several young men, the beaux of the town, in full evening dress, carrying tall black crosses entwined with purple flowers. These walked in the middle of the road, up and down to clear the way. Then came a group of little children, in white satin dresses, white satin shoes, white kid gloves and white wreaths on their heads, strewing flowers in the path of the priests who carried the sacred symbols, the mitre and the cross and the keys of Saint Peter, an archbishop's crozier, several golden staffs and a magnificent white satin banner heavily embroidered with gold. Behind these walked the Archbishop, bearing the Host in both hands, surrounded by a score of priests, who carried a canopy fringed with gold above his head and accompanied by the Papal Nuncio, a troop of soldiers and five or six bands of music playing gay military airs.

By the way, the only American woman who ever had the honor of canonization lived and died in Peru. She was Santa Rosa, hereabouts known as *La Patrona de todas las Americas*—"The Patroness of all the Americas." She was born in Lima, in April of 1856, of the usual "poor but honest parents," and was one of a very large family. From earliest childhood she is said to have displayed a supernatural amount of holiness, but, unlike the usual fate of good children in the story books, did not die young in consequence. At 5 years of age, against the wishes of her parents, she consecrated herself, body and soul, to the most vigorous conventional order then known, that of St. Catherine of Siennos, taking vows to eschew the world and all the pomps and pleasures thereof, never to eat meat or sleep in a bed, perpetual celibacy, and other promises whose full meaning a child could not have understood.

When 15 years old she was examined by six noted theologians, appointed for that purpose by the Archbishop of Lima, who came to the unscriptural conclusion that she had never once in her life departed from the right path, in thought or deed. After this she entered the third order of St. Domino, that of Saint Catharine, and thenceforth never ceased to exhort the priests to go forth and seek martyrdom among the wild heathen tribes of the Montana. Martyrdom for herself and others seems to have been her holy hobby, for on one occasion when a Dutch squadron was reported to be off Callao, she fervently prayed that they might take and pillage Lima, so that she might attain to the honors of a martyr, a petition which, to say the least of it, was somewhat selfish! But she died peaceably at the age of 31, and her funeral was made the occasion of extraordinary pomp, not at all in accordance with the austere life she had led, nor the customs of her sisterhood of Saint Catharine, to be buried, uncoffined, at dead of night, in an unmarked grave which none of the "world's people" might be able to identify.

The reigning Viceroy, Prince de Esquilache, the Archbishop and all the dignitaries of Lima followed her corpse to its last resting-place; and in the Church of St. Dominic, whose tall, graceful tower its one of the most picturesque objects in the old Peruvian capital, by the side of its great High Altar, may to-day be seen a beautiful statue of La Patrona, reclining on a bed of marble. At the suggestion of Cardinal Azzolini, Pope Clement IX. proclaimed her a saint; and her canonization was completed by Pope Clement X., in the year 1671. The 26th of August was set aside for her *fiesta* throughout the Roman Catholic world, and the day has ever since been celebrated in Lima by a splendid procession, participated in by all the clergy, monks, nuns and thousands of the faithful who leave her shrine laden with flowers.

Peru has supplied one other saint to the Catholic calendar—San Martin de Poras, who was a Dominican monk and a negro. He is always represented with a broom in one hand and a pile of small loaves of unleavened bread in the other, supposed to indicate his cleanliness and his charity, as well as his life of servitude and alms-asking.

FANNIE B. WARD.

"Marvel of Typographical Neatness."

[Daily San Diegan, Jan. 13th.]

The Sacramento RECORD-UNION is out in a new dress, and it is a marvel of typographical neatness. The RECORD-UNION is unquestionably one of the ablest journals on the coast, and we are pleased to note that it seems to be enjoying so large a measure of prosperity as is indicated by this improvement.

ONE CHRISTMAS EVE.

[Written for the SUNDAY UNION by "Lynn."]

It was the day before Christmas—a glad Christmastime over all over the land—and everybody everywhere was making ready for the best holiday in the whole year. The streets of Rochester were gay with Christmas supplies; the markets displayed their tempting meats and fruits, while leaden skies and the first fine feathery flakes told that Dame Nature was contributing her usual share of snow for the merry sleigh-riders of the morrow.

From the forests had been borne boughs of green, and an aspect of summer was given to the hard-winter-fact of death. The color of perennial life swung about in festoons, and lo! the blooming evergreen tree—blooming with buds of flame and fruits of all conceivable gifts—stood forth in the center of the sitting-room of Mrs. Lewis, whose husband was engineer in the employ of the New York Central Railway.

The window-blinds were open, the curtains had been drawn aside and one could look from the street through the halo of fast-falling snow into the bright room where all seemed warmth and plenty. A blazing fire burned in the grate, and two little children danced about in eager, restless joy, while the oldest son, Harley Lewis, who had just returned from business, stood by with his overcoat still on, while the mother added the packages which he had just brought in to the already heavily-laden tree.

While awaiting the return of Mr. Lewis, whose train was due at 8:30, the members of the household gathered about the fire, making a pretty group of silhouettes on the curtains in the background. The mother occupied the time telling them the old, yet never threadbare story of Daniel, foretelling that the birth of Christ should be announced by the appearance of a new star, and that, at the time predicted, a new star did appear. Faith in prophecy led the Wise Men of the East to brave the difficulties of a long, tedious journey over mountains, valleys, and deserts, and lo! the new star which they saw "went before them till it came and stood over where the young child lay." Then the Wise Men proclaimed in the ears of the astonished, affrighted, unbelieving people of Jerusalem the birth of its King, in whom was blended earth and heaven, humanity and divinity—God and man. That shepherds were watching by their drowsy flocks at night, and suddenly the heavens' azure gates swung back, and lo! was heard the angels' story of good news, and an angel chorus singing the "Gloria in Excelsis."

"Hark!" said little Alice, who had climbed in her mother's arms, "isn't that papa's train?"

"No, dear, papa's train isn't due yet for twelve minutes," said Harley, looking at his watch and still holding it in his hand, as if by doing so he could speed the train that was to bring papa to them.

"Sing something, mamma; that will shorten the time, and make believe the train will come quicker," said Clara, the eldest of the girls. Then the mother's sweet, clear voice rang out with:

> Brightest and best of the suns of the morning,
> Dawn on our darkness and lend us thy aid;
> Star in the east, the horizon adorning,
> Guide where our infant redeemer was laid.

Twelve minutes went by. Papa's train whistled and sped on its onward journey. "He will be here very soon now. We will light the candles on the tree, that with his home-coming he may realize more fully our Christmas greeting," said Mrs. Lewis.

But no papa arrived. The clock chimed out the hour of 9. A flash of light suddenly appeared in their midst and in the twinkling of an eye was gone, as though some disembodied spirit had hovered in their midst a moment before taking its departure from this world into the unknown.

Mrs. Lewis and Harley glanced quickly at each other, each apprehensive of some ill having happened to the father.

Harley arose, put on his overcoat and calling one of the servants to accompany him, hurriedly passed out to search for the absent one.

The little ones grew tired waiting, but not a hand would touch the presents on the tree until papa would come, for papa had promised to "play" Santa Claus for them.

"Sing again, Mamma," said Alice, as she cuddled closer in her mother's arms. Again the mother's voice, but this time trembling, sang out:

> Hush, my dear, be still and slumber,
> Holy angels guard thy bed.
> Heavenly blessings without number
> Gently fall around thy head.
>
> Hush, my dear, lie still and slumber.

The mother sang it over and over again, soft and low,

> 'Till the blue eyes blinked no longer,
> 'Till the rosy lids closed fast,
> Tired nature proving stronger
> Than the witching song at last.

"I'm so sleepy, mamma," said the little one as sleep was overcoming the dainty lids which she had tried, but vainly to keep open. "When papa comes tell him a Merry Christmas," and the little one was soon in dreamland.

Mrs. Lewis placed her gently on the sofa and threw a light robe over her, just as a man ran hurriedly up the broad steps and rang the bell. She hastened to the hall to greet, as she supposed, her husband. Clara, who had followed her mother, cried out, "A Merry Christmas to you papa, dear," but as the bright light from the hall chandelier streamed full in the face of the man, they recognized him as a messenger from the railroad office at the depot. He accepted her invitation to walk in, and as he took the proffered chair and glanced at the tree and other indications of festivity awaiting the father's arrival, he shrank, more than ever, from telling the sad news. But duty, however unpleasant, must be done sometimes.

Levi Lewis, one of the most trustworthy engineers in the employ of the road, was in the cab of No. 26 when it stood panting and wheezing in the Buffalo depot. He had seen to it that everything was in the best of condition for a fast run and he took his seat and pulled the throttle open. The train was twelve minutes behind time, which he wished to make up between Buffalo and Rochester. With a bound the steel steed was off and the long, heavy train dashed through the country at the rate of a mile a minute. Jason Parker, the fireman, on the other side of the cab, was kept so busy during the fast run shoveling coal into the furnace that he had little time to notice what was passing around him.

The train sped rapidly through the little town of Brockport, and the fireman noticed that engineer Lewis was almost as pale as death as he sat on his seat, his right hand grasping the throat of the throttle and his left firmly gripping the reversing bar.

The engine groaned and trembled as it bounded over the glittering rails, and as the fireman looked at the engineer he knew that he was suffering. The big engine rushed madly through the little hamlet of Adam's Beach, its shrill whistle screaming an alarm as it flew. But that last whistle sounded the death-knell of the brave engineer. He had tried to beat time in its flight, but time had come off the victor, for just as the train went spinning and twisting through the country a few miles beyond Adam's Beach, the engineer threw back his head, his body wavered for the moment and he fell heavily on the iron floor—dead. He still grasped the throttle, and in his fall the weight of his body pulled it still farther open.

The terrified fireman knew not what to do. The train had attained a frightful speed and something must be done to stop it. By a powerful effort he wrenched the dead man's hand from the throttle and shut off the steam. Then he applied the air-brakes and the lightning express quickly came to a standstill.

The conductor and trainmen quickly ran to the cab and there found the dead body stretched out upon the floor. They carried him tenderly to the baggage-car and a physician, who happened to be on the train, was hastily summoned. He pronounced life extinct, and said that death had been instantaneous and had been caused by heart disease.

The fireman then took charge of the train until Rochester was reached, where a new engineer was procured, and where all that remained of the brave engineer, Lewis, was taken charge of at the depot, while a messenger was sent to inform the anxious family. When Harley and the old servant arrived at the depot they were grief-stricken.

"I feared something of this kind when that flash of light passed through the room. Now I believe it was my father's spirit come to tell us good bye," said Harley.

It was a sad procession that moved slowly through the gently-falling snow, conveying the corpse to the mansion whose occupants had anticipated such a joyous meeting.

The Christmas lights were extinguished, blinds closed, and sad and noiselessly mother and children moved about the house. But they mourned not as those having no hope, for Mr. Lewis was one of the "Wise Men of the Earth," to whom the Star of Bethlehem was a pillar of cloud by day, and of fire by night, guiding him onward in life—ever onward in the path of Him whose birthday the millions all over the land were celebrating that Christmas night, and who said "Because I live, ye shall live also."

O, Prince of Peace! Come and fill with consolation these troubled hearts; convince them that through the birth and death of the Star of Bethlehem—guide of faithful souls—was gained victory over the grave. Aye! A Merry Christmas to you, papa dear.

PEOPLE WHO ARE TALKED ABOUT.

A nephew of the great Dr. Schliemann, Carl Schliemann, is singing in the Emma Juch Opera Company.

There are nineteen millionaires in the United States Senate, whose combined wealth foots up about $140,000,000.

Think of 2,000 clocks, of all ages, varieties, and forms of beauty, and all ticking for George W. Childs, in a room specially designed for them.

Dr. W. H. Milburn, the blind Chaplain of the House of Representatives, is writing a book on the pioneers of the Mississippi Valley. He has a collaborator.

The Duchess d'Uzes has lost $80,000 by the flight of a French banker. It is said that she has also sunk $650,000 in the *Gaulois*, a Parisian Royalist newspaper.

Ida Lewis, the famous life-saver, has been offered a chance to go on the stage as the hero in a life-saving scene, but she prefers her station in the Newport lighthouse.

Gustav Freitag, the famous German novelist, is dangerously ill. His physicians have ordered his removal to a resort for invalids in the southern part of Europe.

Mrs. Chandler, the widow of Zachariah Chandler, is erecting a beautiful house in Washington. Its walls are of pink-yellow brick, with trimmings of gray-yellow stone.

George T. Brewster, who designed the figure "Indiana" for the Soldiers' and Sailors' Monument to be erected at Indianapolis, is a native of Massachusetts, and is not yet 28 years of age.

Mrs. Dolph, wife of the Oregon Senator, is one of the pretty women of Washington. She is a brunette, of fine figure and handsome face. She is a farmer's daughter and was a dairymaid in her youth.

Professor R. H. Jesse, of Tulane University, New Orleans, who has been elected President of the Missouri State University, is a Virginian by birth, and a graduate of the Virginia State University.

Edwin B. Winans, who will be the first Democratic Governor that Michigan has had in thirty years, is a conservative, bald-headed old farmer, with a neatly trimmed beard and kindly eyes beaming out of gold spectacles.

Sir John Millais' eyesight, which gave him a good deal of trouble and threatened to interfere with his painting, has improved. He has given himself the advantage of a very long rest, and his general health is excellent.

Archduchess Maria Dorothea is one of the beauties of the Austrian Imperial family. She is above medium hight, with dark hair and eyes and a fresh complexion. She is noted for her charities and for her skill in piano playing.

Miss Annie Reeve Aldrich, who is achieving some reputation as a poet and story writer, is a tall, graceful and rather statuesque girl. Her manner are very charming, and she is proud of the fact that she comes of a good old English family.

German musical papers say that Dr. Hans Von Buelow has decided to give up his public piano recitals. It is said that the state of the great pianist's health will not allow him to do more than attend to the direction of the Philharmonic Society of Berlin.

Mrs. Harrison never touches wine, punch or liquor of any description, and if her wishes were carried out the strongest beverage served at White House state dinners and banquets would be Apolinaris water. On the President's private table wine is never served.

The widow of Dr. Schliemann, the great Grecian archæologist, is hardly more than a girl in years, but she is a beautiful woman, and has been most carefully educated. She knows several languages besides Greek, and is said to know nearly all the Iliad by heart.

Ye Cha You, the Corean Charge d'Affairs at Washington, is believed never to have seen his little son, who died recently, as the Corean custom prevents a father from seeing a child until three months after its birth, and the little one was only two months old when it died.

Bertha Weldon, a Peoria, Ill., spinster, solved the tin-horn nuisance in that town on Christmas eve. She stood at her gate and every boy who came along with a horn or other sound nuisance received a bag of popcorn and package of candy. Hers was a quiet neighborhood after that.

Queen Victoria is said to believe that the House of Orleans is unlucky, and does not wish their bad luck to overcloud her family. She has also, says a correspondent, a clear view of the necessity of not being on bad terms, through the fault of her own house, with the French Republic.

Edwin A. Abbey and John T. Sargent are to decorate a room each in the new Public Library of Boston. It is expected that this building when completed will rank with the finest in America. At all events, the Hubites make this claim. It is hoped to have each room of the edifice decorated by a different artist.

Baron Nordenskjold, the Swedish explorer and a recognized authority on Greenland, has written a letter to Professor Horsford, of Cambridge, in which he expresses full accord with his view that the Norsemen frequently and numerously visited the American continent and formed an element ih the race mixture here.

The ladies of Sorosis are not beautiful, according to a description of one of them, but they look earnest and sensible, and undeniably compose the cream of New York's literary women. Mrs. Clymer, the club's old-time President and best looking member as well, is a slender and graceful blonde, with a sweet voice and fine eyes.

United States Treasurer Huston is a devoted horseman, and at his place at Connersville, Ind., he has handsome stables, the stalls of which contain valuable horses, of aristocratic lineage and noble records. Mr. Huston is a student of the trotting horse and his stables invariably carry off prizes when they are exhibited at fairs and horse shows.

Dr. Henneage Gibbs, of the Michigan University, the man who has helped discover a consumption cure to rival Dr. Koch's, has a daughter who is a mighty hunter. He, too, loves out-of-doors, and, with his child, is often seen tramping afield with dog and gun. The two are familiar figures on the hills and fields about the Michigan Athens.

Young Henry George Savage, who is exploring some of the unknown lands of Japan, is a grandson of Walter Savage Landor, and an artist of note. He has traveled into the interior of Hokhaido and to the Kurile Islands, going on horseback 2,800 miles and walking some 400 miles. For seventy days he lived entirely on raw fish, seaweed and rice.

Mrs. Mackay's stay in Charles street is to be brief, for her husband has just purchased the slendid house in Carlton House Terrace, on which Mrs. Sandford expended a little over £100,000. There is nothing more palatial in London, for the marble staircase, only just completed, alone cost £20,000, and all the rooms have been fitted up in the most magnificent manner.

SUPREME COURT DECISIONS.

[Filed January 4, 1891.]

Appeal from Superior Court, San Francisco—John Hunt, Judge.

For people, Eugene N. Deuprey, Samuel M. Shortridge, E. F. Fitzpatrick, Attorney-General Geo. A. Johnson.

For appellant, George C. Ross, George A. Knight,

DEPARTMENT ONE.

PEOPLE, Respondent, vs. POWELL, Appellant, } No. 20,698.

The appellant was charged by information, in the County of San Mateo, with the crime of murder, alleged to have been committed in that county. He was twice tried in said county, and the jury failed to agree upon a verdict at each trial. Without any effort made to procure a third jury, the District Attorney moved the court, under Section 1033 of the Penal Code, for a change of venue to another county. The material part of the application was as follows: "Said District Attorney, on behalf of the People of the State of California, hereby makes application to said court for a change of venue from said County of San Mateo, to some convenient county, of the above case of the People of the State of California vs. Llewellyn A. Powell, on the grounds and for the reasons *that a fair and impartial jury cannot be obtained for the trial of said case in said County of San Mateo*, the same being the county where said action is now pending; and hereby states the following facts and causes for making said application, viz.: that the above-named defendant is charged, by information, filed in said Superior Court of said County of San Mateo, with the crime of murder, alleged to have been committed in the month of November, 1887, in killing, in said county, at said time, one Ralph S. Smith; that said defendant has had two trials in said Superior Court, on said charge; that the first trial was had in April, 1888, and the second trial in August, 1888; that at said first trial there were summoned from all parts of said county, to appear before said court, to serve as jurors in said case, seventy-two citizens, and of said number sixty-seven were examined before a jury could be obtained in said case; that at said second trial there were summoned from all parts of said county, to appear before said court to serve as jurors in said case, one hundred and eighty-four citizens, and of said number, one hundred and seventy-three were examined before a jury could be obtained to try said case; that said county is small in size and population, and a large number of its citizens, whose names appear upon its assessment roll, are Italians and Portuguese, and are disqualified from serving as jurors, in consequence of not understanding the English language; that, also, a large number of those citizens, whose names appear upon the assessment roll of said county, live in the City and County of San Francisco, and are, therefore, not liable to jury duty in said County of San Mateo; that said case was so horrible in its nature that it attracted the attention of the people of, and has been fully discussed in all parts of said County of San Mateo; that said case has also been discussed, more or less, by the citizens summoned to appear to serve as jurors, as aforesaid; that there are two local weekly newspapers in said county, having a general circulation therein, and the newspapers of the City and County of San Francisco also have a widespread circulation throughout said County of San Mateo, and by and through the columns of the newspapers aforesaid, the facts of said case, and the trials thereof, have been fully discussed before the citizens of said County of San Mateo.

"For the reasons herein set forth, said District Attorney says that *a fair and impartial jury cannot be obtained to try said case in said County of San Mateo*, and said District Attorney therefore prays that said court make an order transferring said action of the People of the State of California vs. Llewellyn A. Powell, now pending in said court, as aforesaid, to some convenient county, free from like objections."

This application was supported by the following affidavit of the District Attorney:

"George H. Buck, being duly sworn, says that he is the District Attorney of said county of San Mateo, and is the same person who made and signed the foregoing application; that as such District Attorney he makes said application; that he has read said application, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters he believes it to be true."

In addition to this affidavit there were written others, by citizens of said county, in which each of the affiants, after alleging his residence in the county and acquaintance with the people thereof, alleged that he knew the contents of the affidavit of the District Attorney and that "said affidavit is *well-founded and true*."

The Assessor of the county also made affidavit that he had examined the last assessment of the county and that there were about six hundred persons among those whose names appeared on the assessment roll, who had the necessary qualifications, and were competent to serve, as jurors of said county. The Sheriff of the county also made the following affidavit in support of the application:

"W. H. Kinne, being duly sworn, says: That he is now, and has been for more than two years last past, the Sheriff of said county; that at the two trials of the above case, in said county, he summoned most of the jury in both of the said trials of said case; that in doing so he was obliged to, and did go to and visit all parts of said county; that he was a candidate for re-election at the last election, in the fall of 1888, for the office of Sheriff of said county, and during the said campaign he visited all portions of said county many times; that he has also seen many people of and from all parts of said county at the county seat, to wit: at Redwood City, during the past year; that he has had an opportunity to, and has discussed the merits of the case of The People of the State of California vs. Llewellyn A. Powell, now pending in said Superior Court, and that he understands the feelings of the people in regard to said case, and has often heard them express their opinion about said case; that from such expression of the people, so interviewed, he says *that a fair and impartial jury cannot be obtained* to try said case in said county."

The defendant objected to the granting of the change of venue, and in opposition to the application therefor filed the affidavit of one of his attorneys and seventeen other citizens of the county, to the effect that they were residents of the county and knew many of the other residents thereof, and that in their opinion a fair and impartial jury could be obtained in said county to try the defendant.

The application was granted and the venue changed to the city and county of San Francisco. When the case reached that county the defendant objected to being tried therein, on the grounds, in substance, that the offense was charged to have been committed in the county of San Mateo; that the Superior Court of that county alone had jurisdiction to try the defendant; and, that the court of the City and County of San Francisco had no jurisdiction in the matter, and moved that the cause be remanded to the County of San Mateo for trial. The objection and motion were overruled, the defendant put upon his trial, convicted of manslaughter, and sentenced to the State's Prison for the term of ten years. He moved for a new trial, which was denied, and now appeals to this court.

The change of venue was granted under Section 1,033 of the Penal Code, as amended, which provides:

"A criminal action may be removed from the court in which it is pending; * * * * *

"Second—On the application of the District Attorney, on the ground that from any cause *no jury can be obtained for the trial of the defendant* in the county where the action is pending."

The appellant contends, first, that this section of the Code, so far as it authorizes a change of venue on the application of the District Attorney, without the consent of the defendant, is in conflict with Section 7 of the bill of rights contained in the Constitution of this State, which provides: "The right of trial by jury shall be *secured* to all and remain *inviolate*."

The precise point urged upon us is that the effect of this clause in the bill of rights is to preserve and continue in force the right of trial by jury *as it existed at common law*, and that the common-law right was to a trial by jury selected from the vicinage or county. This calls upon us to determine, first, what the common-law right of trial by jury was, and, second, whether or not the right is the same under our constitution. We think the common-law right of trial by jury is clearly and definitely stated by Mr. Blackstone in his Commentaries (Book 4, page 350) as follows: "When, therefore, a prisoner, on his arraignment, has pleaded not guilty and for his trial hath put himself upon the county, which county the jury are, the Sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto;* that is, freeholders, without just exception, *and of the visne or neighborhood;* which is interpreted to be the county where the fact is committed." And Mr. Cooley, in his work on Constitutional Limitations (5th ed., page 392) says: "The jury must also be summoned from the vicinage where the crime is supposed to have been committed." Again, in Story on the Constitution: "By the *common law* the trial of all crimes is required to be in the *county* where they were committed. Nay, it originally carried its jealousy still farther and required that the jury itself should come from the *vicinage* of the place where the crime was alleged to be committed." (Story, Const., sections 1769, 1779, 1781, 1791.) See, also, Swart vs. Kimball (43 Mich., 448.)

There can be no doubt that such was the common-law right of trial by jury. We are led to inquire, therefore, whether the same right is given, or preserved, by our constitution, and if so, whether the section of the Penal Code under consideration is in conflict with this constitutional right. Our constitution does not define the right of trial by jury. It was a right then existing, the extent, scope and limitations of which were well understood, and the constitution simply provides that such right shall be secured and remain inviolate. If the right at common law was as above stated there can be no question but that an Act of the Legislature, authorizing the trial of a defendant out of the county where the offense is charged to have been committed, is an abridgement of the right and for that reason void. Such statutes have been almost uniformly condemned as unconstitutional in other States. (Kirk vs. State, 41 Tenn., 344; Wheeler vs. State, 24 Wis. 52; Osborn vs. State, 24 Ark. 629; State vs. Howard, 31 Vt. 414; Ex parte Rivers, 40 Ala. 712; State vs. Knapp, 40 Kan. 148.)

It is contended, by the respondent, that in the States in which these cases were decided the constitutions provided, in express terms, that one charged with crime should be entitled to a trial by a jury selected from the county or district where the offense is charged to have been committed and, therefore, the Statutes referred to were in direct conflict with the express requirements of the constitutions, while in this State, the constitution contains no such requirement. As to most of the States the fact contended for is true but not as to all of them. But can this make any difference? Does not our constitution confer upon a defendant charged with crime precisely the same right although not expressed in terms? We have seen that this was the well understood common-law right. This court has said that it is this same right that is held inviolate by our constitution. In Koppikus vs. State Capital Commissioners (16 Cal. 256), in discussing the effect of this constitutional provision, the court said: "The provision of the constitution, that 'the right of trial by jury shall be secured to all, and remain inviolate forever,' applies only to civil and criminal cases in which an issue of fact is joined. *The language was used with reference to the right as it exists as common law.* It is true, that the civil law was in force in this State at the time of the adoption of the constitution, but its framers were, with few exceptions, from States where the common law prevails, and where the language used has a well-defined meaning. The people who, by their votes, adopted the constitution, at least a vast majority of them, were also from countries where the common law is in force, and they looked upon the right secured as the right there known and there held inviolate. It is in this common law sense that the language has always been regarded by the courts of this State. It is a right 'secured to all,' and 'inviolate forever,' in cases in which it is exercised in the administration of justice according to the course of the common law, as that law is understood in the several States of the Union." See also Cassidy vs. Sullivan (64 Cal. 266.)

It is true the question before the court, in the cases cited, was as to the class of cases triable by jury, but the language used would have been just as appropriate and applicable if the question now before us had been under consideration. Mr. Cooley, in his work on Constitutional Limitations, in discussing the effect of such a constitutional provision as ours, says: "Accusations of criminal conduct are tried, at the common law, by jury; and wherever the right to this trial is guaranteed by the Constitution, without qualification or restriction, it must be understood as retained in all those cases which were triable by jury at the common law, *and with all the common law incidents to a jury trial*, so far, at least, as they can be regarded as tending to the protection of the accused. * * * Many of the incidents of a common law trial by jury are essential elements of the right. The jury must be indifferent between the prisoner and the Commonwealth; and to secure impartiality challenges are allowed, not only for cause, but also peremptory without assigning cause. *The jury must also be summoned from the vicinage where the crime is supposed to have been committed;* and the accused will thus have the benefit, on his trial, of his own good character and standing with his neighbors, if these he has preserved; and also of such knowledge as the jury may possess of the witness who may give evidence against him. He will also be able, with more certainty, to secure the attendance of his own witnesses." (Cooley, Const. Lim. 5th ed. pp. 390 to 393.)

This same doctrine, and the reasons for upholding it, are more fully stated by the same learned author and Judge in the case of Stuart vs. Kimball (43 Mich. 448), in which it said:

"The Constitution of the State provides that 'The right of trial by jury shall remain, but shall be deemed to be waived in all civil cases unless demanded by one of the parties in such manner as shall be prescribed by law.' (Art. VI. 3, 27.) The right is to *remain*. What right? Plainly the right as it existed before—the right to a trial by jury as it had become known to previous jurisprudence of the State. (Underwood vs. People, 32 Mich. 1.) The right is not described here; it is not said what shall be its incidents; it is mentioned as something well known and understood, under a particular name; and by implication, at least, even a waiver of its advantages is forbidden. If the accused himself cannot waive them, plainly the Legislature cannot take them away. The next section of the Constitution repeats the guaranty of this method of trial 'in every criminal prosecution,' and nothing is better settled on the authorities than that the Legislature cannot take away a single one of its substantial and beneficial incidents; opinions of Judges, 41 N. H. 550; Ward vs. People, 30 Mich. 116; and even the accused cannot waive any one of the essentials. Work vs. State, 2 Ohio (N. S.) 296; Cancemi vs. People, 18 N. Y. 128; Hill vs. People, 16 Mich. 251; Allen vs. State, 54 Ind., 461.

"Now that in jury trial it is implied that the trial shall be by jury of the vicinage is familiar law. Blackstone says the jurors must be of the *visne*, or neighborhood; which is interpreted to be of the county where the fact is committed: (4 Com., 350.) This is an old rule of the common law: Hawk, P. C., b. 2, C. 40; 2 Hale P. C., 264; and the rule was so strict and imperative that if an offense was committed partly in one county and partly in another, the offender was not punishable at all. (Hawk, P. C., b. 2, c. 25; 1 Chit., Cr. L. 177.) This over-nicety was long since dispensed with, but the old rule has in the main been preserved in its integrity to this day. It is true that Parliament as the supreme power of the realm made some exceptions, which are enumerated by Mr. Chitty in his treatise on Criminal Law (Vol. 1, p. 179), the chief of these being cases of supposed treason or misprision of treason examined before the Privy Council, and which under the statute of Henry VIII. might be tried in any county, and offenses of the like character committed out of the realm, and which by a statute of the same arbitrary reign were authorized to be tried in any county in England. But it is well known that the existence of such statutes with the threat to enforce them was one of the grievances which led to the separation of the American colonies from the British Empire. If they were forbidden by the unwritten Constitution of England, they are certainly unauthorized by the written Constitutions of the American States, in which the utmost pains have been taken to preserve all the securities of individual liberty. It has been doubted in some States whether it was competent even to permit a change of venue on the application of the State, to escape local passion, prejudice and interest: Kirk vs. State, 1 Cold. 344; Osborn vs. State, 24 Ark. 629; Wheeler vs. State, 24 Wis. 52; but this may be pressing the principle too far. State vs. Robinson, 14 Minn. 447; Gut vs. State, 9 Wall. 35. But no one doubts that the right to a trial by a jury of the vicinage is as complete and certain now as it ever was, and that in America it is indefeasible. (1 Bish., Cr. Law [2d ed.] § 552; Whart. Crim. Law., § 277; Paul vs. Detroit, 32 Mich. 108; Ward vs. People, 30 Mich. 116.)"

This case was decided under a Constitutional provision the same, in effect as our own, and is directly in point.

It may be added that the effect of holding this statute to be unconstitutional will be to render it necessary, in a case where no jury can be obtained in the county, that a defendant be discharged or held in confinement for an indefinite time until such changes take place in the county that a jury can be had, but we cannot take away from the defendant a right conferred upon him by the Constitution, on the mere ground that such a result may follow in rare cases. The right is one that has always been regarded as of great importance, and has been preserved and continued in force by the Constitution of the United States, and perhaps by the Constitutions of every State in the Union. If it be allowed that the Legislature can break in upon this right and take it away or abridge it on the ground and for the reason stated in the statute under consideration, it must be admitted that it may do so for other reasons, and thus the right guaranteed by the Constitution will be subject to modification at the will of the Legislature, and this cannot be conceded. We are convinced that the section of the Penal Code, so far as it authorizes a change of venue on the application of the District Attorney, without the consent of the defendant, is unconstitutional and void; that the change of venue in this case was improperly granted; and that the Court below had no jurisdiction to try the cause.

But if it were conceded that the statute is valid, the result of this appeal must be the same. The application for the change of venue, and the affidavits in support of it, were entirely insufficient to bring the case within the statute or to authorize a change of the place of trial. The application was not made on the ground that *no* jury could be obtained in the county, but because a *fair and impartial* jury could not be obtained. As to what will constitute a fair and impartial jury there may be many different opinions. The statement that such a jury could not be obtained was the statement of a mere conclusion, and the facts did not show that *no* jury could be obtained. There are two modes provided by which a defendant or the people may avoid a trial by partial or unfair jurors, viz.: challenges for cause, which excludes all persons from the jury who are legally incompetent to serve as such, and peremptory challenges, by which a party may relieve himself of jurors whom he believes will not be fair and impartial jurors. This last kind of challenge is limited, and it may happen that when a party's right of peremptory challenge is exhausted there may remain on the jury persons who are not, in his estimation or in fact, fair and impartial, but who are competent jurors. The application and the proof to support it do not show that a jury of such persons as these might not have been obtained. It is perfectly clear that the intention of the Legislature was to make a distinction between the grounds upon which the people and the defendant should be entitled to a change of venue. The defendant has only to show that a fair and impartial trial cannot be had in the county. (Penal Code, Sec. 1033.) The application before us would have been sufficient under the clause, but it is not sufficient under the clause relating to the right of the District Attorney to a change of venue, which provides that the change may be had where no jury can be obtained, which is quite a different thing, as we have attempted to show. A juror is not necessarily incompetent because he is not impartial. He may favor one party or the other and yet if he has not formed or expressed an opinion as to the merits of the cause he cannot be challenged for cause. For this reason proof that a *fair and impartial* jury cannot be obtained is not equivalent to proof that *no* jury can be obtained. A statute of this kind, if valid, should be strictly construed and if it could be enforced at all, in our judgment, the change should not be granted until all legal means to procure a jury had been exhausted and no jury could be obtained. It should not be allowed to rest upon the mere opinion of persons, however numerous, that a jury could not be procured.

The conclusion we have reached on this point is decisive of this appeal, but there are other questions presented which may arise on another trial, which we feel it our duty to decide.

The prosecution was allowed, over the objection of the defendant, to prove in rebuttal that the deceased was not in the habit of carrying arms; that on various occasions he had so stated; and, that on the morning of the shooting he had refused to go armed when it was suggested that he had better do so. We have looked in the transcript in vain for any evidence on the part of the defendant which could justify or call for any such evidence in rebuttal. There was evidence tending to show that the defendant believed the deceased to have been armed at the time he shot him. This rendered it competent for the prosecution to prove that, as a matter of fact, he was not armed at that time, but it did not justify the proof as to his general habit with respect to the carrying of weapons or his declarations with reference to the matter, not made in the presence of the defendant, and not shown to have been communicated to him prior to the shooting. There was no evidence on the part of the defendant going to show that the character of the deceased for peace and quietness was bad, therefore the evidence cannot be justified on the ground that it tended to show his good character in these respects. Evidence to sustain his character could not be heard unless it had been attacked (People vs. Anderson, 39 Cal. 704), and if it could it would not have been competent to prove it by evidence that he was not in the habit of carrying arms, or that he had refused to do so.

On cross-examination of one or more of the witnesses for the prosecution the defendant asked whether the deceased had not had quarrels with several persons named, and it was admitted that the deceased had so stated. There was no objection to this evidence by the prosecution. It was clearly incompetent, and if it had been objected to would no doubt have been excluded. It is claimed that this evidence on the part of the defense rendered the above-mentioned proof competent. We do not think so. In the first place the evidence, on the part of the defense, was incompetent, as we have said, but if it were not we do not see how the evidence offered in rebuttal, that the deceased was not in the habit of going armed tended to rebut the proof that he had stated to some one that he had quarrelled with certain persons.

There was also evidence admitted in behalf of the prosecution of conversations between the witness, Mrs. Willis, and third parties, not in the presence of the defendant, and with which he was in no way connected. This evidence should have been excluded. It was admitted by the court below, upon the assurance of counsel for the defendant, that it would be brought home to the defendant, which was not done. The same may be said of the testimony of the witness, Glennon, of conversations between Mrs. Willis and himself. The prosecution having failed to connect the defendant with the subject-matter of the conversation, the defendant moved to strike out the evidence. The motion was denied. This was error. The evidence should have been stricken out. The same witness, Glennon, was also allowed to testify to a conversation with the defendant. The ill-feeling which resulted in the death of Mr. Smith, at the hands of the defendant, grew out of an article published in a newspaper of which the deceased was proprietor. The conversation testified to by Glennon was with reference to this article and tended to show that the defendant believed the witness was the author of the article and abused him and threatened to get even with him; that in the same connection he made abusive remarks about one Mrs. Willis, and, that, subsequently, during the same day, he returned and stated to Glennon that he had learned that he was not the author of the article, and apologized for the language he had used. This evidence was well calculated to prejudice the jury against the defendant and was immaterial and incompetent. If it had been shown to have been communicated to the deceased it might have tended, in some small degree, to excuse his conduct toward the defendant, at the time of the shooting, but it was not shown that it was communicated to him. It could hardly be claimed that the threat of the defendant to "get even" with Glennon was evidence tending to prove that he killed the deceased, or the motive of the killing. And if this were not so that part of the conversation relating to Mrs. Willis, and which the defendant moved specially to strike out was clearly incompetent.

It is contended by the appellant that the court below excluded evidence offered by him to the effect that he was told before the shooting that the deceased was a dangerous character and that he had better beware of him, and that this was error. The defendant claimed, and introduced evidence tending to show, that in firing the shot which caused the death of deceased he acted in self defense. In connection with the evidence as to what occurred at the time of the shooting, it would no doubt have been competent for the defendant to show that before the shooting he was informed that the deceased was a dangerous man. State vs. Lull, 48 Vt., 586.)

Where a defendant claims to act in self-defense, any evidence tending to show that he acted as a reasonably prudent man would have acted under the circumstances is competent. (People vs. Iams, 57 Cal. 119, 130; People vs. Westlake, 62 Cal. 307.)

In this case the evidence tended to show that the defendant was attacked by the deceased, and, in the rencounter that followed, shot and fatally wounded him. In judging whether the defendant acted with reasonable prudence and caution, and in the honest belief that he was put in imminent danger of death or great bodily injury, it was proper that the jury should know, if such were the fact, that he had been informed beforehand that the man that attacked him was a dangerous character, and so believed at the time, as such information and belief might reasonably influence the conduct of a prudent man under such circumstances. Such evidence does not rest upon the necessity of showing that the communication was brought home to the deceased, as counsel for respondent contend. The sole object of it is to show the state of mind of the defendant at the time of the shooting, and for this purpose it was proper and should have been admitted. There may be some doubt whether the questions put to the witnesses were such, in form, as to raise the point, but the qustion has been presented on its merits here. The form of the questions were not objected to in the court below, nor are they here. In the effort to prove a certain state of facts either the question put to the witness should disclose clearly what it is proposed to prove or a proposition to prove certain facts should be submitted to the court below, and refused, in order to present the question in this court. Neither was done here, and we are led to believe by certain questions put to the defendant on the same subject, that the communication to the defendant was not of the kind claimed by the appellant. It certainly was not competent to show that the defendant was warned to "look out" for the deceased or the like. This would be quite a different thing from proving that the deceased was a dangerous man and one who might be expected to go to extreme measures if he should attack the defendant. For these reasons, if no other error appeared in the record, the cause would not be reversed on this ground.

The rulings of the court in excluding certain questions asked the witness Mrs. Smith, widow of the deceased, on cross-examination, with reference to certain articles appearing in the paper formerly owned by her husband, after the first trial of this case, and excluding said articles when offered in evidence, were not erroneous.

There was no error in allowing private counsel, employed to assist the District Attorney in the prosecution of the case, to open and close the argument in the case. The court below must be left to determine upon the propriety of allowing such a course to be taken, and so long as private counsel conduct the prosecution properly we see no reason for holding that the entire argument may not be made by them with the consent and acquiescence of the District Attorney and the trial court.

The court below gave the following instruction, which is complained of by the appellant:

"In this case the *homicide* having been *established by the State*, unless the testimony of the State proves that the offense was manslaughter, or unless such testimony tends to show that the homicide was excusable or justifiable the burden of the proof is upon the defendant to show *by a preponderance of evidence* that the *crime* was only manslaughter or was justifiable."

This instruction was erroneous, because the homicide being established by the State, it cast upon the defendant the burden of proving *by a preponderance of the evidence* that the killing was justifiable or only manslaughter. (People v. Bushton, 80 Cal. 160; People v. Elliot, *Id.* 296; People v. Lanagan, 81 Cal. 142.)

Judgment and order reversed and cause remanded, with instruction to the court below to remand the cause to the Superior Court of the County of San Mateo for further proceedings.

WORKS, J.

We concur:

MCFARLAND, J.
SHARPSTEIN, J.

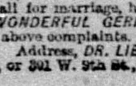
CONCURRING OPINIONS.

I concur in the judgment. The second subdivision of Section 1035 of the Penal Code is clearly unconstitutional. There was also error in the giving of the instruction, referred to in the opinion of Mr. Justice Works. Upon the other points therein discussed, I express no opinion.

DEHAVEN, J.

I concur in the above, except as to the instruction discussed in it. I am of opinion that the instruction is sound law, and that there was no error in giving it.

THORNTON, J.

CAST YOUR  OVER THIS

SICK PEOPLE write for free illustrat[ed] family paper on surgical operati[ons,] tumors, fistula, piles, varicoce[le,] hydrocele; braces, appliances [for] deformities, female complaint[s;] also, confidential book for me[n] explaining why thousands cannot get cured of special, priva[te,] chronic diseases, eyes, ears, lungs, seminal weakness, loss [of] manhood, gleet, syphilis, unnatural losses, results of abuse [or] excesses, which unfit all for marriage, happiness, or life's d[uties.] DR. LIEBIG'S WONDERFUL GERMAN INVIGORATO[R] the greatest remedy for above complaints. To prove its merit $1 trial bottle sent free. Address, DR. LIEBIG & CO. 400 Geary St., San Francisco, Cal., or 301 W. 9th St., Kansas City, Mo.