

**Rocca Vs. Thompson**

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**Court :** US Supreme Court

**Decided On :** Feb-19-1912

**Appeal No. :** 223 U.S. 317

**Appellant :** Rocca

**Respondent :** Thompson

**Judgement :**

Rocca v. Thompson - 223 U.S. 317 (1912)

U.S. Supreme Court Rocca v. Thompson, 223 U.S. 317 (1912)

**Rocca v. Thompson**

**No. 292**

**Argued January 17, 18, 1912**

**Decided February 19, 1912**

**223 U.S. 317**

*ERROR TO THE SUPREME COURT*

*OF THE STATE OF CALIFORNIA*

## SYLLABUS

Instructions of the head of a department must be read in light of the statute directly bearing on the subject, and so *held* that instructions of the Secretary of State to consuls in regard to administering effects of citizens of the United States dying in foreign lands must be read in the light of 1709, Rev.Stat.

There is no federal probate law, but right to administer property left by a foreigner within the jurisdiction of a state is primarily committed to state law.

*Quaere* whether it is within the treaty-making power of the national government to provide by treaty with foreign nations for administration of property of foreigners dying within a state, and to commit such administration to consuls of the nation to which deceased owed allegiance.

"Intervene in the possession and administration of the deceased" as the expression is used in the Argentine Treaty of 1853, is to be construed as permitting the consul of either contracting nation to temporarily possess the estate of his national for the purpose of protecting it, before it comes under the jurisdiction of the laws of the country, or to protect the interests of his national in an administration already instituted otherwise than by him.

Under the Argentine Treaty of 1853, a consul has not the right to the original administration of the estate of a deceased national to the exclusion of one authorized by local law to administer the estate.

While treaties are to be liberally construed, they are to be read in the light of conditions existing when entered into with a view to effecting the objects of the contracting states.

The law of the Argentine Republic, as brought to the attention of this Court, does not give to consuls of foreign countries the right to administer the estates of deceased nationals, but only to appoint an executor, which appointment is to be communicated to the testamentary judge.

*Quaere* whether the most favored nation clause included in the Treaty with Italy of 1878 carries the provisions of the Argentine Treaty of

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1853 in regard to the administration by consuls of the estate of deceased nationals.

In California, the public administrator is entitled to administer the estate of an Italian citizen dying and leaving an estate in California, in preference to the Consul-General of the Kingdom of Italy, and so *held* after construing the provision of the Treaty of 1878 with Italy, and that of 1853 with the Argentine Republic.

157 Cal. 552 affirmed.

The facts, which involve the construction of the provisions of the Treaty of 1878 with Italy and that of 1853 with the Argentine Republic in regard to the right of consuls to administer estates of their respective natives dying in the United States, are stated in the opinion.

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MR. JUSTICE DAY delivered the opinion of the Court.

This is a writ of error to the Supreme Court of the State of California to review a judgment in which that court held that the public administrator was entitled to letters of administration upon the estate of an Italian citizen dying and leaving an estate in California, in preference to the Consul General of the Kingdom of Italy.

The facts are briefly these: Giuseppe Ghio, a subject of the Kingdom of Italy, died intestate on the 27th day of April, 1908, in San Joaquin County, California, leaving a personal estate. Ghio resided in the State of California. His widow and heirs at law, being minor children, resided in Italy. Plaintiff in error, Salvatore L. Rocca, was the Consul General of the Kingdom of Italy for California, Nevada,

Washington, and Alaska territory.

Upon the death of Ghio, Consul General Rocca made application to the superior court of California for letters of administration upon Ghio's estate. The defendant in error, Thompson, as public administrator, made application for administration upon the same estate under the laws of California. The superior court held that the

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public administrator was entitled to administer the estate. The same view was taken in the Supreme Court of California. 157 Cal. 552. From the latter decision, a writ of error was granted, which brings the case here.

The Consul General bases his claim to administer the estate upon certain provisions of the Treaty of May 8, 1878, between Italy and the United States. Arts. XVI and XVII read as follows:

"Article XVI. In case of the death of a citizen of the United States in Italy, or of an Italian citizen in the United States, who has no known heir or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the consuls or consular agents of the nation to which the deceased belongs, to the end that information may be at once transmitted to the parties interested."

"Article XVII. The respective consuls general, consuls, vice consuls, and consular agents, as likewise the consular chancellors, secretaries, clerks or attaches, shall enjoy in both countries all the rights, prerogatives, immunities, and privileges which are or may hereafter be granted to the officers of the same grade of the most favored nation."

20 Stat. p. 732.

While Article XVI only requires notice to the Italian consul or consular agent of the death of an Italian citizen in the United States, Article XVII gives to consuls and similar officers of the Italian nation the rights, prerogatives, immunities, and privileges which are or may be hereafter granted to an officer of the same grade of the most favored nation. It is the contention of the plaintiff in error that this favored-

nation clause in the Italian treaty gives him the right to administer estates of Italian citizens dying in this country because of the privilege conferred upon consuls of the Argentine Republic by the treaty between that country and the United States of July 27 1853, Art. IX of which provides:

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"If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the Consul General or Consul of the nation to which the deceased belonged, or the representative of such Consul General or Consul, in his absence, shall have the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs."

10 Stat. p. 1009.

From this statement of the case it is apparent that the question at the foundation of the determination of the rights of the parties is found in the proper interpretation of the clause of the Argentine treaty just quoted. The question is: does that treaty give to Consuls of the Argentine Republic the right to administer the estate of citizens of that Republic, dying in the United States, and a like privilege to Consuls of the United States as to citizens of this country, dying in the Argentine Republic? The question has been the subject of considerable litigation, and has been diversely determined in the courts of this country which have had it under consideration.

The surrogate of Westchester County, New York, in two cases, *In re Fattosini's Estate*, 67 N.Y.S. 1119, and *In re Lobrasciano's Estate*, 77 N.Y.S. 1040, has held that the Treaty of Italy of 1878, in the most favored nation clause, carried the benefit of the Argentine treaty to the consuls of Italy, and that the Argentine conferred the right of administration upon the consuls of that country. In *In re Wyman*, 191 Mass. 276, the supreme judicial court of that state, as to Russian consuls, under the most favored nation clause in the Russian treaty, followed the

surrogate courts of Westchester County, observing that the cases were well considered and covered the entire ground. The Supreme Court of Alabama, in *Carpigiani v. Hall*, 55 So. 248,

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followed the decisions in New York and Massachusetts just referred to, and in *In re Scutella's Estate*, 129 N.Y.Supp. 20, the appellate division of the Supreme Court of New York pursued the same course.

A contrary view was expressed by the Surrogate Court of New York County in *In re Logiorato's Estate*, 69 N.Y.S. 507, and by the Supreme Court of Louisiana in *Lanfear v. Ritchie*, 9 La. Ann. 96.

An examination of the cases which have held in favor of the right of a Consul General to administer the estate, to the exclusion of the public administrator, makes it apparent that the *Lobrasciano* case, which is the fullest upon the subject, is the one that has been followed without independent reasoning upon the part of the courts adopting it.

In that case, the right of a consul to administer the estates of deceased citizens of his country is based not only upon the interpretation of the treaties involved, but as well upon the law of nations giving the right to consuls to administer such estates. In the opinion, some citations are made from early instructions of Secretaries of State emphasizing the right and duty of consuls to administer upon the effects of citizens of the United States dying in foreign lands.

But these instructions must be read in the light of the statute of the United States, 1709, Rev.Stat., \* which,

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while it recognizes the right of consuls and vice consuls to take possession of the personal estate left by any citizen of the United States who shall die within their consulates, leaving there no legal representative, partner, or trustee, to inventory the same, and to collect debts, provides in the fifth paragraph of the section that, if

at any time before the transmission to the United States Treasury of the balance of the estate, the legal representative appears and demands his effects in the hands of the consul, they shall be delivered up, and he shall cease further proceedings, and the duties imposed are where "the laws of the country permit."

The consular regulations of the United States tersely express the duty of a consul as to the conservation of the property of deceased countrymen, and declare that he has no right, as consular officer, apart from the provisions of treaty, local law, or usage, to administer the estate, or, in that character, to aid any other person in so administering it, without judicial authorization. Section 409 of the consular Regulations is as follows:

"A consular officer is, by the law of nations and by statute, the provisional conservator of the property within his district belonging to his countrymen deceased therein. He has no right, as a consular officer, apart from the provisions of treaty, local law, or usage, to administer on the estate,

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or in that character to aid any other person in so administering it, without judicial authorization. His duties are restricted to guarding and collecting the effects, and to transmitting them to the United States, or to aid others in so guarding, collecting, and transmitting them, to be disposed of pursuant to the law of the decedent's estate. 7 Op.Att.Gen. 274. It is, however, generally conceded that a consular officer may intervene by way of observing the proceedings, and that he may be present on the making of the inventory."

In Moore's International Law Digest, Vol. 5, p. 123, a letter of Mr. Hay, Secretary of State, under date of February 3, 1900, is quoted to the effect that the right of a United States consular officer to intervene by way of observing proceedings in relation to the property of deceased Americans leaving no representatives in foreign countries is not understood to involve any interference with the functions of a public administrator.

In this country, the right to administer property left by a foreigner within the jurisdiction of a state is primarily committed to state law. It seems to be so regulated in the State of California by giving the administration of such property to the public administrator. There is, of course, no federal law of probate or of the administration of estates, and, assuming for this purpose that it is within the power of the national government to provide by treaty for the administration of property of foreigners dying within the jurisdiction of the states, and to commit such administration to the consular officers of the nations to which the deceased owed allegiance, we will proceed to examine the treaties in question with a view to determining whether such a right has been given in the present instance.

This determination depends primarily upon the construction of 9 of the Argentine Treaty of 1853, giving to the consular officers of the respective countries, as to citizens dying intestate, the right

"to intervene in the

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possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs."

It will be observed that, whether, in the possession, the administration, or the judicial liquidation of the estate, the sole right conferred is that of intervention, and that conformably with the laws of the country . Does this mean the right to administer the property of such decedent, and to supersede the local laws as to the administration of such estate? The right to intervene at once suggests the privilege to enter into a proceeding already begun, rather than the right to take and administer the property.

Literally, to intervene means, as the derivation of the word indicates [ *inter*, between, and *venire*, come], to come between. Such is the primary definition of the word given in Webster's Dictionary and in the Century Dictionary. When the term is used in reference to legal proceedings, it covers the right of one to

interpose in, or become a party to, a proceeding already instituted, as a creditor may intervene in a foreclosure suit to enforce a lien upon property or some right in connection therewith; a stockholder may sometimes intervene in a suit brought by a corporation; the government is sometimes allowed to intervene in suits between private parties to protect a public interest, and whether we look to the English ecclesiastical law, the civil law, from which the Argentine law is derived, or the common law, the meaning is the same.

"In English ecclesiastical law. -- The proceeding of a third person, who, not being originally a party to the suit or proceeding, but claiming an interest in the subject matter in dispute, in order the better to protect such interest, interposes his claim. 2 Chitty, Pr. 492; 3 Chitty, Commer.Law, 633; Dalrymple v. Dalrymple, 2 Hagg.Const. 137; 3 Phillim.Ecc.Law 586."

"In the civil law. -- The act by which a third party demands to be received as a party in a suit pending between other persons. "

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"The intervention is made either for the purpose of being joined to the plaintiff, and to claim the same thing he does, or some other thing connected with it, or to join the defendant, and with him to oppose the claim of the plaintiff, which it is his interest to defeat."

Poth.Proc.Civile, pt. 1, c. 2, 7, no. 3.

"In practice. -- A proceeding in a suit or action by which a third person is permitted by the court to make himself a party, either joining the plaintiff in claiming what is sought by the complaint or uniting with the defendant in resisting the claims of the plaintiff or demanding something adversely to both of them. *Logan v. Greenlaw*, 12 F. 16; *Fischer v. Hanna*, 8 Colo. App. 471, 47 P. 303; *Gale v. Frazier*, 4 Dak.196, 30 N.W. 138; *Reay v. Butler* 7 P. 671."

Black's Law Dict. p. 651.

Emphasis is laid upon the right under the Argentine treaty to intervene in possession, as well as administration and judicial liquidation, but this term can only have reference to the universally recognized right of a consul to temporarily possess the estate of citizens of his nation for the purpose of protecting and conserving the rights of those interested before it comes under the jurisdiction of the laws of the country for its administration. The right to intervene in administration and judicial liquidation is for the same general purpose, and presupposes an administration or judicial liquidation instituted otherwise than by the consul, who is authorized to intervene.

So, looking at the terms of the treaty, we cannot perceive an intention to give the original administration of an estate to the Consul General to the exclusion of one authorized by local law to administer the estate.

But it is urged that treaties are to be liberally construed. Like other contracts, they are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects

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and purposes of the states thereby contracting. *In re Ross*, [140 U. S. 453](#) , [140 U. S. 475](#) .

It is further to be observed that treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms. For instance, where that was the purpose, as in the treaty made with Peru in 1887, it was declared in Art. 33 as follows:

"Until the conclusion of a consular convention, which the high contracting parties agree to form as soon as may be mutually convenient, it is stipulated that, in the absence of the legal heirs or representatives, the consuls or vice consuls of either

party shall be ex-officio the executors or administrators of the citizens of their nation who may die within their consular jurisdictions, and of their countrymen dying at sea, whose property may be brought within their district."

And in the convention between the United States and Sweden, proclaimed March 20, 1911, it is provided:

"In the event of any citizens of either of the two contracting parties dying without will or testament, in the territory of the other contracting party, the consul general, consul, vice consul general, or vice consul of the nation to which the deceased may belong, or, in his absence, the representative of such consul general, consul, vice consul general, or vice consul shall, so far as the laws of each country will permit, and pending the appointment of an administrator, and until letters of administration have been granted, take charge of the property left by the deceased, for the benefit of his lawful heirs and

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creditors, and, moreover, have the right to be appointed as administrator of such estate."

The Argentine treaty was made in 1853, and the Italian treaty in 1878. In 1894, correspondence between Baron Fava, the then Italian Ambassador, and Mr. Uhl, Acting Secretary of State, shows that the Italian Ambassador proposed that Italian consuls in the United States be authorized, as were the American consuls in Italy, to settle the estates of deceased countrymen. It was the view of the Department of State of the United States, then expressed, that, as the administration of estates in the United States was under the control of the respective states, the proposed international agreement should not be made. The Acting Secretary of State adverted to the practical difficulties of giving such administration to consular officers, often remotely located from the place where the estate was situated. See 5 Moore's International Law Digest, p. 122.

The learned counsel for the plaintiff in error, in his supplemental brief, has referred to a statement of the law of the Argentine Confederation of 1865, English

translation published in Vol. 58, British and Foreign State Papers, p. 455, in which it is said that a foreigner dying intestate, without leaving a wife or lawful heirs in the Argentine Republic, or where he dies leaving a will, the heirs being foreigners, absent from the country, and the executor being also absent, the consul of the deceased foreigner's nation is given the right to intervene in the arrangement of his affairs. In Arts. III and IV, it is declared:

"III. Consular intervention shall be confined to -- 1st. sealing up the goods, furniture, and papers of the deceased, after giving due notice to the local authorities, provided always that the death has taken place within the consular district; 2nd. appointing executors."

"IV. The consuls shall at once communicate to the testamentary judge the appointment of such executors. "

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It is contended that the right secured to a foreign consul to appoint an executor under this Act of 1865 is evidence of the fact that the Argentine Republic is carrying out the treaty in the sense contended for by the plaintiff in error; but in this law certainly no right of administration is given to the consul of a foreign country. It is true, he may appoint an executor, which appointment it is provided is to be at once communicated to the testamentary judge.

In Art. VIII, the same law provides that executors shall perform their charge in accordance with the laws of the country. Art. XIII declares that the rights granted by the law shall be only in favor of the nations which cede equal privileges to Argentine consuls and citizens.

Our conclusion, then, is that, if it should be conceded for this purpose that the most favored nation clause in the Italian treaty carries the provisions of the Argentine treaty to the consuls of the Italian government in the respect contended for (a question unnecessary to decide in this case), yet there was no purpose in the Argentine treaty to take away from the states the right of local administration provided by their laws, upon the estates of deceased citizens of a foreign country,

and to commit the same to the consuls of such foreign nation to the exclusion of those entitled to administer as provided by the local laws of the state within which such foreigner resides and leaves property at the time of decease.

We find no error in the judgment of the Supreme Court of the State of California, and the same is

*Affirmed.*

\*

"SEC. 1709. It shall be the duty of consuls and vice-consuls, where the laws of the country permit:"

"First. To take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any vessel, who shall die within their consulate, leaving there no legal representative, partner in trade, or trustee by him appointed to take care of his effects."

"Second. To inventory the same with the assistance of two merchants of the United States, or, for want of them, of any others at their choice."

"Third. To collect the debts due the deceased in the country where he died, and pay the debts due from his estate which he shall have there contracted."

"Fourth. To sell at auction, after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and at the expiration of one year from his decease, the residue."

"Fifth. To transmit the balance of the estate to the Treasury of the United States, to be holden in trust for the legal claimant, except that, if at any time before such transmission, the legal representative of the deceased shall appear and demand his effects in their hands, they shall deliver them up, being paid their fees, and shall cease their proceedings."

