A. HOLSCHER, Agent for MESSRS. A. WOERMANN, Appellant, *v.* RACHEL E. TOWNSEND, by her Husband M. M. TOWNSEND, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued December 10, 11, 15, 16, 17, 18, 1941. Decided December 30, 1941.

1. The chief clerk or other employee of a firm or company not holding a power of attorney from said firm or company is not the representative of a firm upon whom legal process can be served with effect.
2. Where a case is adjourned without day, a justice of the peace cannot enter a judgment by default without notice to the defendant.

Upon an appeal from an affirmance of the circuit court of a default judgment in an action of debt, *judgment reversed and new trial ordered.*

B. G. Freeman and *H. Lafayette Harmon* for appellant. *S. David Coleman* for appellee.

MR. JUSTICE BARCLAY delivered the opinion of the Court.

In March of the year 1938 this case originated in the Municipal Court of the Commonwealth District of Monrovia, James A. Gittens, Judge of the Municipal Court, presiding, and it has traveled hither through the Circuit Court for the First Judicial Circuit upon appeal from the judgment of His Honor E. A. Monger.

The bill of exceptions contains seven counts, but because of certain irregularities complained of by appellant as having taken place in the municipal court where the case originated and because of the refusal of His Honor the Judge of the Circuit Court to hear arguments before ruling so as to bring these to his notice, this Court,

notwithstanding other interesting and important issues which have appeared in the case, will direct its attention particularly to count four of the bill of exceptions, which reads as follows:

> "4. And also because the records of the Municipal Court show that due to an illegal judgment rendered by default by the said Municipal Magistrate against appellant, without notice of the assignment of the hearing of said cause being served on appellant nor on his counsel, His Honour the Judge refused to permit all attempts on appellant's part to offer testimony of an affirmative nature to prove the fact that there was no promise made by Beatrice Tyler to her father Solomon Hill, as a condition precedent to the execution of the Deed, that she relinquish her claim to half of the rent annually accruing from the lot No. 302, Water Street, Monrovia; and His Honour the Judge in ruling said that the testimony of appellee's witnesses to the fact that there was such a promise on the part of Beatrice Tyler to her father relinquishing half of the rents on said lot to her mother was not broken down, thereby showing that there was such a promise relinquishing half of the rents on said lot to her mother, to which appellant excepts."

The facts briefly stated are as follows:

Mrs. Beatrice Tyler, sister of plaintiff, now appellee, gave to her mother Laura Ann Hill, the widow of the late Solomon Hill, an order on Messrs. A. Woermann to pay to Mrs. Hill annually the sum of three hundred dollars out of the rent accruing from the lease of Mrs. Tyler's store situated on lot Number 302, Water Street, in the City of Monrovia, during the life of the agreement of the lease executed for said premises.

The order reads as follows:

"ARTHINGTON *July 2, 1935.*

"THE AGENT
A. WOERMANN,
MONROVIA.

"SIR,

"You will please pay to Mrs. Laura Ann Hill, widow of the late Solomon Hill of Arthington, the sum of three hundred dollars annually from the rent of my premises situated in the City of Monrovia known as the Old Woermann store which you now hold in your possession during the life of the agreement now in operation between you and myself. In the event that said widow would unfortunately die before the expiration of said Agreement, then in that case, you will pay same over to me, as heretofore.

"You will please observe, that this amount is given to the widow during her life and she will not be authorized to assign same to any one after her natural life.

"Respectfully yours,
(Sgd.) BEATRICE HILL-TYLER.

"Stamp.

"AGREED:
A. WOERMANN,
(Sgd.)—*Agent.*"

The agent of Messrs. A. Woermann accepted the order and paid £31. 5s. 0d., or one half of the amount to be paid to Mrs. Hill annually. A few months later and before the next installment was due, Mrs. Beatrice Tyler, with the consent of the firm, cancelled and terminated the lease agreement and the order in favor of Mrs. Laura Ann Hill, without reference to her.

Consequently, when the next installment of rent was due, the agent of Messrs. A. Woermann refused, upon the

application of Mrs. Hill, to pay her any money but informed her that Mrs. Tyler and her husband had cancelled the agreement upon the payment to them of £312. os. od. and that one Mr. Freeman was present at the time. The old lady, then, apparently taken by surprise, was annoyed and disappointed and exclaimed, "Did I not tell you not to pay my money to anyone except to me?" The agent is reported to have replied, "Yes, but on the morning they came, I was busy and forgot."

It was argued here that the agent committed a very grave blunder in consenting, without Mrs. Hill's knowledge and consent, to such a unilateral cancellation of an agreement by which, by virtue of his agreement to pay a part of the lease money to Mrs. Hill, he had become responsible to the said Mrs. Hill, since indeed he could not in such manner relieve himself of the obligation he had incurred. But, in view of the conclusions we have reached, necessitating a remand of this case, we have decided to refrain from commenting upon that issue at this stage of the proceedings.

From the records in the case, it appears that Mrs. Laura Ann Hill made no further move until after about one year and eight months when she, for reasons not appearing in the records, executed an assignment of the order to her other daughter, Rachel Hill Townsend, the plaintiff in this case, empowering her to apply to Messrs. A. Woermann and draw the money. Armed with this assignment, Mrs. Townsend, the assignee, through her husband, M. M. Townsend, immediately entered an action of debt against Messrs. A. Woermann, in her own right, in the Municipal Court of the Commonwealth District of Monrovia.

It appears further that at the call of the case in the municipal court, appellant and his counsel being absent, appellee's counsel asked for judgment by default, which was granted. In the process of perfecting the judgment

after the first witness had testified and left the stand, appellant's counsel appeared in court and filed a motion to vacate said judgment by default on the grounds *inter alia* that no notice of the assignment of the case for hearing had been served on him or on his client.

Plaintiff, now appellee, countered in his resistance by stating that a regularly issued notice for the assignment of the cause had been presented to the chief clerk of Messrs. A. Woermann, who promised to inform the agent who was then engaged. He did not do so. But the police magistrate in his ruling on the question stated that the notice given to the chief clerk was a verbal notice and not a regularly issued notice, that he considered such verbal notice sufficient notice to the firm and that "the Court will suffer defendant to place upon the record his plea; to cross-examine witnesses and to produce in his behalf such evidence in support of his plea. It shall however strongly object to all matters of an affirmative nature being put upon record by defendant."

The chief clerk or other employee of a firm or company, not holding a power of attorney from said firm or company, is not the representative of a firm upon whom legal process can be served with effect. The notice served upon the chief clerk of Messrs. A. Woermann by Policeman Dixon was tantamount to no service at all and of no legal validity. Consequently, the Police Magistrate of the Municipal Court erred in refusing to vacate the judgment by default upon the application of defendant and in limiting him to a plea of *nil debet*.

> "A subordinate agent or a mere clerk or bookkeeper is not a person on whom process can be served as a representative of the corporation, in the absence of a statute authorizing such service. . . . So service on a mere bookkeeper . . . or watchman is insufficient. . . . The corporation may appoint an agent or attorney with power to accept service of process and

where this is done, jurisdiction will be conferred by service on such agent or attorney." 4 Thompson, Corporations, § 3107, at 915–17 (3d ed. 1917).

Since said case had been adjourned without day before it was taken up, it was absolutely necessary that a notice of the assignment of the case for hearing should have been served on the agent of the defendant firm or upon its counsel, especially where both defendant and its counsel could be located, the more so as Roesing, the chief clerk of the mercantile firm, upon whom the notice was served, was not an agent of the company for the conduct of this or any other legal matter.

"Where a case is adjourned without day, a justice of the peace cannot enter a judgment by default without notice to the defendant." 6 Encyc. Plead. & Prac. *Defaults* 69 (1896).

The Municipal Court of Monrovia is controlled by the Justice of the Peace Code and in said Code it is provided that:

"At the time of his appearance or at a time to which the proceedings may be adjourned by the justice the defendant may answer the plaintiff's complaint in the following manner: to wit: (1) by denying that the complaint is sufficient in law to maintain the action; (2) by denying the truth of the facts stated in the complaint, or (3) he may present as an offset a counter-claim against the plaintiff, but the counter-claim must be germane to the action." J. P. Code, ch. 8, p. 23.

It is also provided in the aforesaid chapter of the Justice of the Peace Code, section 26, that, "Upon the trial, the justice shall first decide such questions of law as may be raised by either party."

It having been clearly shown to the police magistrate that no legal notice of the assignment of the case for hearing had been served on defendant or on his counsel, the court would have been well within the law to have vacated the judgment by default and to have given defend-

ant every opportunity to make an answer in accordance with the Code.

In the case of *Voss* v. *Hooke,* 2 L.L.R. 184 (1915), the following occurred:

> "In this case, judgment by default was entered against the defendants in error on the motion of plaintiff in error, at the December term of this Court, A. D. 1913, said defendants in error having failed to answer in person or by counsel, and Counsellor P. J. L. Brumskine, whose name appeared upon the docket as attorney for defendants in error announcing, upon inquiry from the court, that he had not been retained by said defendants in error.
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> "Subsequently, and before the perfecting of the judgment, a motion was filed at said April term of the court, by counsel for defendants in error, in which it was alleged that said defendants had retained Counsellor Brumskine to appear and defend their interests in said cause; but the said counsellor on being queried by the court, declared that he was not the attorney for defendants, and the case went by default. He therefore prayed the court to vacate the judgment by default, and to permit a rehearing of the case. Whereupon the court ruled:
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> "'That the case be continued, that Counsellor Brumskine be summoned to give evidence in the matter; and that if the facts stated by the defendants in error are substantiated, a rehearing of the case will be had.'
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> "A court may alter its judgment at any time before it is entered, or if it is entered before it is made final, before it is carried into effect." *Id.* at 184–85.

It being obvious that no notice of the time of trial of said case had been properly given to defendant and that the police magistrate refused to permit counsel for defendant, now appellant, to raise questions of law or to make any affirmative defense, this Court in order that

substantial justice be given to all parties concerned is of the opinion that the judgment of the circuit court be reversed with costs against appellee and the case be remanded with instructions to the Judge of the Circuit Court for the First Judicial Circuit also to remand the case to the Municipal Court of the Commonwealth District, City of Monrovia, to hear the case *de novo,* giving defendant an opportunity to make an answer in accordance with the provision as set out in the Justice of the Peace Code, if he so desires. And it is so ordered.

Reversed.