non-eligible, replaced petitioner Meliton de Gracia, a non-eligible; respondent Jacinto Barro, a non-eligible, replaced petitioner Margarito Basuga, a non-eligible; respondent Constancio Acasio, a non-eligible, replaced petitioner Luis Marte, a non-eligible; respondent Tereso Kaindoy, a non-eligible, replaced petitioner Dominador Cordoves, a non-eligible; and respondent Arcadio Maglines, a non-eligible, replaced petitioner Teotimo Mullet, a non-eligible, as shown by Exhibits 1 to 13;

9. That since the aforesaid petitioners have been duly appointed and qualified and assumed the performance of their respective offices up to the time their services were ordered terminated effective as of October 31, 1950, they did not resign nor have they been removed either for misconduct, incompetency, disloyalty to the Philippine Government, neither have they ever committed any irregularity in the performance of their duties nor have they violated any law or duty or committed any act that may cause abandonment of their duties nor have they been investigated for cause.

10. That until the present, the respondents, Governor, Treasurer and Guards, have refused and continue to refuse the petitioners their respective positions above mentioned and they have not been paid their salaries from the time of the termination of their services or removal from their offices until the present;

11. That the respondent provincial guards were paid their salaries as such provincial guards, the first salary payment having been made on December 26, 1950, after their respective appointments have been duly authorized by the Commissioner of Civil Service and approved by the Secretary of the Interior;

12. Respondents and petitioners admit the authenticity and due execution of Exhibits A, A-1 to A-14, B, B-1 to B-4, C, D, E, F, G, H, I, J, K, L, L-1, L-2, L-3 of petitioners and of Exhibits 1, 1(a), 1(b), 2, 2(a), 3, 4, 4(a), 4(b), 4(c), 4(d), 4(e), 4(f), 4(g), 5, 6, 6(a), 7, 7(a), 8, 8(a), 9, 9(a), 10, 10(a), 11, 11(a), 12, 12(a), 13, 13(a), 14, 16, 16 (2 pages), 17 (2 pages), 17(a), 17(b), 17(c), 17(d), 17(e), and 17(f) for respondents, respectively, without necessarily admitting their validity, legality nor the conclusions therein contained.

WHEREFORE, the parties to this Honorable Court most respectfully submit the foregoing stipulation of facts for approval with the reservation to sumbit such additional evidence as each party may deem necessary.

Maasin, Leyte, April 12, 1951.

Upon the above quoted stipulations of facts, the Court of First Instance of Leyte rendered judgment, the dispositive part of which is —

(a) Declarado a los recurrentes Teodulo Orais, Eulalio Bernades, Dominador Cadavero, David Lim, Nicomedes Conejos, Vedasto Cabales, Meliton de Gracia, y Margarito Basuga sin derecho a los cargos de sargento de la guardia provincial y guardias provinciales ocupados por los recurridos Isidro Magallanes, Pedro Flores, Francisco Tavera, Narciso Ravago, Crisanto Cab, Dalmacio Cortel, Rafael Galleon, Filomeno Adobas, Jacinto Barro. Tereso Caindoy y Arcadio Maglines, y sobreseyendo su accion.

(b) Declarando a los recurrentes Felipe Enelo y Luis Marte con derecho de continuar en sus cargos como guardias provinciales y que los nombramientos extendidos a favor de los recurridos Bienvenido Gonzales y Constancio Acasio son contrarios a la lay, y ordenando a estos dos ultimos que entreguen sus puestos a los referidos recurrentes Felipe Enelo y Luis Marte.

(c) Ordenando al tesorero provincial Sr. Melecio Palma, o a su sucesor que pague los sueldos de los recurrentes Felipe Enelo y Luis Marte desde el primero de Noviembre de 1950 y mientras dichos recurrentes continuen desempeñando sus cargos legalmente.

(d) Sobreseyendo la accion de los recurrentes Manuel Kangleon y Alfredo Lucin.

(e) Absolviendo libremente de la demanda a los recurridos Mamerto S. Ribo y Francisco P. Lopez; y

(f) Condenando a los recurrentes, excepcion de Felipe Enelo y Luis Marte, a pagar las costas del juicio.

From this judgment the petitioners, with the exception of Felipe Enelo and Luis Marte, appealed. Respondents Bienvenido Gonzales and Constancio Acasion appealed from the decision in so far as the trial court found them not entitled to the positions claimed by them.

The respondents Isidro Magallanes, Pedro Flores, Francisco Tavera and Narciso Ravago, all civil service eligibles, replaced the petitioners Teodulo T. Orais, David Lim, Domingo Saligo and Eulalio Bernades, respectively, who are not civil service eligibles. The rest of the respondents, all not civil service eligibles, replaced the rest of the petitioners, except Manuel Kangleon and Alfredo Lucin, who are also not civil service eligibles. Respondents Bienvenido Gonzales and Constancio Acasio, not civil service eligibles, replaced Felipe Enelo and Luis Marte who though not civil service eligibles are veterans.

Petitioners invoke in support of their claim section 682 of the Revised Administrative Code, as amended by Com. Acts Nos. 177 and 281. Said section provides:

> Temporary appointment without examination and certification by the Commissioner of Civil Service or his local representative shall not be made to a competitive position in any case, except when the public interests so require, and then only upon the prior authorization of the Commissioner of Civil Service; and any temporary appointment so authorized shall continue only for such period not exceeding three months as may be necessary to make appointment through certification of eligibles, and in no case shall extend beyond thirty days from receipt by the chief of the bureau or office of the Commissioner's certification of eligibles; x x x.

Appointments made under the section are temporary, when the public interests so require and only upon the prior authorization of the Commissioner of Civil Service, not to exceed three months and in no case shall extend beyond thirty days from receipt by the chief of the bureau or office of the Commissioner's certification of eligibles. The fact that the petitioners held the positions for more than three months does not make them civil service eligibles. Also the fact that the acting Commissioner of Civil Service authorized their appointments "under section 682 of the Revised Administrative Code to continue only until replaced by an eligible" does not make them eligibles. The holding of a position by a temporary appointee until replaced by an eligible in disregard of the time limitation of three months is unauthorized and illegal. The temporary appointment of other non-eligibles to replace those whose term have expired is not prohibited. Hence the replacement of Teodulo T. Orais, David Lim, Domingo Saligo and Eulalio Bernades, who are non-eligibles, by Isidro Magallanes, Pedro Flores, Francisco Tavera and Narciso Ravago, who are eligibles, is in accordance with law. The replacement of non-eligibles by non-eligibles is lawful under and pursuant to section 682 of the Revised Administrative Code. The replacement of Felipe Enelo and Luis Marte, non-eligibles but veterans, by Bienvenido Gonzales and Constancio Acasio, who are non-eligibles, is unlawful The former are preferred under Rep. Act No. 65, as amended by Rep. Act No. 154, they have been appointed within the term provided for in said Republic Acts. If the preference of a veteran is to be confined to appointment and promotion only and does not include the right to continue to hold the position to which he was appointed until an eligible is certified by the Commissioner of Civil Service, then he would be in no better situation than a non-eligible who is not a veteran. The appointment of a veteran, however, is subject to cancellation or his removal from office or employment must be made by competent authority when the Commissioner of Civil certifies that there is an eligible.

There is no averment in the petition that the positions held by Manuel Kangleon and Alfredo Lucin were usurped or that they were replaced by others in their positions as provincial guards. Hence the petition in so far as it concerns them must be dismissed.

Republic Act No. 557 is also invoked by the appellants Bienvenido Gonzales and Constancio Acasio. The act guarantees the tenure of office of provincial guards and members of city and municipal police who are eligibles. Non-eligibles like the two appellants do not come under the protection of the act invoked by them.

The judgment appealed from is affirmed, without costs.

Paras, Bengzon, Montemayor, Jugo, Pablo, Tuazon, Reyes, Bautista, Angelo and *Labrador*, J. J., concur.

VI

The Leyte-Samar Sales Co. and Raymond Tomassi, versus Sulpicio V. Cea, in his capacity as Judge of the Court of First Instance of Leyte; and Atty. Olegario Lastrilla, G. R. No. L-5963, May 20, 1953.

CIVIL PROCEDURE; EXECUTION; WHERE PROPERTY SOLD AT PUBLIC AUCTION IS CLAIMED BY THIRD PERSON.—In a suit for damages by S Co. and RT against L Co., AH FB and JR, judgment against defendants, jointly and severally, for the amount of ₱31,589.14 was rendered. On June 9, 1951 the

sheriff sold at auction to RD and PA "All the rights, interests, titles and participations" of the defendant in certain properties. But on June 4, 1951 OL filed in the case a motion in which he claimed to be the owner by purchase on September 29, 1949, of all the "shares and interests" of FB in L Co., and requested "under the law of preference of credits" that the sheriff be required to retain in his possession so much of the proceeds of the auction sale as may be necessary "to pay his right." The court granted OL's motion, which was later modified to the effect that it merely declared that OL was entitled to 17% of the properties sold. *HELD*: The judge's action on OL's motion should be declared as in excess of jurisdiction, considering specially that RD and PA, and the defendants themselves, had undoubtedly *the right to be heard — but were not notified*, and it was necessary to hear them on the merits of OL's motion because RD and PA might be unwilling to recognize the validity of OL's purchase, or, if valid, they may want him not to forsake the partnership that might have some obligations in connection with the partnership properties. And what is more important, if the motion is granted, when the time for redemption comes, RD and PA will receive from redemptioners seventeen per cent (17%) *less than the amount* they had paid for the same properties. AH and JR, eyeing OL's financial assets, might also oppose the substitution by OL of FB, the judgment against them being *joint and several*. They might entertain misgivings about FB's slipping out of their common predicament thru the disposal of his shares. Lastly, all the defendants would have reasonable motives to object to the delivery of 17% of the proceeds to OL, because it is so much money deducted, and for which the plaintiffs *might ask another levy* on their other holdings or resources on the assumption that there was no fraudulent collusion among them.

Assuming that OL's shares have been actually — but unlawfully — sold by the sheriff to RD and PA the remedy can be found in Sec. 15, Rule 39.

Filemon Montejo and Ramon T. Jimenez for petitioners.
Olegario Lastrilla in his own behalf.

DECISION

Bengzon, J.

Labeled "Certiorari and Prohibition with Preliminary Injunction" this petition actually prays for the additional writ of mandamus to compel the respondent judge to give due course to petitioners' appeal from his order taxing costs. However, inasmuch as according to the answer, petitioners thru their attorney withdrew their cash appeal bond of ₱60.00 after the record on appeal had been rejected, the matter of mandamus may summarily be dropped without further comment.

From the pleadings it appears that,

In Civil Case *No. 193* of the Court of First Instance of Leyte, which is a suit for damages by the Leyte Samar Sales Co. (hereinafter called LESSCO) and Raymond Tomassi against the Far Eastern Lumber & Commercial Co. (unregistered commercial partnership hereinafter called FELCO), Arnold Hall, Fred Brown and Jean Roxas, judgment against defendants jointly and severally for the amount of ₱31,589.14 plus costs was rendered on *October 29, 1948*. The Court of Appeals confirmed the award in November, 1950, minus ₱2,000.00 representing attorneys' fees mistakenly included. The decision having become final, the sheriff sold at auction on *June 9, 1951* to Robert Dorfe and Pepito Asturias "all the rights, interests, titles and participation" of the defendants in certain buildings and properties described in the certificate, for a total price of eight thousand and one hundred pesos. *But on June 4, 1951* Olegario Lastrilla filed in the case a motion, wherein he claimed to be the owner by purchase on September 29, 1949, of all the "shares and interests" of defendant Fred Brown in the FELCO, and requested "*under the law of preference of credits*" that the sheriff be required to retain in his possession so much of the proceeds of the auction sale as may be necessary "to pay his right". Over the plaintiffs' objection the judge in his order of June 13, 1951, granted Lastrilla's motion by requiring the sheriff to retain 17% of the money "for delivery to the assignee, administrator or receiver" of the FELCO. And on motion of Lastrilla, the court on August 14, 1951, modified its orders of delivery and merely declared that Lastrilla was entitled to 17% of the properties sold, saying in part

"x x x el Juzgado ha encontrado *que no se* ha respetado los derechos del Sr. Lastrilla en lo que se refiere a su adquisicion de las acciones de C. Arnold Hall (Fred Brown) en la Far Eastern Lumber & Commercial Co. porque las mismas han sido incluidas en la subasta.

"Es verdad que las acciones adquiridas por el Sr. Lastrilla representan el 17% del capital de la sociedad 'Far Eastern Lumber & Commercial Co., Inc., et al' pero esto no quiere decir que su valor no esta sujeto a las fluctuaciones del negocio donde las invertio.

"Se vendieron propiedades de la corporacion 'Far Eastern Lumber & Commercial Co. Inc.,' y de la venta solamente se obtuvo la cantidad de ₱8,100.00.

"EN SU VIRTUD, se declara que el 17% de las propiedades vendidas en publica subasta pertenece al Sr. O. Lastrilla y este tiene derecho a dicha porcion pero con la obligacion de pagar el 17% de los gastos por la conservacion de dichas propiedades por parte del Sheriff; x x x." (Annex K)

It is from this declaration and the subsequent orders to enforce it (1) that the petitioners seek relief by certiorari, their position being that such orders were null and void for lack of jurisdiction. At their request a writ of preliminary injunction was issued here.

The record is not very clear, but there are indications and we shall assume for the moment, that Fred Brown (like Arnold Hall and Jean Roxas) was a partner of the FELCO, was defendant in Civil Case No. 193 *as such partner*, and that the properties sold at auction actually belonging to the FELCO partnership and the partners. We shall also assume that the sale made to Lastrilla on September 29, 1949, of all the shares of Fred Brown in the FELCO was valid. (Remember that judgment in this case was entered in the court of first instance a year before.)

The result then, is that on June 9, 1951 when the sale was effected of the properties of FELCO to Roberto Dorfe and Pepito Asturias, Lastrilla was already a partner of FELCO.

Now, does Lastrilla have any proper claim to the proceeds of the sale? If he was a creditor of the FELCO, perhaps or maybe. But he was not. The partner of a partnership is not a creditor of such partnership for the amount of his shares. That is too elementary to need elaboration.

Lastrilla's theory, and the lower court's, seems to be: inasmuch as Lastrilla had acquired the shares of Brown in September 1949, i.e., before the auction sale, and he was not a party to the litigation, such shares could not have been transferred to Dorfe and Asturias.

Granting, *arguendo* that the auction sale did not include the interest or portion of the F9LCO properties corresponding to the shares of Lastrilla in the same partnership (17%), the resulting situation would be — at most — that the purchasers Dorfe and Asturias will have to recognize dominion of Lastrilla over 17% of the properties awarded to them.[2] So Lastrilla acquired no right to demand any part of the money paid by Dorfe and Asturias to the sheriff for the benefit of LESSCO and Tomassi, the plaintiffs in that case, for the reason that, as he says, his shares (acquired from Brown) could not have been and were not auctioned off to Dorfe and Asturias.

Supposing however that Lastrilla's shares have been actually (but unlawfully) sold by the sheriff (at the instance of plaintiffs) to Dorfe and Asturias, what is his remedy? Section 15, Rule 39 furnishes the answer.

Precisely, respondents argue, Lastrilla vindicated his claim by proper action, i.e., motion in the case. We ruled once that "action" in this section means action as defined in section 1, Rule 2.[3] Anyway his remedy is to claim "the property", not the proceeds of the sale, which the sheriff is directed by section 14, Rule 39 to deliver unto the judgment creditors.

In other words, the owner of property wrongfully sold may not voluntarily come to court, and insist, "I approve the sale, therefore give me the proceeds because I am the owner". The reason is that the sale was made for the judgment creditor (who paid for the fees and notices), and not for anybody else.

(1) Requiring sheriff to turn over 17% of the proceeds to Lastrilla.
(2) This is a feature to be discussed between the three of them at the proper time — and this statement does not attempt to settle their respective rights.
(3) Cf. Manila Herald Publishing Co. v. Judge Ramos, L-4268, January 18, 1951, Moran, Comments, 1952 Ed. Vol. 2, p. 46.

On this score the respondent judge's action on Lastrilla's motion should be declared as in excess of jurisdiction, which even amounted to want of jurisdiction, considering specially that Dorfe and Asturias, and the defendants themselves, had undoubtedly *the right to be heard — but they were not notified.*[4]

Why was it necessary to hear them on the merits of Lastrilla's motion?

Because Dorfe and Asturias might be unwilling to recognize the validity of Lastrilla's purchase, or, if valid, they may want him not to forsake the partnership that might have some obligations in connection with the partnership properties. And what is more important, if the motion is granted, when the time for redemption comes, Dorfe and Asturias will receive from redemptioners seventeen per cent (17%) *less than the amount* they had paid for the same properties.

The defendants Arnold Hall and Jean Roxas, eyeing Lastrilla's financial assets, might also oppose the substitution by Lastrilla of Fred Brown, the judgment against them being *joint and several.* They might entertain misgivings about Brown's slipping out of their common predicament thru the disposal of his shares.

Lastly, all the defendants would have reasonable motives to object to the delivery of 17% of the proceeds to Lastrilla, because it is so much money deducted, and for which the plaintiffs *might ask another levy* on their other holdings or resources. Supposing of course, there was no fraudulent collusion among them.

Now, these varied interests of necessity make Dorfe, Asturias and the defendants *indispensable parties* to the motion of Lastrilla — granting it was a step allowable under our regulations on execution. Yet these parties were not notified, and obviously took no part in the proceedings on the motion.

"A valid judgment cannot be rendered where there is a want of necessary parties, and a court cannot properly adjudicate matters involved in a suit when necessary and indispensable parties to the proceedings are not before it." (49 C. J. S. 67.)

"Indispensable parties are those without whom the action cannot be finally determined. In a case for recovery of real property, the defendant alleged in his answer that he was occupying the property as a tenant of a third person. This third person is an indispensable party, for, without him, any judgment which the plaintiff might obtain against the tenant *would have no effectiveness,* for it would not be binding upon, and cannot be executed against, the defendant's landlord, against whom the plaintiff has to file another action if he desires to recover the property effectively. In an action for partition of property, each co-owner is an indispensable party, for without him *no valid judgment for partition* may be rendered." (Moran, Comments, 1952 9d. Vol. I, p. 56.) (Underscoring supplied.)

Wherefore, the orders of the court recognizing Lastrilla's right and ordering payment to him of a part of the proceeds were patently erroneous, because they were promulgated in excess or outside of its jurisdiction. For this reason the respondents' argument resting on plaintiffs' failure to appeal from the orders on time, although ordinarily decisive, carries no persuasive force in this instance.

For as the former Chief Justice Moran has summarized in his Comments, 1952 9d. Vol. II, p. 168 —

"x x x And in those instances wherein the lower court has acted without jurisdiction over the subject-matter, or where the order or judgment complained of is a patent nullity, courts have gone even as far as to disregard completely the question of petitioner's fault, the reason being, undoubtedly, that acts performed with absolute want of jurisdiction over the subject-matter are void *ab initio* and cannot be validated by consent, express or implied, of the parties. Thus, the Supreme Court granted a petition for certiorari and set aside an order reopening a cadastral case five years after the judgment rendered therein had become final. In another case, the Court set aside an order amending a judgment six years after such judgment acquired a definitive character. And still in another case, an order granting a review of a decree of registration issued more than a year ago had been declared null and void. In all these cases the existence of the right to appeal has been disregarded. In a probate case, a judgment according to its own recitals was rendered without any trial or hearing, and the Supreme Court, in granting certiorari, said that the judgment was by its own recitals a patent nullity, which should be set aside though an appeal was available but was not availed of. x x x"

Invoking our ruling in Melocotones v. Court of First Instance, 57 Phil. 144, wherein we applied the theory of laches to petitioners' 3-year delay in requesting certiorari, the respondents point out that whereas the orders complained of herein were issued in June 13, 1951 and August 14, 1951 this special civil action was not filed until August 1952. It should be observed that the order of June 13 was superseded by that of August 14, 1951. The last order merely declared "que el 17% de las propiedades vendidas en publica subasta pertenece al Sr. Lastrilla y este tiene derecho a dicha porcion." This does not necessarily mean that 17% of *the money had to be delivered to him.* It could mean, as hereinbefore indicated, that the purchasers of the property (Dorfe and Asturias) had to recognize Lastrilla's ownership. It was only on *April 16, 1952* (Annex N) that the court issued an order directing the sheriff "to turn over" to Lastrilla "17% of the total proceeds of the auction sale". There is the order that actually prejudiced the petitioners herein, and they fought it until the last order of July 10, 1952 (Annex Q). Surely a month's delay may not be regarded as laches.

In view of the foregoing, it is our opinion, and we so hold that all orders of the respondent judge requiring delivery of 17% of the proceeds of the auction sale to respondent Olegario Lastrilla are null and void; and the costs of this suit shall be taxed against the latter. The preliminary injunction heretofore issued is made permanent. So ordered.

Paras, Feria, Pablo, Tuazon, Montemayor, Reyes, Jugo, Bautista Angelo and *Labrador*, J. J., concur.

(4) True, Lastrilla was attorney for defendants, but he was careful in all his motions on the matter to sign "in his own representation" or "for himself and in his behalf."

VII

Tomasa V. Bulos Vda. de Tecson, as administratrix of the testate estate of the deceased Pablo Tecson Ocampo, versus Benjamin, et al., all surnamed Tecson, G. R. No. L-5233, September 30, 1953.

CIVIL PROCEDURE; PETITION FOR RELIEF FROM JUDGMENTS. — While a petition for relief as a rule is addressed to the sound discretion of the court, however, when it appears that a party has a good and meritorious defense and it would be unjust and unfair to deny him his day in court, equity demands that the exercise of judicial discretion be reconsidered if there are good reasons that warrant it.

Castillo and Guevara and Lc-O, Feria and Manglapus for appellants.
Claro M. Recto for appellee.

DECISION

BAUTISTA ANGELO, J.:

The incident involved in this appeal stems from an action for forcible entry originally commenced on June 12, 1941 in the Justice of the Peace Court of San Antonio, Nueva Ecija, by Tomasa V. Bulos Vda. de Tecson in her capacity as administratrix of the estate of the deceased Pablo Tecson Ocampo against defendants-appellants.

In that case, defendants filed a written answer. After trial, the court dismissed the case. From the decision plaintiff appealed to the Court of First Instance of Nueva Ecija, and the case was docketed as Civil Case No. 8889.

Having failed to answer the complaint within the time prescribed in Section 1, Rule 15, of the Rules of Court, defendants, on motion of plaintiff, were declared in default and thereafter plaintiff presented her evidence. On October 9, 1941, a judgment by default was rendered against defendants, and on October 10, 1941, copy of the decision was served on defendants' counsel.

Three days after receipt of copy of the decision, or on October 13, 1941, counsel for defendants filed a written manifestation stating that he would file a petition to set aside the decision by default but that he needed more time to do so to enable him to gather evidence