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by the Munsiff. The plaintiff then filed an application for review, and that application was granted by the Munsiff. An appeal was preferred by the defendants against the order, granting a review under s. 629 of the Code of Civil Procedure. The District Judge set aside the order granting the review, so far as the respondents in second appeal No. 2925 were concerned, but affirmed the order so far as the appellant in appeal No. 296 was concerned. Against the order of the District Judge, passed under s. 629, these two appeals have been preferrod. There is no provision in the Code which allows a second appeal against the order passed on appeal under s. 629. Both these appeals are, therefore, dismissed without costs.

Appeals dismissed.

REFERENCE FROM CALCUTTA COURT OF SMALL CAUSES.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Wilson.

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February 23.

NUSSERWANJEE (PLAINTIFF) *v.* PURSUTUM DOSS AND OTHERS (DEFENDANTS).*

Act XV of 1882, *s.* 69—*New trial, Application for—Difference of opinion between Judges—Order rejecting application—Contingent judgment.*

An order rejecting an application for a new trial, subject to the decision of the High Court on certain point or points referred, is not a "contingent judgment" within the meaning of s. 69 of Act XV of 1882, nor can points of difference between the Judges at that stage form matter for reference.

A SUIT was brought in the Calcutta Court of Small Causes for the recovery of Rs. 2,000 as damages, owing to the failure of the defendants to perform an alleged contract. During the course of the trial, the plaintiffs' pleader offered to abandon the claim, if the defendants would go into the witness box and swear on Ganges water and the leaves of the *toolsi* plant that they had never confirmed the contract. This was met by a counter-offer on the part of the defendants that they would abide by any statement the

* Small Cause Court Reference No. 8 of 1884, made by H. Millet, Esq., Chief Judge of the Court of Small Causes of Calcutta, dated the 16th of August 1884.

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plaintiff, who was by faith a Zoroastrian, would make in the presence of fire. The challenge was at once accepted; but the defendants wanted to withdraw their offer, and submit to the original offer of the plaintiff. The Court, however, decided that the parties were bound by the counter-offer, and the plaintiff having solemnly made a statement before a lighted match, his claim was decreed. A new trial was applied for; but the Chief Judge refused the application, subject to the decision of the High Court upon a point in which there seemed to be a difference of opinion between *him and his colleague*. Mr. Millet, however, referred to the case of *Hall* v. *Joachim* (1) and expressed doubts as to whether at that stage of the proceedings the Small Cause Court had the power of referring any question to the High Court.

The question referred was as follows: Whether under the circumstances the parties could be considered as of one mind, or whether the defendants were entitled to withdraw from the counter-offer made by them after it had been accepted.

Mr. *T. Apcar* for the plaintiff contended that the reference could not be heard, and relied on *Hall* v. *Joachim* (1).

Mr. *Allen* for the defendant.—*Hall* v. *Joachim* (1) is not an authority in this case. That was a case where the reference was made at the instance of parties. This is a case where two Judges have differed on a point of law. Section 69 of Act XV of 1882 leaves the Small Cause Court no option but to refer the matter according to the provisions thereof. *Hall* v. *Joachim* (1) decided no more than that this Court would not decide for the Court of Small Causes what they ought to decide for themselves. Moreover, when the Small Cause Court Judges, two in number, were hearing an application for a new trial in the suit, they were sitting together in the suit within the meaning of s. 69. The course pursued in the present case was correct, and the matter was properly before the Court. This is a reference by the Judges of the Small Cause Court differing in a point of law, not a reference at the instance of parties.

The opinion of the Court was delivered by

GARTH, C.J. (WILSON, J., concurring.)—I think that the pre-

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liminary objection, which has been taken to our hearing this reference must prevail. The case is precisely similar to that of *Hall* v. *Joachim* (1) to which we have been referred.

That case was decided under s. 7 of Act XXVI of 1864, which is similar in its terms to s. 69 of Act XV of 1882. In that case, as in this, an application was made for a new trial to two Judges of the Small Cause Court; and on the hearing of that application, the Judges differed in opinion upon a point of law, which was consequently referred for the opinion of this Court.

The reference came on before the late Chief Justice and Mr. Justice *Pontifex*, who decided, that if the Judges of the Small Cause Court thought fit to take the opinion of the High Court upon the point referred, their proper course was to grant a new trial, so that the point might be properly raised. But they held that upon the application for a new trial no judgment could be given, which would be a "*contingent judgment*" within the meaning of s. 7 of the Act of 1864.

The reason upon which that case was decided directly applies here; and this is more evident, because, having heard from Mr. *Allen* what the nature of the point is, it is obvious that, if we were to decide that point now, we should not determine the case finally. We should not in fact enable the Court below to give any judgment, properly so called, upon the present proceeding. The only effect of our decision might be, that a new trial would be had, in which the very point upon which we had given our opinion might not arise.

We think that we are bound by the decision in *Hall* v. *Joachim* (1), and my own opinion is, that the principle upon which that case proceeded is correct.

If the Judges of the Small Cause Court consider that the point is a proper one for discussion, the course which they should take is pointed out by Sir R. Couch in the above case, *namely*, that they should grant a new trial, at which the point can be raised in the regular way. We make no order as to costs.

Attorneys for plaintiff: Messrs. *Barrow & Orr.*

Attorney for defendants: Baboo *A. T. Dhur.*

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