

**FRANCISCO J. GONZALEZ AND VICENTE MAURICIO, PLAINTIFFS
AND APPELLEES, VS. PAULINA FRANCISCO, DEFENDANT AND
APPELLANT.***G. R. No. 25976. December 16, 1926*

Ponente: OSTRAND, J.

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This action is brought to foreclose a mortgage for the sum of P40,000, with interest, on a parcel of land situated in the District of Santa Ana, City of Manila. Summons was served upon the defendant on July 1, 1925, and her appearance was filed on the 20th of the same month. On July 30, counsel for the plaintiffs moved that the defendant be declared in default on the ground that no copy of the appearance had been served on the plaintiffs or the latter's counsel, and on the following day the defendant was declared in default for not having presented her answer. On the same day, the defendant filed an answer denying generally and specifically all the allegations of the complaint, but as far as the record shows, again failed to serve copy upon the adverse party, and upon hearing, without notice to the defendant, judgment was rendered on August 7, 1925 in favor of the plaintiffs and in accordance with the prayer of the complaint.

On September 4, the defendant's counsel filed a motion for reconsideration in which he alleged that he mailed copies, both of the appearance and of the answer, to the attorney for the plaintiffs before filing the documents; that said attorney consequently must be presumed to have received due notice in the ordinary course of the mails; that the defendant had no notice of the trial, and that, therefore the judgment rendered by default should be set aside and the case reopened.

The motion for reconsideration was not accompanied by an affidavit of merit nor was there any intimation that the defendant had a valid defense, and for this reason the motion was denied by the court below. Upon appeal by the defendant to this court, the appellant presents five assignments of error, the sum and substance of which is that the trial court erred in denying the motion for reconsideration and in not reopening the case.

The failure of the appellant to have her motion for the setting aside of the default accompanied by an affidavit of merit is fatal to her contentions. The rule that a motion for the setting aside of a judgment by default must be accompanied by an affidavit of merit or its equivalent, is so well established as to require no discussion. (*Wahl and Wahl vs. Donaldson, Sims & Co.*, 2 Phil., 301; *Daipan vs. Sigabu*, 25 Phil., 184; *Coombs vs. Santos*, 24 Phil., 446; *Real Monasterio de Santa Clara vs. Villamar*, 33 Phil., 411.) There is an exception to this rule when the judgment has been rendered without jurisdiction or before the defendant was in default, but such is not the case here. As far as the record shows, no copies neither of the appearance nor of the answer, were served upon the plaintiffs; the documents were therefore not filed in accordance with the rules of the court and the defendant was in default when the case was tried and the judgment rendered.

The judgment of the court below and the order denying the motion for setting aside the default are affirmed with the costs against the appellant. So ordered.

Avanceña, C. J., Johnson, Street, Malcolm, Villamor, Johns, Romualdez, and Villa-Real, JJ., concur.

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