and restrict it more nearly within the limits of the earliest statute. Martin's Adm'r v. Railroad Co., 151 U. S. 673, 14 Sup. Ct. 533. This statute was intended as a substitute for previous legislation on the subject, and expressly repealed all laws and parts of laws in conflict with its provisions. The rule of limitation as to the time of application for the removal of a cause from a state court to a federal court on the grounds of diverse citizenship of the parties is positive, and was intended to be imperative, so as to make certain, fixed, definite, and uniform the time of application for removal in accordance with the positive laws of the state, and the uniform and established rules of court, and not leave the matter to be regulated by the stipulations of parties, or the discretionary action of a trial judge, in each particular case. This act, being so clearly remedial in its nature, should be liberally construed, with a view to effectuate the beneficent public purposes for which it was intended, and thus advance the comity between state and federal courts; produce more harmony of judicial decisions, and greater regularity and certainty of procedure in the administration of justice. The Code of Civil Procedure of this state, in sections 206 and 207, requires a plaintiff to file his complaint in the clerk's office on or before the third day of the term to which the action is brought, and the defendant is required to appear and demur or answer at the same term to which the summons is returnable. Section 283, Code Civ. Proc., provides that:

"The time for filing the complaint, petition or of any pleading whatever may be enlarged by the court for good cause shown by affidavit, but it shall not be enlarged by more than ten additional days, nor more than once, unless the default shall have been occasioned by accident over which the party applying had no control, or by the fraud of the opposing party."

In the case now before this court the transcript shows that the defendant petitioner was duly served with process to appear at November term, 1896, of Iredell superior court. It was conceded on the argument that petitioner at that term was represented by properly authorized attorneys. From the entry made of record of the agreement of counsel, it may be inferred that no pleadings were actually filed at said term, but were subsequently filed as of said term. The defendants were sued as joint tort feasors. In such action their liability was joint and several, and each party had a right to offer a separate defense. The Southern Railway Company, on its appearance at November term, was required by state laws to demur or answer, and was entitled to a motion to dismiss the action for the want of complaint, although the other defendant had not been served with process. It also had the right at that term to file a petition and bond for removal of the action, and have their merits adjudged by the court. If the same had been presented, and been refused or disregarded, the case would have been removed to this court by operation of law, if the petition and bond were sufficient in law to authorize removal. The stipulation extending the time for filing pleadings, made by counsel of both parties for their mutual convenience, and by agreement entered of record, did not have the force and effect of dispensing with the requirements of positive law, and extending

the period in which an application for removal could be lawfully made. Such stipulation was not a rule of court made in conformity with the laws of the state, but was manifestly in disregard of such laws. If a judge had made an order extending the period for pleadings, founded upon affidavit for cause shown, in accordance with state laws, such order would have extended the operation of the removal statute for the period which the judge could grant as matter of right and law; but a mere discretionary order, made with consent of parties, would have no such effect. The object and purposes of this remedial statute would be defeated if its requirements could be changed or modified by the stipulations of parties, or the discretionary orders of trial judges in the courts of the several states. I am of opinion that the stipulation of the counsel of parties entered into on the 10th of December, 1896, was, on the part of the petitioner, a full acquiescence in the jurisdiction of the state court to try and dispose of the case in the course of regular procedure, and this acquiescence was further manifested and confirmed by the agreement of counsel made on the 20th January, 1897, continuing the cause for trial over the next February term to the subsequent May term of the state court.

There is another fatal objection to the application for removal, appearing on the face of the record. The petition and bond for removal were filed in the clerk's office in vacation, and seem to have never been presented to the court in session. No implied presentation to the court in session can be inferred from the fact that the petition was in the clerk's office of the court, which soon afterwards was in regular session; for by previous agreement of counsel the cause had been continued beyond the next regular term, and was not open for judicial notice, consideration, and action at that term. A sufficient petition and bond to have the legal force and effect of removal must be actually or impliedly presented to a state court in session, with power to hear and consider the application. The removal statute imposes a duty upon the state court to accept a sufficient petition and bond, and proceed no further in the cause against the petitioner. It is certainly courteous, reasonable, just, and lawful that such court should have opportunity of performing its duty by considering and acting upon the application before it surrenders its original and concurrent jurisdiction, or before it is deprived of jurisdiction by the operation of paramount laws of the United States. A wise and just public policy requires federal courts, in the exercise of their rightful jurisdiction, to accord to state courts the most liberal and cordial comity that is consistent with their legal duty in the enforcement of paramount national laws.

As I am of opinion that the facts and proceedings appearing in the transcript, and the principles of law above announced, are fully sufficient to warrant an order remanding this case, I have deemed it unnecessary to consider and determine other questions presented by counsel on the argument. Let an order be drawn remanding this case to the superior court of Iredell county, with costs to be taxed by the clerk of this court against the Southern Railway Company.

In re FOLEY.

SMITH v. FOLEY.

(Circuit Court, D. Nevada. May 28, 1897.)

No. 605.

1. REMOVAL OF CAUSE—PROBATE PROCEEDINGS—COMMUNITY PROPERTY.
Proceedings in a probate court to determine whether the property of a deceased person is separate or community property cannot be said to be "a suit of a civil nature at law or in equity," within the meaning of the removal act of 1887–88; and such a proceeding cannot be removed to a federal court, though the opposing parties are citizens of different states.

2. SAME—SEPARABLE CONTROVERSY.
In a proceeding for the determination of the question whether the property of a deceased person was separate or community property, there cannot be any separable controversy between any of the persons claiming rights to share in the distribution of the property.

3. SAME—ADMINISTRATION PROCEEDINGS.
The federal courts will not interfere with the custody of the estate of a deceased person by the state probate court in which proceedings are pending for the administration of such estate, by removing such proceedings to the federal courts.

Motion to remand.

Robert M. Clarke, for petitioner.
G. W. Baker and T. V. Julien, for respondents.

HAWLEY, District Judge (orally). Petitioner is the Minnie D. Foley mentioned in Foley v. Hartley, 72 Fed. 571, as the widow of M. D. Foley, deceased. She has since intermarried with Oscar J. Smith. On December 31, 1896, after her marriage, she filed in the state district court of Washoe county (having jurisdiction of probate matters) an amended petition for the partial distribution of the estate of M. D. Foley, deceased, in which, among other things, it is alleged that a portion of said estate is separate property of said deceased, and a portion community property, not subject to administration and distribution, except for the payment, pro rata, of the debts of said deceased, and pro rata expenses of administration; that the other heirs of said estate, designated in Foley v. Hartley as the "nonresident heirs," claim that all of the property of said estate is separate property, subject to administration and distribution. And petitioner prays that it be adjudged and determined what portion of said estate is community property, and not subject to distribution, and what portion is separate property, and subject to administration and distribution, etc. The nonresident heirs petitioned the state court to remove the proceedings to this court, which application was denied. They thereupon procured and caused to be made a transcript of the record on removal, and filed the same with the clerk of this court. The grounds of the motion to remand the cause are:

"(1) That the state court is in the possession of the property by its officer, the administrator, and is proceeding to administer the estate, and to determine, upon the petition for distribution, the persons who are entitled to share in the

distribution of the estate, and the proportion that each is entitled to have; and having acquired jurisdiction, and being actually engaged in determining the question, its jurisdiction is exclusive, and, upon the principle of comity, the federal court will not interfere. (2) That the proceeding is a matter of probate jurisdiction and inquiry, and that the federal courts have no probate jurisdiction. (3) That the matter in controversy is not a suit 'of a civil nature at law or in equity,' within the meaning of the removal act of 1887–88. (4) That one of the petitioners is an alien, and is not entitled, under the removal act of 1887–88, to remove a cause. (5) That Vernon Harrison Hartley and George H. Thoma, guardian of Vernon Harrison Hartley, who were on the opposite side of the controversy from the petitioner, Mrs. Oscar J. Smith, are residents and citizens of the same state of which Mrs. Oscar J. Smith is a resident and citizen, and for this reason all the parties on one side of the controversy are not citizens of different states from the parties on the other side of the controversy."

The interest and claim of Vernon Harrison Hartley, the alleged minor heir, is set forth in the petition, and the motion to remand applies to him as well as to the nonresident heirs; but he being dead, and there being no revival of the former proceedings as to him, this court cannot determine any question concerning his rights. But inasmuch as the state court has taken jurisdiction of the petition of Mrs. Smith, and is proceeding to determine the nature of the property,—whether separate or community,—and the interests of the respective parties in the distribution thereof, it is deemed advisable to dispose of the motion, in so far as it relates to the contest between Mrs. Smith and the nonresident heirs. In considering the question whether the petitioner is entitled to have the proceedings herein remanded to the state court, or whether respondents are entitled to have the issues tried in this court, it is deemed proper to refer to certain facts and some general principles of law which should be constantly kept in mind in determining questions of this character. The administrator of the estate of M. D. Foley, deceased, is a party respondent. He is an officer of the state court. As such officer, he is lawfully in the possession of the property of the estate. His possession thereof is virtually the possession of the state court. Naturally, the jurisdiction of that court has attached to the assets of the estate. They are in gremio legis. The law of the state in relation to the rights of all parties having any claims or demands against, or interest in the property of, an estate, will always be observed in the national courts. The property of the estate is not, during the progress of administration, subject to seizure or sale. The national courts cannot enforce any judgment or execute any decree against the estates of deceased persons, in the regular course of administration in the state courts, contrary to the law of the state upon the subject. It will readily be seen that the administrator or executor of an estate could not perform his duty under the law if the property placed in his charge could be taken away from him, and appropriated to the payment of one or more claims against the estate, to the injury of all others. These propositions have been frequently announced, followed, and, so far as this court is advised, always sustained, by the national courts. Vaughan v. Northup, 15 Pet. 1, 6; Williams v. Benedict, 8 How. 107, 112; Peale v. Phipps, 14 How. 368, 374; Bank v. Horn, 17 How. 157; Pulliam v. Osborne, Id. 471; Yonley v.

Lavender, 21 Wall. 276, 280; Heidritter v. Oil-Cloth Co., 112 U. S. 294, 304, 5 Sup. Ct. 135; Walker v. Brown, 11 C. C. A. 135, 63 Fed. 204, 212. It is a rule of general application in the United States courts that, where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court. Hagan v. Lucas, 10 Pet. 400; Peck v. Jenness, 7 How. 612, 625; Taylor v. Carryl, 20 How. 583; Freeman v. Howe, 24 How. 450; Ellis v. Davis, 109 U. S. 485, 498, 3 Sup. Ct. 327; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27; Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355; Borer v. Chapman, 119 U. S. 587, 600, 7 Sup. Ct. 342; In re Tyler, 149 U. S. 164, 181, 13 Sup. Ct. 785; Byers v. McAuley, 149 U. S. 608, 614, 13 Sup. Ct. 906; In re Chetwood, 165 U. S. 443, 457, 17 Sup. Ct. 385; Ball v. Tompkins, 41 Fed. 486, 490; Compton v. Jesup, 15 C. C. A. 397, 68 Fed. 263, 279; Foley v. Hartley, 72 Fed. 570, 573; Gamble v. City of San Diego, 79 Fed. 487, 500. It follows from the views expressed in the foregoing authorities that the national courts have no jurisdiction in ordinary probate matters in the settlement of the estates of deceased persons. They cannot appoint administrators or executors, nor regulate the proceedings provided by the laws of the state for the discharge of the duties of their trust. They cannot probate a will. These and other matters that need not be further mentioned belong exclusively to the jurisdiction of the state courts that are invested with authority to act in the settlement of the estates of deceased persons. In re Cilley, 58 Fed. 977; In re Foley, 76 Fed. 390, 394; Armstrong v. Lear, 12 Wheat. 169; Fouvergne v. City of New Orleans, 18 How. 470. But, in the regular course of the administration of an estate, nonresidents may have the right to institute an independent action in the national courts to establish a claim or demand against the estate, or to have such matter adjudicated upon, if the requisite citizenship exists, by a removal from the state court, if there controverted. As was said in Hess v. Reynolds, 113 U. S. 73, 77, 5 Sup. Ct. 377, 378:

"It may be convenient that all debts to be paid out of the assets of the deceased man's estate shall be established in the court to which the law of the domicile has confided the general administration of these assets. And the courts of the United States will pay respect to this principle, in the execution of the process enforcing their judgments of these assets, so far as the demands of justice require. But neither the principle of convenience, nor the statute of a state, can deprive them of jurisdiction to hear and determine a controversy between citizens of different states, when such a controversy is distinctly presented, because the judgment may affect the administration or distribution in another forum of the assets of the decedent's estate. The controverted question of debt or no debt is one which, if the representative of the decedent is a citizen of a state different from that of the other party, the party properly situated has a right, given by the constitution of the United States, to have tried originally, or by removal in a court of the United States, which cannot be defeated by state statutes enacted for the more convenient settlement of estates of decedents."

See Payne v. Hook, 7 Wall. 425; Yonley v. Lavender, 21 Wall. 276; Borer v. Chapman, 119 U. S. 587, 7 Sup. Ct. 342; Clark v. Bever, 139 U. S. 96, 103, 11 Sup. Ct. 468; Byers v. McAuley, 149 U. S. 608, 620, 13 Sup. Ct. 906; Wickham v. Hull, 60 Fed. 326, 330;