

22, 1948

No. 23 of 1946.

**In the Privy Council.**

UNIVERSITY OF LONDON  
-9 OCT 1956  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

**ON APPEAL**  
*FROM THE SUPREME COURT SITTING AS A COURT OF APPEAL JERUSALEM.*

BETWEEN

**44460**

- 1. JOSEPH KLEIN
- 2. ABRAHAM KLEIN
- 3. ISRAEL ASHER SHAFIR - - - - - *Appellants*

AND

- 1. ELIAHU (LEO) HEIMAN
- 2. ABRAHAM HEIMAN
- 3. BARUCH HEIMAN
- 4. ISRAEL HEIMAN
- 5. SHMUEL HEIMAN
- 6. RACHEL HEIMAN - - - - - *Respondents.*

**RECORD OF PROCEEDINGS.**

**KAUFMAN & CO.,**  
72 NEW CAVENDISH STREET,  
LONDON, W.1,  
*Solicitors for the Appellants.*

**HERBERT OPPENHEIMER, NATHAN & VANDYK,**  
20 COPTHALL AVENUE, E.C.2,  
*Solicitors for the Respondents.*

# In the Privy Council.

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## ON APPEAL

*FROM THE SUPREME COURT SITTING AS A COURT OF  
APPEAL JERUSALEM.*

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BETWEEN

1. JOSEPH KLEIN
2. ABRAHAM KLEIN
3. ISRAEL ASHER SHAFIR

*Appellants*

AND

1. ELIAHU (LEO) HEIMAN
2. ABRAHAM HEIMAN
3. BARUCH HEIMAN
4. ISRAEL HEIMAN
5. SHMUEL HEIMAN
6. RACHEL HEIMAN

*Respondents.*

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# RECORD OF PROCEEDINGS.

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# In the Privy Council.

## ON APPEAL FROM THE SUPREME COURT SITTING AS A COURT OF APPEAL JERUSALEM.

BETWEEN

1. JOSEPH KLEIN
2. ABRAHAM KLEIN
3. ISRAEL ASHER SHAFIR

*Appellants*

10

AND

1. ELIAHU (LEO) HEIMAN
2. ABRAHAM HEIMAN
3. BARUCH HEIMAN
4. ISRAEL HEIMAN
5. SHMUEL HEIMAN
6. RACHEL HEIMAN

*Respondents.*

# RECORD OF PROCEEDINGS.

No. 1.

## STATEMENT OF CLAIM.

20 IN THE DISTRICT COURT TEL-AVIV.

Civil Case No. 261/42.

*In the  
District  
Court,  
Tel-Aviv.*

No. 1.  
Statement  
of Claim,  
17th August  
1942.

- Between
1. ELIAHU (LEO) HEIMAN
  2. ABRAHAM HEIMAN
  3. BARUCH HEIMAN
  4. ISRAEL HEIMAN
  5. SHMUEL HEIMAN
  6. RACHEL HEIMAN

orange - growers, by their Attorneys  
I. BEN-JAMINY, Barrister-at-Law, Dr. I.  
VORCHHEIMER, S. Z. ABRAMOV, Advocates  
of 13 Achad Haam Street, Tel-Aviv

Plaintiffs

30

and

1. JOSEPH KLEIN
2. ABRAHAM KLEIN  
merchants of 33 Achad Haam Street,  
Tel-Aviv
3. ISRAEL ASHER SHAFIR  
merchant of 8 Yehuda Halevy Street,  
Tel-Aviv

Defendants.

*In the  
District  
Court,  
Tel-Aviv.*  
—  
No. 1.  
Statement  
of Claim,  
17th August  
1942,  
*continued.*

*Nature of Claim :* Action for an account and a declaratory judgment.

1. On or about the 15th day of August 1935, respective contracts were made in Tel-Aviv, between the Plaintiffs and the Defendants aforesaid, whereby the Plaintiffs bought certain shops from the Defendants, more particularly described in the contracts aforesaid.

2. Under the contracts aforesaid the Plaintiffs are bound to pay to the Defendants the purchase price in the following manner : one moiety to the Defendants Joseph Klein and Abraham Klein, and the other moiety to the Defendant Israel Asher Shafir.

3. Under clause 27 of the contracts aforesaid, the Plaintiffs are 10 entitled to pay up the balance of the purchase price outstanding for the time being before the date of maturity thereof.

4. The Plaintiffs are ready and willing to pay the balance due from them to the said Defendants and have invoked clause 27 aforesaid.

5. Disputes and differences have arisen between the parties hereto as to the mode and manner of payment and the balance due for the time being.

6. The Defendants refuse to deliver an account and to accept the balance due to them.

7. This Honourable Court has jurisdiction in the matter as the 20 contract was made in Tel-Aviv and the amount involved is more than LP.250.—.

AND THE PLAINTIFFS CLAIM—

(A) An account or accounts of all moneys due from them respectively to the Defendants, by virtue or in respect of the contracts aforesaid, and a declaration as to what balance of the said moneys is due from them after giving credit for all moneys already paid or properly charged in respect of the premises.

(B) Costs.

(c) All further accounts, inquiries and directions. 30

(D) Such further relief as to the Court may seem meet.

Attorney for Plaintiffs,

(Sgd.) I. BEN-JAMINY,

Barrister-at-Law.

Address for service for the Plaintiffs is : Office of I. BEN-JAMINY,  
13, *Achad Haam Street, Tel-Aviv.*

*Attached :*

(A) Power of Attorney 1

(B) Enemy Declaration 1

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2

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No. 2.

**STATEMENT OF DEFENCE AND COUNTER-CLAIM of I. A. Shafir.**

(Translation from Hebrew.)

IN THE DISTRICT COURT TEL-AVIV.

Civil Case No. 261/42.

*In the  
District  
Court,  
Tel-Aviv.*No. 2.  
Statement  
of Defence  
and  
Counter-  
claim of  
I. A. Shafir,  
1st October  
1942.

Between 1. ELIAHU (LEO) HEIMAN  
2. ABRAHAM HEIMAN  
3. BARUCH HEIMAN  
4. ISRAEL HEIMAN  
5. SHMUEL HEIMAN  
6. RACHEL HEIMAN

10

Plaintiffs

and

1. JOSEPH KLEIN  
2. ABRAHAM KLEIN  
3. ISRAEL ASHER SHAFIR

Defendants.

## 1. This Defendant contends :—

(A) That the action was improperly filed, for the necessary documents have not been attached thereto.

(B) That the Statement of Claim reveals no cause of action.

20

(C) That there is no privity between him and Plaintiff No. 5.

(D) That following the relations between the parties there exists no legal ground for the institution of an action for accounts.

(E) That, alternatively, the accounts were made at the time between the parties and are well known to Plaintiffs, and that the action is baseless.

2. The present Defendant denies that he entered into any contracts whatsoever with the Plaintiffs on 15.8.35.

The Defendant admits that two contracts were made on 3.10.1937, one with Plaintiffs 1 and 6 and the other with Plaintiffs 2, 3 and 4, while no contract was made with Plaintiff No. 5 (Shmuel Heiman), but that these contracts were cancelled and have no effect.

30

3. Defendant admits paragraph 2 of the Statement of Claim.

4. Defendant denies paragraphs 3, 4 and 5 of the Statement of Claim and each one of them separately.

5. Defendant denies paragraph 6 of the Statement of Claim that he refused to deliver accounts or to receive at the time what is due to him.

Defendant contends that the Plaintiffs, although the accounts were known to them in accordance with clear contracts, and although they signed promissory notes, failed to pay the amounts which became due, and, for that matter, were not ready not only to pay the whole amount that was due from them, but were even unable and unwilling to pay those partial sums which had become payable.

40



## COUNTER-CLAIM.

*In the  
District  
Court,  
Tel-Aviv.*

By way of counter-claim, Defendant alleges :—

No. 2.  
Statement  
of Defence  
and  
Counter-  
claim of  
I. A. Shafir,  
1st October  
1942,  
*continued.*

6. That Plaintiffs committed a breach of the contracts between the parties ; and in accordance with what has been stipulated in the contracts, Defendants are entitled to cancel these contracts, and this they did.

7. Defendant by way of counter-claim prays that judgment be given against Plaintiffs (A) declaring that the contracts made between the parties are cancelled, (B) ordering payment of costs and advocate's fees.

(Sgd.) I. FRAENKEL,

Attorney for Defendant No. 3. 10

*In the  
Magistrate's  
Court, Tel-  
Aviv.*

## No. 3.

**STATEMENT OF DEFENCE of Defendants Joseph and Abraham Klein, and Counter-claim.**

(Translation from Hebrew.)

No. 3.  
Statement  
of Defence  
of  
Defendants  
Joseph and  
Abraham  
Klein and  
Counter-  
claim, 2nd  
October  
1942.

IN THE MAGISTRATE'S COURT, TEL-AVIV.

Civil Case No.  
2.10.1942.

Between 1. ELIAHU (LEO) HEIMAN  
2. ABRAHAM HEIMAN  
3. BARUCH HEIMAN  
4. ISRAEL HEIMAN  
5. SHMUEL HEIMAN  
6. RACHEL HEIMAN

20

Plaintiffs

and

1. JOSEPH KLEIN  
2. ABRAHAM KLEIN  
3. ISRAEL ASHER SHAFIR

Defendants.

1. Plaintiffs failed to submit either to the Court or to the Defendants the contracts upon which they base their action, and they ought to be ordered to submit copies of the said contracts.

2. The contracts upon which Plaintiffs base their action were 30 breached by the Plaintiffs, who failed to fulfil their obligations thereunder.

3. In accordance with the terms of the said contracts—in the event of a breach thereof by Plaintiffs—Defendants are entitled to cancel the said contracts. Defendants did cancel the said contracts and notified Plaintiffs thereof in conformity with the provisions of the contracts between the parties.

4. Plaintiffs are, therefore, not entitled to call for any accounts under the said contracts.

5. Defendants deny that Plaintiffs offered them any payment under Clause 27 of the contracts, as alleged in para. 4 of the Statement of Claim.

6. Defendants deny the facts stated in paras. 5 and 6 of the Statement of Claim.

7. Defendants deny that Plaintiffs are entitled to a declaration from the Court as to the amount due from them to the Defendants under the said contracts.

10 8. By reason of the foregoing, I pray that Plaintiffs' action be dismissed and that they be ordered to pay costs and advocate's fees.

9. Defendants hereby counter-claim for cancellation of all the contracts made between the parties, which are mentioned in Plaintiffs' Statement of Claim.

10. Defendants committed a breach of the conditions of the contracts aforesaid, and following clause 22 of the said contracts, Defendants notified Plaintiffs in writing that they availed themselves of their right to cancel the said contracts and that they do cancel them.

20 11. Defendants, therefore, pray the Court to declare that the said contracts between the parties are cancelled, with costs and advocate's fees.

(Sgd.) R. HUTORY,

Advocate for Defendants 1 & 2.

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No. 4.

**REPLY AND DEFENCE to the Counter-claim of Defendants Nos. 1 and 2, Joseph Klein and Abraham Klein.**

(Translation from Hebrew.)

Civil Case No. 261/42.  
26th October, 1942.

IN THE DISTRICT COURT, TEL-AVIV.

30 Between 1. ELIAHU (LEO) HEIMAN  
2. ABRAHAM HEIMAN  
3. BARUCH HEIMAN  
4. ISRAEL HEIMAN  
5. SHMUEL HEIMAN  
6. RACHEL HEIMAN - - - Plaintiffs

and

1. JOSEPH KLEIN  
2. ABRAHAM KLEIN  
3. ISRAEL ASHER SHAFIR - - - Defendants.

40 1. Plaintiffs point out that the defence, as it were, was addressed to the Magistrate's Court, Tel-Aviv, and that the number of case has been incorrectly stated.

*In the  
Magistrate's  
Court,  
Tel-Aviv.*

—  
No. 3.

Statement  
of Defence  
of

Defendants  
Joseph and  
Abraham  
Klein and  
Counter-  
claim, 2nd  
October

1942,  
*continued.*

*In the  
District  
Court,  
Tel-Aviv.*

—  
No. 4.

Reply and  
Defence  
to the  
Counter-  
claim of  
Defendants  
Joseph and  
Abraham  
Klein, 26th  
October  
1942.

*In the  
District  
Court,  
Tel-Aviv.*

No. 4.  
Reply and  
Defence  
to the  
Counter-  
claim of  
Defendants  
Joseph and  
Abraham  
Klein,  
26th  
October,  
1942.

2. Plaintiffs join issue with Defendants' defence.
3. As regards the counter-claim, Plaintiffs say that it ought to be dismissed on the ground that it is not addressed to this Honourable Court.
4. Defendants failed to submit either to this Court or to the Plaintiffs the contracts upon which they base their counter-claim, and must, therefore, be ordered to produce copies of the said contracts.
5. Plaintiffs contend that the counter-claim does not reveal the nature of the breach.
6. Alternatively, Plaintiffs contend that no breach of the contracts was committed by them.

10

(Sgd.) I. BEN-JAMINY,

Attorney for Plaintiffs.

No. 5.  
Defence to  
Counter-  
claim of  
Defendant  
No. 3  
Israel  
Asher  
Shafir,  
26th  
October  
1942.

No. 5.

**DEFENCE TO COUNTER-CLAIM of Defendant No. 3, Israel Asher Shafir.**

(Translation from Hebrew.)

Civil Case No. 261/42.  
26th October, 1942.

IN THE DISTRICT COURT, TEL-AVIV.

Between 1. ELIAHU (LEO) HEIMAN  
2. ABRAHAM HEIMAN  
3. BARUCH HEIMAN  
4. ISRAEL HEIMAN  
5. SHMUEL HEIMAN  
6. RACHEL HEIMAN - - - - Plaintiffs

20

and

1. JOSEPH KLEIN  
2. ABRAHAM KLEIN  
3. ISRAEL ASHER SHAFIR - - - Defendants.

1. Plaintiffs contend that the counter-claim was improperly filed, inasmuch as the required documents have not been attached thereto.
2. Plaintiffs contend that the counter-claim reveals no cause of action.
3. The counter-claim does not reveal the nature of the breach.
4. Alternatively, Plaintiffs contend that there was no breach of the contracts on their part.

30

(Sgd.) I. BEN-JAMINY,

Attorney for Plaintiffs.

No. 6.

**AMENDED STATEMENT OF DEFENCE of Defendants Joseph and Abraham Klein and Counter-claim.**

(Translation from Hebrew.)

Civil Case No. 261/42.

30th November, 1942.

*In the  
District  
Court,  
Tel-Aviv.*

No. 6.  
Amended  
Statement of Defence  
of the  
Defendants  
Joseph and  
Abraham  
Klein and  
Counter-  
claim, 30th  
November  
1942.

IN THE DISTRICT COURT, TEL-AVIV.

Between 1. ELIAHU (LEO) HEIMAN  
2. ABRAHAM HEIMAN  
10 3. BARUCH HEIMAN  
4. ISRAEL HEIMAN  
5. SHMUEL HEIMAN  
6. RACHEL HEIMAN

- Plaintiffs

and

1. JOSEPH KLEIN  
2. ABRAHAM KLEIN  
3. ISRAEL ASHER SHAFIR

- - Defendants.

1. Plaintiffs failed to submit either to the Court or to the Defendants the contracts upon which they base their action, and they ought to be  
20 ordered to submit copies of the said contracts.

2. The contracts upon which the Plaintiffs base their action were breached by the Plaintiffs, who failed to fulfil their obligations thereunder.

3. In accordance with the terms of the said contracts—in the event of a breach thereof by Plaintiffs—Defendants are entitled to cancel the said contracts. Defendants did cancel the said contracts and notified Plaintiffs thereof in conformity with the provisions of the contracts between the parties.

4. Plaintiffs are, therefore, not entitled to call for any accounts under the said contracts.

30 5. Defendants deny that Plaintiffs offered them any payment under Clause 27 of the contracts, as alleged in para. 4 of the Statement of Claim.

6. Defendants deny the facts stated in paras. 5 and 6 of the Statement of Claim.

7. Defendants deny that Plaintiffs are entitled to a declaration from the Court as to the amount due from them to the Defendants under the said contracts.

8. By reason of the foregoing, I pray that Plaintiffs' action be dismissed and that they be ordered to pay costs and advocate's fees.

40 9. Defendants hereby counter-claim for cancellation of all the contracts made between the parties, which are mentioned in Plaintiffs' Statement of Claim.

10. Defendants committed a breach of the conditions of the contracts aforesaid, and following clause 22 of the said contracts, Defendants notified Plaintiffs in writing that they availed themselves of their right to cancel the said contracts and that they do cancel them.

11. Defendants, therefore, pray the Court to declare that the said contracts between the parties are cancelled, with costs and advocate's fees.

(Sgd.) R. HUTORY,

Advocate for Defendants 1 &amp; 2.

*In the  
District  
Court,  
Tel-Aviv.*

**No. 7.  
ISSUES.**

(Translation from Hebrew.)

No. 7.  
Issues, 6th  
January  
1943.

Civil Case No. 261/42

IN THE DISTRICT COURT OF TEL-AVIV.

Before : HIS HONOUR JUDGE KORNGRUEN.

Between 1. ELIAHU (LEO) HEIMAN  
2. ABRAHAM HEIMAN  
3. BARUCH HEIMAN  
4. ISRAEL HEIMAN 10  
5. SHMUEL HEIMAN  
6. RACHEL HEIMAN - - - Plaintiffs

and

1. JOSEPH KLEIN  
2. ABRAHAM KLEIN  
3. ISRAEL ASHER SHAFIR - - - Defendants.

For Plaintiffs : Advocate HAIMOVITZ.

For Defendant 1 : Advocate HUTORY.

For Defendant 2 : " "

For Defendant 3 : Advocate FRAENKEL. 20

The following issues were settled :—

1. Whether on 15th August, 1938, or thereabouts, contracts were made between Plaintiffs and Defendants whereby Plaintiffs purchased certain shops as described in the contracts.

2. Whether under Clause 27 of the contracts, the Plaintiffs are entitled to pay the balance of the purchase-price before the dates fixed in the contract.

3. Whether Plaintiffs were ready and prepared to pay the balance of the purchase-price, and whether they availed themselves of their right to pay as provided in Clause 27 of the contract. 30

4. Whether disputes and misunderstandings arose between the parties as to the mode of payment of the balance of the purchase-price and as to the balance due.

5. Whether Defendants refused, for lack of accounts, to accept the balance of the purchase-price.

6. Whether the contracts mentioned in (1) were broken by the Plaintiffs and what are the legal effects of such breach ; especially, whether Defendants are entitled to cancel the said contracts ; whether they were cancelled, and whether they notified Plaintiffs thereof.

7. Whether Plaintiffs are entitled to demand accounts of said 40 contracts from the Defendants.

8. Whether Plaintiffs are entitled to a declaration by the Court as to the amount due from them under the contracts.

*In the  
District  
Court,  
Tel-Aviv.*

9. Whether Defendants are entitled to file a counter-claim and claim cancellation of the contracts made between the parties and upon what grounds.

—  
No. 7.  
Issues, 3th  
January  
1943,  
*continued.*

10. Whether there is privity between the Plaintiff No. 5 and Defendant No. 3.

10 11. Whether accounts were made between the parties at the time and whether they are known to Plaintiffs and what are the effects of this fact.

ORDER: To be entered in pending list. Parties' advocates notified to be ready with evidence for hearing.

(Sgd.) P. KORNGRUEN,

Judge.

6th January, 1943.

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No. 8.

**RECORD OF PROCEEDINGS in District Court.**

(Translation from Hebrew.)

**RECORD.**

20 Advocate BENYAMINI appeared on behalf of the Plaintiffs.  
Advocate HOTORY appeared on behalf of Joseph and Abraham Klein.  
Advocate Y. FRAENKEL appeared on behalf of Israel Asher Shafir.

No. 8.  
Record of  
Proceedings  
in District  
Court, 12th  
July 1943  
to 24th  
October  
1943.

*Attorney of Plaintiff:* I repeat my claim and pray that para. 1 of the statement of claim be amended to read 15.8.38 instead of 15.8.35.

30 *The Plaintiff, Barouch Heiman, sworn:* In the year 1936 I entered into a transaction with Israel Shafir and Joseph and Abraham Klein. I and my wife were desirous of buying a shop. We concluded a provisional contract with the defendants. This contract was deposited with the ASHRAI BANK. A few days ago I saw the contract at the above-mentioned Bank. At the time of the making of the contract I paid money to the Ashrai Bank and I also deposited there promissory notes in favour of the defendants. The subject matter of the contract was the purchase of shops in the New Commercial Centre. The contract was made between me and the defendants. In 1937 we made two contracts: one contract was entered into between Abraham Eliahu Israel Heiman and the defendants and a second contract was made between Barouch and Rachel Heiman and the defendants. The subject matter was certain shops in the above-mentioned Commercial Centre—not the same shops dealt with by the contract of 1936. There were no shops as yet but plans for shops. The  
40 1937 plan was from the 1936 plan (*sic*). In 1937 I gave to the Ashrai Bank promissory notes to the order of the defendants. In the year 1938 the shops were built. In 1938 new contracts were made between the six plaintiffs and the defendants. My brother Shemuel joined in as a purchaser

Evidence of  
Plaintiff  
Barouch  
Heiman.

p. 2.

*In the  
District  
Court,  
Tel-Aviv.*

No. 8.  
Record of  
Proceedings  
in District  
Court, 12th  
July 1943  
to 24th  
October  
1943,  
*continued.*

in the year 1938. The subject matter of the contracts was those same shops which we had bought in 1937, but my brother Shemuel has joined in as a purchaser. In 1938 we gave more promissory notes which were deposited with Ashrai Bank and which were made to the order of the defendants. The promissory notes had to be paid within 10 years. The promissory notes were given as price for the shops in accordance with the 1938 contract, but they also include sums in respect of additions in the building. There exists between us and the defendants differences of opinion in connection with the additions. We are prepared and disposed to pay immediately all the promissory notes which have already matured 10 and also all those which have not yet matured. I state on my behalf and on behalf of all the family. I only do not know how much I owe and I am therefore asking for an account.

*XXX by Adv. Fraenkel :* The contracts, copies of which were produced in this file, are the 1938 contracts. There are six contracts, Mr. Shafir gave me copies together with the original contract. I handed to Advocate Benyamini the copies made on "Stencil" paper. I do not know who wrote the date on the copy. These are copies of the contracts : P/1, P/2, P/3, P/4, P/5, P/6. The original contracts were delivered by the two parties to Ashrai Bank. The construction of the shops was terminated on 20 15.8.38. Some days afterwards the shops were delivered to us. We made an account till 15.8.38 before we received the shops. The account was full as regards the price and interest and we signed promissory notes and paid money in cash. This is the account : D/1. The sum of LP.16,467.984 fits and it is the price of the shops. The amount of LP.3,250 does not fit with the account which I have ; the balance does not fit ; it is possible that the capital and interest account is correct. I do not remember the amount of interest added. I do not remember for what amount I gave promissory notes after we made the account. I swore an affidavit on 18.6.43. We gave to the Ashrai Bank promissory 30 notes covering the whole amount which, as we then thought, was due. I paid all the promissory notes which were presented to me for payment. There are, however, promissory notes which were presented to me but which I did not pay. The amount of the promissory notes which were presented to me but which I did not pay is about one thousand pounds. My instructions to the Ashrai Bank were that the promissory notes should not be delivered to the defendants, but were deposited with the Ashrai Bank in accordance with the contract. The Ashrai Bank did not give me a list of the promissory notes. I knew the amount. The payments which I effected were made to the defendants and we subsequently went together 40 to the Bank and asked for the promissory notes which were paid. I paid the amount of the advance agreed upon less LP.400. I wanted to pay but the defendants refused to accept, this was after 1938. I do not remember the date. This was about two years after 1938. I remember that I was invited to the Tabo to accept transfer and to pay in accordance with the contract. We received six letters such as D/2. I did not go to the Tabo. I told Mr. Shafir that the times were bad and that I could not pay. I received this letter : D/3. My partners except Mr. Shemuel Heiman, also received. There is no difference between the wording of the 1937 contract and that of the 1938 contract. In the year 1938 we made 50 six separate contracts which were deposited with the Ashrai Bank. I

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am not wrong at all. The contracts should be at the Ashrai Bank. Shemuel Heiman did not sign a contract in the year 1937. I do not know how much rent I collected. It was between LP.2,000 and LP.4,000. All the shops yield at present LP.180 per month. In the previous year it was much less. I know that there is an accountant called Kleinoud. He is the man who made the account.

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10 *XXX by Adv. Hotori:* The contract deals with shops to be built in the future. Though the shops were built in August, 1938, we signed the old text of the contract. I deposited with the Ashrai Bank promissory notes covering all the amount. The Ashrai Bank should have presented the promissory notes to me. On presentation I paid save for promissory notes in the amount of LP.1,000 approximately, which I did not pay though they were presented to me. About two years ago I approached the Ashrai Bank in order to pay but they informed me that the defendants had instructed them not to receive payments from me. I did not pay any more monies. This was in 1941 approximately.

20 *R.XD.:* I did not pay the promissory notes which were payable at sight. Apart from these, all the promissory notes which were presented to me and which bore a date of payment, were paid by me. I signed the promissory notes payable at sight in the year 1937. These promissory notes were given on the condition that they shall be paid if the defendants would start with the building. The contract does not provide for such promissory notes; these promissory notes were given as a result of an oral agreement made between us. The reason why I did not pay these promissory notes is that out of the amount of the promissory notes I did not owe LP.300 and the balance in the amount of LP.664 was entered in the account D/1. The defendants did not react at my refusal to pay these promissory notes. They did not send me any notice (warning) in this connection. The defendants presented these promissory notes in the year 1938, 1939. The promissory notes were in the hands of Ashrai Bank. I did not go to the Tabo when I was requested to do so. I went to the defendant and said that the times were hard and that I could not pay. They did not warn me and did not state that they rescinded the contract: on the contrary, they told me that they would not press on me and that they had written to me to come to the Tabo only in order to be on good terms with the other clients. These words were said to me by Mr. Shafir and Joseph Klein. D/3 is the last letter which I received from the defendants. In connection with this there was an exchange of promissory notes. The exchanged promissory notes were at the BA'ALEI BATIM (Landlords) BANK. In the year 1942 I went to the a/m bank to pay promissory notes and I was told that they had been instructed not to accept payments from me. The promissory notes were exchanged four months before I desired to pay.

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50 *To Court:* The defendants built the shops. They had to give us something ready. On 15.8.38 they made a final account according to which we knew exactly what was due from us to them (the defendants). The promissory notes payable at sight were made in 1937. On 15.8.38 I asked for the return of all the notes which were unpaid. They replied that I was indebted in respect of additions and that they will return them to me. They did not return them to me.



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*Adv. of Plaintiff :* I have no more witnesses and I pray for an order appointing an auditor (accountant).

*Adv. Fraenkel :* There is no room for such an action. It is baseless. Refers to the question in issue. I wish to call witnesses but owing to the late hour I pray for an adjournment.

Adjourned for the hearing of the witnesses.

12.7.43.

(Sgd.) MANY.

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12.10.1943.

Attorneys of parties present.

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Attorney of defendants prays that his witnesses may be heard.

*Witness, Abraham Hambourger, sworn :* I am a clerk in the ASHRAI BANK. I have before me a file in connection with the contracts made between the parties. They were at the time deposited with the Bank ; Ex. D/4. I found in the Promissory Notes Department the promissory notes which were given in connection with the contracts. I produce the list of promissory notes ; D/5. The promissory notes themselves are found in the Bank. Part of the notes are made to the order of Klein and part to the order of Shaphir. The promissory notes contained in the list were not paid.

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*XXX :* I do not know when were the promissory notes given.

Evidence of  
Defendant  
Israel Asher  
Shaphir.

*The Defendant Israel Asher Shaphir, on affirmation :* I and Mr. Klein entered into contracts with the plaintiffs. On 27.9.36 we signed a provisional contract with Barouch Heiman. After that they started to build final contracts were made on 3.10.37 ; one with Barouch and Rachel Heiman in respect of 5 shops and the other with Eliahu, Abraham and Israel Heiman in respect of 5 shops. No contract at all was made with Mr. Shemuel Heiman but on 15.8.38 when the accounts were made, Shemuel was joined in the accounts as a purchaser of one shop. Barouch Heiman acted in the matter on behalf of all of them. The Heiman family has bought 9 shops in all. The shops were delivered to the purchasers in August 1938. At that time a detailed account was made and he brought promissory notes as per account and deposited them with the ASHRAI BANK. The terms of payments (instalments) were as follows : 1/4 of the price to be paid in cash and 3/4 to be paid within 10 years from the date of the contract by instalments plus 8% interest. When we made the account it showed that the price of all the shops was LP.16,463.984 without interest. The interest till the end of the ten years amounted to LP.5,992. This is the account D/1. Barouch Heiman received a copy of the account, he perused it and gave promissory notes which he deposited with BANK ASHRAI. Apart from the price of the shops there were building additions (annextures) which amounted to a total of LP.1,400. Barouch Heiman paid this sum in ASHRAI BANK. This does not appear in the account D/1. The advance money was not paid in full and the Plaintiffs are still owing 10 promissory notes payable at sight each made in the amount of LP.100. Out of the promissory notes in respect of 3/4 of the sum only LP.4,680 were paid. We prepared at the time at the Land Registry a file in the name of the purchasers whom we invited to accept

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transfer. At the time of the transfer they had to pay the One Thousand Pounds of the 1/4 of the sum and all the promissory notes the time of maturity of which has passed. This was on 15.10.40. The purchasers did not come to the Tabo and Barouch Heiman told me that he had no money at all. They had then to pay the sum of LP.5,171.242. On 20.1.42 I instructed advocate Eliash to send notices in connection with clause 22 of the contract. A notice such as Ex. D/3 was sent. Subsequent to 20.1.42 no promissory notes of the notes deposited with the Ashrai Bank were paid. There were at that time notes in the amount of LP.4,000 10 which have already matured but were not paid. Apart from the LP.1,000 on account of the advance money which were also not paid, a total of LP.3,216 was paid on account of the advance money and LP.1,000 remained due. Only LP.1,465 were paid on account of the notes. Apart from the promissory notes which were deposited with the Ashrai Bank we received notes in the amount of LP.1,644.925 for the first year. My share was paid but Mr. Klein's share was not paid. The plaintiffs have invested in this affair about LP.7,000. The shops are in the hands of the plaintiffs who have let them out. At the present time they receive about LP.200 monthly rent. Two years ago they got only LP.150 per month and at the 20 beginning they obtained LP.100. The plaintiffs obtained out of the shops about LP.10,000.— We paid for werko and for repairs and made new pits.

I did not release the plaintiff from coming to the Tabo. I was p. 9. compelled to sell my property in order to pay debts and many times I requested Barouch Heiman to pay me what is due and he answered that he had no means to pay. I asked him to give me at least the rent yielded by the shops but he refused.

XXX: I did not sign any other contracts except D/4. I did not speak at all with Shemuel Heiman. Three notes are signed by Shemuel and by Barouch Heiman. I agreed to that. Shemuel bought one shop. 30 On 3.10.37 the contracts were deposited with the Ashrai Bank. The notes were deposited in August 1938. At the time when the contracts were deposited the account of the payments was not known yet. I agreed to Mr. Barouch Heiman depositing the promissory notes at a later time than that agreed upon in the contract. My partner also agreed to that. The reason was that it was difficult to make the accounts at that time. Our accountant Mr. Kleinoud made the account D/1 after discussions with Barouch Heiman and after that Barouch Heiman agreed to the account. I agreed that part of the advance money should be paid in notes payable at sight because he did not have cash money. This amount is included in 40 Ex. D/1. This is an account in connection with the payments of the first year: Exh. P/7. The purchasers did not have cash money and I received promissory notes in the amount of LP.1644.925. I am not asking for any monies; I am asking for the rescission of the contract.

*Adv. Fraenkel:* In our action for the rescission we did not base ourselves on the non-payment of the notes payable at sight made in the amount of LP.1,000 but on the non-payment of certain notes which have matured and were not paid. I say that I do not rely on breach that the sum of LP.1,644 of the first year was not paid (*sic*).

*Witness continues his evidence in cross-examination:* The promissory 50 notes were not with me and I did not have to present them. He deposited

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them with the Ashrai Bank and possible the Ashrai Bank presented them. I paid to the Ashrai Bank LP.75 for collection. The property is jointly owned by me and Klein at the rate of 50% for each. There exists no mutuality between us (*sic*). It is not true that a judgment was given declaring us partners.

*Attorney of Defendant No. 3* : I do not propose to call the Tabo official because the plaintiff has admitted in his evidence that he did not appear at the Tabo because he had no money to pay. I therefore declare that I have no more witnesses.

*Attorney of Defendants No. 1 and 2* : I content myself with the evidence 10 of Defendant No. 3.

Adjourned to 24.10.43 for the hearing of the addresses of the parties.

MANY.

24.10.43.

Attorneys of parties present and the question arose who was to begin with his address. It was decided that advocate Benyamini shall begin with his address.

24.10.43.

(Sgd.) KORNGRIEN.

(Sgd.) MANY.

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*Adv. Benyamini* : The defendants have alleged that the plaintiffs had 20 committed a breach of the contract in that they had failed to pay three promissory notes. The defendants lodged an action for breach of contract only after we lodged an action for accounts. The counter-claim of the defendant Klein immediately falls for formal reasons because he is asking for the rescission of contracts of the year 1937 whilst our claim is based on contracts of the year 1938. The unpaid promissory notes were not produced and the counter-claim falls. See : Taylor's On Evidence 12 (1), p. 272/391, 275/397, 279/401. The evidence tendered with regard to the promissory notes is secondary evidence. The witness Hambourger spoke about promissory notes but he did not submit them. Clause 21/22 of the 30 contract does not mention the number of promissory notes and for what amount. No note was deposited within 72 hours. They were given after almost a year. The defendant contended that they did not know then the exact accounts. Thus in these circumstances clause 21 of the contract is a dead letter. This shows that the notes were not created with the contract but were created by virtue of a new oral agreement. And the proof is : D/1 ; P/7 and clause 22 does not apply to such a case. At any rate, the contract does not apply as far as the plaintiff Shemuel Heiman is concerned. There was no proof of non-payment of a promissory note. Halsbury 2, 690/961. My client paid all the notes which were presented to him and I 40 was not bound to pay promissory notes which were not presented. Byles on Bills, 9th Ed., p. 214 1 (?)—16.

I also contend that in our case non-appearance at the Tabo does not constitute breach. There was a waiver here. In the letters D/3, the defendants do not rely on non-appearance at the Tabo, nor do they do so in their defence. The only allegation is non-payment. Not every breach of contract results in the rescission of the contract. Chitty 18, p. 834.

Clause 22, 25 of the contract. There was no seven days' previous notice in accordance with clause 22. D/3 is not evidence of notice, it is not evidence against the other plaintiffs. The wording of the notice does not constitute previous notice as it does not afford my client the opportunity of carrying the contract. Halsbury 31, p. 403-404.

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*Adv. Fraenkel* : Refers to the evidence. According to the evidence of Barouch Heiman, contracts were made in the year 1937 and more contracts were made in the year 1938. These contracts were produced by the plaintiffs and were deposited with the Ashrai Bank. The clerk of the Ashrai Bank produced them, D/4. It follows that the only contracts signed by the parties were of the year 1937. In 1938 copies were given to all those interested. Attorney of plaintiffs did not say a single word about their action for accounts. They knew that the action has no basis at all and this appears from the affidavit of Barouch Heiman in which he states the amount which he owes. The action is vexatious and frivolous. Refers to the issues. The plaintiffs did not prove that they were ready and prepared; refers to the affidavit of Barouch Heiman, clause 21 of the contract as regards payment. In order to facilitate the payments promissory notes were given and they were deposited with the Ashrai Bank. The plaintiffs cannot contend that they do not know where the promissory notes are. Section 88 of the Bills of Exchange Ordinance provides that presentment is necessary where the notes are domiciled. The plaintiffs should have proved that the notes are domiciled. The undertaking consists in making monthly payments and the plaintiffs failed to fulfil such undertaking. Our counter-claim is based on the fact that the plaintiffs did not pay and were not prepared to pay when I invited them to the Tabo. The notice is not important because we are not claiming damages. They also failed to pay even after seven days. As regards the action for accounts I refer to Halsbury 13, p. 33/30. There was no waiver on the part of my client. Digest 20, p. 266/276, 267/277, 279, C.A. 179/41, Ap. 41 p. 692. As regards the presentation of promissory notes see C.A. 114/39, Ap. 41, 227 C.A. 55/41 Ap. 41, 181. I pray that the action be dismissed and that the contract be declared to be rescinded.

*Adv. Hutori* : I support my friend Fraenkel. It was proved that there were contracts of the year 1937 and that the promissory notes were given in connection with these contracts. As regards the presentation of the notes see section 88 of the Bills of Exchange Ordinance. Refers to clause 17/19 of the contract which indicate the intention of the parties. There was no need at all for presentation. See Chitty 18, p. 825. There were breaches and not only one breach committed by the plaintiffs. The plaintiffs have committed breach of the contract in that they failed to appear at the Tabo. Clause 24 of the contract. There was no allegation made to the effect that we did not want to give an account.

Adjourned for judgment.

MANY.

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**No. 9.  
JUDGMENT.**

(Translation from Hebrew.)

No. 9.  
Judgment  
of District  
Court, 31st  
October  
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IN THE DISTRICT COURT, TEL-AVIV.

Civil Case No. 261/42.

Before : THEIR HONOURS JUDGES DR. MANY and DR. KORNGRUN.

IN THE MATTER of :

ELIAHU HEIMAN  
ABRAHAM HEIMAN  
BAROUCH HEIMAN  
ISRAEL HEIMAN  
SHEMUEL HEIMAN  
RACHEL HEIMAN

10

Plaintiffs

vs.

JOSEPH KLEIN  
ABRAHAM KLEIN  
ISRAEL ASHER SHAFIR

Defendants.

The facts in this case are as follows :

1. By virtue of contracts dated 3.10.37 the defendants undertook to sell to the plaintiffs nine shops situate at the New Commercial Centre near the Central Station : Ex. D/4. 20

2. It was agreed that the price for the a/m shops shall be LP.16,463.984. The purchasers had to pay one quarter in cash till the day of the delivery of the shops to them and the balance by instalments with 8% interest to be secured by a mortgage together with the transfer of the properties to the name of the purchasers.

Apart from that the purchasers undertook to pay for additions to the building.

3. The purchasers paid on account of the advance money the sum of LP.3,110 instead of LP.4,115.996, as provided by the contract, so that the purchasers are still indebted on account of the advance money in the sum of LP.1,000 as per promissory notes deposited with the Ashrai Bank. 30

4. In August 1938 the purchasers took possession of the shops and during the time they let out the shops to various people and collected the rent till 25.6.43, when a Receiver in respect of the said shops was appointed by this Court.

5. In accordance with the account Ex. D/1 which was made between the parties at the time of the delivery of the shops, the purchasers delivered to Ashrai Bank promissory notes for the balance of the price and for ten years' interest. 40

6. The purchasers delayed payments and many promissory notes, about fifty in number, were not paid.

7. On 6.10.40 the vendors sent to the purchasers an invitation D/2 to come to the Tabo office on 15.10.1940 between 10 and 12 in the morning in order to receive the transfer to their name of the shops in question. The purchasers did not respond to the invitation in breach of clause 13 of the contract D/4.

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8. One of the purchasers, Mr. Barouch Heiman, who acted on behalf of all the purchasers, has admitted in his evidence given before this Court that the reason for their non-appearance at the Tabo was that they were not able to pay what was due from them.

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10 9. On 20.1.42 the vendors sent to the purchasers, through Advocate Eliash, a seven days' notice in a registered letter as is provided for in clause 22 of the contract, Ex. D/3, and they rescinded the a/m contract.

10. The purchasers, who are the plaintiffs in the main action, contend that they are prepared to pay all monies due from them but stated that as there existed disputes of accounts between the parties, they asked the Court to give an order for the production of accounts so that they should know the amount which they had to pay.

11. The vendors, who are the defendants in the main action, denied the existence of disputes of accounts between the parties, and contended  
20 that the contracts relied upon by the plaintiffs were rescinded by the defendants because the plaintiffs had breached them.

12. The defendants did not content themselves with submitting a defence in the main action for they also lodged a counter-claim in which they prayed the Court to declare that the contracts between the parties are rescinded because the defendants had committed a breach thereof.

13. In their reply to the counter-claim, the purchasers merely contended that the counter-claim did not disclose a cause of action and that there was no breach on their part.

14. As regards the main action, the Court finds that it has no legal  
30 and factual basis at all. Not only that no dispute at all was revealed in respect of the accounts, but also in the affidavit submitted to the Court the purchasers admit a sum greater than that claimed from them by the vendors. Furthermore, the plaintiff Barouch Heiman declared on oath in his evidence that a final account was made between the parties (D/1) and that in accordance with this account he had delivered promissory notes to the Ashrai Bank. The Plaintiffs' action lacks cause and should be dismissed. It must be pointed out at this stage that the plaintiffs' contention that apart from the contracts which were signed by the parties in 1937, other contracts were signed in 1938, has no foundation at all.  
40 The contracts : P/1, P/2, P/3, P/4, P/5, P/6, which were submitted are not signed and are mere copies of the contracts signed on 3.10.37 and which were deposited together with the promissory notes with the Ashrai Bank. There were no contracts between the parties except Ex. D/4 which are dated 3.10.37.

15. As regards the counter-claim there is no denial by the purchasers of their delaying payments ; but they contend that they were not bound to pay notes which were not presented to them as required by law. The Court finds that in the present case the notes were given only in order to

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facilitate payments and they were deposited by the purchasers with the Ashrai Bank. They therefore knew that the vendors could not transfer the notes to other hands and they always knew that they had to come every month to the Ashrai Bank to pay the payments agreed upon in the contract. Moreover, section 88 of the Commercial Law (*sic*) applies only and solely to those notes which are payable at a particular place. There is no proof that the said notes contain such a condition. The purchasers have further contended that the seven days' notice provided for in clause 22 of the contract and which was sent to them on 20.1.42 did not afford them the last opportunity of complying with the contract as is the usage in the case of such admissions. The Court is of the opinion that the notice Ex. D/3 contains an indication that it was sent in accordance with clause 22 of the contract and there is no need for further particulars. 10

16. From all the above the Court comes to the conclusion that the purchasers Barouch Heiman and the others were not prepared to fulfil their undertaking in accordance with the contracts and that they have committed a breach thereof on two occasions: (A) On 15.10.1940 they failed to appear at the Tabo in order to receive transfer to their name of the shops in question, a thing which is contrary to clause 13 of the contract; (B) within the seven days starting on 20.10.1942, they did not pay the amounts which were then due from them. On the ground of these breaches the defendants were entitled to rescind the contract. 20

We therefore decide to dismiss the action of the Plaintiffs and to declare that the contracts between the parties are rescinded. The plaintiffs in the main action should pay the costs of the defendants in the main claim and in the counter-claim and LP.20 advocate's attendance fees in the two claims.

Given and notified to the parties on 31.10.43.

(Sgd.) KORNGRUEN.

(Sgd.) MANY.

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No. 10.  
NOTICE OF APPEAL.

IN THE SUPREME COURT.

Sitting as a Court of Appeal Jerusalem.

Civil Appeal No. 372/43.

ON APPEAL

FROM THE DISTRICT COURT TEL-AVIV, Civil Case No. 261/42.

BETWEEN

- 10 1. ELIAHU (LEO) HEIMAN  
2. ABRAHAM HEIMAN  
3. BARUCH HEIMAN  
4. ISRAEL HEIMAN  
5. SHMUEL HEIMAN  
6. RACHEL HEIMAN

Orange-growers, of Nes-Siona, by their Attorneys  
I. BEN-JAMINY, Barrister-at-Law, Dr. I. VORCHHEIMER,  
S. M. ABRAMOV, Advocates, of 13 Achad Haam St.,  
Tel-Aviv

*Appellants*

AND

- 20 1. JOSEPH KLEIN  
2. ABRAHAM KLEIN  
both merchants of 33 Achad Haam St., Tel-Aviv  
3. ISRAEL ASHER SHAFIR  
merchant of 8 Yehuda Halevy St., Tel-Aviv

- *Respondents.*

NOTICE OF APPEAL.

1. Take notice that this is an appeal against so much of the judgment given by the District Court Tel Aviv on the 31st day of October, 1943, in the above case as declared that the contracts between the Appellants and the Respondents are discharged and rescinded.

- 30 2. It is respectfully prayed that so much of the judgment appealed from, as hereinbefore mentioned, may be set aside on the following, amongst other, grounds :—

(A) That the Ruling made by the Court below on the 24th day of October, 1943, was wrong in law.

(B) That there was no evidence upon which the Court below could find that the amount of LP.1,000.— referred to in para. 3 of the said judgment remained due from and unpaid by the Appellants, and that the promissory notes in respect thereof were ever deposited with the Ashrai Bank.

- 40 (C) That the Court below were wrong in law and misdirected themselves in making a finding whatsoever in respect of the LP.1,000 referred to above.

(D) That there was no evidence upon which the Court below could find that Exhibit D/2 referred to in para. 7 of the said judgment was ever sent to, or received by the 5th Appellant.

(E) That there was no evidence upon which the Court below could find that the 1st Appellant was a lawful agent, or has been lawfully empowered to act for and on behalf of all and each of the other Appellants.

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(F) That the contents of the alleged Exhibit D/3 referred to were never proved, in respect of the 5th Appellant.

(G) That there was no evidence upon which the Court below could find that the said Exhibit D/3 was ever sent by the Respondents to the 5th Appellant, or ever received by him.

(H) That the counter-claim of the 1st and 2nd Respondents ought to have been dismissed as they never asked the Court below for a declaration that the contracts referred to in para. 1 of the said judgment are discharged or rescinded.

(I) That the Court below was wrong in law in not making 10 separate findings of fact and law on the two counterclaims.

(J) That the counter-claim of the 1st and 2nd Respondents was never proved.

(K) That none of the promissory notes whatsoever the dishonour of which was alleged to be a breach of the contracts referred to above, have ever been produced, filed or, made an exhibit in the action, and that the Court below were wrong in law and misdirected themselves by making any findings of fact and law in respect of such alleged promissory notes.

(L) That there was no evidence that the above alleged 20 promissory notes were ever made or given in connection with, or in relation to, or in respect of the contracts dated the 3rd day of October, 1937.

(M) That there was ample evidence that the above promissory notes did arise, or were made, or given in connection with, or in respect of a new and independant oral agreement which was made on or about the 15th day of August, 1938.

(N) That there was no evidence upon which the Court below could find that the 5th Appellant was ever a party to all or any of the contracts referred to in para. 1 of the said judgment. 30

(O) That the Court below erred in law and fact in holding that the above promissory notes were dishonoured.

(P) That the Court below erred both in law and fact in holding that Exhibit D/3 was a proper notice for the purposes of rescinding or discharging the contracts referred to in para. 1 of the said judgment.

(Q) That the Court below erred in law in holding that the alleged non-appearance in the Land Registry on the 15th day of October, 1940, did constitute a breach of Exhibit D/4 or alternatively, that they erred in making a declaration for the discharge 40 or rescission of Exhibit D/4.

*Enclosed :*

Copies of Motion of Appeal—5  
Certified copies of the judgment

—4

Application pursuing to rule 327  
of the C.P.R. 1938—6

Notification of amount paid into  
court—6

Non-Enemy Declaration—1

Attorney for Appellants,

(Sgd.) I. BEN-JAMINY,  
Barrister-at-Law.

Address for service of Appellants :  
Office of I. BEN-JAMINY,  
Advocate, 13 Achad-Haam St.,  
Tel-Aviv.

No. 11.  
JUDGMENT.

Civil Appeal No. 372/43.

Before : Mr. JUSTICE EDWARDS and Mr. A/JUSTICE PLUNKETT.

*In the  
Supreme  
Court  
sitting as a  
Court of  
Appeal,  
Jerusalem.*

In the Appeal of :

No. 11.  
Judgment,  
17th  
November  
1944.

10

1. ELIAHU (LEO) HEIMAN
2. ABRAHAM HEIMAN
3. BARUCH HEIMAN
4. ISRAEL HEIMAN
5. SHMUEL HEIMAN
6. RACHEL HEIMAN

*Appellants*

*v.*

1. JOSEPH KLEIN
2. ABRAHAM KLEIN
3. ISRAEL ASHER SHAFIR

*- Respondents*

Appeal from the judgment of the District Court of Tel-Aviv dated the 31st day of October, in Civil Case No. 261/42.

5

For Appellants : No. 1 : Mr. I. BEN-JAMINY.  
Nos. 2, 3, 4 & 6 Mr. E. D. GOITEIN.  
No. 5 : ABCARIUS BEY.

20 For Respondents : Nos. 1 & 2 : Dr. M. DUNKELBLUM.  
No. 3 : Mr. ABRAHAM LEVIN.

JUDGMENT.

This is an appeal from a judgment of the District Court of Tel-Aviv which Court had allowed a counter-claim by the present respondents, in which they asked for a declaration that a certain contract for the sale of some shops had been rescinded.

30

The present appellants, who were the plaintiffs in the Court below, had asked for accounts to be taken and for a declaration as to what was the balance of money due from them in respect of contracts for the sale of certain shops. The Court below dismissed the appellants' claim for accounts but allowed the counter-claim and made a declaration that the contracts between the parties were rescinded. There is no appeal against the part of the judgment dismissing the claim for accounts and this appeal is directed solely against the part of the judgment which allowed the counter-claim. We do not rule that a defendant to an action for accounts can never by way of counter-claim ask for a declaration that a contract for sale is or has been rescinded. The matter in Palestine is governed by rule 85, Civil Procedure Rules, 1938, read together with rule 52 (4).

*In the  
Supreme  
Court  
sitting as a  
Court of  
Appeal,  
Jerusalem.*

No. 11.  
Judgment,  
17th  
November  
1944,  
*continued.*

In the course of the argument, Mr. Goitein, for the appellants, referred to the case in *Re Staples* (1916) 1 Chancery Division 322 and to *Austen v. Collins*, Vol. 54, Law Times Reports, p. 903.

Because of the view which we take of this matter it is, for obvious reasons, undesirable that we should deal at length with the judgment of the Court below or with the lengthy arguments advanced before us by the several advocates who have appeared on behalf of the various parties. Suffice it to say that, while an appellate Court is always reluctant to interfere with the discretion of a Court of first instance we think that, in the peculiar circumstances of this case, it was not appropriate to order 10 rescission of the contracts—the subject-matter of this dispute—by way of declaration in a counter-claim to an action for accounts. We are not, of course, laying down any rule of law or of practice. There is, however, a stronger reason why the judgment of the District Court cannot stand and that is that the judgment does not, in our view, contain sufficient findings of fact to support a finding that the contracts had been rescinded or should be rescinded.

We accordingly allow the appeal and set aside that part of the judgment of the District Court which allowed the counter-claim. The parties will pay their costs in the Court below and the appellants will be allowed one 20 set of costs of this appeal to be taxed on the lower scale to include one advocate's attendance fee of LP.15.

Delivered this 17th day of November, 1944.

(Sgd.) D. EDWARDS,  
British Puisne Judge.

I concur.

(Sgd.) O. PLUNKETT,  
A/British Puisne Judge.

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No. 12.

ORDER granting Special Leave to Appeal.

*In the  
Privy  
Council.*

AT THE COURT AT BUCKINGHAM PALACE

The 14th day of August, 1945

Present

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT

MISS WILKINSON

LORD MACMILLAN

MR. THOMSON

MR. TOM WILLIAMS

No. 12.  
Order  
granting  
Special  
Leave to  
Appeal,  
14th  
August  
1945.

10 WHEREAS there was this day read at the Board a Report from the  
Judicial Committee of the Privy Council dated the 31st day of July 1945  
in the words following, viz. :—

“ WHEREAS by virtue of His late Majesty King Edward the  
Seventh's Order in Council of the 18th day of October 1909 there  
was referred unto this Committee a humble Petition of (1) Joseph  
Klein (2) Abraham Klein (3) Israel Asher Shafir in the matter of an  
Appeal from the Supreme Court of Palestine between the Petitioners  
and (1) Eliahu (Leo) Heiman (2) Abraham Heiman (3) Barouch  
Heiman (4) Israel Heiman (5) Shmuel Heiman (6) Rachel Heiman  
20 Respondents setting forth (amongst other matters): that the  
Respondents as Purchasers from the Petitioners of certain land and  
shops in Tel Aviv under contracts dated 3rd October 1937 brought  
an action in the District Court Tel Aviv (Civil Case No. 261/42) on  
the 17th August 1942 alleging that disputes had arisen as to the  
balance of purchase money due from themselves to the Petitioners  
and claiming that an account should be taken of the amount due  
which amount they declared their readiness to pay: that the  
Petitioners contended that the action was baseless as the Respondents  
had made default in due payment of the purchase money as  
30 stipulated whereupon the sale had been rescinded by the Petitioners  
by a notice given pursuant to provision in the Contracts entitling  
the Petitioners to cancel the sale in the event of such default: that  
the Petitioners accordingly counterclaimed for a declaration that  
the Contracts were cancelled: that the District Court on the  
31st October 1943 dismissed the Respondents' action and held that  
no dispute was revealed in respect of the accounts and that the  
Respondents had not been prepared to fulfil the terms of payment  
and that a notice in writing dated 20th January 1942 given on  
behalf of the Petitioners pursuant to Clause 22 of the Contracts  
was effective as a cancellation thereof: that accordingly the Court  
40 declared in favour of the Petitioners on their Counterclaim that the  
Contracts between the parties were rescinded: that the Respondents  
served Notice of Appeal to the Supreme Court against the Judgment  
on the Counterclaim only: that the many grounds of appeal in the  
Notice did not include any objection to the jurisdiction of the

*In the  
Privy  
Council.*

No. 12.  
Order  
granting  
Special  
Leave to  
Appeal,  
14th  
August  
1945.

District Court to grant by way of Counterclaim a declaration that the Contracts were cancelled : that on the 17th November 1944 the Supreme Court gave Judgment allowing the appeal : that the agreed price for the entire properties in the present case was LP.16,463.984 and it is undisputed that the value of the property covered by each Contract separately exceeded by many times the sterling value of £500 : that the Petitioners gave notice of Motion to the Supreme Court for conditional leave to appeal to His Majesty in Council and on the 20th December 1944 leave was refused : And humbly praying Your Majesty in Council to grant the Petitioners 10 special leave to appeal from the Order of the Supreme Court of Palestine dated 17th November 1944 or for such other Order as to Your Majesty in Council may seem fit :

“ THE LORDS OF THE COMMITTEE in obedience to His late Majesty’s said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Order of the Supreme Court of Palestine dated the 17th day of November 20 1944 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs :

“ And Their Lordships do further report to Your Majesty that the proper officer of the said Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioners of the usual fees for the same.”

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof 30 and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the High Commissioner or Officer administering the Government of Palestine for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.

(Translation from Hebrew.)

NEW COMMERCIAL CENTRE

I. A. SHAFIE & JOSEPH ABRAHAM KLEIN

TEL AVIV

shops, 15th  
August  
1938.

To Mr. Heiman, Ness Ziona.

Tel-Aviv, 15th August, 1938.

ACCOUNT—Payments of balance of promissory-notes for the first year and the *difference in the earnest-money*, together with interest till 15.9.1939.

Name	No. of shop	Monthly payment	Proportional payment at L.P.100 per month	Balance of monthly payment	Balance of 12 payments	Balance of earnest money	Interest 8%	Total of principal, balance of payments and interest
Rachel Heiman	.. { 21 55 56	35.275	22.673	12.602	151.224	196.320	25.375	372.919
Baruch Heiman	.. { 22 23	23.765	15.275	8.490	101.880	132.500	17.117	251.497
Abraham ,,	.. 17	24.584	15.801	8.783	105.396	136.810	17.687	259.893
Israel ,,	.. 18	23.701	15.233	8.468	101.616	131.850	17.030	250.496
Eliahu ,,	.. 19	23.701	15.233	8.468	101.616	131.850	17.030	250.496
Samuel ,,	.. 20	24.559	15.785	8.774	105.288	136.666	17.670	259.624
		155.585	100.—	55.585	667.020	865.996	111.909	£P 1,644.925

No. 45.

Exhibit D/1.

## ACCOUNT of Price of Shops with profits payable in half-yearly instalments.

(Translation from Hebrew.)

Exhibits.

No. 45.  
D/1  
Account of  
price of  
shops with  
profits,  
15th  
August  
1938.

New Business Centre  
I. A. Shafir Joseph & Abraham Klein  
Tel-Aviv  
To Mr. Haiman,  
Ness—Ziona.

Tel-Aviv, 15th August 1938.

## ACCOUNT OF PRICE OF SHOPS WITH PROFITS PAYABLE IN HALF-YEARLY INSTALMENTS

Dates of payments for period of 9½ years	Sum total of 18 instalments, capital and interest	HALF-YEARLY INSTALMENTS (8%)		CAPITAL AND INTEREST			Proportionate part of earnest money of the amount of LP.3.250	Price of shop	No. of shop
		Sum total of each instalment	Per month of delay	Interest & principal half-yearly	Serial number	Balance			
from 15 March 1939 15 September .	LP. 4288.626	238.257	L.P. 1.578—1 month	L.P. 236.699	1	980.667	L.P. 241.196	L.P. 1221.863	21
						II 993.956	„ 251.195	„ 1272.511	55
						I 1021.316	„ 244.465	„ 1238.421	56
15 April 1939 15 October	„ 2908.440	161.580	„ 2.126—2 months	„ 159.454	2	993.956	„ 244.465	„ 1238.421	22
						1024.443	„ 251.963	„ 1276.406	23
15 May 1939 15 November	„ 3028.500	168.250	„ 3.300—3 months	„ 164.950	3	2087.971	„ 513.540	„ 2601.511	17
15 June 1939 15 December	„ 2938.698	163.261	„ 4.240—4 months	„ 159.021	4	2012.927	„ 495.082	„ 2508.009	18
15 July 1939 15 June 1940	„ 2957.778	164.321	„ 5.300—5 months	„ 159.021	5	2012.927	„ 495.082	„ 2508.009	19
15 August 1939 15 February 1940	„ 3084.678	171.371	„ 6.591—6 months	„ 164.780	6	2085.821	„ 513.012	„ 2598.833	20
	LP.19206.720	1067.040	„ 23.135	1043.905		13213.984	L.P.3250.—	L.P.16463.984	
				Principal Interest		13213.984 5992.736			
				Total		19206.720			

No. 48.

Exhibit D/4.

**CONTRACT between Shafir Klein and Eliahu, Abraham and Israel Heiman, together with accompanying Letter dated 3.10.37 from B. Heiman to the Ashrai Bank.**

(Translation from Hebrew.)

The Ashrai Bank Ltd.  
Tel-Aviv.

Dear Sirs,

I am handing over to you 24 notes of LP.100 each, LP.2,400 in all, and also two contracts signed by me and by Rachel Heiman, Eliahu, Abraham and Shmuel Heiman in respect of 9 shops, and you have to act with regard to the aforesaid in accordance with our agreement dated 3.10.37.

In case I shall not receive up to the 30.10.37 a copy of the contracts signed by Messrs. Shafir & Klein, you will have to return to me the aforesaid notes and contracts.

Yours faithfully,

(Sgd.) BARUCH HEIMAN,

3/10/37.

*Exhibits.*

No. 48.

D/4

Contract between Shafir-Klein and Eliahu, Abraham and Israel Heiman, together with accompanying letter dated 3rd October 1937 from B. Heiman to the Ashrai Bank, 3rd October 1937.

20

## CONTRACT.

(Translation from Hebrew.)

MADE between Mr. JOSEPH KLEIN and ABRAHAM KLEIN, jointly and severally between them, as owners of 50% of the subject matter of the contract, and ISRAEL ASHER SHAFER, who is owner of 50% of the subject matter of this contract, all three of Tel-Aviv, of the one part, hereinafter called "The Vendors," and ELIYAHU, ABRAHAM and ISRAEL HEIMAN, jointly and severally, hereinafter called "The Purchaser."

WHEREAS the Vendors declare to be the owners of three plots of land mafrouz of an area of 21.322 dunums, in Tel-Aviv, situate on the Tel-Aviv—Petach-Tikvah Road, opposite the Electric Power Station, which form part of the land of Nabulsi grove, registered (shown) on the map prepared by Engineer Kulman, as Block No. 6942, Parcels 37, 38 and 39, and recorded by virtue of Tabu Kushan, Volume 52, Pages 145, 146, 147.

AND WHEREAS the Vendors are preparing a combination of the said plots and their division into parcels, and upon four of the said parcels they are about to build four blocks of shops as indicated in the copy plan appended to this contract and approved by the Municipality of Tel-Aviv, i.e., the blocks marked in the copy plan appended hereto by numbers 1, 2, 3, 4, and in the plan signed by both parties and attached to the present contract, which forms an inseparable part thereof :

AND WHEREAS the Vendors agree to sell to the Purchaser and the latter has agreed to purchase from the Vendors the shops Nos. 17, 18, 19 and 20, Block No. II (two), the area being \_\_\_\_\_, and Parcel No. \_\_\_\_\_ as per the plan appended :



*Exhibits.*

IT HAS THEREFORE BEEN AGREED as follows :

No. 48.  
D/4  
Contract  
between  
Shafir-Klein  
and Eliahu,  
Abraham  
and Israel  
Heiman,  
together  
with accom-  
panying  
letter dated  
3rd October  
1937 from  
B. Heiman  
to the  
Ashrai  
Bank, 3rd  
October  
1937,  
*continued.*

1. The Vendors undertake to build upon the said lands the said shops on columns set for four storeys with fitting foundations as described in the Technical Description. Every shop shall have a basement of a height of three metres, and the shops shall be of a height of  $5\frac{1}{2}$  metres. The Purchaser shall pay the difference of the area of the shop between construction of the foundations for three storeys and construction of foundations for four storeys as shall be agreed upon between the parties. In the event of differences of opinion, then as per the assessment of an expert who shall be appointed as provided for in Clause 8 hereinafter. 10

If, due to the topographical position, the shop shall be higher than five and a half metres (provided there shall be no more than three metres height below the gallery), the parties shall not object thereto; and no further payments shall be borne by the purchaser on that score.

The following things shall be built and set in order at the expense of the Vendors. On the front of every shop there shall be opened a street 10 metres wide and a pavement of a width of three metres; and there shall be arranged a water installation and electric installation and a staircase room built with stairs leading to the second storey and reaching the roof. 20

There shall be built by the Vendors, on the area of 25% of the shop a gallery of iron reinforced concrete, and the whole building shall be constructed of good material, in accordance with the requirements of the Technical Department of the Municipality of Tel-Aviv, and the technical description hereto attached.

The Vendors undertake to commence the said works under the contract within two months of the present contract, and in the event of their failure to do so, the Purchaser shall be released from payment of the promissory notes mentioned in Clause 17 hereinafter until commencement of the work, and the date of payment of the unpaid promissory notes shall be deferred to a time equivalent to the delay in the commencement of the work. 30

2. The whole building shall be constructed in conformity with all particulars and descriptions shown in the technical description attached to this contract. The Vendors, however, shall be eligible to introduce slight changes in accordance with the requirements of the Technical Department of the Municipality of Tel-Aviv or Government institutions. The Purchasers shall likewise be entitled to introduce changes in so far as they shall be approved of by the Technical Department of the Municipality of Tel-Aviv. Should the changes introduced by them exceed the budget for the construction as per the plan and technical description under the present contract, the Purchasers shall pay such difference to the contractor; and if the changes which the purchasers shall require shall be prior to the signature of a construction contract between the contractor and the vendors, then the purchasers shall pay the difference of the changes to the vendors. Should, further, the changes lessen the budget of the building, then the said difference shall be refunded or deducted in favour of the purchasers. 40

The Vendors undertake to pave the courtyard and fence it off and deliver the shop to the purchaser after clearing the courtyard and building site of all building materials, all sorts of tools and other materials.

3. Every block of shops shall be built in such form as would make the area set aside for building occupy approximately 65% of the total area of the parcel, and the balance of the area shall be set aside for the courtyard, entrance to the courtyard and pavement in the front. Should the Technical Department of the Municipality of Tel-Aviv require that the building percentage shall be less than 65%, then the total of the building area shall be changed accordingly; but it shall in any case be not less than 50%, the balance going for the courtyard, entrance to the courtyard and the pavement, as above.

4. The vendors agreed to sell to the purchaser and the purchaser agreed to buy from the vendors the shops shown in the plan attached as numbers 17, 18, 19, 20 in Block No. II (two), Parcel No. \_\_\_\_\_ the area of the shops being about \_\_\_\_\_ sq. m.

5. Sale of the shops includes the shops themselves complete as per the technical description attached hereto: the cellars below them; the plot of land upon which the shops and cellars stand; right of legal ownership, recorded in the Land Registry by way of Musha'a, of the staircase room, the joint pavement and courtyard in the whole of the Block in the same relation as that of the area of the sold shop to the area of all the shops about to be built on Block No. \_\_\_\_\_, as per the plan attached.

6. The Purchaser is entitled to appoint an engineer or supervisor on his behalf whether for himself or jointly with other purchasers in order to supervise the fulfilment of all the conditions in accordance with the stipulations of the present contract and in conformity with the technical description hereto attached.

7. In the event of the purchaser or engineer finding that any particular part in the construction is not in accordance with the conditions of the contract or with the technical description, they shall immediately notify the vendors or their engineer thereof, either by registered letter or by express letter, and if the vendors or their engineer shall satisfy themselves of the correctness thereof, they shall be bound to change and amend immediately that part which shall not have been built in conformity with the conditions of the present contract and the technical description.

8. In the event of differences between the two parties as regards any claim whatever, which may arise in connection with the construction under the present contract, they shall be bound by the opinion of any one of the three architects—Messrs. Tuvia, Orenstein and Wexler of Tel-Aviv—and the decision of the expert who shall be thus appointed shall be final.

Should the purchaser make no notification as aforesaid to the vendors or their architect, either personally or through the architect, as to any part of the building work, which, in his opinion, does not conform to the conditions of the contract and the technical description, as provided for in clause 7 hereinabove, he shall be considered as consenting to the work done, and he shall have no further right to object to that part of the construction. This, however, shall not release the vendors of their liability to complete all the building works in accordance with this contract and its appendices.

9. Upon completion of the shop hereby sold—(a certificate signed by the Vendors' architect, Mr. Gepstein, or any other architect appointed in

*Exhibits.*

No. 48.  
D/4

Contract between Shafrir-Klein and Eliahu, Abraham and Israel Heiman, together with accompanying letter dated 3rd October 1937 from B. Heiman to the Ashrai Bank, 3rd October 1937, *continued.*

*Exhibits.*  
 No. 48.  
 D/4  
 Contract  
 between  
 Shafir-Klein  
 and Eliahu,  
 Abraham  
 and Israel  
 Heiman,  
 together  
 with accom-  
 panying  
 letter dated  
 3rd October  
 1937 from  
 B. Heiman  
 to the  
 Ashrai  
 Bank, 3rd  
 October  
 1937,  
*continued.*

his stead and by the purchaser, or a certificate given in the form prescribed in clause 29 hereinafter, testifying that the shop is finished, shall be considered as sufficient proof of the termination of the construction)—and should the purchaser by then have complied with all his undertakings under the present contract, the vendors shall notify the purchaser within 7 days—by registered letter—that the shop is ready and calling upon him to come and take delivery thereof by accepting the key, and the purchaser shall then come and receive the key of the shop within 7 days of the despatch of the letter as aforesaid. Should the Purchaser find any defects in the shop requiring alteration in accordance with the work-description attached to the contract, a report of such repairs shall be drawn up and the vendors shall undertake to effect them within 10 days from the date of the drawing up of the report; and the purchaser shall pay the instalment which he is bound to pay to the Vendors under the contract. Differences of opinion shall be settled as per clause 8 above. To secure the repairs shown in the report, the vendors shall give the purchaser a Bank guarantee to the value of the repairs set out in the report until final repair, as per clause 8. Delivery of the key to the purchaser or the latter's non-appearance within the said period to receive it, or the security of the repairs by a Bank guarantee as aforesaid, shall be considered as delivery to and acceptance by the purchaser of the shop; and from that time onwards the vendors shall have no further liability in connection with the construction of the shop and the purchaser shall have no right to make any claim whatsoever in connection therewith. 10

10. The Vendors undertake to complete the building of the shop and deliver it to the purchaser within one year of the date of the signature of the present contract. Should the completion of the buildings be delayed because of various hindrances, then the vendors shall have a delay of six additional months to complete all the works; and no further delay shall be given them for any reason whatsoever. 30

11. Upon delivery of the shop to the Purchaser and the compliance by the latter with all his undertakings under the present contract, the vendors undertake to transfer to the Purchaser in the Land Registry the ownership of the shop and cellar and plot of land upon which the shop and cellar stand and the plot of the courtyard and pavement and other properties, jointly held by all shop owners in the Block, within six months. Should, however, the work be delayed because of obstacles in Government and Municipal Departments, then completion of the transfer shall be delayed until removal of the obstacles. At the time of transfer in the Land Registry the Vendors shall produce a certificate of completion of the building from the Municipality of Tel-Aviv. 40

Should the transfer be not effected till the expiry of one year from the delivery of the shop to the Purchaser, then the Purchaser shall be entitled to stop making payments on account of the purchase price until the transfer, on which date the purchaser shall pay to the vendors all the amounts the payment of which was stopped as aforesaid, without interest. The vendors undertake to deal with the preparation in the Land Registry of the file for the transfer, as aforesaid.

12. Transfer of ownership of the parcels in the plot of land upon which the shop and cellar stand shall be in the form of Mafrouz; and of the parcels in the courtyard, pavement and staircase room, in the form of Musha'a. Transfer of ownership of the shop and cellar shall be in the form 50

of Mafrouz, provided that the transfer in such way shall be approved by the Land Registry and the Municipality of Tel-Aviv. Should the transfer in such form not be approved then ownership of the shop and cellar shall be transferred in the form of mushaa' parcels.

10 13. The Purchaser undertakes to appear personally in the Land Registry or through his representative at any time as he shall be called upon to do so by the vendors in writing, or by a preliminary notice of 7 days in a registered letter in order to accept the transfer and sign all documents in connection with the said transfer and the mortgage or mortgages required as provided for in clause 23 hereunder on the day on which the vendors shall summon him.

All Government taxes and Municipal dues payable upon the said property until the completion of the building and delivery of the shop to the purchaser, shall be borne by the vendors ; and from that day onwards, they shall be borne by the purchaser.

14. The purchaser undertakes to pay at the time of the transfer in the Land Registry that part of the said taxes which applies to him under clause 13, as well as transfer fees and registration fees of the mortgage and the costs of preparation of the file in the Land Registry.

20 15. The price of the shop hereby delivered is LP.22.391 mils per each sq. meter of the area of the shop. The area of the shop is measured from the middle of the second joint shop and from the frontage line on the pavement to the outside line of the rear wall. Where any of the walls of the shop is not a joint one with another shop, or where the shop is bounded by the staircase room, then measurement shall be from the outside line of the wall and not from the middle thereof.

30 If it be found after measurement of the shop that it is larger than described in the preamble, to this a contract (in any event not more than a few meters), as per clauses 20 and 21, then the purchaser shall pay to the vendors at the time of receipt of the shops, the difference between the size of the measured shop and the size of the shop as described in the preamble hereof ; and should it be found that the shop be smaller, then the vendors shall refund to the purchaser such difference by promissory notes which he shall have received from the purchaser.

The said price includes the shop and cellar, the land upon which the shop and cellar stand, the part in the courtyard, in entrance to the courtyard, and in the pavement and building and the installation of the W.C. as per the technical description.

40 16. In addition to the said price and in addition to that mentioned in the third paragraph of clause 1 of the present contract, the Purchaser shall pay unto the vendors a sum of LP.43 in respect of each shop, as participation in the expenses involved in the building and the land of the staircase room, other than the cellar which shall be sold to any one of the shop-owners in that block and other than the walls under clause 15.

50 17. On account of the said purchase price, the purchaser has deposited with the Ashrai Bank Ltd. Tel-Aviv, to the credit of the vendors, all the moneys and promissory notes set out in the list attached hereto, and such monies together with the amounts of the promissory notes, shall be termed hereinafter "earnest money." That list shall form an inseparable part of the present contract.

The purchaser undertakes to honour the aforesaid promissory notes on their respective dates of maturity.

*Exhibits.*

No. 48.  
D/4

Contract between Shafir-Klein and Eliahu, Abraham and Israel Heiman, together with accompanying letter dated 3rd October 1937 from B. Heiman to the Ashrai Bank, 3rd October 1937,  
*continued.*

*Exhibits.*

No. 48.  
D/4  
Contract  
between  
Shafir-Klein  
and Eliahu,  
Abraham  
and Israel  
Heiman,  
together  
with accom-  
panying  
letter dated  
3rd October  
1937 from  
B. Heiman  
to the  
Ashrai  
Bank, 3rd  
October  
1937,  
*continued.*

18. The earnest-money shall be paid by the Bank to the vendors in three equal instalments, as follows :—

(A) On completion of the casting of the foundation of the cellar.

(B) On completion of the casting of the roof of the cellar of the shop.

(C) On completion of erection of the walls of the shop.

The Purchaser hereby instructs the Ashrai Bank Ltd. Tel-Aviv, to pay unto the vendors the said instalments in accordance with the provisions of this clause. 10

A certificate signed by the vendors' engineer or any other to be appointed by them, certifying that the said works have been carried out shall serve as sufficient proof for the Ashrai Bank Ltd. Tel-Aviv, that the vendors are entitled to receive the amounts due to them on completion of the work in question, as per clause 18 ; provided clearly, that should the purchaser notify the Ashrai Bank Ltd. Tel-Aviv, two days before payment in accordance with clause 18, that the works in his shop have not been carried out in accordance with the plan and technical description attached hereto, then the Bank shall be liable to the purchaser for that instalment which it shall have paid to the contractor for each shop under clause 18, 20 until the claim of the purchaser shall have been cleared by one of the engineers, as per clause 8, and until the repair is effected and carried out by the Vendor.

19. If, when the time comes for payment of any amount to the Vendor under clause 18, there shall be no sufficient funds therefor at the disposal of the Bank for the reason that sufficient promissory notes have not matured, the purchaser shall be bound immediately to redeem promissory notes to such an amount as would make up the required sum.

20. On completion of the building of the shop as per clause 9, the purchaser shall be bound to pay unto the vendors, in cash, to the extent of 30 completion of one-fourth of the price of the shop. Should the purchaser fail to pay what is due from him under this clause within 7 days of the despatch of a notice in writing by registered letter by the vendors to the effect that the shop is ready in accordance with clause 9 herein, he shall be considered as a defaulter and the Vendors shall be entitled to sell the shop to others and the purchaser shall be liable to pay the damages provided for in this contract.

21. The balance of the purchase price, i.e. three-fourths thereof, together with a bi-annual interest of 8%, shall be paid by the purchaser to the vendors within ten years of the date of the signature of this contract 40 by equal monthly instalments, principal and interest, to be reckoned from day of delivery of the key, but payments shall commence from day of delivery of the shop, i.e. first payment shall fall due on the expiry of one month of delivery.

In order to ease the said payments, the purchaser gives promissory notes to the order of the vendor, and the purchaser undertakes to deposit the said promissory notes with the Ashrai Bank Ltd., Tel-Aviv, within 72 hours of to-day with instructions to hand to the vendors promissory notes covering one year only from the date of delivery of the shop, and the remaining promissory notes on transfer in the Land Registry. 50

Every promissory note shall be considered as an instalment only upon payment thereof.

*Exhibits.*

No. 48.

D/4

Contract  
between  
Shafir-Klein  
and Eliahu,  
Abraham  
and Israel  
Heiman,  
together  
with accom-  
panying  
letter dated  
3rd October  
1937 from  
B. Heiman  
to the  
Ashrai  
Bank, 3rd  
October  
1937,  
*continued.*

22. In the event of three promissory notes due under the present contract remaining unpaid after receiving into his possession of the shop prior to the transfer in the Land Registry and making of the mortgage he shall be considered as having committed a breach of the contract, and the vendors shall be entitled to cancel the contract by a preliminary notice of 7 days by registered letter, and the purchaser shall pay the damages stipulated in the contract. The purchaser shall likewise immediately vacate the shop and deliver it back to the vendors in the same good condition as he received it without any necessity for service of a notarial  
10 or other notice.

23. At the time of transfer of the property to the purchaser in the Land Registry, the Purchaser shall record a first mortgage of the property transferred in favour of the vendors or in the name of whomsoever the vendors shall indicate, or to their order, in a sum covering all the amounts which shall remain unpaid on account of the (purchase) price under the present contract. Conditions of the mortgage shall be as per the form annexed to this contract. Any one payment of the said promissory notes shall be considered as payment on account of the mortgage.

On demand by the vendors, the purchaser shall be bound to secure  
20 payment of the said moneys by two mortgages in lieu of one mortgage in such a division and, generally, in such a manner as the vendors shall indicate.

24. All conditions of the present contract are equal in validity without difference.

25. In the event of breach of the present contract or any one of its conditions, then the party committing the breach shall pay to the other party the sum of LP.500 as liquidated damages in respect of every shop, and there shall be no necessity to serve a notarial or other notice, the breach in itself serving in lieu of notice.

30 In the event of breach by the vendors, they shall, in addition to the damages, be bound to refund to the purchaser the moneys they received from him under the present contract as well as the unpaid promissory notes.

Should the purchaser commit a breach, the vendors shall be entitled to put a lien on all the moneys they shall have received from the purchaser as payment on account of the damages and to claim the balance only.

26. The vendors shall give the purchaser—every one on behalf of himself—a Bank guarantee for payment of all amounts which the purchaser shall pay under the present contract until delivery of the shop.

40 27. The purchasers shall be entitled to pay unto the vendors what is due from them even prior to maturity, in which case a deduction shall be made of the interest which was added to the principal in the promissory notes in respect of the period covering such advance payment.

28. The purchaser shall not be liable for any workmen's compensation during the period of construction and until delivery of the shop to the purchaser under the present contract.

29. Should the purchaser avoid or refuse to sign any certificate under clauses 9 and 18 hereof, it shall, for the purpose of the above clauses, be sufficient if the certificate be signed by one of the engineers mentioned in clause 8.

50 30. The vendors shall be responsible to the purchaser during one year from the date of delivery of the shop to the purchaser for all repairs required as a result of the execution of the work in the said building under

*Exhibits.*  
 No. 48.  
 D/4  
 Contract

the present contract and the technical description attached hereto in conformity with the agreed instructions of the vendors and the purchaser. Should there be no agreement between the said parties, the matter shall be settled in accordance with clause 8 hereof.

between  
 Shafir-Klein  
 and Eliahu,  
 Abraham  
 and Israel  
 Heiman,  
 together  
 with accom-  
 panying  
 letter dated  
 3rd October  
 1937 from  
 B. Heiman  
 to the  
 Ashrai  
 Bank, 3rd  
 October  
 1937,  
*continued.*

31. Any differences (disputes) arising between the parties (whether during the progress of the work or on delivery of the shop to the purchaser, when it shall be necessary to appoint one of the engineers as an arbitrator under clauses 8, 9, 18, 29, 30, then the party, whose claim (as shall be decided by the arbitrator) is found to be unjustified, shall pay the remuneration of the engineer-arbitrator.

10

(Sgd.) A. KLEIN.

J. KLEIN.

ISRAEL ASHER SHAFIR.

3.10.1937.

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No. 46.

Exhibit D/2.

**COPY OF NOTICE sent by Advocate Houtory on behalf of Shafir-Klein to all Respondents (Heiman).**

(Translation from Hebrew.)

No. 46.  
 D/2  
 Copy of  
 notice  
 sent by  
 Advocate  
 Houtory on  
 behalf of  
 Shafir-Klein  
 to all  
 Respon-  
 dents  
 (Heiman),  
 6th October  
 1940.

*Exhibit D/2.*

20

6th October, 1940.

Messrs. Abraham Heiman,  
 Shmuel Heiman  
 Eliahu Heiman  
 Israel Heiman  
 Barouch Heiman  
 Rachel Heiman

Dear Sirs,

In the name of my clients, Messrs. I. A. Shaffir and Joseph Abraham Klein, I hereby invite you to come to the Land Registry of Tel-Aviv, on Tuesday the 15th day of October, 1940, between 10 to 12 a.m., in order to accept transfer in your names of the shops which you bought from my above-mentioned clients in the New Business Centre Shaffir-Klein, Tel-Aviv, in accordance with the agreement made between you and my said clients.

I wish to point out that my clients have already invited you once to accept the transfer and you did not come.

Yours faithfully,

(Sgd.) R. HOUTORY,

Advocate. 40

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No. 47.

Exhibit D/3.

COPY OF NOTICE sent by Advocate Eliash to Eliahu Heiman.

(Translation from Hebrew.)

D/3.  
20.1.42.

Exhibits.

No. 47.

D/3

Copy of notice sent by Advocate Eliash to Eliahu Heiman, 20th January 1942.

Mr. Eliahu Heiman,  
Nes-Ziona.

Sir,

10 In accordance with the instructions I received from Messrs. Israel Asher Shafir, Joseph Klein and Abraham Klein, I hereby give you, on behalf of the afore-mentioned gentlemen, seven days' notice by registered letter as stipulated in Clause 22 of the contract of the 3.10.37 existing between the aforesaid gentlemen on the one part and you and Messrs. Abraham Heiman and Israel Heiman jointly on the other part, and I notify you that the aforesaid vendors are hereby exercising their right to rescind the aforesaid contract by way of seven days' prior notice as above, because more than three instalments of promissory notes due from you and your associates by virtue of the above contract have not been paid,

20 and you and your associates will have to bear the consequences mentioned in the aforesaid clause and my aforesaid clients demand that you pay the damages agreed to in the contract and vacate the shop in accordance with the aforesaid clause without the above vendors being compelled to cause you additional expenses through legal proceedings.

Yours faithfully,

(Sgd.) M. ELIASH.

No. 51.

Exhibit D/5.

LIST of Heiman's Promissory Notes to Order of Shafir-Klein.

(Translation from Hebrew.)

30 1. TO ORDER OF JOSEPH AND ABRAHAM KLEIN AND ISRAEL ASHER SHAFIR (JOINTLY)

PAYABLE ON PRESENTATION—

Signed by Baruch & Rachel Heiman—  
2 promissory notes each LP.100.— LP. 200

Signed by Israel Heiman—  
1 promissory note each LP.100.— „ 100

Signed by Eliahu, Abraham and Israel Heiman—  
7 promissory notes, each LP.100.— „ 700

40 *Sum total in accordance with balance of account of promissory notes for collection (1528/9)—*  
10 promissory notes for LP.100.— each LP.1,000.000

No. 51

D/5

List of Heiman's promissory notes to order of Shafir-Klein.



<i>Exhibits.</i>	2. TO ORDER OF JOSEPH & ABRAHAM KLEIN—		
No. 51.	(A) <i>signed by Abraham Heiman—</i>		
D/5	15 <i>pro-notes each LP.73.752</i>	=	LP.1,106.280
List of	Maturing :		
Heiman's	15.5.40, 15.5.41, 15.11.41, 15.5.42,		
promissory	15.11.42, 15.5.43, 15.11.43, 15.5.44,		
notes to	15.11.44, 15.5.45, 15.11.45, 15.5.46,		
order of	15.11.46, 15.5.47, 15.11.47		
Shafir-			
Klein,			
<i>continued.</i>			
	(B) <i>signed by Eliahu Heiman—</i>		
	16 <i>pro-notes each LP.71.103</i>	=	LP.1,137.648 10
	Maturing :		
	15.1.40, 15.7.40, 15.7.41, 15.1.42,		
	15.7.42, 15.1.43, 15.7.43, 15.1.44,		
	15.7.44, 15.1.45, 15.7.45, 15.1.46,		
	15.7.46, 15.1.47, 15.7.47, 15.1.48.		
	(C) <i>signed by Shmuel Heiman—</i>		
	16 <i>pro-notes each LP.73.677</i>	=	LP.1,178.832
	Maturing :		
	15.2.40, 15.8.40, 15.8.41, 15.2.42,		
	15.8.42, 15.2.43, 15.8.43, 15.2.44,		20
	15.8.44, 15.2.45, 15.8.45, 15.2.46,		
	15.8.46, 15.2.47, 15.8.47, 15.2.48.		
	(D) <i>signed by Israel Heiman—</i>		
	15 <i>pro-notes each LP.71.703</i>	=	LP.1,066.545
	Maturing :		
	15.12.40, 15.6.41, 15.12.41, 15.6.42,		
	15.12.42, 15.6.43, 15.12.43, 15.6.44,		
	15.12.44, 15.6.45, 15.12.45, 15.6.46,		
	15.12.46, 15.6.47, 15.12.47.		
	(E) <i>signed by Baruch Heiman—</i>		30
	17 <i>pro-notes each LP.71.295</i>	=	LP.1,212.015
	Maturing :		
	15.10.39, 15.4.40, 15.10.40, 15.4.41,		
	15.10.41, 15.4.42, 15.10.42, 15.4.43,		
	15.10.43, 15.4.44, 15.10.44, 15.4.45,		
	15.10.45, 15.4.46, 15.10.46, 15.4.47,		
	15.10.47.		
	(F) <i>signed by Rachel Heiman—</i>		
	15 <i>pro-notes each LP.100</i>	=	LP.1,500.000
	Maturing :		40
	15.3.40, 15.9.40, 15.9.41, 15.3.42,		
	15.9.42, 15.3.43, 15.9.43, 15.3.44,		
	15.9.44, 15.3.45, 15.9.45, 15.3.46,		
	15.9.46, 15.3.47, 15.9.47.		

				<i>Exhibits.</i>
	(G) <i>signed by Rachel Heiman—</i>			No. 51.
	17 <i>pro-notes each LP.5.825</i>	=	LP. 99.025	D/5
	Maturing :			List of
	15.9.39, 15.3.40, 15.9.40, 15.3.41,			Heiman's
	15.9.41, 15.3.42, 15.9.42, 15.3.43,			promissory
	15.9.43, 15.3.44, 15.9.44, 15.3.45,			notes to
	15.9.45, 15.3.46, 15.9.46, 15.3.47,			order of
	15.9.47.			Shafir-
				Klein,
	<hr/>			<i>continued.</i>
10	<i>Total and as per balance of a/c of bills for collection (A/33)</i>		LP.7,300.345	
3.	TO ORDER OF ISRAEL ASHER SHAFIR—			
	(A) <i>signed by Abraham Heiman—</i>			
	15 <i>pro-notes each LP.73.752</i>	=	LP.1,106.280	
	Maturing :			
	15.5.40, 15.5.41, 15.11.41, 15.5.42,			
	15.11.42, 15.5.43, 15.11.43, 15.5.44,			
	15.11.44, 15.5.45, 15.11.45, 15.5.46,			
	15.11.46, 15.5.47, 15.11.47.			
	(B) <i>signed by Eliahu Heiman—</i>			
20	15 <i>pro-notes each LP.71.103</i>	=	LP.1,066.545	
	Maturing :			
	15.7.40, 15.7.41, 15.1.42, 15.7.42,			
	15.1.43, 15.7.43, 15.1.44, 15.7.44,			
	15.1.45, 15.7.45, 15.1.46, 15.7.46,			
	15.1.47, 15.7.47, 15.1.48.			
	(C) <i>signed by Shmuel Heiman—</i>			
	15 <i>pro-notes each LP.73.677</i>	=	LP.1,105.155	
	Maturing :			
30	15.8.40, 15.8.41, 15.2.42, 15.8.42,			
	15.2.43, 15.8.43, 15.2.44, 15.8.44,			
	15.2.45, 15.8.45, 15.2.46, 15.8.46,			
	15.2.47, 15.8.47, 15.2.48.			
	(D) <i>signed by Israel Heiman—</i>			
	16 <i>pro-notes each LP.71.103</i>	=	LP.1,137.648	
	Maturing :			
	15.6.40, 15.12.40, 15.6.41, 15.12.41,			
	15.6.42, 15.12.42, 15.6.43, 15.12.43,			
	15.6.44, 15.12.44, 15.6.45, 15.12.45,			
	15.6.46, 15.12.46, 15.6.47, 15.12.47.			
40	(E) <i>signed by Baruch Heiman—</i>			
	16 <i>pro-notes each LP.71.295</i>	=	LP.1,140.720	
	Maturing :			
	15.4.40, 15.10.40, 15.4.41, 15.10.41,			
	15.4.42, 15.10.42, 15.4.43, 15.10.43,			
	15.4.44, 15.10.44, 15.4.45, 15.10.45,			
	15.4.46, 15.10.46, 15.4.47, 15.10.47.			

<i>Exhibits.</i>	(F) <i>signed by Rachel Heiman—</i>		
No. 51.	16 <i>pro-notes each LP.100.—</i>	=	LP.1,600.000
D/5	Maturing :		
List of	15.9.39, 15.3.40, 15.9.40, 15.9.41,		
Heiman's	15.3.42, 15.9.42, 15.3.43, 15.9.43,		
promissory	15.3.44, 15.9.44, 15.3.45, 15.9.45,		
notes to	15.3.46, 15.9.46, 15.3.47, 15.9.47.		
order of			
Shafir-			
Klein,			
<i>continued.</i>	(G) <i>signed by Rachel Heiman—</i>		
	16 <i>pro-notes each LP.5.825</i>	=	LP. 93.200
	Maturing :		10
	15.9.39, 15.3.40, 15.9.40, 15.9.41,		
	15.3.42, 15.9.42, 15.3.43, 15.9.43,		
	15.3.44, 15.9.44, 15.3.45, 15.9.45,		
	15.3.46, 15.9.46, 15.3.47, 15.9.47.		
	<i>Total and as per balance of a/c of bills for</i>		
	<i>collection (1528/23)</i>		LP.7,249.548

# In the Privy Council.

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## ON APPEAL FROM THE SUPREME COURT SITTING AS A COURT OF APPEAL JERUSALEM.

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BETWEEN

1. JOSEPH KLEIN
2. ABRAHAM KLEIN
3. ISRAEL ASHER SHAFIR - - - - - *Appellants*

AND

1. ELIAHU (LEO) HEIMAN
  2. ABRAHAM HEIMAN
  3. BARUCH HEIMAN
  4. ISRAEL HEIMAN
  5. SHMUEL HEIMAN
  6. RACHEL HEIMAN - - - - - *Respondents.*
- 

# RECORD OF PROCEEDINGS.

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KAUFMAN & CO.,  
72 NEW CAVENDISH STREET,  
LONDON, W.1,  
*Solicitors for the Appellants.*

HERBERT OPPENHEIMER, NATHAN & VANDYK,  
20 COPTHALL AVENUE, E.C.2,  
*Solicitors for the Respondents.*