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 presented Mrs. Paz Siguion went to my office and told me that there was no need of presenting the motion and for me to 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. — J.J. concur

Pablo, J., took no part.

X

Hernandez et al., Petitioners vs. Emilio Peña et al., Respondents, G.R. No. L-2777, May 19, 1950.

FORCIBLE ENTRY AND DETAINER; DEPOSIT OF RENT DURING PENDENCY OF APPEAL; EXTENSION OF TIME NOT ALLOWED. — Section 8 of Rule 72 of the Rules of Court provides that should the defendant fail to make the payment or deposit of the rent during the pendency of the appeal, the Court of First Instance, upon motion of the plaintiff of which the defendant shall have notice, and upon proof of such failure, shall order the execution of the judgment appealed from. The court has no jurisdiction to allow extensions of time for such payment

Leoncio C. Jimenez for petitioners.

Pedro Valdes Liongson for respondents.

DECISION

OZAETA, *J.*:

Ines Oliveros, as defendant in an unlawful detainer case pending before the respondent Judge Emilio Peña on appeal from the Municipal Court, failed to deposit with the Clerk of Court the rent of ₱200 corresponding to the month of October, 1948, in accordance with the judgment of the Municipal Court. A motion for the issuance of a writ of execution was filed by the petitioners on November 23, 1948, which was opposed by the respondent on the ground that her failure to make the deposit was due to the fact that she had instituted in this court a petition for certiorari and prohibition (G.R. No. L-2602), in which she prayed to be relieved of the obligation of making a monthly deposit of ₱200.

Acting upon said motion and the reply thereto, the respondent judge on December 21, 1948, issued the following order:

> "The Court orders the defendants to deposit in Court the rents corresponding to the months of October and November, 1948, within five days from the receipt of a copy of this order, and should they fail to do so, it is hereby ordered that the corresponding writ of execution be issued."

The above-quoted order, which is the subject of the present petition for certiorari and mandamus, is contrary to section 8 of Rule 72 and the decisions of this court in various cases. Said rule provides that should the defendant fail to make the payment or deposit of the rent during the pendency of the appeal, "the court of First Instance, upon motion of the plaintiff of which the defendant shall have notice, and upon proof of such failure, *shall* order the execution of the judgment appealed from . . ." This court has repeatedly held that the Court of First Instance has no jurisdiction to allow extensions of time for such payments. (Lapuz *vs.* Court of First Instance of Pampanga, 46 Phil. 77; Arcega *vs.* Dizon, G.R. No. L-195, 42 Off. Gaz. 2138; Meneses *vs.* Dinglasan, G.R. No. L-2088, Sept. 9, 1948.)

The mere filing by the respondent Ines Oliveros of a petition for certiorari and prohibtion, praying that she be relieved of the obligation of making the monthly deposit, did not ipso facto relieve her of such obligation, as the respondent judge himself impliedly held by requiring her to make the deposit within five days.

The order complained of is set aside, and the respondent judge is hereby directed to issue the writ of execution prayed for by the petitioners, with costs against the respondent Ines Oliveros.

Pablo, Bengzon, Tuason, Montemayor, and Reyes, — J.J.; concur

Agustina Paranete et. al., Petitioners, vs. Hon. Bienvenido Tan, et al., Respondents, G.R. No. L-3791, November 29, 1950.

PROHIBITION; OWNERSHIP OF REAL PROPERTY IN LITIGATION; ORDER REQUIRING ACCOUNTING AND DEPOSIT OF PROCEEDS OF HARVEST WITH CLERK OF COURT, IMPROPER. — A trial court issuing an order requiring the party in possession of the property whose ownership is in litigation, to to make an accounting and to deposit the proceeds of the sale of the harvest with the Clerk of Court acted in excess of its jurisdiction. That order, in effect, made the Clerk of Court a sort of a receiver charged with the duty of receiving the proceeds of sale and the harvest of every year during the pendency of the case with the disadvantage that the Clerk of Court has not filed any bond to guarantee the faithful discharge of his duties as depositary; and considering that in actions involving title to real property, the appointment of a receiver cannot be entertained because its effect would be to take the property out of the possession of the defendant, except in extreme cases when there is clear proof of its necessity to save the plaintiff from grave and irremediable loss or damage, it is evident that the action of the respondent judge is unwarranted and unfair to the defendants

Emiliano M. Ocampo for petitioners.

Jose E. Morales for respondents *Felix Alcaras*, and *Fructuosa, Maxima* and *Norberta*, all surnamed *Vasquez*.

DECISION

BAUTISTA ANGELO, J.:

This is a petition for a writ of prohibition wherein petitioner seeks to enjoin the respondent judge from enforcing his order of March 4, 1950, on the ground that the same was issued in excess of his jurisdiction.

On January 16, 1950, Felix Alcaras, Fructuosa Vasquez, Maxima Vasquez and Norberta Vasquez filed a case in the Court of First Instance of Rizal for the recovery of five (5) parcels of land against Agustina Paranete and six other codefendants. (Civil Case No. 1020). On January 28, 1950, plaintiffs filed a petition for a writ of preliminary injunction for the purpose of ousting the defendants from the lands in litigation and of having themselves placed in possession thereof. The petition was heard *ex parte*, and as a result the respondent judge issued the writ of injunction requested. On February 28, 1950, the defendants moved for the reconsideration of the order granting the writ, to which plaintiffs objected, and after due hearing, at which both parties appeared with their respective counsel, the respondent judge reconsidered his order, but required the defendants to render an accounting of the harvest for the year 1949, as well as all future harvests, and if the harvest had already been sold, to deposit the proceeds of the sale with the Clerk of Court, allowing the plaintiffs or their representative to be present during each harvest. This order was issued on March 4, 1950. Defendants again filed a motion for the reconsideration of this order, but it was denied, hence the petition under consideration.

The question to be determined is whether or not the respondent judge exceeded his jurisdiction in issuing his order of March 4, 1950, under the terms and conditions set forth above.

We hold that the respondent judge has acted in excess of his jurisdiction when he issued the order above adverted to. That order, in effect, made the Clerk of Court a sort of a receiver charged with the duty of receiving the proceeds of sale and the harvest of every year during the pendency of the case with the disadvantage that the Clerk of Court has not filed any bond to guarantee the faithful discharge of his duties as depositary; and considering that in actions involving title to real property, the appointment of a receiver cannot be entertained because its effect would be to take the property out of the possession of the defendant, except in extreme cases when there is clear proof of its necessity to save the plaintiff from grave and irremediable loss or damage, it is evident that the action of the respondent judge is unwarranted and unfair to the defendants. (Mendoza v. Arellano, 36 Phil. 59; Agonoy v. Ruiz, 11 Phil. 204; Aquino v. Angeles David, L-375; prom. Aug. 27, 1946; Ylarde v. Enriquez, *supra*; Arcega v. Pecson, 44 Off. Gaz. (No. 12) 4884; Carmen Vda. de De la Cruz v. Guinto, 45 Off. Gaz. pp. 1309, 1311.) Moreover, we find that Agustina Paranete, one of the defendants, has been in possession of the lands since 1943, in the exercise of her rights as owner, with her codefendants working for her exclusively as tenants, and that during all these years said Agustina Paranete had made improvements thereon at her own expense. These improvements were made without any contribution on the part of the plaintiffs. The question of ownership is herein involved and both parties seem to have documentary evidence in support of their respective claims, and to order the defendants to render an accounting of the harvest and to deposit the proceeds in case of sale thereof during the pendency of the case would be to deprive them of their means of livelihood before the case is decided on the merits. The situation obtaining is such that it does not warrant the placing of the lands in the hands of a neutral person as is required when a receiver is appointed. To do so would be unfair and would unnecessarily prejudice the defendants.

While the respondent judge claims in his order of March 25, 1950, that he acted as he did because of a verbal agreement entered into between the lawyers of both parties, we do not consider it necessary to pass on this point because the alleged agreement is controverted and nothing about it has been mentioned by the respondent judge in his order under consideration.

Wherefore, petition is hereby granted. The Court declares the order of the respondent judge of March 4, 1950 null and void and enjoins him from enforcing it as prayed for in the petition.

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