COMMENT.

The Supreme Court of Alabama in the recent case of *Beggs* v. *The Edison Electric Light & Illuminating Co.*, 11 Sou. Rep. 381, took occasion to decide the question in that State, as to whether an electric light company was a manufacturing company within the meaning of that section of the Code of 1886 providing rules for the consolidation of manufacturing corporations. This has only been considered in two other States — Pennsylvania and New York — and the decisions in these cases were directly opposite. (See Vol. I. of THE JOURNAL, page 123.) The Alabama court follows the reasoning of the New York case and bases its decision largely on the meaning of the word manufacture as ordinarily understood. It is evident that the business of producing electricity requires the investment of capital in a plant and the consumption of large quantities of coal in the operation of exceedingly complicated machinery. The substance produced, whether a material substance or a form of energy, is distributed through an extensive system of cables, mains and wires, and is of obvious utility. This is to all intents and purposes a manufacturing operation, and, in the absence of any express statute, it will probably be so held in other States in which the question may arise.

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The question of what constitutes "a quorum" of members present at any meeting, which has within the past year provoked so much discussion, both political and judicial, still occasionally intrudes itself before our various courts and demands solution. The Supreme Court of Indiana has recently put its sanction on the much mooted method adopted by the Speaker of the House in the LI. Congress. In the case of *State ex. rel. Walden* v. *Vanosdal*, 31 N. E. Rep. 79, they held, "that when, at a regular meeting of school trustees, three of the trustees refused to act longer and withdrew from the place where the balloting was being held into a crowd of spectators, but without leaving the room, the quorum is not broken, though they may refuse to vote and protest against further action, and where the remaining trustees cast their ballots

for a person he is duly elected, the retiring trustees being properly treated as being present and not voting."

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In the recent case of *The Badger Lumber Company* v. *The Marion Water Supply, Electric Light and Power Company* the Supreme Court of Kansas has handed down a decision which has been productive of much favorable comment. The original action was for the enforcement of a mechanic's lien under a Kansas statute which provided that "any mechanic or other person who shall, under contract with the owner of any tract or piece of land * * * perform labor or furnish material for erecting, altering or repairing any building or the appurtenance of any building, or any erection or improvement, or shall furnish or perform labor in the putting up of any fixture in or attachment to any such building or improvement, * * * shall have a lien upon the whole piece or tract of land, the building and appurtenances, in the manner herein provided," etc.

The case was submitted to the lower court upon an agreed statement of facts which set forth that the defendant was a company operating an electric light plant and furnishing light for the city of Marion; that it had a franchise to use the streets of the city for the erection of poles and stretching of wires thereon; that the defendant company had so used the streets; that the plaintiff furnished the poles upon which the wires were stretched; that defendant had actually operated its plant and furnished light for different portions of the city; and that none of the material furnished by the plaintiff was actually situated upon the premises upon which the electric light plant was located and upon which plaintiff sought to enforce a lien. Upon this statement of facts the trial court awarded a personal judgment against the defendant but refused to enforce the lien, upon the ground that no part of the material furnished by the plaintiff was on the real estate of the defendant or attached thereto in any manner except by the wires stretched from the poles of the defendants.

The Supreme Court reversed this decision, holding that the poles and wires were appurtenances of the defendant's premises, and that therefore the plaintiff was entitled to a lien under the statute. Johnston J. in giving the opinion of the court dwells at some length upon the question of what constitutes an appurtenance. Upon a rehearing of the case the court held that the defendant having a franchise to occupy the streets of the city was not so distinctively public in its nature and operations as to

exempt its property from the application of the mechanic's lien statute. Both the points decided by the court seem to be thoroughly founded upon reason and justice and the case will undoubtedly be received by other courts as authority.

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The passage of the "Miner Law" in Michigan, under which presidential electors are chosen by congressional districts instead of by the State at large, marks what might prove to be an important epoch in our constitutional history should other States join in this departure from a mode of construction of the constitution which has obtained for the last sixty years. While there is probably little danger of such a change on account of the resulting loss of power to the individual State in political conventions as well as the natural tendency to cling to a construction so long and universally employed, the well considered opinion of the court in *McPherson* v. *Blacker*, 52 N. W. Rep. 469, upholding the constitutionality of the Michigan law is well worthy of the careful reading of the student of constitutional law.

It was contended that the "Miner Law" was in conflict with Section 1, Article 2, of the Federal Constitution, which provides that "each State shall appoint in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which this State may be entitled in the congress." And it was claimed that under this section of the Constitution the State must in the choice of electors act as a unit, and was not empowered to delegate the authority to name electors to any fractional part of the State, as a district filed for that purpose alone or for that and other political action. The language of the section plainly admits of such a construction, and the words "in such manner as the legislature thereof may direct," could be held to confer only the limited power of directing how the State acting as an entirety should make the appointment. But in the first presidential election Maryland and Virginia adopted the district plan, their example was followed by Massachusetts and New York, and for forty years after the adoption of the Constitution electors were chosen in several of the States by districts. This practical contemporaneous interpretation the court held to be decisive under the rule of resort to contemporaneous construction so well recognized by the court and stated by Judge Cooley in his "Constitutional Limitations," that "when a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with

the adoption of the Constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that strong presumption exists that the construction rightly interprets the intention." Since the above was written the Supreme Court of the United States has affirmed the decision in *McPherson* v. *Blacker*, which was taken to it on error to the Michigan court.

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The question was raised in the recent case of *State* v. *Toland*, 15 S. E. Rep. 599, whether a minor could legally act as special deputy of the sheriff, and as such legally summon jurors under a writ of *venire*. The Supreme Court of South Carolina took the ground that as the minor was not required to give any bond, the sheriff being made responsible by statute for his deputy's conduct, he was not an "officer" in the proper sense of the word. The minor was rather the agent of the sheriff: and as there can be no question that a minor may act as the agent of another, the acts of the minor in summoning jurors were legal. The case of *R. R. Co.* v. *Fisher*, 13 S. E. Rep. 698, cited and approved as pointing out the distinction between such a case as the one in hand and that of *Cuckson* v. *Winter*, 17 E. L. C. 713.

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In the case of *in re* King the facts were these: The plaintiff, convicted of murder by the Supreme Court of Tennessee, petitioned the United States Court of that district for the grant of a writ of *habeas corpus*, on the ground that he had been convicted by a jury not entirely impartial and that the constitutional provision that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury," etc., had been violated thereby.

It was held, that the writ of *habeas corpus* could not thus be used as "a substitute for a writ of error, for the purpose of reviewing alleged errors, either of fact or law, occurring at a criminal trial, but, being in the nature of a collateral attack upon the judgment, is limited to the inquiry whether the trial court has acted without jurisdiction, or has exceeded its jurisdiction so as to render the sentence void." The court then goes on to say that this amendment to the Constitution "is a qualification and regulation relating exclusively to the judicial powers granted by the Constitution of the United States, and has no reference to the judicial power possessed and exercised under State authority."

It would seem as if the learned judge differed in this point from the usual authorities. We quote Farrar's Manual of the Constitution (p. 395) as follows: "In these" (the first ten amendments) "certain particular rights are plainly declared or recognized as natural, legal, and subsisting rights of the people, and so made their constitutional rights. They become a part of the supreme law of the land, and so bind the government and all subordinate governments — everybody in fact owing allegiance to the Constitution." Ch. J. Spencer in *People* v. *Goodwin*, 18 John R., 187, says of the V. Amendment, "the Article * * * does extend to all the judicial tribunals in the United States whether constituted by the Congress of the United States or the States individually. * * * The Sixth Article of the Constitution declares that the Constitution shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of the State to the contrary notwithstanding."

In Prigg's case, 16 Peters 628, Mr. Ch. J. Taney says, "The Constitution of the United States and every article and clause in it, is a part of the law of every State in the Union and is the paramount law."

While the judicial power of the United States undoubtedly does not have the power to investigate errors made by a State judiciary in passing on laws which are entirely constitutional, in a constitutional way, yet it would seem as if under that instrument which so high an authority as Ch. J. Marshall has said "was made for the whole people of the Union and is equally binding upon all the courts and all the citizens," would have the power to prevent infringements by a State on the right of trial by jury in criminal cases, as laid down in the VI. Amendment, one of the clauses of that series of ten, which form "the bill of rights," demanded by the people, after the Constitution had been adopted without one, and which was added as a safeguard to the liberties of every citizen of the Union, against the encroachment of either State or Federal powers.

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On October 17th the New York Court of Appeals handed down its decision upon the validity of the Apportionment Act of 1892. By a divided bench the act was declared to be constitutional. Judge Peckham delivered the opinion of the majority of the court, while Judge Andrews manifested his dissent by a vigorous opinion in which Judge Finch concurred. The extent of legislative dis-

cretion under the Constitution of the State of New York was the point upon which the learned judges differed. Was there any discretion left with the Legislature under the clauses of the Constitution which provide that "Each Senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens," and that "the members of the Assembly shall be apportioned among the several counties of the State by the Legislature, as nearly as may be, according to the number of the respective inhabitants, excluding aliens?" If such discretion existed was it so plainly violated by the provisions of the Act of 1892 as to call for judicial interference? These questions are most difficult to answer. It would seem that the Constitution did not demand absolute equality in the apportionment. Absolute equality would be impossible. The Constitutional provisions are flexible enough to allow of some inequalities, for by their very terms they imply that such will exist. But as Judge Peckham said the apportionment was not an "ideal" one. Legislatures, and especially State Legislatures, are not apt to accomplish ideal results. Much less is a legislature dominated by strong party influence, and smarting under the injustice of the operation of a previous apportionment, likely to pass a measure of this character which is even an approximation to the ideal. As to whether legislative power, more or less discretionary, had been abused is a question upon which the fairest and most honest minds may well differ. What wonder that judges should disagree upon it — what wonder that the decision should be upon party lines? Educated in different schools of thought and arguing from principles fundamentally opposed, it was but natural and logical that they should reach different results, honestly and yet in accordance with party convictions.