

"Now it is alleged— and I think for the first time— in defendant's plea that the plaintiff agreed to realize upon the shares before calling upon the defendant to pay.

"If an agreement such as the defendant sets up had in fact been entered into, one of the first and principal things which one would expect to find in it would be a provision that the plaintiff or some nominee of the parties would sell these shares at the end of the period allowed to Lubin to redeem them or within some fixed period thereafter so as to ascertain what depreciation there would be if any.

"Nothing whatever of that sort is provided for in the deed and I find no word of testimony in the record to show that the plaintiff agreed to realize upon the shares or that it was agreed that anybody else should realize upon them. Yet, as we have seen, the defendant freely agreed to give his note with such protection as he considered that the deed afforded him— and that note was in fact made payable fourteen days before Lubin's right to redeem would lapse.

"Besides what I have just said, there is the significant negative fact that, while a formal deed was drawn up and signed to establish how the shares were to be dealt with, it contains no recital that the note sued on was given as a further security. If that was the purpose which the note was to serve, why was it not so stated when the parties took the trouble to draw up a writing.

"Lubin did not redeem or sell the shares before the note fell due. At the date of the trial, the full period for redemption had expired and he had not redeemed them within that period.

"The learned judge who decided the case in the Superior Court in these circumstances decided it upon the state of facts then existing, and having found upon the testimony