or to a statute or ordinance, to warrant declaratory relief. Any other matter not mentioned therein is deemed excluded. This is under the principle of *expressio unius est exclusio alterius.*

Now, does the subject matter under consideration come within the import of the rule? The answer cannot but be in the negative, for it does not refer to any written instrument, statute or ordinance. It merely refers to the sufficiency or probative value of an oral evidence concerning a decree of divorce issued by a former judge, which the court trying the bigamy case has ample power and authority to pass upon. This is not the opportune moment to look into the correctness of the ruling of the court in said bigamy case allowing the presentation of oral evidence to prove a decree of divorce under the circumstances at present obtaining, for the bigamy case is still pending determination. This will be determined in due time when properly presented before this Court. For the purposes of this appeal, it suffices for this Court to declare that the subject matter of the petition does not warrant the granting of declaratory relief within the meaning of said Rule 66.

Wherefore, the order appealed from is affirmed, without pronouncement as to costs.

Moran, Paras, Feria, Pablo; Bengzon; Padilla, Tuason; Montemayor, Reyes, and *Jugo.* — *J.J.* concur.

VIII

Lucila Ornedo, Petitioner vs. Judge Eusebio F. Ramos et al., Respondent G. R. No. L-2898, December 23, 1950.

CERTIORARI; CERTIORARI IS PREDICATED ON LOWER COURT'S POSITIVE ACTION BUT NOT A REMEDY FOR INACTION. — By its nature, certiorari is predicated on a positive or affirmative action that is injurious to the interests of the complainant. It is not a remedy for a lower court's inaction irrespective of the reasons given therefor.

F. Milambiling for petitioner.

Panfilo M. Manguera for respondents *Mabute* and *Magna Labaguis.*

DECISION

TUASON, *J.*:

It appears that Epifania Mabute applied in the Court of First Instance of Marinduque for letters of administration of the intestate estate of Severina Mistal, application which was docketed as Civil Case No. 656. Shortly thereafter Jacinta Ornedo filed a similar application with reference to the estate of Juan Ornedo, Severina Mistal's husband who died after her. The latter application was docketed as Civil Case No. 659.

Lucila Ornedo, Juan Ornedo's illegitimate daughter whose mother he married after his first wife's death, and Natalia Musnit, Lucila's mother, opposed both applications. It seems that the basis of the opposition, or the principal basis, was that the title to the properties of both decedents had already vested in Lucila Ornedo by donation from her father.

The two applications, by agreement of the parties, were heard jointly before Judge Mariano Melendres on July 9, 1946. On July 24, before the applications were decided, six cousins of Severina Mistal filed a complaint in intervention which was admitted. The intervenors claimed a share in Severina Mistal's estate by agreement with Juan Ornedo as Severina's surviving espouse.

Judge Melendres having been assigned to another judicial district before he could write his decision, and as the stenographic notes taken at the trial had been lost, the two applications for letters of administration and the intervention were again set down for hearing and, also by agreement of the parties, were consolidated for trial before Judge Enriquez who had succeeded Judge Melendres. In the second trial as well as in the first the ownership to the properties involved was submitted and in Judge Enriquez's decision adjudicated in the manner set forth in the next following paragraph.

On July 31 Judge Enriquez dismissed both applications for letters of administration and the complaint in intervention. The reasons were: (1) all the property of Severina Mistal had passed to her surviving spouse, Juan Ornedo, by operation of law, Mistal having no legal heirs; (2) Juan Ornedo in life had donated his property to his daughter Lucila; and (3) the deed of partition between Juan Ornedo and the intervenors by virtue of which the latter were assigned a share in Severina Mistal's estate, was, in the opinion of the court, void and of no effect.

The two applicants and the intervenors filed motions for reconsideration on the ground that "the decision is against the law." As Judge Enriquez this time had been detailed to another province, like Judge Melendres before him, it fell upon the lot of Judge Eusebio F. Ramos, who had taken Judge Enriquez's place, to act on the said motions for reconsideration.

Judge Ramos' decision or order rendered on October 15 set aside Judge Enriquez's order or decision on the ground that "it does not appear that the original hearing of the petition(s) in said cases have been duly published as required by the Rules of Court" so that the court, Judge Ramos opined, had acquired no jurisdiction. But Judge Ramos did not stop here. With apparent inconsistency, he decreed the definite dismissal of Case No. 656 and of the intervention and held (1) that Natalia Musnit, Juan Ornedo's widow and Lucila Ornedo's co-opponent, had no interest in her deceased husband's estate "at least (except) as usufructuary over a certain (portion) of the property," and (2) that "when Severina Mistal died her heir was her husband Juan Ornedo to the exclusion of her cousins," the intervenors. In other words, although as he said, the court had acquired no jurisdiction, His Honor went into the merits of the controversy.

With regard to case No. 659, the set-aside order was in keeping with the theory of lack of jurisdiction. With reference to this case, the order was that "the hearing of the petition x x x be published as required by law, the date of the hearing to be set at next calendar of this Court."

The present petition for certiorari was brought by Lucila Ornedo without her mother, her co-opponent to the application for letters of administration, and makes Judge Ramos, Jacinta Ornedo and the intervenors respondents. For answer, the respondents question, among other things, the availability of certiorari to review Judge Ramos' order, it being contended that the respondent Judge did not act outside or in excess of his jurisdiction and that there is plain, speedy and adequate remedy by appeal.

The issues and the arguments have been complicated and confused by the inclusion in the proceedings below and in the various orders, of matters not quite germane to the right of the applicants to appointments as administratrixes, such as the conflicting claims of ownership to the properties. The order complained of presents two aspects which should be taken up separately for clarity's sake. And before we proceed, it is well to take note that Judge Ramos' order is not assailed in so far as it refers to case No. 656 which, for that reason, will be left out of the following discussion.

As has been seen, Judge Ramos did not render a decision on the merits of the application in Case No. 659; he merely directed that the application be published and he postponed the hearing thereof to the next calendar of the court after such publication should have been made.

It is at once obvious that this order is not a cause for complaint on the part of Lucila Ornedo. The postponement of the hearing and the publication of the application are not the concern of the opponent, except perhaps for the delay they would entail. The cost of publication is to be defrayed by the applicant, and the opponent is in possession of the questioned property to the exclusion of all others and is not being bothered in the enjoyment of its produce. In this aspect of the case the petitioner clearly has no cause of action.

The true reason, not plainly apparent on the surface of the pleadings and the memoranda, for the seeming paradox of the applicant's acquiescence in or defense of the respondent Judge's order and for the opponent's vigorous exception thereto is, that in setting aside Judge Enriquez's order, Judge Ramos destroyed an advantage Lucila Ornedo had already achieved. Judge Enriquez's order not only dismissed the application for letters of administration but made a definite declaration that Lucila Ornedo was the absolute owner of the properties sought to be placed under judicial administration. By this award the opponent had,

in a manner of speaking, won the first and very important round of the contest which Judge Ramos' order set at naught.

It is said, with good reason, apropos of this feature of the case that the respondent Judge was wrong in saying that the application had not been published. Lucila Ornedo's counsel points out that the required publication was made in *La Nueva Era*, a newspaper of general circulation in the province of Marinduque, before the first trial, and that copies of the periodical carrying the notice plus supporting testimonial evidence were introduced at that trial held by Judge Melendres.

Lucila Ornedo's counsel also calls attention, with support of precedents and authorities, to the fact that with the consent or acquiescence of the parties concerned, title to property involved in a testate or intestate proceeding may be litigated and adjudged by the probate court. Lucila Ornedo did not do so but she could also cite the fact that the movants' motions for reconsideration of Judge Enriquez's order did not impugn the sufficiency of the publication, nor did they attack the court's jurisdiction to give judgment on the conflicting claims of ownership between the parties.

Even so, certiorari does not lie. Relief must be sought by other mode of procedure. The error, if error was committed by Judge Ramos, was one of omission and not commission. To set aside Judge Enriquez's order was within Judge Ramos' jurisdiction, in much the same manner and to the same extent that Judge Enriquez, if he had not been replaced, would have authority to change, modify or reverse his decision or order.

Judge Ramos' order amounts simply to a refusal, notwithstanding the parties' agreement, to determine the validity of the alleged donation executed by the now deceased Ornedo in favor of his daughter, partly because, according to the Judge, the application for letters of administration had not been published, and principally because, in his judgment, this matter should be tried in a separate, ordinary action. In the last analysis, the petitioner's contention could only be that in the present state of the proceedings in the court below Judge Ramos should decide the motions for reconsideration and affirm Judge Enriquez's order without requiring a new publication of the application for letters of administration.

By its nature, certiorari is predicated on a positive or affirmative action that is injurious to the interests of the complainant. It is not a remedy for a lower court's inaction, irrespective of the reasons given therefor.

Upon the foregoing considerations, the petition for certiorari is dismissed without special finding as to costs.

Moran, Feria, Pablo, Bengzon, Padilla, Montemayor, Reyes, Jugo, and *Bautista Angelo,* concur.

Mr. Justice Paras voted for dismissal.