Inasmuch as the law establishes the presumption that the deceased followed the law and regulations, it was incumbent upon respondent to prove that he did otherwise, or that he failed to comply with the regulations. In other words it was incumbent upon the respondent herein to prove that the deceased *voluntarily* went out of his route and drove his jeepney towards the province of Quezon, not that the deceased voluntarily went to that province thereby going beyond the route provided for the vehicle that he was driving.

Petitioners claim that the deceased voluntarily went out of his ordinary route. Petitioners also have the obligation to prove this fact, this being as affirmative allegation. They failed to do so.

There being no such evidence submitted by the respondent, i. e., that the going of the deceased to Quezon province was made voluntarily by him, we must conclude, pursuant to the presumption that every person performs his duty or obligation, that he was forced by circumstances beyond his will to go outside his ordinary route; in other words that while driving in the city he must have been forced to go out and drive to the province of Quezon on the threats of the malefactors guilty of assaulting and killing him against his (deceased) will.

In the case of Batangas Transportation Co. vs. Josefina de Rivera, et al., G. R. No. L-7656, prom. May 8, 1956, decided by this Court, in which a driver of a bus, while so driving was suddenly attacked by his assailant who boarded the bus and thereafter stabbed him, the majority of this Court held that the driver died in the course of his employment even if there were indications (not sufficient to prove) that there was personal animosity between the assailant and the victim, which may have caused the assault. In said case the reason for the decision of this Court was that the circumstances or indications show that the deceased died while driving the bus, thus that his death must have been due to his employment.

The present case is stronger than the above-cited case of Batangas Transportation Co. vs. Rivera, for while in said previous case there were indications which showed personal animosities which may have been the root cause of the assault, in the case at bar, there are no such indications. On the other hand, there is a presumption that the deceased died while in the course of his employment, and therefore his death must be presumed to have arisen out of said employment.

We, therefore, find that the decision of the majority which has been appealed from is not in consonance with the law and the express provision of Section 43 of the Workmen's Compensation Law; and that by reason of such express provision of the law, we must hold that Victoriano Santiago died by reason of and in the course of his employment and consequently his heirs are entitled to receive the compensation provided for by law in such cases.

Decision rendered by the court below is hereby set aside, and respondent is hereby ordered to pay the compensation due the heirs under the law. Without costs.

SO ORDERED.

Paras, C. J., Bengzon, Bautista Angelo, J.B.L. Reyes, Endencia, Barrera and Gutierrez David, JJ., concurred.

Montemayor, J., reserved his vote.

V

The Municipal Treasurer of Pili, Camarines Sur, Balbino Onquit and Felix Onquit, Petitioners, vs. The Honorable Perfecto R. Palacio, Judge of the Court of First Instance of Camarines Sur and Honesto Paladin, Respondents, G.R. No. L-13653, April 27, 1960 Montemayor, J.

CIVIL PROCEDURE; SECTION 10 RULE 40 OF RULES OF COURT CONSTRUED. — Under Section 10, Rule 40 of the Rules of Court, where a Justice of the Peace Court disposes of a case not on its merits but on a question of law, as when it dismisses it, and it is appealed to the Court of First Instance, the latter may either affirm or reverse the ruling or order of dismissal.

DECISION

This is a petition for certiorari and mandamus to set aside the decision of respondent Judge Palacio in Civil Case No. 3909 of the Court of First Instance of Camarines Sur, and to order him to return the case to the Justice of the Peace Court of Pili, Camarines Sur.

The facts in this case are not in dispute. Balbino Onquit lost a carabao sometime in February, 1946. In December of that year, Honesto Paladin bought a carabao for ₱100.00 from one Jovito Milarpis, who in turn had bought the same animal from Vicente Baguya that same day. Almost ten years later, that is, on April 13, 1956, Balbino Onquit saw the carabao bought by Paladin in December 1946, and in the latter's possession and supposedly recognized it to be the animal he had lost about ten years before; so, he reported the matter to the Chief of Police of Pili, who immediately impounded the animal and gave its custody to the Municipal Treasurer of the said town.

On April 28, 1956, Paladin filed an action for replevin in the Justice of the Peace Court of Pili, Camarines Sur, (Civil Case No. 66), against Balbino Onquit, Felix Onquit, and the Chief of Police of Pili, to recover possession of the carabao. The Justice of the Peace Court decided the case in favor of the defendants. Paladin appealed the case to the Court of First Instance of Camarines Sur (Civil Case No. 3453), which in a decision dated January 14, 1957, reversed the appealed decision and ordered that the carabao involved be returned to plaintiff Paladin. After said decision had become final and executory, Paladin demanded the delivery of the carabao to him, but the Municipal Treasurer refused to deliver.

Instead of having the decision executed by the proper authorities, Paladin would appear to have done nothing, possibly waiting for the Municipal Treasurer to change his mind. But on April 13, 1957, instead of filing motion to enforce the judgment in his favor which had long become final and executory, he filed another Civil Case No. 87 in the same Justice of the Peace Court of Pili, against the Municipal Treasurer, Balbino Onquit and Felix Onquit, making reference to Civil Case No. 66 of the Justice of the Peace Court and the decision in Civil Case No. 3453, Court of First Instance, in his favor, and asking that the same carabao be returned to him and that defendants Onquit be made to pay him the sum of ₱1,500.00 as damages. Defendants filed a motion to dismiss on the ground of *res adjudicata* and estoppel. Acting upon said motion, the Justice of the Peace Court dismissed the case, stating that it was without prejudice on the part of Paladin to file a motion for execution, on the ground that the decision in the first case had already become final and executory, at the same time ruling that the Municipal Treasurer, one of the defendants, had no interest in the case.

Paladin appealed the order of dismissal to the Court of First Instance of Camarines Sur. Defendants-appellees failed to file their answer to the complaint and were declared in default. Paladin was allowed to present his evidence in their absence and respondent Judge Palacio, presiding the Court of First Instance of Camarines Sur, rendered the decision aforementioned, ordering the defendants Balbino Onquit and Felix Onquit to deliver the carabao and its offspring to the plaintiff and to pay the latter the sum of ₱1,500.00 as moral and consequential damages plus costs. Defendants filed two motions for reconsideration which were denied. Thereafter, they filed the present petition for certiorari and mandamus.

It is the contention of the petitioners that respondent Judge acted in excess of his jurisdiction or with grave abuse of discretion in trying the case appealed to him for the reason that under Section 10, Rule 40 of the Rules of Court, which read as follows:

> "Sec. 10. *Appellate powers of Courts of First Instance where action not tried on its merits by inferior courts.* — Where the action has been disposed of by an inferior court upon a question of law and not after a valid trial upon the merits, the Court of First Instance shall on appeal review the ruling of the inferior court and may affirm or reverse it, as the case may be. In case of reversal, the case shall be remanded for further proceedings.",

he should have remanded the case to the Justice of the Peace Court of Pili for further proceedings after he evidently had reversed the ruling of said Justice of the Peace Court, dismissing the case. We agree with petitioners. According to Section 10, Rule 40 of the Rules of Court, where a justice of the Peace Court disposes of a case not on its merits but on a question of law as when it dismisses it, and it is appealed to the Court of First Instance, the latter may either affirm or reverse the ruling or order of dismissal. In the present case, it presumably reverses said order; instead of trying the case on the merits, as it did, it should have returned the same to the Justice of the Peace Court for further proceedings.[1]

IN VIEW OF THE FOREGOING, the petition is granted. The decision of respondent Judge is hereby set aside and he is directed to remand the case to the Justice of the Peace Court for further proceedings. No costs.

Although we are ordering the remand of the case by respondent Judge to the Justice of the Peace Court, nevertheless, there is reason to believe that said case is already barred on the ground of *res adjudicata* and that the Justice of the Peace Court was correct in dismissing the same. If the plaintiff seeks damages due to the failure of the defendants in the first case to deliver the carabao to him within a reasonable time after said decision became final and executory, a separate action might be necessary not for the delivery of the carabao, but for damages suffered, if any, after the rendition of that decision.

As to the delivery of the carabao, the decision of the Court of First Instance in Civil Case No. 3453 in favor of plaintiff Paladin was rendered on January 14, 1957. Within five years thereafter, Paladin may yet file a motion for its execution. This is what he should have done, instead of filing the second case, Civil Case No. 87, in the Justice of the Peace Court.

Paras, C.J., Bengzon, Bautista Angelo, Labrador, Concepcion, and J.B.L. Reyes, JJ., concurred.

Barrera, J., concurred in the result.

VI

Nicanor E. Gabriel, et al., Plaintiffs-Appellants, vs. Carolino Munsayac, et al., Defendants-Appellees, G. R. No. L-12143, June 30, 1960, Bautista Angelo, J.

CIVIL PROCEDURE; PRO-FORMA MOTION FOR NEW TRIAL; MOTION FOR RECONSIDERATION.—Where the order of the trial court denying the motion for new trial on the ground that it is merely *pro-forma* has already become final for failure of appellant to ask for its reconsideration within the period of thirty days from the date it was received by counsel, but instead gave notice of his intention to appeal from the decision on the merits, appellant can not attack the validity of said order for the first time on appeal.

D E C I S I O N

Nicanor E. Gabriel brought this action before the Court of First Instance of Isabela to recover from Carolino Munsayac and Rafael de Leon certain sums of money allegedly advanced by the former to the latter in connection with the construction of a government project known as the "Pinakanawan Bridge Approach" along the Cagayan valley road which was the subject of a contract entered into between plaintiff and the government on June 5, 1950, plus damages and attorney's fees.

Defendants filed separately their respective answers setting up certain special defenses and a counterclaim. After trial, the court rendered judgment ordering defendant Munsayac to pay to plaintiff the sum of ₱674.35, but plaintiff in turn was ordered to pay defendant Rafael de Leon the sum of ₱4,351.92 as prayed for in the latter's counterclaim.

On September 28, 1955, plaintiff filed a motion for new trial, which was denied by the court in an order entered on October 15, 1955. And on October 19, 1955, plaintiff gave notice of his intention to appeal from the decision rendered by the court on August 24, 1955.

On November 11, 1955, defendant Munsayac filed a motion to dismiss the appeal on the ground that the notice of appeal was filed beyond the reglementary period considering that the motion for new trial filed by plaintiff was merely *pro-forma* as it does not conform with the rule relative to a motion for new trial. On December 10, 1955, plaintiff filed a petition for relief praying that the order of the court of October 15, 1955 denying plaintiff's motion for new trial on the ground that it was merely *pro-forma* be set aside, to which defendant Munsayac filed an opposition on January 23, 1956. On October 29, 1956, the court, considering the reasons alleged in the opposition founded, denied the motion for relief. Plaintiff interposed the present appeal seeking to set aside the order denying his petition for relief as well as the order denying his motion for reconsideration.

It should be noted that the decision of the trial court on the merits was rendered on August 24, 1955, copy of which was received by plaintiff's counsel on September 3, 1955. On September 28, 1955, plaintiff's counsel filed a motion for new trial with the request that it be included in the calendar for October 15, 1955 stating as reason the fact that counsel for plaintiff will be busy appearing before the House Electoral Tribunal in an election case then pending before it. The purpose of counsel was to appear before the court on said date and argue his motion orally and if necessary "supply" his oral argument with a written memorandum. However, he sent a telegram on October 14, 1955 praying that the hearing be postponed to October 18, 1955 alleging again as reason the fact that he was busy attending to the electoral protest. But when he went to Ilagan, Isabela on October 18, 1955 ready to argue on his motion for new trial he was surprised to find that his said motion was denied on October 15, 1955.

Plaintiff's counsel advanced as reasons for his petition for relief the following facts; that it was his intention to support his oral argument on the motion for new trial with a written memorandum so much so that he started its preparation in Ilagan, Isabela after filing the motion for new trial, but could not finish it on time as he had to leave for Manila in order to overtake the hearing of the electoral case between Albano and Reyes; that instead of finishing the memorandum, counsel prepared a supplementary petition for new trial wherein he pointed out in detail the errors which in his opinion were committed in the decision, putting the original and the copies in different envelopes ready to be sent to court and to the parties, but when he went to the post office to mail them he found the same already closed; that in the morning of September 13, 1955, being indisposed because he was then suffering from severe headache, plaintiff's counsel decided to see his doctor for treatment and entrusted the three envelopes to his housemaid, one Virginia de Vera, with the request to mail the same, but unfortunately Virginia lost the three envelopes and failed to inform counsel for her failure to mail them. Counsel now claims that the trial court committed a grave abuse of discretion in denying the petition for relief.

[1] Mirano vs. Diaz, 75 Phil. 274; Saavedra vs. Pecson, 76 Phil. 330.