

**IN THE MATTER OF THE WILL OF THE DECEASED FLORA VIARDO.
LEON C. VIARDO, APPLICANT AND APPELLEE, VS. GALICANO
GUTIERREZ, ADMINISTRATOR AND APPELLANT.**

G.R. No. 45166. April 19, 1939

Ponente: AVANCENA, C.J.

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AVANCENA, C.J.:

Flora Viardo and her husband Galicano Gutierrez, together with Honorato Viardo and the spouses Trinidad Viardo and Valentin Liwag, filed a complaint against Leon Viardo for the partition of real property and the rendition of accounts. Leon Viardo, in his answer, filed a counter-claim in the amount of P2,184.48 against Flora Viardo and Galicano Gutierrez.

During the pendency of this case, Flora Viardo died on December 23, 1930, leaving a will which was later probated and which gave rise to her testate proceedings wherein the commissioners on claims were appointed on the 20th of February. Flora Viardo was substituted in this case for partition by the judicial administrator of her estate, namely, her widow Galicano Gutierrez.

After the case was heard, the court on January 23, 1936, ordered the administrator Galicano Gutierrez to pay to Leon Viardo the amount of P2,184.48, which the latter claims in his counterclaim. From this order, an appeal was perfected.

It is contended in this appeal that the Court of First Instance was without jurisdiction to enter the appealed resolution, hence, the same is null and void. It is alleged in favor of this proposition that, Flora Viardo having died, the claim for the amount of P2,184.48 should have been filed with the committee on claims in the testate of Flora Viardo, and this claim should have been dismissed in the partition case. It is true that, under section 119 of the Code of Civil Procedure, when a party to a case for the recovery of money dies while the action is pending, the action shall be dismissed and the claim thereafter filed before the committee on claims in the testate or intestate proceedings commenced for the administration of the estate of the deceased, litigant. But section 701 of the same Code of Civil Procedure excepted from this provision the case wherein the claim had been filed as a counterclaim, like the one filed by Leon Viardo in the case at bar.

The appealed judgment is affirmed, with the costs to the appellant. So ordered.

Villa-Real, Imperial, Diaz, Laurel, Concepcion, and Moran, JJ., concur.

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