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.

IX

Paz E. Siguiong, Plaintiff-Appellee vs. Go Tecson et al., Defendant-Appellants, G. R. Nos. L-3430-3431, May 23, 1951.

1. DESCENT & DISTRIBUTION; MORTGAGES; ONLY ACTUAL FILING OF CLAIM IN INTESTATE OR PROCEEDINGS CAN CONSTITUTE WAIVER OF MORTGAGE LIEN. — In order that a mortgage creditor may be said to have waived his mortgage lien against an estate, he must appear to have formally filed his claim in the testate or intestate proceeding. The fact that the administrator has merely made an overture to pay the mortgage debt and the mortgagees (or one of them) have signified willingness to accept payment, is not sufficient to constitute a waiver of the mortgage lien, where there is nothing to show that the offer of payment has been preceded by the formal filing of a claim. Without that formality, the mortgagees cannot be deemed to have waived their mortgage so as to be estopped from bringing a foreclosure suit.

2. PLEADING & PRACTICE; ANSWER; MATTER NOT SET UP AS DEFENSE IN ANSWER OR MOTION TO DISMISS CAN NOT BE RELIED UPON AS A GROUND ON APPEAL. — The validity or the constitutionality of Republic Act 342 cannot be made an issue on appeal, where moratorium has not been invoked as a defense or as a ground for a motion to dismiss.

Bienvenido A. Tan, Jr. for appellant.

J. Perez Cardenas for appellees.

DECISION

REYES, J.:

On October 1, 1927, Paulino P. Gocheco mortgaged to Paz E. Siguion a piece of registered real property in the City of Manila to secure a debt of ₱30,000.00. Some ten years later, he constituted a second mortgage on the same property in favor of Paz E. Siguion's son, Alberto Maximo Torres, to secure a debt of ₱20,000. Both mortgages were duly registered.

Gocheco died in 1943 without having discharged either mortgage. The following year, proceedings for the settlement of his estate were instituted in the Court of First Instance of Manila, and Go Tecson was appointed judicial administrator.

On February 3, 1949, the present actions were filed against the administrator Go Tecson for the foreclosure of the two mortgages, and judgment having been rendered against him in both, he has elevated the cases here by way of appeal, contending that the lower court erred in not holding (1) that he could no longer be sued as administrator because the administration proceedings had already been closed; (2) that the matter in controversy was already *res judicata;* (3) that plaintiffs' claim had already been paid; and (4) that Republic Act No. 342 was unconstitutional and void.

The first error assigned deserves no serious consideration, it appearing from the certificate of the Clerk of the Court of First Instance of Manila (Exh. "B") that the order for the distribution of the estate among the heirs has not as yet been complied with. In fact, counsel for appellant admits in his brief that, technically speaking, the administration proceedings are still pending.

As to the second assignment of error, the record does not disclose facts sufficient to support the claim of *res judicata.* The record of the administration proceedings, if already reconstituted, has not been presented, and nowhere does it appear that a claim for the mortgage indebtedness was formally filed in the administration proceedings and that it was there litigated and judicially determined. There is, for sure an alleged order read at the hearing, which says:

> ORDER
>
> "A written constancia having been forwarded to this Court by registered mail by Paz E. Siguion, wherein she made known her willingness to accept the payment for the mortgage obligation contracted by the deceased, Paulino P. Gochocho within ten (10) days after receipt of the written notice from the administrator signifying his intention to pay, the Court hereby advises the herein administrator to take the necessary steps to make payment to said Paz E. Siguion.
>
> So ordered.
>
> "Manila, Philippines September 7, 1944
>
> "(SGD.) ROMAN A. CRUZ
>
> Judge"

This order conveys the information that the administrator has made an overture to pay the mortgage debt and the mortgagees (or one of them) have signified willingness to accept payment. But there is nothing in the order to show that the offer of payment has been preceded by the formal filing of a claim. Without that formality, the mortgagees cannot be deemed to have waived their mortgage so as to be estopped from bringing a foreclosure suit.

> "In order that the mortgage creditor may be said to have waived his mortgage lien, he must appear to have filed formally his claim in the testate or intestate proceeding. The fact that he requested the committee on claims (now abolished) to take the necessary measures to have his claim paid at its maturity, does not imply that he has presented such claim as to be estopped from foreclosing his mortgage. So, also, the mere fact of bringing his credit to the attention of the committee on claim for the purpose of having it included among the debts and taken into account in case the estate should be

sold, but with a statement at the same time that said claim is secured by a mortgage duly registered, is not equivalent to filing the claim and does not, therefore, constitute a waiver of said mortgage." (II Moran, Comments on the Rules of Court 3rd ed. p. 406).

The payment alleged in the third assignment of error is not evidenced by any receipt, and there is nothing to support it except the bare declaration of the administrator's former attorney, Judge Bienvenido Tan, to the effect that, threatened with contempt proceedings for refusing to receive payment, the appellee Paz E. Siguion came to see him in his office and accepted the payment tendered by him. But the testimony is denied by this appellee, and we note that Judge Tan has merely inferred from what she told him on that occasion that she was then accepting the money tendered by him in payment for the debt, an inference not warranted by appellee's actual words, as may be seen from following testimony of Judge Tan:

"Q Meaning to say that you personally paid her the money?

"A After the motion (to cite for contempt) was present Siguion went to my office and tol Mrs. Paz no need of presenting the motion and therefore I do not ask the court that she be declared in contempt since she was willing to accept payment. And I told her that if she was willing to accept payment I have the money in my office. I took the money from a 'bayong' and delivered it to her but she said: 'Well, I am sorry I cannot carry this bag of money with me because it is very dangerous and besides I am going to the province. Will you please keep it yet in your office until I call for it?' That is what I meant that she accepted the payment.

"Q And, the money, Judge Tan, remained with you?

"A Yes, it remained with me.

"Q Until when?

"A Until now. It is still in the office."

Far from expressing actual acceptance of payment and consequent signification of intention to have the money kept for her by Judge Tan as her depositary despite the fact that he was attorney for the adverse party, appellee's words should rather be construed as a refusal on her part to receive payment, an interpretation which would be consistent with her previous attitude in repeatedly declining to receive payment, as denounced in Judge Tan's motion for contempt, and also in consonance with what may be expected to be the natural reaction of any creditor to a tender of payment in the depreciated currency of those days (October, 1944). Indeed, had the money really been accepted, considering the amount involved, a receipt would surely have been required for the same; and not only a receipt, but also a release or discharge of mortgage. No such document, however, has been signed by Paz E. Siguion, it does not even appear that the money was counted. In the circumstances, we have no hesitation in holding that the lower court did not err in not finding that the mortgage debt has already been paid.

As to the fourth and last assignment of error, the record does not show that appellant has in a definite and suitable manner invoked moratorium in the court below. That defense was neither pleaded in the answer nor made a ground for a motion to dismiss. On the other hand, the answer admits the allegation of the complaint that the moratorium on prewar debts has already been lifted by Republic Act No. 342 subject to the exception or condition therein specified in favor of debtors who have filed their claim with the War Damage Commission, to which class the estate represented by appellant does not belong since it has not filed any war damage claim. All this reveals lack of intention to resort to the defense of moratorium, especialy when considered in connection with the allegation in the answer that despite defendant's repeated attempts to pay the debt, plaintiffs have refused to accept payment. It is true that at the conclusion of the trial appellant's counsel in open court asked for leave to amend his answer "so as to allege therein," to use his own language, "that the moratorium is unconstitutional." By this counsel probably meant to challenge the constitutionality of Republic Act No. 342. But the petition to amend was withdrawn when it encountered determined opposition from the adverse party, and in any event the validity of that Act cannot be made an issue since moratorium has not been invoked as a defense or as a ground for a motion to dismiss.

In view of the foregoing, and without passing on the constitutionality of Republic Act No. 342 because it is not a necessary issue in the case, the decision appealed from is affirmed, with costs against the appellant.

Paras, Feria, Bengzon, Padilla Tuason, Montemayor, Jugo and Angelo. — JJ. concur

Pablo, J., took no part.