C.A. 525/63

REUVEN and ZILPAH SHMUEL

v.

ATTORNEY-GENERAL

In the Supreme Court sitting as a Court Of Civil Appeal
[June 30, 1964]
Before Agranat D.P., Landau J., Berinson J., Witkon J. and Cohn J.

Judges - disqualification - religious bias - Courts law, 1957, secs. 7(a), 7(b)(2), (3) and 36.

The Attorney-General applied for an order against the applicants to remove their children from a Christian missionary school where they had placed them and to arrange for the children's education in a Jewish school. In those proceedings in the Tel Aviv District Court, the applicants requested that the sitting judge should disqualify himself because he was an orthodox Jew and people might gain the impression that he would therefore not deal with the matter impartially. The judge refused to do so and the applicants moved the Supreme Court to have the hearings transferred to another judge of the Tel Aviv District Court.

Held (1) The statutory provisions regarding transfer of cases go only to change of venue in the strict sense of place of trial and not the personality of the judge, and then only when the judge concerned consents thereto.

(2) A judge may certainly possess personal views and beliefs but he must not allow these to pervert his allegiance to the law either in letter and spirit. Judges are presumed to be conscious of and to abide by this obligation.

(3) Whilst there is no dispute that a judge's decision not to disqualify himself should be subject to judicial review, there is no room for the notion that a litigant should be able to choose to be tried by a judge whose views please him.

(4) The decision of a judge not to disqualify himself may be an administrative and not a judicial act, and as such open to review like any other administrative act by the High Court of Justice especially when no right of appeal against the act exists. As a judicial act, the decision is not reviewable under the High Court's statutory powers. In the absence**,** however, of any remedy, the decision may be challenged indirectly or incidentally by way of an ordinary appeal against the judge's final judgment in the case. A decision on a challenge to the composition of a court before it has been constituted is an administrative act. A like decision after the proceedings have commenced isa judicial act which can only be contested by ordinary appeal.

(5) The High Court of Justice will not order prohibition either against a court or a particular judge where the remedy of appeal is available.

(6) Interlocutory appeal against a judge's decision not to disqualify himself is in any event only possible under the law in respect of civil and not criminal matters. The legislature might well consider a reform of the law in this regard.

Israel cases referred to:

(1) H.C. 295/59 - *Moshe Goldenberg v. President of Tel Aviv-Yaffo District Court and others* (1959) 13 P.D. 2207.

(2) *Misc. App.* 3/50 - *Yosef Weinberg v. Attorney-General and another* (1950) 3 *P.D.* 592.

(3) H.C. *174/54* - *Yisrael Shimel v. Competent Authority and Appeal Committee for the purpose of the Law regulating Seizure of Land in an Emergency* (1955) 9 P.D. 459.

(4) H.C. 279/60 - *Ulame Gil Ltd. v. Moshe Yaari and another* (1961) 15 P.D. 673; VI S.J. 1.

(5) *H.C.* 203/57 - *Eliezer Rubinsk*i *v. Competent Officer under Cooperative Houses Law (1958)* 12 *P.D.* 1668.

(6) H.C. 23/50 - *Yosef Weinberg v. Attorney-General and another* (1950) 10 P.M. 85.

(7) Cr.A. 239/54 - Bess Perah v. Attorney-General (1955) 9 P.D. 397.

(8) H.C. 49/62 - Aharon Kluger and others v. Inspector General of Police and others (1962) 16 P.D. 1267.

(9) H.C. 206/59 - Shlomo Gilah v. Jerusalem Magistrate and others (1960) 14 P.D. 1709.

(10) F.H.15/62 - Societe des Ateliers Pinguely Ville Gozet S.A. v. Aharon Kluger and others (1962) 16 P.D. 1539.

(11) H. C. 125-127/50 - Kvutzat HaHugim Bet HaShitah and others v. Haifa Committee for Prevention of Profiteering and others (1951) 5 P.D. 113.

(12) H.C. 91/61 - Israel Film Studios Ltd. v.Jerusalem District Court (1961) 15 P.D. 782.

(13) H.C. 326/61 - Natan Kravchik v. Attorney-General and others (1961) 15 P.D. 2389.

(14) H.C. 142/64 - Carmel Mahviti v. Attorney-General and others (1964) 18 P.D. 449.

(15) H.C. 250/61 - Moshe Dvik v. President of Supreme Court and others (1961) 15 P.D. 2529.

(16) H.C. 66/63 - Attorney-General v. Beersheba Traffic Judge (1963) 17 P.D. 1056.

(17) H.C. 307/51 - Y. Lalo v- Tel Aviv District Court Judge (1952) 6 P.D. 1062.

English cases referred to:

(18) Dimes v. Proprietors of Grand Junction Canal 10 E.R. 301 (1852).

(19) R. v..Camborne Justices and another (1955) 1 Q.B. 41; (1954) 2 All E.R. 850.

(20) Eckersley and others v. Mersey Docks and Harbour Board (1894) 2 Q.B. 667.

(21) R. v. Rand and others (1865-66) L.R. 1 Q.B. 230.

(22) Colonial Bank of Australasia and another v. Willan (1873-74) L.R. 5 P.C. 417.

(23) R. v. Cheltenham Paving Commissioners 113 E.R. 1211 (1841)

(24) R. v. Recorder of Cambridge 120 E.R. 238 (1857).

American cases referred to:

(25) *No. 721 Jewel Ridge Coal Corp. v. Local No- 6167, United Mine Workers of America and others* 89 L.Ed. 2007 (1945).

(26) *Korer v- Hoffman* 212 F *(2d)* 211 (1954).

(27) *Gulf Research & Development Co.v. Leahy and others* 193 *F(2d)* 302 (1951).

(28) *Roche and others v. Evaporated Milk Ass.* 319 U.S. 21 (1943).

(29) *Minnesota & Ontario Paper Co. and others v. Molyneaux* 70 F *(2d)545* (1934).

Y. *Ben-Menashe* for the applicants.

Z. *Bar-Niv,* State Attorney, and *P. Albek for* the respondent.

LANDAU J. This is an application for leave to appeal against the decision of His Honour Judge Kisser dismissing the applicants' application for consent to transfer to another judge the hearing of a guardianship claim pending before him as a sole judge of the Tel Aviv-Jaffo District Court.

In those proceedings the Attorney-General had sought an order against the applicants to remove their three children from a Christian missionary institution where they were and to arrange for their admission to a Jewish school. The application to transfer the hearing was based on section 36 of the Courts Law, 1957. At the beginning of his decision in question Judge Kister said

> "Section 36 deals with a transfer from the court of one locality to the court of another locality, and since Mr. Ben-Menashe does not ask for the matter to be transferred to the District Court of another locality, for that reason alone the application is to be dismissed."

Nevertheless the judge went on to deal with the application on its merits and found no cause for disqualifying himself from sitting and hearing the action.

On the application for leave to appeal Mr. Bar-Niv, the State Attorney, raised the fundamental question of the correct interpretation of section 36 and the remedy of a party who contends that a judge is disqualified from sitting.

Section 36 provides:

> "Where a matter has been or is to be brought before a District Court or Magistrate's Court in one locality, the President of the Supreme Court or his Permanent Deputy may direct that it be dealt with by a court of the same level in another locality; but a direction under this section shall not be issued after the commencement of proceedings in the matter save with the consent of the Judge who has begun to deal with it."

The learned State Attorney submits that the section is to be read literally: it speaks of the transfer of a matter from the court of one *locality* to the court of another *locality* and does not deal with the transfer of a matter from one judge to another in the same court. In this connection he asks us to demur from previous decisions of this Court expressing a view contrary to his. The first of these decisions was given in *Goldenberg v. President of Tel Aviv-Yaffo District Court* (1) which involved an order nisi to transfer the hearing of a civil action from the judge dealing with it to another in the same court. It was said there by Olshan P. (at p. 2208) that

> "We are of the opinion that in making the present application the petitioner erred as regards jurisdiction.
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> The petitioner argues that an application to transfer a hearing fromone judge to another has actually the character of an application for prohibition and for that, he urges, one must apply to the High Court of Justice.
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> Even if the petitioner is right in assimilating an application under section 36 of the Courts Law, 1957 to an application for prohibition, the answer is that if a given matter for which prohibition is desired is regulated by the legislature in a particular manner, it must be determined in accordance with the manner laid down by the legislature. Clearly, according to the rule found by the President (Zmoira) in *Weinberg v. Attorney-General* (2) the

> transfer of a hearing to another locality includes its transfer to another judge. It is therefore obvious that under the legislature's regulation of the matter in section 36 of the Courts Law, 1957, the petitioner's application falls within the section. Hence the course pursued by the petitioner in this instance is not well-founded."

In H.C. 282/63 Rehana v. Atory (unreported) this Court followed *Goldenberg(1)* and held that where the judge who is sitting in a case refuses to disqualify himself and for that reason the applicant cannot obtain a transfer of the proceedings under section 36 of the Courts Law, no jurisdiction is conferred on the High Court of Justice to transfer them to another judge.

Weinberg (2) was decided before adoption of the Courts Law and *Goldenberg* (1) and the unreported case after its adoption. In both of the latter two this Court accepted the rule in *Weinberg* as binding without especially examining the effect of section 36 and without argument on the question, both being heard in the presence of the applicant alone. Here Mr. Bar-Niv has argued that section 36 has made a basic change and therefore the rule in *Weinberg* (2) no longer applies Moreover, he has cast doubt upon the correctness of the *Weinberg* rule itself at the date when it was given. I accept his argument and also concur in his doubt.

In *Weinberg* (2) Zmoira P. explained the English concept of "change of venue", found in section 21 of the Courts Ordinance, 1940, and held that it also bears the broad meaning of the transfer of a matter from one judge to another. May I be permitted to say that it bears this meaning with great difficulty. In any event, there is no dispute that the common meaning of "change of venue" refers to the *locality* of a trial, and historically the particular place to which the jury has been summoned. A change of venue is called for when fear exists that because of conditions prevailing in a given locality, such as inflamed public feeling, a jury cannot be mustered which will be able to deal with the matter impartially (Blackstone's *Commentaries,* vol. 3, p. 383).

Why, nevertheless, did the Court in *Weinberg* (2) adopt the forced meaning of "change of venue"? Because "without such meaning it would be impossible for a defendant to apply for disqualification of a judge" (at p. 597), the Court pointing out that section 62 of the Ottoman Civil Procedure Law had been repealed without replacement. It appears to me that even failing express provision of enacted law a source can be found for the rules regarding the disqualification of judges. I shall return to this question later.

Even if it is possible to rely on *Weinberg* (2) for the meaning to be given to the English concept of change of venue, it cannot be treated as a precedent for the construction of section 36 of the Courts Law which, written in Hebrew, speaks of the transfer from one locality to another. In the course of the enactment of the section both aspects - transfer from locality to locality and transfer from judge to judge - were in the contemplation of the legislature. Clear evidence of that is to be found in the bill of the Courts Law published in *Reshumot.* Section 46 of the bill contained the substance of section 36 of the Law as finally adopted and section 39 covered "the circumstances in which a judge shall not sit". The latter is omitted from the Law in its final text and we do not know who or what brought about its omission... .

The phrase "a District Court or Magistrate's Court in one locality" is quite clear in its literal sense. It deals with the court as an institution and not with the judge as a person. A "personal" meaning cannot be forced into the word "locality" which it does not possess. From the fact that in *Weinberg* (2) "change of venue" was held to mean both a transfer of locality and a transfer of judge, one may not deduce that in Hebrew the former means also the latter.

Moreover, section 36 refers to a matter which has been "or is to be brought" before a particular court. The locality of the court before which a matter is to be brought is fixed by law but there is no provision of law which from the outset compels a particular matter to be brought precisely before a particular judge. That is left to the discretion of the President of

the court under sections 4(b) and 16(b) of the Courts Law or the Chief Magistrate in consultation with the judges of the Magistrate's Court under section 26. as the case may be.

The latter part of section 36, regarding transfer of a matter after proceedings have commenced, was added (in the Knesset) to safeguard the independence of the judges, so that no matter which they had already commenced to hear should be withdrawn from them against their wishes. That does not go at all to the question of the personal disqualification of the judge dealing with a matter. Furthermore, had section 36 also dealt with a judge's personal disqualification, why distinguish between a trial which has not yet begun and one which has, and only in the latter event require consent of the judge concerned?

Accordingly, I maintain that section 36 of the Courts Law merely prescribes the mode of transferring a matter from one court to another in point of locality, like the classic change of venue, and it has nothing to do with the disqualification of the individual judge. Hence the learned judge was right in the point he made at the beginning of his decision on the subject of the present application, which is enough for dismissing it.

Since, however, the basic question has been raised as to the remedies available to a party seeking to disqualify a judge for reasons of bias, I shall add a number of observations to elucidate this important subject.

The learned State Attorney submits that in Israeli law there is no disqualification of judges at all and the only remedy of a party who feels aggrieved by a judge's bias is to appeal for annulment of his judgment. Mr. Bar-Niv sought to deduce this from the omission of section 39 of the bill, as above, from the final text of the Law, as well as from the judgment of the House of Lords in *Dimes v. Grand Junction* Canal (18).

I cannot go along entirely with the State Attorney in his submission. We can only deduce from the omission of section 39 of the bill that the Israeli legislature abandoned the attempt of defining in enacted law the grounds for the disqualification of judges, but its

silence does not prevent us from referring to the sources of English Common law to fill the gap in our legal system. It is necessary, in my opinion, to have recourse to these sources in this regard since it is unthinkable that a party in this country should be powerless before a biased judge. We may indeed find in Blackstone (vol. 3, p. 361) an extreme view similar to that of Mr. Bar-Niv.

> "By the laws of England also, in the times of Bracton and Fleta, a judge might be refused for good cause; but now it is otherwise, and it is held that judges and justices cannot be challenged. For the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea. And should the fact at any time prove flagrantly such, as the delicacy of the law will not presume beforehand, there is no doubt but that such behaviour would draw down a heavy censure from those, to whom the judge is accountable for his conduct."

Blackstone's teaching that disciplinary sanction against the biased judge is sufficient did not, however, find favour with the English courts, witness the judgment in *Dimes* (18). There the Lord Chancellor himself had decided a matter affecting a company in which he was shareholder but the House of Lords did not hold back from setting aside the judgment. In doing so, it adopted the opinion of Parke B. (at p. 312), who said

> "We think that the order of the Chancellor is not void; but we are of opinion that as he had such an interest which would have disqualified a witness under the old law, he was disqualified as a Judge; that it was a voidable judgment...."

This court has followed English case law when the bias of persons possessing judicial powers was in question *(Shimel v. Competent Authority etc.* (3); *Ulame Gil Ltd. v. Yaari* (4)]. Examination of the precedents cited in *Shimel,* and particularly *R. v. Camborne*

Justices (19) also cited to us by Mr. Bar-Niv, shows that as regards the substantive rules of disqualification by reason of bias no difference exists between judges and other persons possessing judicial powers.

The main question is not as to the substantive rules but the procedural means by which these rules can be effectuated, and more precisely a party's remedy against a judge who refuses to disqualify himself. If the decision on disqualification is left solely to the judge himself, acting in accordance with his conscience, the inevitable consequence will be that if he does not find himself disqualified, he is not to be disqualified subsequently in an appeal against his judgment in the dispute between the parties. We have already seen that this is not the Common law rule and Mr. Bar-Niv also did not suggest that. Of possible solutions of the problem, the extreme one is that a judge must withdraw immediately upon a party raising the question of disqualification. Only in such a case can we speak of the actual disqualification of a judge by a party. That is the position in England with regard to county court judges (see County Court Rules, O.16, r. 2, in *County Court Practice,* 1963, p. 389). An intermediate solution is that the decision rests initially with some other authority, under the French Criminal Procedure Code (articles 668 ff.) the senior presiding judge of the Court of Appeals (see also articles 378 ff. of the French Civil Procedure Code, which inspired section 62 of the Ottoman Civil Procedure Law) or the court of which the judge whose disqualification is sought is a member (that seems to be the statutory arrangement in the Military Jurisdiction Law, 1955, sections 310-15, 343 ff.). Under Common law the disqualification of a judge is clearly a cause for annulling his judgment after close of the trial. But it is undesirable that a party should be without remedy to effectuate a substantive right of his until that late stage. If the judge is really disqualified, it is a waste of the time and effort fruitlessly invested in proceedings which will ultimately be set aside. In England indeed prohibition may lie against a judge of an "inferior" court which will bar him from continuing to hear a case *(Halsbury Laws of England,* 3rd ed., vol. 11, p. 114), and this Court so proceeded in *Ulame Gil Ltd*. (4). As regards courts which are not "inferior" I have not come across any English decision to the effect that the only remedy is appeal at the end

of the case. *Dimes* (18) did not so hold but left the question open. As Parke B. said (at p. 312)

> "If this had been a proceeding in an inferior court, one to which a prohibition might go from a court in Westminster Hall, such a prohibition would be granted, pending the proceedings, upon an allegation that the presiding Judge of the court was interested in the suit; *whether a prohibition could go to the Court of Chancery, it is unnecessary to consider"* (emphasis added).

(The necessity for that did not arise because the proceedings before the Lord Chancellor had already terminated when the House of Lords dealt with his disqualification.)

Since the enactment of the Courts Law, 1957, we are no longer bound, in my opinion, to the rules relating to prohibition in England, and the distinction between the Magistrate's Court as an "inferior court" and the other courts with which the Law deals has ceased to exist. Henceforth we must find the answer to the question before us - whether in fact appeal after close of proceedings is the only remedy available to a party who alleges that the judge is disqualified - within the frame of the Courts Law itself. *Prima facie* matters of this kind come under section 7(b)(3) dealing with the jurisdiction of the High Court of Justice to order that individuals having judicial powers refrain from dealing or from continuing to deal with a particular matter. But what of the proviso which excludes from the application of the Law "courts dealt with by this Law"? I do not find this proviso an obstacle to the exercise of the jurisdiction of the High Court of Justice. A judge who rejects the submission of a party that he is personally disqualified from dealing with a matter brought before him does not thereby exercise the jurisdiction of a court but expresses his opinion on the preliminary question of his personal qualification to sit in trial; and no question arises here of the jurisdiction of the court as such. In other words, the decision of a judge not to disqualify himself (as well as his decision to disqualify himself) is not a judicial decision in the full sense of the word but pertains to "the border country" of judicial administration, similar to

the decision of the President of a court that a particular judge should hear a given case. This is patent when a court sits, for example, in a bench of three and a plea of disqualification is raised against one of the three judges. If he does not think himself disqualified and his two colleagues disagree with him, the latter, in my view, cannot force him by a majority decision to withdraw (in the absence of express statutory authority as in the Military Justice Law). The decision to continue dealing with the matter is therefore his personal decision and not the decision of the court. And it makes no difference if the court consists of a single judge since we must still distinguish the court as an institution having jurisdiction and the judge who serves on it. Moreover, a judge's decision not to withdraw is taken by him on the basis of facts relating to him personally and known to him more than to others. Such a decision is accordingly the complete opposite from a judicial decision on the basis of facts proved before the court in the customary manner. It should be noted that in French civil procedure enacted law accords an express right of appeal against a decision regarding the disqualification of a judge (article 391). In discussing the question whether this right of appeal is also available to the side opposing disqualification, Glasson and Tissier, *Procedure Civile,* (1925) vol. 1, p. 155, say

> "Il ne s'agit pas ici d'un litige a juger, mais plutot d'une question d'administration judiciaire, de la composition du tribunal qui doit statuer sur un litige."

I should add that even if I thought that the matter did not come under section 7(b)(3) I would find occasion in this context to exercise the general powers of the High Court of Justice under the first part of section 7(a), as this Court suggested in *Rubinski v. Competent Officer etc.* (5) regarding a decision of a District Court which was void *ab initio*.

In the United States the dominant rule is that a judge can be compelled by mandamus or prohibition not to deal with a matter which he is disqualified to hear (45 A.L.R. 2nd, pp. 938 ff.) and this rule obtains even without express statutory provision (8 *A.L.R.* pp. 128, 1240).

As will be recalled, it was said in *Goldenberg* (l) that the High Court of Justice has no power to deal with an application for transfer of proceedings from one judge to another. This view is based on the ground that another remedy exists in section 36 of the Courts Law. I have tried to show above that section 36 does not apply to such an application, and if I am correct, the ground of alternative remedy falls away. It should also be remembered that *Weinberg* (2) decided in 1950 that no order is to be made against a District Court judge to refrain from sitting in a particular matter because that court is not an inferior court. As I have explained, this decision is not to be followed after the enactment of the Courts Law.

Since the decision of a judge not to disqualify himself is not the judicial decision of a court, no interlocutory appeal lies against it. Apart from that, this remedy creates unjustified discrimination between civil proceedings in which interlocutory appeals are possible and criminal proceedings in which they are not. What is the difference between an interlocutory and a final appeal, for we have already said that the question of the judge's disqualification can be raised in an appeal against his judgment? The answer is that at the end of the trial the submission is not that the judge was disqualified from the outset but that the judgment of the court is defective as a result of his disqualification.

Consequently the correct way to plead disqualification of a judge about to sit is, in my opinion, to apply to the judge to disqualify himself, and if he is not prepared to do so, the remedy is an application to the High Court of Justice.

Nevertheless I wish to observe that the Court will certainly attach great weight to the position taken by the judge concerned and will interfere only in an extreme case with his opinion that he may sit. The court will so act with regard to the facts of the case, as to which the judge is deemed to be trustworthy, as well as with regard to the conclusions stemming from them, since the presumption is that a judge has properly searched himself, remembering his declaration of allegiance "to dispense justice fairly, not to pervert the law and to show no favour". In order, however, to preserve the confidence of the public in its

judges of all ranks the possibility of reviewing a judge's decision must not be yielded entirely. I have expressed my view about *lex lata* as I see it. Possibly, *de lege ferenda* a more convenient solution may be found, perhaps along the line of the President of the Supreme Court reviewing the judge's decision (without the necessity of the judge concerned giving his consent) or of laying down special procedural provisions for the hearing of petitions of this kind by the High Court of Justice.

Finally, I wish to consider briefly two matters connected with the contents of the application before us, which relate to the substantive law on the disqualification of judges. I do so in order to save the parties from further litigation over the question. The application to his Honour Judge Kister contained six grounds. Among them the following observation occurs six times as a refrain: "Your Honour is known to have no predilection but many persons, not necessarily reasonable people, will draw the conclusion" etc. This very repetition gives the application a vexatious character. The phrase "not necessarily reasonable people" is taken from the judgment of Lord Esher in *Eckersley v. Mersey Docks* (20) (at p. 671). Later cases have criticized it not once as being too wide. If indeed the court were to take heed of the views of unreasonable people there would be no end to the matter. The criticism is collected in R. *v. Camborne Justices* (19) where the court preferred the formula of Blackburn J. in *R. v. Rand* (21) that the applicant must show "a real possibility of bias", a test which this court adopted in *Shimel* (3) (at p. 462).

The sixth ground of applicant's counsel was as follows:

> "Your Honour is known to have no predilection but it is also known that your Honour is a judge with orthodox religious views and must decide in this case whether in your opinion being educated in another religion is not detrimental to the children. Apparently many persons, not necessarily reasonable, would conclude that it is not proper for a Jewish orthodox judge to act in a matter involving the school of another religion and

requiring him to decide whether being eucated in another religion might be detrimental to a Jewish child."

Any one reading these words literally cannot but understand that an attempt is being made here to disqualify a judge from sitting because of his personal outlook - in the instant case his orthodox religious outlook. Mr. Ben-Menashe made a great effort to persuade us that this was not the intention and finally waived this ground in its entirety. He would have done better had he not indited these tasteless words. I would have thought it unnecessary to explain that a judge may have his own personal outlook. Certainly he must guard against his beliefs and opinion about the condition of society under which he lives distorting his fidelity to the letter and spirit of the law. The judges of Israel are presumed to know how to fulfil this obligation of theirs. In no manner is room to be given to the notion that a litigant is only to be tried by a judge whose personal outlook meets with his approval. No legal system could operate on such terms.

Among the five other grounds for disqualifying His Honour Judge Kister, Mr. Ben-Menashe mentions the judge's observations in an interlocutory decision, which according to counsel display preconceptions about the question the judge was to deal with. An interlocutory decision of 26 March 1963 refers to a submission by counsel for the children's parents, that the Attorney-General has no power to intervene with regard to the children's custody and therefore his application should be struck out. Counsel for the parents appeared only after the judge had already heard some of the witnesses. In the said decision the judge dealt at length with some of the general problems involved in the education of children in a religion not their parents' and with the operation of Christian missionary institutions in this country. In this regard he mentions also evidence previously given. The learned judge expressed *inter alia a* negative view on the free education given to children by missionary institutions. The judge treated as discreditable such material benefits to parents, and he also suggested - basing himself on the evidence of the welfare officer that the father had requested a sum of money for his consent to the children being withdrawn from the missionary institution- that the father might have received from that institution consideration

in addition to being relieved of financial expenses. He also expressed his opinion that a religious community seeking to save the souls of members of another community must desist from all illegitimate means "such as deception and bribery and generally to avoid any suspicion of reprehensible activity". Of the father, the judge said that "if a person suggests bribery and is dazzled by it, he can slander all the education provided by the State".

I do not think that all these remarks were necessary for the interlocutory decision on the submission in law of want of jurisdiction. I also doubt greatly whether there was even occasion in response to Mr. Ben-Menashe's concrete request for the observation that "indeed we perceive the corrupt source of the idea of disqualifying an orthodox Jewish judge in this country, the sullied well from which people who so desire draw their views". (What is meant here is Nazi thinking.) So general an observation, written it seems in an angry moment does not, however, give ground for any real fear that the learned judge would not know how to decide impartially between the parties in accordance with the law and the evidence adduced. As for the father "suggesting bribery", I understand that to refer to the benefit which the father obtained from the free education the children received in missionary institution. Although not happily phrased, these words are merely interpretative of what had been said in court down to that point. The judge observes a number of times in his decision that he was for the moment dealing with prima *facie* evidence and at p. 6 he says:

> "After going into the question - of education in institutions where there are parents alive and of education in another religion and the influence on the child - in general and without making any finding of the facts in the present case at this stage so long as I have not heard all the evidence and the parties have not made their submissions regarding the circumstances of the case, I must turn to the legal aspect...."

These explicit remarks take the sting out of a number of the judge's observations and demonstrate that he approached the matter before him with the required caution and

without preconceptions, as a judge should. There is accordingly no ground for Mr. Ben-Menashe's fear that his client will not enjoy a fair trial.

In sum, the application before us was not properly made and for that reason must be dismissed. I would add that it also has no foundation on the merits.

WITKON J. With respect I agree to all that my honourable friend, Landau J., has said regarding the non-applicability of section 36 of the Courts Law, 1957, to a case such as the present but I disagree with his proposal to open the High Court of Justice to litigants who are dissatisfied with the refusal of a judge to disqualify himself.

I do not dispute that the decision of a judge not to disqualify himself (and perhaps even his decision to disqualify himself) should properly be subject to review by another judicial body. Such review might well be left to a different court or to a different judge of the same court. What is important is that a judge should not be the final arbiter regarding his disqualification. But to bring the matter within section 7 of the Courts Law we must first determine that a judge's decision regarding his disqualification is an administrative and not a judicial decision. That is not free from doubt. The difference between a judicial and an administrative act is not firmly based and the boundary is a shifting one. In point of classification no absolute difference exists between an administrative act (when imposed on a judge) and a judicial act. We were exercised with this problem, *inter alia,* in *Perah v. Attorney-General* (7). There, a Magistrate decided that gold, in respect of which an offence was committed entailing expropriation, should be returned by the police to the true owner who was guiltless of the offence. The question was whether the decision made under section 388 of the Criminal Code Ordinance, 1936, was part of the sentence against which the Attorney-General might appeal or whether it was an administrative act in which only the High Court of Justice could intervene. The question was left open but I wish to say at once that there was no reason to have raised the problem had it not been clear that no appeal lies against a purely administrative decision.

Deeper research was devoted by Berinson J. to the distinction between judicial and administrative acts in *Kluger v. Inspector General of the Police* (8). That case involved a search and seizure warrant issued in the course of criminal proceedings. The element common to this and the previous case is that in both the order affected a third person not party to the proceedings. Here the High Court of Justice intervened on the application of the third party. Berinson J. had the following to say about its power to do so:

> "The question arises *whether* in issuing the search and seizure warrant the judge acted as a court or merely performed an administrative act even though it involved judicial discretion. It seems to me that basically the function was administrative, although not ... a function of executing a judgment like activating conditional imprisonment for instance. Here the judge is not activating another's decision but is deciding in his discretion and on the basis of *prima facie* evidence adduced to him that the statutory conditions for issuing a search and seizure warrant have been fulfilled. For all that, the issue of such a warrant is unlike a pure judicial act of a court. It can be issued before trial and even before any one is charged and there is no procedure for joining persons concerned in the matter or liable to be prejudiced by the warrant in the proceedings before the judge. Such a warrant may affect the interests of a bystander not directly connected with the matter itself in respect of which the search warrant is claimed and issued. Even when it is issued in the course and for the purpose of a criminal trial, it is still not an integral part of the trial but a side issue secondary thereto. A person prejudiced by it has no way to test its lawfulness or correctness in any court other than this Court which is thus competent to deal with the matter under section 7(a) of the Courts Law, 1957. The present case is closely, if not entirely, similar to *Gilah v. Jerusalem Magistrate* (9). Here as there the sitting judge held that the matter was within his competence whilst hearing another trial. Here as there the judge's decision was not open to appeal or other judicial review. Here as

> there the person who felt himself aggrieved by the decision was not a party to the trial within which it was given. Accordingly, here as there the applicants can ask for relief from this Court in pursuance of section 7(a) of the Courts Law" (at p. 1271).

In that case application was made for a Further Hearing - *Societe des Ateliers etc. v. Kluger* (10). Cohn J. summed up the law as follows:

> "Within the framework of the relief mentioned in paragraph (3) of section 7(b) of the Courts Law, 1957, the High Court of Justice will not take cognizance of judicial decisions of District Courts or Magistrate's Courts, whether or not appeal against them is possible. It is otherwise within the framework of the relief mentioned in paragraph (1) or (2) of section 7(b) or within the wider framework of the relief under section 7(a). When performing an administrative act, a judge is also a state organ and in doing so exercises a lawful function. The rule that the High Court of Justice is competent to interfere with administrative acts even if done by a judge is nothing novel" (at p. 1540).

There is no doubt that in the course of his ordinary work the judge makes decisions having an administrative character, the remedy against them lying with the High Court of Justice. But, as I have already said, a decision may frequently be of a mixed nature with features of both kinds. It can then be said that if the person aggrieved has a clear right of appeal, the indication is that the judicial aspect is decisive. On the other hand, lack of a right of appeal opens the path to the High Court of Justice for the aggrieved person. And where a right of appeal is available against a decision which as such and in what it involves is an administrative decision, the matter can only be resolved by converting the decision into a judicial one. Thus no clear distinction exists between the two.

A judge's decision not to disqualify himself may, no one disputes, be challenged by the aggrieved person by appeal against the decision of the judge on its merits. I am alive to the fact (pointed out by my friend, Landau J.) that disqualification is only incidental to such an appeal and not in itself the subject of appeal. Nonetheless, in my opinion, it is sufficient that a judge's decision not to disqualify himself can be tested in the course of the appeal, even if only in this manner. The decision thus assumes the form of a judicial decision, and once again cannot be contested in the High Court of Justice. Obviously, I can also reach the same conclusion under the express rule in section 7(a) of the Courts Law that the High Court of Justice will not intervene in matters which are within the jurisdiction of any other court. I think that the existence of another remedy in the present case closes the path to the High Court of Justice completely.

The rule is that the High Court of Justice does not order prohibition where the aggrieved person has a right of appeal against the decision likely to affect him. In my opinion, it is immaterial to the application of this rule whether the order is sought simply against a court or a particular judge of a court. As far as I know, prohibition has never issued in this country simply against a court when a right of appeal exists. An attempt at that in *Kvutzat HaHugim Bet HaShitah v. Haifa Committee etc.* (11) was unsuccessful. Although the Court did not utterly deny the "coexistence" of prohibition and appeal, it should be remembered (a) that a special tribunal was involved in that case, (b) that appeal against the tribunal's decision went only to the District Court and (c) that the Court considered the possibility of ordering prohibition in cases only of manifest want of jurisdiction. (See the precedents cited at pp. 125-28.) It is in this spirit - delimiting the ambit of the applicability of prohibition - that I understand the remarks of Agranat J. in *Rubinski* (5).

Another attempt to obtain a High Court order against a District Court this time by mandamus requested by a third party in an "administrative" matter - failed in *Israel Film Studios Ltd. v. Jerusalem District Court* (12). Moreover in *Kravchik v. Attorney-General* (13) the High Court of Justice dismissed an application for an order against the Attorney-

General to discontinue a criminal action (on the ground of *autrefois acquit)* on the ground that the applicant first had to address himself to the Attorney-General. Although the Court pointed out that because of that its intervention was premature, in a later case, *Mahviti v. Attorney-General* (14), it refused to intervene in a trial pending in the Magistrate's Court. The question whether prohibition can issue against the President of the Supreme Court was left open in *Dvik v. President of the Supreme Court* (15). Finally, I should mention *Attorney-General v. Beersheba Traffic Judge* (16) where the High Court of Justice made an order against a Traffic Judge to refrain from continuing to hear a case after the Attorney-General had ordered a stay; this case is different from the one before us since after a stay order the competence of a magistrate ceases entirely.

Should it be urged that appeal is not a sufficiently effective remedy and therefore the matter merits the attention of the High Court of Justice, I would answer by way of preliminary that cases may occur where a party raises the question of the court's composition even before it has been determined by its President under sections 4(b) or 16(b) or by the Chief Magistrate under section 26 of the Courts Law: and it appears to me that the determination is an administrative act which the aggrieved party might well ask the High Court of Justice to review. After commencement of trial, however, a party unsuccessfully seeking the disqualification of a judge can only seek his remedy on appeal. I would say that on a balance of the instances and convenience that this is more effective and seemly than application to the High Court of Justice, even if in the meantime the party must bear with the judgment and wait for his remedy until the appeal reaches its turn. In practice, however, I see no reason for preventing an interim appeal (after leave) against a judge's decision not to disqualify himself. It is very true that this possibility exists only in civil cases as distinct from criminal. But this difference between the two kinds of trial obtains in any event and the discrimination affects every accused person raising a preliminary issue regarding the charge sheet or the jurisdiction of the court, since he cannot appeal against the decision of the court which dismisses his plea and must stand perhaps lengthy trial with all the distress and hardship that entails.

Perhaps the most important consideration against transferring this jurisdiction to the High Court of Justice is that it is not at all a convenient forum for going into the problem. In this Court the judge becomes the respondent and if the petitioner has levelled against him an empty charge, is it not unbecoming for the judge to enter an affidavit in reply on which he may be examined? And what will happen if the other party concerned is not ready to support the judge's decision not to disqualify himself? Such problems and the like do not arise when the remedy is by way of appeal for then the judge has the opportunity to explain in his decision the position he has taken and the party may contest it and even contradict it by affidavit but cannot compel the judge to debate it with him. I therefore believe that to open the High Court of Justice to a party dissatisfied with a judge's decision not to disqualify himself is not only unnecessary for justice to be done but is also inconvenient and undesirable.

Like my friend Landau J., I also wish to add a few observations on the merits of the case. I join in the view that there was no room for Judge Kister to disqualify himself from sitting in the case or even to ask him to disqualify himself. And I also find that the very request was in bad taste. Nevertheless I would like to explain why I think that the honourable judge was not disqualified. He himself reacted to the applicants' request in an exaggerated fashion and among his reasons for not disqualifying himself there were some that were irrelevant. Nobody argued that a Jewish judge, even an orthodox Jew, is incapable of dealing without preconceptions with matters affecting members of another religion. The argument was confined to the concrete case before the judge of a Jewish child whose parents had sent her to a Christian missionary school. In such a case, the applicants urged, an orthodox Jew has firm views of a wholly negative nature. Is that a reason for disqualifying an orthodox Jewish judge?

In my opinion, it is not. The question whether the State should rightly and properly interfere with the decisions of parents to send their children to mission schools is debatable. On the one hand one need not be an orthodox Jew to regard such action with profound concern. Educationally it is certainly undersirable to create conflict in the minds of very

young children and bring them up in a manner which ultimately will erect a barrier between them and the large public among whom they will be living. On the other hand one recoils from any interference in the freedom of parents to educate their children as they think fit; equally one must be careful not to prejudice freedom of religion and to avoid excessive interference by the state in the free competition of opinions and views in the religious and other spiritual fields. It is precisely the Jewish people largely living in the Diaspora which is sensitive to such interference. For the purpose of the present application we do not have to decide which of these two considerations (and perhaps others of the same kind) we should prefer. That is the task of the judge dealing with the case on its merits. Here we are only concerned with the question whether the judge is disqualified. To this end we must emphasise with the utmost clarity that a judge - be his personal outlook what it may - is presumed to know how to give *all* important considerations their full weight and importance. Such moderation is a characteristic of a judge *qua* judge. Hence it is wrong and truly prejudicial to the judiciary itself to request a judge to disqualify himself because of his "religious" or "non-religious" views (to use these unhappy terms) or because of his views in other areas. I am sorry that the present applicants could not understand that.

BERINSON J. I concur in the judgment of Witkon J. and have nothing to add.

AGRANAT D.P. I agree with the conclusions of my honourable friend, Landau J., that section 36 of the Courts Law does not bear the meaning that it is designed to accord a remedy to a party claiming the disqualification of a judge but only prescribes the manner of transferring a matter from one court to another in point of locality. Such conclusion is sufficient to defeat the application before us, but I must add that I also join in the view of my friend, denying the very argument of disqualification raised by applicants' counsel.

On the important basic question over which my friends, Landau J. and Witkon J., are divided - whether the High Court of Justice should be open to a person who quarrels with a judge's decision regarding his personal disqualification to deal with a case - I side with Witkon J., that it is impossible to grant such person the relief provided for in section 7(b)(3)

of the Courts Law. My reason for that is that such a decision - and here with all respect I disagree with the view of Landau J. - is of the kind that goes to the Court's jurisdiction to hear and decide a matter, civil or criminal, before it. I shall explain myself.

"Jurisdiction" means the power of a tribunal to conduct a judicial hearing and to decide a matter pending before it; if conditions are set for the exercise of this power, then every decision as to whether these conditions have been met is a decision concerning the tribunal's jurisdiction to try the matter. In this regard, it is clear to me, there is no place for distinguishing between conditions precedent that affect the material and local jurisdiction of the tribunal asked to try a particular matter and conditions that affect the qualifications of the judge about to do so. If the judge concedes the argument of his disqualification, the decision means that the tribunal in the given composition is not competent to hear and decide the matter. If the argument is rejected, itmeans that the tribunal in the given composition is fully competent. Support for this view may be found in the observations of the Privy Council in *Colonial Bank of Australasia v. Willan* (22) at pp. 442-42:

> "It is necessary to have a clear apprehension of what is meant by the term 'want of jurisdiction'. There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal or upon the nature of the subject-matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry... Objections founded on the personal incompetency of the Judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which ... are extrinsic to the adjudication impeached."

And at pp. 443-44:

> "In *Reg. v. Cheltenham* (23) ... the objection was that the Court which passed the order was improperly constituted, inasmuch as three of the magistrates who were interested took part in the decision. And *Reg. v. Recorder* (24) proceeds on the same ground... In cases which fall within the principles of the last-mentioned decisions the question is, whether the inferior Court had jurisdiction to enter upon the inquiry, and not whether there has been miscarriage in the course of the inquiry."

See to the same effect de Smith, *Principles* and *Scope of Judicial Review,* p. 67; Street and Griffith, *Principles of Administrative Law* (1952) p. 205; and D.M. Gordon in (1931) 47 L.Q.R. 407: "Jurisdiction must be complete before a tribunal can make any move at all... . It is simply a right to take cognizance."

It follows that I am wholly at one with my friend when he says that a judge who rejects a plea that he is disqualified to try a matter "is (merely) expressing an opinion on the preliminary question of his personal qualification to sit in judgment" and therefore "no question arises here of the jurisdiction of the court as such." In my judgment when a judge dismisses such a plea it means that the court in its given composition is competent to deal with the case in hand just as in the reverse it is not. The legal position will not change if the judge against whom the plea of disqualification is directed is sitting in the company of other judges. I would agree with my friend that in this last event the responsibility of deciding on the plea of disqualification rests on the judge alone who is concerned and the others cannot participate therein or force upon him their view of the plea (see the remarks to this effect of Justice Jackson with regard to the practice in the Supreme Court of the U.S., with which Justice Frankfurter agreed, in *Jewel Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America* (25)). But the decision of the judge to dismiss the plea will bind the entire court and by virtue thereof it will in its given constitution hold the trial; in the same way his decision to withdraw from the case will bind the entire court and it will be unable to sit until it is properly constituted in accordance with the law. In both instances the decision is determinative of the question about jurisdiction to hear and decide the particular matter.

Moreover, if appeal is lodged against judgment as a result of one of the judges deciding to dismiss the plea of disqualification against him and the plea is accepted on appeal, the judgment will be set aside because it was given by a court not having jurisdiction by reason of its defective consititution.

It follows from the foregoing that in view of the proviso in section 7(b)(3) - "other than courts dealt with by this Law" - the High Court of Justice cannot possibly intervene with a decision concerning the qualification of a judge to deal with a particular matter in reliance on the first part of the paragraph.

Can the High Court of Justice interfere with such a decision in reliance on section 7(a) of the Law? A condition precedent to such interference is that the matter in which relief is sought does not lie in the jurisdiction of any other court or tribunal. Hence our general approach must be not to open the doors of the High Court of Justice to any one contesting a decision dismissing a plea of disqualification. In contemplation of the view that a plea of this kind is akin to a plea going to a court's jurisdiction to hear and decide a matter before it, the decision may be upset by appeal against the judgment given at the end of the trial. Furthermore, in a civil case, there is the remedy of asking for leave to appeal against the decision forthwith upon its being given, just as it is available against a decision rejecting a plea regarding want of jurisdiction as to subject matter or place. It can therefore be said that in civil matters the necessity will in general not arise of applying to the High Court of Justice, for no one disputes that the remedy of appeal against an interlocutory decision is speedy and effective.

The remedy last-mentioned does not exist in criminal proceedings and I was therefore exercised by the question whether in respect of such proceedings an appeal against judgment should not be treated as an effective means for the accused who protests against rejection of a plea of disqualification he has raised. This plea is different from a plea of want of jurisdiction in that it concerns the judge personally and thus protest against its rejection should be better reviewed immediately by another judicial body totally unconnected with the

plea, a course which would help to "clear the air" at the very outset of the criminal proceedings and strengthen the accused's and the public's feeling that the plea has been objectively treated in a manner befitting it. I am, however, of the opinion that this is the ideal situation and so long as the legislature has not prescribed such special procedure we must act on the presumption that it is satisfied with the remedy of appealing against the outcome of the criminal trial, just as it is satisfied with the same remedy with regard to other pleas of want of jurisdiction in criminal matters, in view of the policy of the legislature to avoid interlocutory appeals in such matters. That was the view of the Federal Court of Appeals in *Korer v. Hoffman* (26) where it refused an application for mandamus against a judge who refused to disqualify himself in a criminal trial before him.

> "Counsel for petitioner urges that denial of the writ means that petitioner will be forced to continue under the stigma, stress and strain of an indictment, and subject to restriction under bail, until a later day when his case may be reached and tried. Meanwhile, he must pay heavily in time, effort and expense to prepare his case for trial and suffer the ignominies of a trial. This is an appealing argument to which I know of no good answer other than that it is made in the wrong forum."

To emphasize all this the court mentioned the following precedents:

"In response to a similar contention, the Court in *Gulf Research and Development Co. v. Leahy...(27]* stated: 'The mere fact that the petitioners will be put to the inconvenience and expense of what may prove to be a wholly abortive trial is an argument which might be addressed to Congress in support of legislation authorizing interlocutory appeals but does not constitute ground for invoking mandamous power'... . In *Roche v. Evaporated Milk Ass.* (28) ... the Court stated: 'Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to

> avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases.' "

Although this approach in general should also guide us in matters of the last kind, I must add that I do not exclude the possibility that in rare and exceptional circumstances - as where strong evidence is produced regarding the material interest of a judge in the outcome of a trial - the High Court of Justice will interfere at an early stage so as to grant relief against a decision rejecting a disqualification plea. (See the remarks of the court in *Minnesota and Ontario Paper Co. v. Molyneaux* (29) and the judgment in *Lalo v. Sussman* (17).)

Such are my observations on the broad problem dealt with by my two friends, a problem which, as I have indicated, calls for legislative amendment as soon as may be. As regards the application before us I am of the opinion that it should be rejected.

COHN J. I am also at one with the view of my honourable friend, Landau J., that section 36 of the Courts Law does not apply to a transfer from one judge to another, as distinct from one court to another. For this reason alone the present application must be dismissed. I myself see no need to enter into the question of the right path a litigant should pursue when he wishes to disqualify a judge in a particular case. It seems to me that the matter is for the legislature to decide, and perhaps one may regret that it missed the opportunity to do so when dealing with the bill of the Courts Law.

Since, however, my learned friends also saw fit to address themselves to the question of what is the proper procedure for disqualifying a judge, I will only say that my view is like that of Witkon J. and Agranat D.P. and for the reasons they have given, that the High Court of Justice is generally not competent in such matters.

Application dismissed.

Judgment given on June 30, 1964.