courts. It may be sufficient to say that in a great many cases Congress has left to the State courts a concurrent jurisdiction with the Federal courts; but we have seen, where the Constitution confers jurisdiction upon the Federal courts, it is competent for Congress to make the jurisdiction exclusive. Judge Cooley, whose accuracy will be a voucher for his statements, has given, in his judicial work on the Constitution, this enumeration of the cases and proceedings where Congress has vested exclusive jurisdiction in the courts of the Union: "All crimes and offenses cognizable under the authority of the United States; all suits for penalties and forfeitures incurred under the laws of the United States; all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it; all seizures under the laws of the United States, on land or waters not within admiralty and maritime jurisdiction; all patent and copyright cases; all proceedings in bankruptcy; all controversies of a civil nature where a State is a party, except between a State and its citizens, and between a State and citizens of other States or aliens."[1] So Federal courts have original jurisdiction of actions under the postal laws; suits for drawbacks of duties, and other cases set out in the Revised Statutes of the United States;[2] also of suits by the United States, or any officer thereof, suing under authority of an act of Congress; suits arising under the revenue laws; suits arising under any law relative to the slave trade; and suits brought by any person to recover damages for an injury to person or property on account of any act done by him under any law of the United States for the protection or collection of any of its revenues, or to enforce the rights of citizens of the United States to vote in any State; also of suits of a civil nature, at common law or in equity, where the matter in dispute, exclusive of costs, exceeds the sum of five hundred dollars (by act of 1887 changed to two thou-

[1] Cooley on the Constitution, p. 138 *et seq.*

[2] R. S. U. S. (1878), secs. 563, 711.

sand dollars), and the United States are petitioners, or where the suit is between a citizen of the State in which it is brought and the citizen of another State. In many of the suits just referred to, the States have concurrent jurisdiction, as a plaintiff might sue a defendant in a State court to his disadvantage, and he would naturally prefer that his case should be tried in the Federal court. To reach all such cases, though brought in the State court within the jurisdiction of the Federal courts, Congress has gone further, and has made large provision for removing cases from State courts, having original jurisdiction of them, into the inferior Federal courts for trial. Judge Cooley has mentioned a number of cases of this kind in the work just referred to.[1] A single instance may be mentioned: A Virginia plaintiff sues a Massachusetts defendant, whom he reached by process in Virginia, in the Virginia court. By the Constitution, this suit between citizens of different States is within the jurisdiction of the United States court. The law of Congress gives him a right to remove it. The same plaintiff might sue the same defendant in a Massachusetts State court, and this might be satisfactory to the defendant, but not to the plaintiff. After the suit was brought, a former law permitted the plaintiff to remove the case to the United States court, but the act of 1886–87 prevents this on the ground that the plaintiff, having made his election, shall not be allowed to remove. It is further provided that, on affidavit by a defendant corporation that it has a defense under the Constitution of the United States, no matter what the amount involved, the case shall be removed to the Federal court. The cases illustrative of this practice are very numerous, and may be referred to in the note.[2] This right of removal, granted by

[1] Cooley's Constitution, pp. 139–59.

[2] Teall v. Felton, 1 N. Y. 537; s. c. in error, 12 How. 284; Boom Co. v. Patterson, 98 U. S. 403; Strauder v. West Virginia, 100 id. 303; Tennessee v. Davis, Id. 451; Virginia v. Rives, Id. 313; Gaines v. Fuentes, 98 Id. 10; Railroad Co. v. Whitton, 13 Wall. 270; Insurance Co. v. Morse, 20 id. 445; Insurance Co. v. Pechner, 95 U. S. 183; Gold Washing Co. v. Keyes, 96 id. 199; Koontz v. Baltimore & Ohio R. R. Co., 104 id. 5.

United States law, cannot be taken away or limited by State law; and where a lawful order of removal has been made, and the State court proceeds to judgment, its judgment is reviewable, on appeal to the Supreme Court from the highest State court, under the twenty-fifth section of the Judiciary Act of 1789. On the contrary, if the order of removal was submitted to by the State, but is illegal, the Supreme Court will reverse the judgment and remand the case to the State court for trial.[1] This results from the fact that the jurisdiction of the United States court is rightful, and may be made exclusive of the State court, upon the legal order for removal; therefore the case in the State court was *coram non judice.* On the other hand, if the order of removal in the Federal court be illegal, the judgment in that court is void because *coram non judice.* The provisions of the statute of 1878, above referred to, have been greatly enlarged by the act of March 3, 1887, modified by the act of 1888.[2] These acts have largely abridged the exclusive jurisdiction of the United States courts, and were so intended.[3] In this last act, National banks must sue and be sued in State courts as if they were State corporations; and so State courts have jurisdiction of a suit brought against a receiver of a State railroad company appointed by the Federal court in that State.

§ 384. The policy of removal of cases in the State courts to the United States courts, established by the original act, was extended by the third section of the act of March 2, 1833,[4] in consequence of the laws of South Carolina passed to sustain its ordinance of nullification. Those laws provided for prosecuting and suing an officer of the United

[1] Koontz v. Baltimore & Ohio R. R. Co., *supra;* Stone v. South Carolina, 117 U. S. 439; Graves v. Corbin, 132 id. 571; The Removal Cases, 100 id. 457.

[2] 24 U. S. Stat. at Large, ch. 373, p. 523; 25 Stat. at Large, pp. 433, 435.

[3] Smith v. Lyon, 133 U. S. 315; Fisk v. Henarie, 142 id. 459; Tennessee v. Bank, 152 id. 454; Hanrick v. Hanrick, 153 id. 192; In re Pennsylvania Co., 137 id. 451; Mo. Pac. Ry. Co. v. Fitzgerald, 160 id. 556.

[4] 4 U. S. Stat. at Large, 632.

States for acts done by him under the tariff laws. For any act done under the color of any revenue law of the United States, or on account of any right, title or authority claimed by such officer or other person set up under such laws, the case might be removed to a Federal court; or in case of the imprisonment of any person for acts done by him under the authority of the United States, a *habeas corpus* from the Federal court for his relief would be granted. This act was somewhat modified and enlarged by the act of 1871[1] and made to apply to criminal prosecutions in the State courts.

It is somewhat singular that this statute was called into operation in respect to the fugitive slave law, and the attempted nullification of that law by the State of Ohio. The United States marshal held, under the United States law, a fugitive slave; a State judge ordered his discharge, which the marshal refused to obey, and the State court committed him for contempt. Mr. Justice McLean, upon *habeas corpus,* discharged the marshal.[2] In the case of *United States v. Jailer, etc.,* on charge of murder, in the courts of Kentucky, the prisoner offered to show that what he did was under the authority of the United States in the execution of the revenue laws. Judge Ballard discharged him.[3] Many other cases of like character have been provided for in the Revised Statutes of 1878. It is provided that in case of the denial to any person, in a civil suit or criminal prosecution in a State court, of any right secured to him by the Constitution or laws of the United States, or in any suit against any civil or military officer for any arrest by virtue of, or under color of, authority derived from any law providing for the equal rights of citizens and the like, such suit or prosecution may, upon petition verified by oath of the defendant, be removed to the circuit court of the United States.[4] It was under section 643 that the important case of *Tennessee v. Davis* arose.[5]

[1] 16 Stat. at Large, 438. See also R. S., sec. 643.

[2] Ex parte Robinson, 6 McLean, 355; Ex parte Bridges, 2 Wood, 428.

[3] 2 Wall. Jr. C. C. 521.

[4] R. S. of U. S. 641–43.

[5] 100 U. S. 257.

Davis was indicted in the State court of Tennessee for murder. He made affidavit that the killing charged was committed in his necessary self-defense, while engaged in the discharge of the duties of his office as internal revenue collector, while attempting to seize an illicit distillery, and while thus engaged he was assaulted and fired upon, and, in defense of his life, returned the fire by which the killing was done. He prayed a removal of the case into the circuit court of the United States. Three questions were adjourned to the Supreme Court: *First.* Whether the indictment for murder was removable to the circuit court of the United States under section 643? *Second.* If removable, whether there is any mode of trial prescribed in the act of Congress? *Third.* If not, can a trial be had in the circuit court of the United States? The first and third questions were answered in the affirmative; as to the second, it was replied that he must be tried under the laws of the State, in the courts of the United States, according to its own forms of proceeding. In this case Justices Clifford and Field dissented in an elaborate opinion, holding that no United States court could have jurisdiction of a homicide committed in the State of Tennessee. With due respect to the decision of the court the author must express his assent to the views of the dissenting judges. The removal was based upon the ground that the United States should protect its officer from prosecution by a State for any alleged crime in the discharge of his Federal office. The removal assumes that the State court would disregard the defense, and violates in its operation the comity which is due from the one government to the other. The law assumed that the United States court alone would uphold the defense. It could not claim that the United States court had jurisdiction to try the offense. The trial involved the hearing of the defense, and a decision upon that, with the right of appeal as shown above, if the decision of the State court had been adverse to the defense of the prisoner. As that defense arose under a law of the United States, the twenty-fifth section of the Judiciary Act affords ample protection to the

prisoner by an appeal from the highest State court to the Supreme Court of the United States. But the removal ousted the State from all jurisdiction to try and punish an offender against *its own law*, and asserted for the United States court, upon the application of the prisoner, an exclusive jurisdiction in that court to try an offender against a State law.

This judicial anomaly by which the court of the United States must try a prosecution by the State against its own citizen presents difficulties of a striking character. Is a jury to be selected according to the law of a State or according to the laws of the United States? If convicted, there was no right to appeal to the Supreme Court of the United States; and the right of appeal to the Supreme Court of the State, which he would have had if convicted in the inferior State court, is out of the question. Again, the question arises: If convicted, who may pardon him — the Governor of the State or the President of the United States? The decision in that case was substantially upheld, however, in *Strauder's Case*,[1] *Virginia v. Rives*,[2] *Ex parte Virginia*,[3] and in *Neagle's Case*.[4] In *Neagle's Case* the defendant was a marshal of the United States who accompanied the venerable and esteemed Justice Field upon his duties as the Circuit Judge in California. Terry, who had threatened the life of Judge Field, assaulted him with great violence while sitting at the dinner-table. Marshal Neagle, in defense of the Judge, shot and killed Terry. The State indicted him for homicide, but before trial he sued out a *habeas corpus* from the United States court, alleging the justification of the act by his duty to defend Justice Field. The United States court discharged him from the custody of the State, and the Supreme Court affirmed the decision. This was done under the Revised Statutes of 1878, section 641. The dissent in this case was very strong. The author, with profound respect for the distinguished judge in whose defense the marshal acted, ventures to concur with the dissent in this case,

[1] 100 U. S. 303.
[2] 100 U. S. 313.
[3] 100 U. S. 339.
[4] 135 U. S. 1.

upon the ground that it goes farther than the doctrine laid down in the case of *Tennessee v. Davis*, *supra*, for it discharged from trial the man who committed the homicide, and did not even remove the case, as in *Tennessee v. Davis*, from the State court to the United States court for trial. A single judge of the United States court discharged Neagle from custody and trial by the State court. In addition to all of the objections stated above to the decision in the case of *Tennessee v. Davis*, the decision in *Neagle's Case* involves the exercise of the pardoning power, which is an executive function, by the judge; for what is pardon, if immunity from prosecution of all crimes be not pardon? In *Neagle's Case* Chief Justice Fuller and Justice Lamar dissented.

Another case was provided for in the act of August 29, 1842.[1] The act was passed in respect to the celebrated McLeod case. McLeod was prosecuted for murder on the Caroline, which was a vessel supposed to be engaged in aiding a revolutionary movement in Canada. He was indicted in the State court of New York for murder, and defended on the ground that, as an officer of Her Majesty's navy, he made the attack for which Her Majesty's government held itself responsible; that the killing was not a personal homicide, but was an act of *quasi*-war. Pending the prosecution quite an extensive correspondence occurred between the government of Great Britain and the government of the United States, in which the former demanded the release of McLeod, and it was felt to be a very delicate situation. Had McLeod been convicted in the State court, despite his defense, the United States might have been involved in hostile relations with Great Britain. The situation suggested the passage of a law providing that wherever a defense rested, as in this case, upon the relations of the offender to a foreign government, and the act, seemingly a violation of State law, was international in its character, proper to be arbitrated between the government of the Union and the foreign power,

[1] 5 Stat. at Large, 529, 641.

the offender should have the privilege of a *habeas corpus* from the United States court, and upon the defense appearing as indicated, that he should be discharged. The validity of this regulation by Congress, it seems to the author, rests upon very solid ground. The United States government has charge of the international relations of the States with foreign powers; and furthermore, under a clause of the Constitution in respect to belligerent operations, has the express power to make rules concerning captures on land and water.[1] The capture of McLeod under the circumstances was a highly belligerent act. He was a prisoner of war for the international act of belligerency, and a prisoner of war cannot be tried by a State for an act of war within the State. His capture brought him within the range of the Federal power, and it was proper to exercise for his discharge the jurisdiction of the United States courts. The case above referred to will be considered hereafter in another connection — in commenting upon the nature of the fourteenth amendment to the Constitution.

§ **385.** A large class of cases has arisen where, in aid of and as a branch of the appellate jurisdiction of the Supreme Court, the exercise of that jurisdiction through the *habeas corpus* right has been of great service. The doctrine may be thus stated: When a court, by process of contempt or any other process, undertakes to punish with imprisonment a man for refusing to comply with its order, which the court had no authority to make, the original order being void, the punitive order is equally void, and the party, though no appeal lies to the Supreme Court from the order of the inferior court, may by the writ of *habeas corpus*, issued from the Supreme Court, be discharged from his imprisonment.[2] The same doctrine was extended in *Ex parte Bain*.[3] In this

[1] Const. U. S., Art. I, sec. 8, clause 11.

[2] Ex parte Lange, 18 Wall. 163; Ex parte Parks, 93 U. S. 18; Ex parte Siebold, 100 id. 371; Ex parte Virginia, Id. 339; Ex parte Fisk, 113 id. 713; Ex parte Rowland, 104 id. 604; Ex parte Watkins, 7 Pet. 568; Ex parte Milburn, 9 id. 704; Ex parte Kaine, 14 How. 103.

[3] 120 U. S. 1.

case the prisoner was convicted and sentenced to imprisonment by a circuit court of the United States, on an indictment amended by the district attorney, by leave of the court, after it had been returned by the grand jury. It was held that such indictment was not found by a grand jury, and under the fifth amendment of the Constitution the prisoner could not be tried on it, and that his conviction and imprisonment were void. No appeal lay from the judgment of the Circuit Court, but the Supreme Court discharged the prisoner because the judgment was *coram non judice* and void. In the case of *In re Ayres*,[1] the same circuit judge enjoined the Attorney-General of Virginia from bringing suit in behalf of the Commonwealth against its taxpayers. The Attorney-General refused to obey the injunction, and the court committed him for contempt. He prayed a *habeas corpus* from the Supreme Court, who discharged him on the ground that the order of injunction by the circuit judge was void and the commitment for contempt was equally so; and, though no appeal lay from either order to the Supreme Court, yet the illegality of the imprisonment required the discharge under the *habeas corpus*. Again, the powers of the judiciary of the United States are, in terms of the Constitution, judiciary powers only, and they imply no political power. They accept the determination of the political departments of the government as conclusive, whether war exists or peace has been restored. What is the *de facto* government of another country; the authority of foreign ministers; the admission of a State to the Union; the restoration of the seceded States to the Union; the extent of the jurisdiction of a foreign power; the relations of the Indians to the government,—are all questions which belong to the executive and legislative departments of the government, and in respect to which the judiciary power does not apply, except in regard to what has been decided by the political departments.[2] This principle has been pressed to an extreme point,

[1] 123 U. S. 443.

[2] United States v. Anderson, 9 Wall. 56; Gelston v. Hoyt, 3 Wheat. 246; Foster v. Neilson, 2 Pet. 253; Luther v. Borden, 7 How. 1; Georgia v. Stanton, 6 Wall. 50; Williams v. Insurance Co., 13 Pet. 415; Kansas Indians, 5 Wall. 757; United States v. Holliday, 3 id. 407.

to which attention will now be called. Upon the passage of what was generally known as the "Reconstruction Measures" in 1867, vetoed by President Johnson, but passed *non obstante* his objection by two-thirds of both Houses, which substantially subjected the Southern States to a government of military satraps, the State of Mississippi filed a bill against the President praying an injunction restraining the execution of such unconstitutional laws by the President of the United States. The case was argued very fully, and the Supreme Court unanimously refused to allow the bill to be filed, on the ground that it had no judicial power to enjoin the President in the performance of his official duties.[1] The State of Georgia filed a bill against Secretary Stanton upon the same grounds substantially as in the previous case, and the Supreme Court dismissed the bill for want of jurisdiction upon like grounds. Another effort was made by a bill which it was proposed to file against Generals Grant, Meade and others. The report of the cases does not state wherein they differed from the former cases, nor what the court did with them.

These decisions seem to settle the question that the Supreme Court is no arbiter between a State of the Union and the United States government as to any political issue, and that despite the unconstitutionality of the reconstruction acts there was no judicial power to decide upon that question unless it arose in a case between parties where property and personal rights were involved. The political right of a State to be protected against the unconstitutional reconstruction laws of the government is without remedy before the Supreme Court of the United States; and this was held though in the case of *Georgia v. Stanton* the bill charged that the effect of the reconstruction measures would be to dispossess the State of its public property as well as of its polit-

[1] State of Mississippi v. Johnson, 4 Wall. 475.

ical power; the court saying that the question of property was only the effect of the dispossession of the political power and incident to it. In *McCardle's Case*, one imprisoned under the judgment of a military court, organized under the reconstruction laws, sought to be released by *habeas corpus* from the Supreme Court because of the unconstitutionality of those laws and judgment of the courts in pursuance of them. The Supreme Court decided that it had jurisdiction to issue the writ, but postponed the consideration of it until the next term. In the interval Congress passed the Drake bill over the veto of President Johnson, which bill took away the jurisdiction from the Supreme Court to hear the *habeas corpus*. At the next term the court dismissed the writ of *habeas corpus* and refused to release McCardle because it had been divested of its power by the Drake bill.[1] There can be no doubt that except for the Drake bill the Supreme Court would have decided to release McCardle on the ground above stated, because the personal right of a citizen was involved as the consequence of an unconstitutional law.

Courts-martial are the courts which are constituted under the rules and articles of war for the trial of offenses arising under the military and naval service,[2] and of militiamen when called into the actual service of the United States. The power to establish these does not exist as part of the judicial power of the United States, but as part of the general war power: "To make rules for the government and regulation of the land and naval forces. To provide for calling forth the militia to execute the laws of the Union," etc.[3] The fifth article of amendment saves this power in the exception it makes in the following language: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." The celebrated case of *Milligan*[4] was a case of condemnation to

[1] 6 Wall. 318; s. c., 7 id. 506.

[2] Martin v. Mott, 12 Wheat. 19; Wise v. Withers, 3 Cr. 331.

[3] Const. U. S., Art. I, sec. 8, clauses 14, 15.

[4] 4 Wall. 2.

death of a citizen of Indiana by a court-martial approved by the President. The Supreme Court, after full argument, held the trial, conviction and sentence to be a violation of the Constitution. It may therefore be asserted that courts-martial are only for the trial of persons in the army, navy or military service, when in actual service. Military courts or commissions have been justified by the laws of war and for the trial of persons whose acts impede or obstruct military operations. When the army is in the enemy's country, provincial courts can be established under military orders, as in the case of the Mexican provinces in the military possession of the United States army.[1] While the United States army was in possession of the State of Tennessee during the civil war, Coleman, a soldier of the army, killed a citizen. There were no civil courts to try him for the homicide, and he was tried by a military tribunal and acquitted. After the war he was indicted for the homicide by the civil court of Tennessee and convicted. The Supreme Court held that his acquittal by the military tribunal exempted him from any other trial, and that the conviction by the civil court was wrong and reversed it.[2] The doctrine seems to be sound that, in the exceptional cases mentioned, where the civil courts are not open, a military tribunal may constitutionally try such case. But it must be confessed that the trial of a citizen by a military court is so obnoxious to our Constitution, and especially to the fifth article of amendment above cited, that it is difficult to justify any judgment upon a conviction by such a court.

The last class of courts to which attention is called are the courts of the Territories. As a Territory is not a State of the Union, and is subject to the government of Congress during its temporary existence as a Territory, it is held that the courts established in the Territories are not courts of the United States. Congress may establish them, and regulate their jurisdiction as part of their governmental power

[1] Jecker v. Montgomery, 13 How. 512; The Grapeshot, 9 Wall. 129.

[2] Coleman v. Tennessee, 97 U. S. 509.

over its Territories, but not within the terms of the third article of the Constitution, which we have been considering. The judges of these courts, therefore, do not hold offices during good behavior, but are appointed by the President and are removable like other officers. The practice, pleading and procedure are left by Congress to be regulated by the Territorial legislatures.[1]

[1] American Ins. Co. v. Canter, 1 Pet. 511; Clinton v. Englebrecht, 13 Wall. 434; Hornbuckle v. Toombs, 18 id. 648.

CHAPTER XIV.

LIMITATIONS ON THE POWERS OF THE STATES.

§ 386. In the tenth amendment of the Constitution, which is in fact but an expression of what is involved by implication in the original Constitution, it is provided: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This draws the line of demarcation between the powers delegated to the United States and the powers reserved to the States for the people. The language of the clause would indicate that all powers are reserved to the States, or the people, except two classes: First, those delegated to the United States by the Constitution; and second, those prohibited to the States.

We have already considered the extent of the powers delegated to the United States by the Constitution, and the express limitations upon those powers as well as those which were implied from the nature of the Constitution, and found that those so delegated or implied are not reserved to the States. We come now to consider another class of powers, not reserved to the States or to the people, and that class is those which are prohibited to the States. Two remarks are proper in this connection. First, except for these express prohibitions, the States would hold them as reserved under the terms of the tenth amendment. Second, all of these prohibitions are based on the principle that in the nature of our Union, the powers prohibited to the States should be vested exclusively in the common government, and that their exercise by the States would be inconsistent with the intercommunication of citizen rights, intended to be conserved by the establishment of the Union. The application of these remarks to each limitation will appear in the consideration of