BETWEEN:

HAZELDEAN FARM COMPANY LIMITED ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Ottawa 1966
June 6-8, 24 & 28
Sept. 30

Income tax—Company with farming objects purchasing land—Whether possible sale contemplated—Sale of lots over long term—Sale of remainder—Whether trading transaction.

In 1944 the three promoters of appellant company bought a 619 acre farm on the outskirts of Ottawa for $26,500, transferred it to appellant company which they incorporated with the declared object of carrying on farming. The company subdivided 67 acres of river frontage into 187 lots and 120 of these and in addition other parcels totalling approximately 70 acres were sold to various purchasers over the next 14 years. The remaining property was leased to two farmers successively at annual rentals ranging from $500 to $850 a year until 1959, when it was sold to the National Capital Commission. Appellant company was assessed to income tax of $145,336 on the price received for the land sold in 1959.

Held, the profit on the sale of the land in 1959 was not taxable. The inference to be drawn from the evidence was that appellant did not have the intention of selling the land at a profit when it acquired it.

Paul Racine, Amédée Demers, François Nolin v. M.N.R. [1965] 2 Ex. C.R. 335; [1965] C.T.C. 150 at 159; [1965] D.T.C. 5102, referred to.

Practice—Exchequer Court Rules 146 and 147—Notice to admit facts—Making admissions part of record at trial—Procedure.

1. The reply to a notice to admit documents or facts pursuant to Exchequer Court Rules 146 and 147 should together with the notice be filed at the trial as part of the case of the serving party in order (*a*)

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to prove a fact whether admitted absolutely or qualifiedly, or (*b*) to prove refusal to admit in order that an application for costs may be made under the Rules.

2. Where the admission is qualified the opposing party should when filing it elect for the record whether he treats it as a refusal to admit.

3. A document admitted pursuant to notice under Rule 146 may be tendered as an admitted document. Documents, plans or schedules mentioned in the reply to a notice to admit facts should also be tendered as admitted. In such case, to avoid unnecessary costs, the document should not be proved by a witness.

4. Where a document has not been admitted pursuant to a notice to admit the notice and the reply may be filed in order to found an application for costs under Rule 146.

5. If there has been no reply to the notice to admit documents or facts service of the notice and of the failure to reply must be proved to found an application for costs under Rule 146 or 147.

6. Questions as to the relevancy or otherwise as to admissibility of the evidence should be raised when the evidence is submitted.

7. A party who has failed or refused to admit a fact or a document should ask the court prior to the completion of the hearing to certify that the refusal to admit was reasonable on penalty of paying the costs of proving the fact or document.

APPEAL from a decision of the Tax Appeal Board dismissed for want of prosecution.

Hyman Soloway, Q.C., C. S. Bergh and *David McWilliam* for appellant.

G. W. Ainslie and *Bruce Verchere* for respondent.

NOËL J.:—This is an appeal from a decision of the Tax Appeal Board, dated October 21, 1964, dismissing the appellant's appeal for want of prosecution from an assessment to income tax dated November 8, 1960, whereby a tax in the amount of $145,336.37 was levied on the appellant's income for its 1959 taxation year. The sole issue in this appeal is whether the profit arising from a sale made by the appellant in 1959 of certain real property was income or a capital gain.

In the early part of the year 1944, three Ottawa citizens, Louis Baker, Alexander Betcherman and the latter's brother, Meyer Betcherman, who had been partners in the scrap business, purchased from J. R. Booth, through a real estate agent, Clayton Fitzsimmons, a farm located in the area

now known as Crystal Beach or Crystal Bay, and situated at the time some six or seven miles from the western outskirts of the City of Ottawa. This property was acquired for the sum of $26,500 and included, according to the deed (Ex. A-3), some 708 acres of land (which however appear from the evidence to be less than this amount, i.e., 619.3 acres) with buildings and equipment. The northern part of this land (67 acres) fronted on the Ottawa River. Highway 17 runs through the property and almost bisects it with land on both sides of this road. The purchase included the land and buildings and certain stock in trade which had been used by the J. R. Booth family as a farm. In the summer of 1944 an application for a plan of subdivision (No. 444) of the northern part of the farm abutting the Ottawa River was made, filed and registered on November 16, 1944.

The appellant was incorporated in Ontario under the name of Hazeldean Farm Company Limited in the fall of 1944 and letters patent were issued on September 23, 1944. The objects of the appellant are as follows:

> to operate and carry on the business of farming, gardening, dairy producing and the raising of horses, cattle and dairy stock including buying, selling, distributing and generally trading by wholesale or retail, all kinds of farming and dairy products, cattle, horses, sheep and all materials and products used or which can be used or are usually used or are usually employed in connection with such business as aforesaid.

By an indenture dated October 13, 1944, Louis Baker, Alexander Betcherman and Meyer Betcherman, sold to the appellant for the sum of $20,000 the farmlands and premises situated in the Township of Nepean comprising 619.3 acres, although the total consideration for the assets of land, buildings, equipment and goodwill owned by the three partners was $50,000 in return for the shares of the corporation which were held equally by the three principal shareholders, Louis Baker, Alexander Betcherman and Meyer Betcherman.

For a proper understanding of the various transactions which took place with regard to the appellant's property, it will be useful to reproduce hereunder a plan showing the various parcels of land involved in this appeal and produced as Ex. R-1.

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One hundred and twenty of the 188 river abutting lots of plan No. 444 were sold over a period of 14 years and 67 were taken over by the National Capital Commission, in 1958, or an average of eight lots a year, at an average price of approximately $500 a lot for a total price of approximately $60,000 as follows: 13 lots were sold in 1944 at a total price of $6,650; 23 lots in 1945 at a price of $8,000; 16 lots in 1946 at a price of $5,850; 5 lots in 1947 at a price of $2,300; 13 lots in 1948 at a price of $4,425; 10 lots in 1949 at a price of $5,600; 6 lots in 1950 at a price of $4,300; 5 lots in 1951 at a price of $2,615; 5 lots in 1952 at a price of $2,675; 2 lots in 1953 at a price of $1,200; 9 lots in 1954 at a price of $5,600; 6 lots in 1955 at a price of $4,900; 2 lots in 1956 at a price of $3,000; 2 lots in 1957 at a price of $3,000 and, finally, 2 lots in 1958 at a price of $2,000.

The appellant also sold a number of lots from its land south of subdivision No. 444 as follows:

Purchaser	Date	Lots	Price of Sale
H. McDowell	14 Nov. 1944 reg. 16 Dec. 1944	5 acres of land situated on the right bottom and marked as No. 1 on Ex. R-1	$1,250
H. McDowell	8 May 1945	1 acre, marked as No. 2 on Ex. R-1	$ 250
Isobel M. McDowell		4.35 acres marked as No. 3 on Ex. R-1	$ 900
F. A. Fleming & D. M. Fleming	15 Nov. 1946	50 acre parcel marked as No. 4 on Ex. R-1 (which was sold to the following):	
E. Glatt & A. L. Achbar	19 June 1953		$8,000
P. V. Little	18 Oct. 1948 Agreement to sell to P. V. Little assigned by the latter to one Gadbois and then to:	10 1 acres marked as No. 5 on Ex. R-1	
A. L. Achbar & E. M. Glatt	on June 16, 1954	for	$2,500
Board of Trustees of the Roman Catholic Separate School	29 Feb. 1952 reg. May 7, 1952	parcel of land adjacent to lot marked as No. 7 on Ex. No. 7 on Ex. R-1	$ 900

PLAN

SHOWING

EAST HALF LOT 7, LOTS 8, 9 & 10 CONCESSION 'A' OTTAWA FRONT
PART OF LOTS 8, 9 & 10 CONCESSION I OTTAWA FRONT
TOWNSHIP OF NEPEAN
COUNTY OF CARLETON

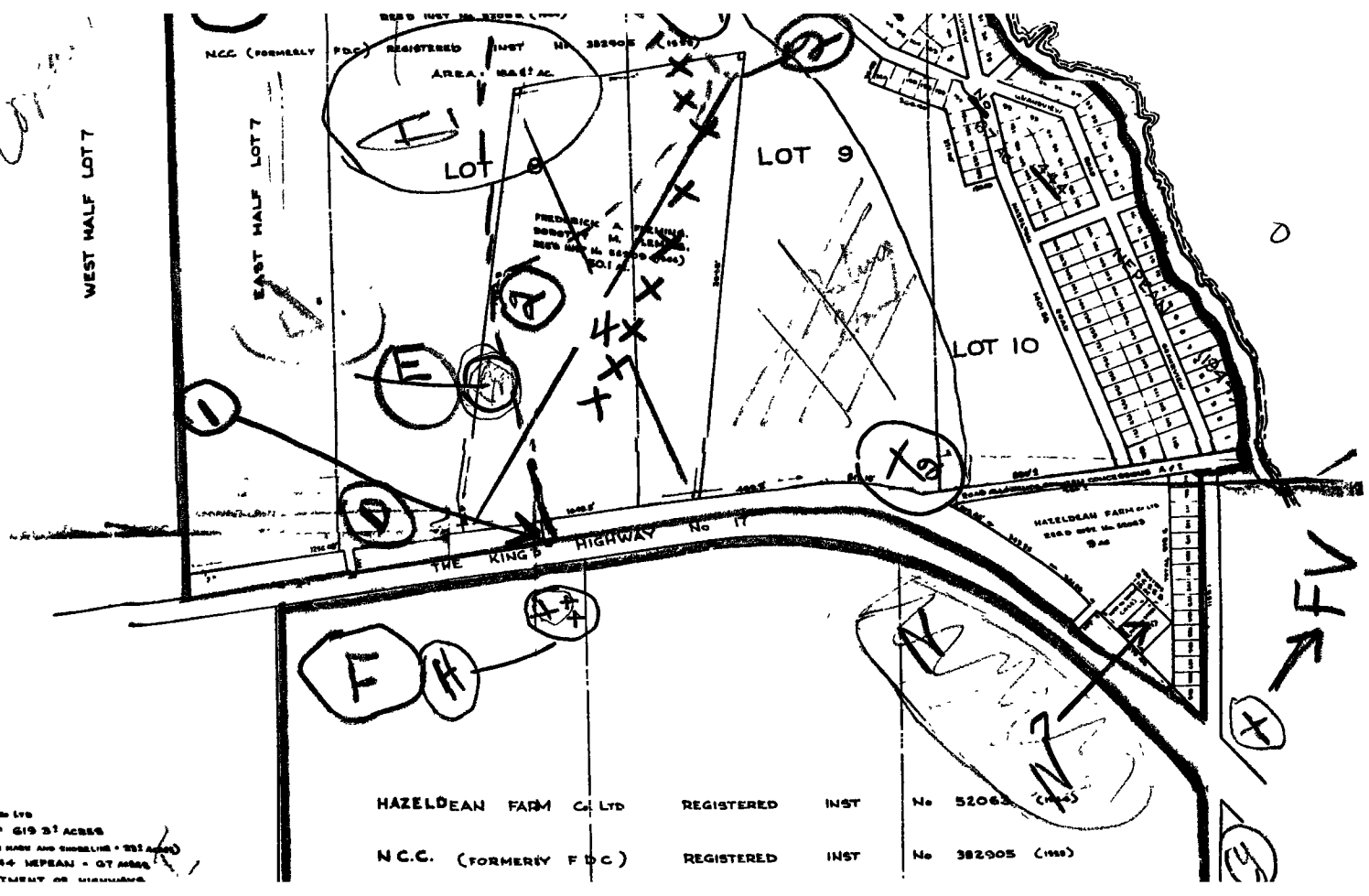
SCALE 1in = 200ft

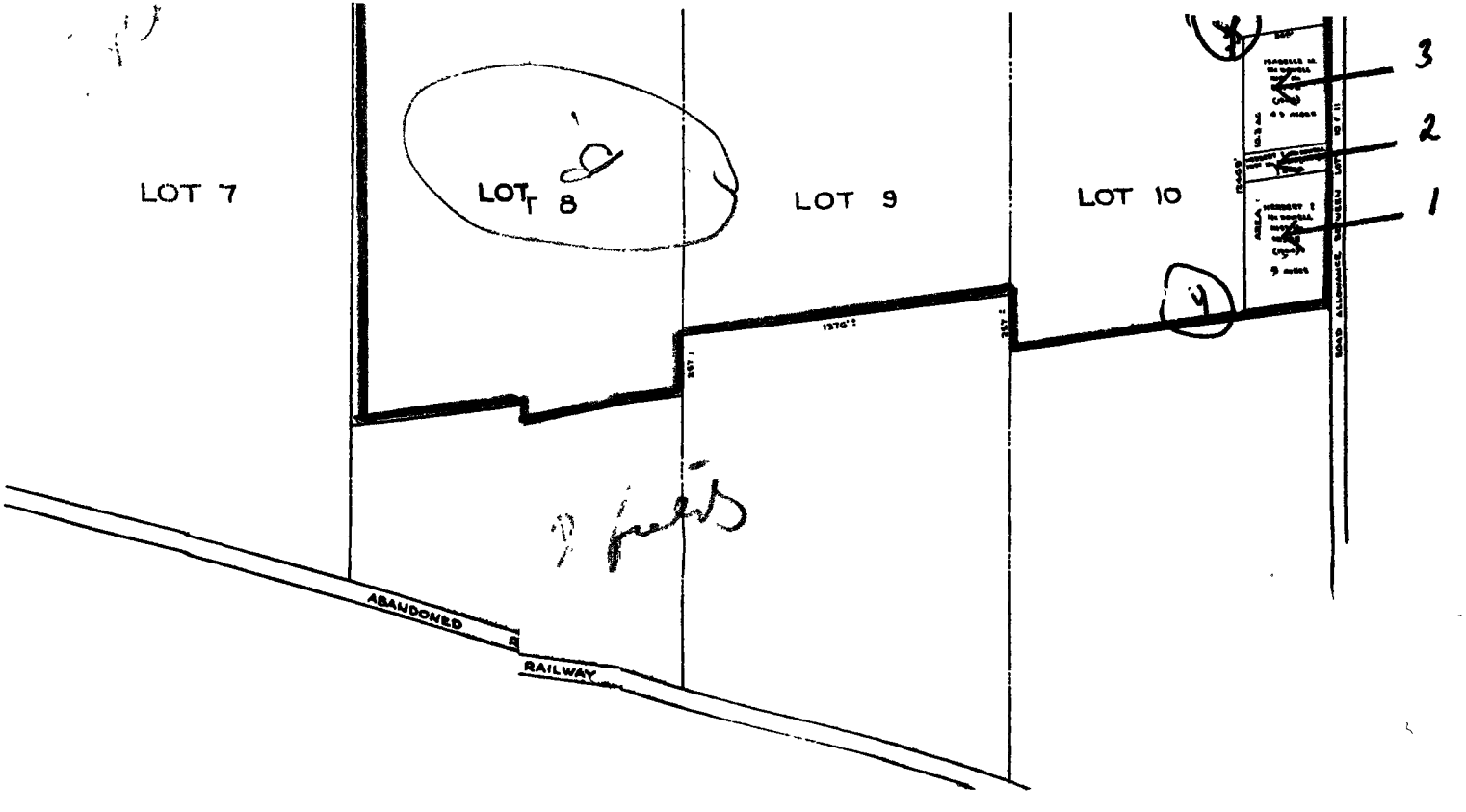
R-1

Schedule A

H. ROSTIE MacLEAN & FAIRHALL
ONTARIO LAND SURVEYORS.

PLAN COMPILED FROM DEEDS WITHOUT THE BENEFIT OF FIELD WORK.


N.C.C. (FORMERLY F.D.C.) REGISTERED INST No 382905 (1958)
AREA: 188.61 AC.
WEST HALF LOT 7
EAST HALF LOT 7
LOT 8
LOT 9
LOT 10
MEADOWVALE
THE KING'S HIGHWAY No 11
HAZELDEAN FARM & LTD
INST No 52063 (1944)
619.31 ACRES
AREA BETWEEN HIGH WATER MARK AND CENTRELINE = 22.1 ACRES
REGISTERED PLAN No 444 NEPEAN = 97 ACRES
BY ONTARIO DEPARTMENT OF HIGHWAYS
HAZELDEAN FARM & LTD REGISTERED INST No 52063 (1944)
N.C.C. (FORMERLY F.D.C.) REGISTERED INST No 382905 (1958)


LOT 7
LOT 8
LOT 9
LOT 10
ABANDONED
RAILWAY
3
2
1

The appellant then sold two lots situated next to plan No. 444 and marked as No. 6 on plan No. 289493 registered on March 15, 1951, as follows:

Purchaser	Date	Lots	Price of Sale
S. B. Handleman	20 March 1953	2	$1,000
C. A. Boggild F. A. E. Boggild	reg. 29 March 1953	1	$2,000

Starting in the year 1954 and up to the year 1959, a number of attempts were made by a corporation called Glabor Realty Limited which was in the business of subdividing, developing and trading in land, and of which Emmanuel M. Glatt, the president of the appellant, was part owner, to obtain approval of several subdivision plans comprising, in some cases, land belonging to the appellant which, however, according to Glatt, the owners of the shares of the appellant knew nothing of. One only of these attempts was successful, (Ex. R-6), in 1957, but was not acted upon. Glatt and the shareholders of the appellant all stated that the shareholders of the appellant had no knowledge of the inclusion of the appellant's land in these plans or of the steps taken to have the property subdivided and were annoyed and opposed to their inclusion.

The evidence of Glatt that the appellant's shareholders knew nothing of the inclusion of some of the appellant's land in the subdivision plans, is not too satisfactory nor convincing and these attempts to subdivide must be considered in order to enable a total and complete examination of the conduct of the taxpayer for the purpose of drawing inferences as to what was the original intent of the purchaser. The fact, however, that these attempts to subdivide, which started in 1954 and ended in 1959, occurred between 10 and 14 years after the purchase of the property and long after the original partners had either died or left the corporation greatly reduces whatever significance this evidence might otherwise have had. One sole attempt to subdivide, however, was made in 1957 by the appellant for the purpose of opening Hazelton Road as an extension of No. 444, and although this plan provided for future extension as mention is made of "Block B" and "Block C" both of which were reserved for a future street which indicates, of course, that the sale of future parcels of land encroaching upon the

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farmlands were then contemplated, this also took place in 1957, long after the purchase of the property.

The appellant's land was then sold to the National Capital Commission when a 60-day purchase-compensation option dated October 1, 1958, executed by the appellant was accepted by the Federal District Commission on October 1, 1958.

It therefore appears that of a total acreage of approximately 619.3 acres, subdivision plan 444 contained 67 acres, i.e., 187 lots, of which 68 had remained unsold in October 1958, when the Federal District Commission exercised its option to purchase. The Fleming parcel (marked as No. 4 on Ex. R-1) contained 50 acres, the three McDowell parcels (marked as Nos. 1, 2 and 3 on Ex. R-1) contained a total of 10.35 acres and the Little property (marked as No. 5 on Ex. R-1) contained 10.1 acres.

The balance of the property, i.e., approximately 481.85 acres, therefore, remained available for whatever the owners could use it for. According to Fitzsimmons, the real estate agent who sold the land to the incorporators of the appellant corporation "of the 600 acres, approximately 200 acres was considered to be tillable. The rest would be described as bush land and rocky where, however, cattle would graze". The appellant claims that the remaining land was used for farming and grazing from the date of the purchase in 1944 to the date it was taken over by the Federal District Commission in the fall of 1958, i.e., a period of some 14 years.

The evidence discloses that the farmlands purchased by the three partners, Louis Baker, Alexander Betcherman and Meyer Betcherman, were indeed operated as a farm by them and subsequently by the appellant corporation when the three partners transferred their interest to the latter. Although both Alexander Betcherman and his brother, Meyer, knew nothing of farming, Louis Baker had had some experience on farms prior to his arrival in this country sometime after the turn of the century and had owned and operated, although unsuccessfully, a farm in Cantley, Quebec, in the years 1908-1911.

A Mr. Samuel Whetherton, who was hired by Louis Baker to work the farm, remained there for four years. He

states that when he moved to the farm with his family in 1944, there were two or three fields of barley (10½ acres) which had to be harvested, two on the north side of highway 17 and one on the south side (10 acres) and a field of 12 acres of corn. The barley field on the northside did not appear satisfactory and Louis Baker obtained assistance from the Department of Agriculture. Samples of the ground were obtained and a fertilizer was supplied which resulted in what Whetherton stated was a wonderful crop. The barley was fed to the cattle and most of the oats was sold.

Whetherton, with his family, lived in the farm-house which was on the property, where there were a stable, a barn, a pig-pen and a garage or shed. There was an old henhouse and he built a new one. There were also, at the time, over 70 head of cattle, all beef shorthorns, and six or eight sows, and Baker purchased a registered boar with the result that in 1945, there were 82 pigs and the offspring were sent to market; there were also four horses, a black team and a white team. The second year Whetherton was on the farm, Mr. Baker purchased turkeys and geese.

In 1945, all the young cattle (steers) were sold and the older ones retained to raise stock. In 1945, there were on the farm approximately 38 to 40 cows and calves.

In 1946, the pig stable was turned into a hen-house and a couple of thousands of chickens were raised on the farm instead of pigs on the instigation of Alexander Betcherman, another partner, who did not like pigs and who, according to Whetherton, came often to the farm. The choice chickens were killed off and sold and the pullets were retained for laying and a considerable number of eggs were sold. A good number of the geese died in a wind storm in 1945. Five or six dozen turkeys bought by Baker were raised by Whetherton and then sold.

Louis Baker never lived on the farm but was there often. The first couple of months after the arrival of Whetherton, he was there sometimes twice a day but after he would come twice a week. Whetherton was paid a salary for his services of $100 a month and given free milk and meat and his wife kept one dozen of eggs for every ten dozen she would collect. He was directed by Louis Baker with regard to what he had to do and as to what was to be grown or

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raised on the farm. Whetherton, who was raised on a farm, stated that from his knowledge and his observation of Mr. Baker, the latter knew quite a bit about farming and was very interested in farming and cattle.

During the four years Whetherton was on the farm, from 1944 to 1948, close to 300 acres of land was cultivated in the sense that hay was cut and the land was worked and the cattle grazed in the pastures.

Whetherton described the nature of the area in which this farm was situated during this period as having farms on both sides with three farms between the Hazeldean farm and Ottawa. There was a streetcar that came out to Britannia Bay and Whetherton would get to the bay by means of a horse-drawn wagon, a distance of some 3 miles. Between Britannia Bay and Westboro, there were, according to Whetherton, not many houses nor much development at the time "just bush and grown-up stuff until you crossed the highway at Woodroffe". Going west towards a sawmill and the Hazeldean farm, there were, in 1944, four or five cottages before crossing the railroad track and on the beach there were also a few houses. When he came to the farm in 1944, there was not too much equipment and in the fall of 1944, Baker bought a new manure spreader and on May 1 of the following year, he bought a big new tractor. In the summer of 1945, he bought a combine, one of the first automatic ones in the area. He states that he built some fences at Baker's request to keep the cattle in.

Whetherton remained on the farm until Mr. Baker took ill sometime in 1947 or 1948 when he was told either to look for a job elsewhere or rent the farm. He, however, left to take another job.

Prior to his departure, in 1947 or 1948, most of the machinery was disposed of by auction and the livestock was taken by the butcher.

It was in the course of the year 1948, when Louis Baker's health was failing, that the latter and his two partners, the Betcherman brothers, decided to divide their holdings and as they held another property in common, an apartment building called the Athlone Apartment, situated on McLaren Street, in Ottawa, it was agreed that the Betcherman brothers would take the apartment building and

Baker would have the farm. Alexander Betcherman explains this at p. 294 of the transcript:

> Q. You met him and you decided to take the apartment in the city?
>
> A. Well, I had the preference. He is a farmer. He knew more about land than I did and I figured it would be the best thing for him so he took the farm and I took the apartment.

In April 1948 the appellant, through Louis Baker, leased the farm to one David Corrigan, a farmer who remained thereon for 19 years and is still living there. The first lease, Ex. A-11, was dated March 10, 1948, and was for a term of four years from April 1, 1948. The second lease, dated May 1951, was of one year and was renewed from year to year. Corrigan stated that when he took over the farm in 1948, there wasn't as much ploughed as was advertised in the newspaper but that there were some 25 to 26 acres ploughed. His description of the farm is that "on the west side near Davidson, there is 100 acres there as good a land as the sun ever shone on and on the other side it is log land".

When Corrigan leased the farm he bought a grinder and a seed drill from Mr. Glatt, the appellant's president and in July bought the combine. Corrigan made the arrangement with Mr. Glatt and it was approved by Mr. Baker who was then in the hospital.

When Corrigan arrived on the farm in the spring, the farm had been idle from the preceding fall and there was no livestock. Baker, in 1948, came out of the hospital and would visit Corrigan sometimes twice a week and, according to the latter, remained interested in the farm as on these visits he would remain talking to Corrigan for long periods of time. "I suppose it was he would like to get out to the farm, there is no doubt about that. His heart and soul was in the farm. He was always enquiring every time you were in the office about the farm". He added that Louis Baker had quite a bit of knowledge of farming and had an interest in everything "more so than practically any other landlord would have".

Baker offered to lend Corrigan money to buy cattle and stock the place and loaned him $1,000 to repair the barn and make it possible to house dairy cattle. Baker then, in 1948, obtained pipes to put in a water system and a 500 gallon water tank was supplied and water boles were set up

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in the barn. Corrigan paid the appellant $500 a year plus $250 a year in reimbursement of the $1,000 loan, which took four years to repay. He states that in 1948 the area was a farming area and he raised a good number of cattle in which Louis Baker maintained a lively interest. The latter died sometime in the year 1949 and the shares in the appellant from then on were held equally by Jacob Baker (Louis Baker's brother), Lena Glatt (Emmanuel G. Glatt's wife and Louis Baker's daughter), Harry Baker and Jack Baker (Louis Baker's two sons). It is at this stage that Glatt became president of the appellant corporation in which he held one qualifying share.

When Corrigan leased the property there were two cattle barns on the property and also a log hen-house which burnt in 1951.

Sometime around 1956 one of the barns was destroyed by fire and upon Corrigan's request, the appellant, through Mr. Glatt, agreed to rebuild it at a cost of $5,300, supplied by Mr. Glatt (Ex. A-18) from an amount of $13,000, the proceeds of a fire insurance policy. It was rebuilt ten feet larger than the former barn and the appellant paid the difference.

Corrigan paid a rental of $500 a year for the first four and possibly six years and then his rent was raised to $850 a year. He now pays the National Capital Commission $750 although there is 70 acres less.

During the ten years he spent on the farm, from 1948 to 1958, date of the acquisition by the National Capital Commission, he never saw any sale signs on the farm portion of the property. He admitted, however, that there were many people looking for lots adding: "I referred them to Mr. Glatt. He never sold any. There was a choice of lots there right on the south side. There was hundreds in looking to it just on the height of the land there and there was a lot of people desired to build there but never sold".

The statements of profit and loss for the farming operations of the Baker-Betcherman partnership from February 1, 1944 to September 30, 1944, as well as for the appellant's farming operations for the years 1944 to 1948, although indicating considerable farming activity, disclose an operating loss for each year of the above period.

The partnership statement (Ex. A-32) shows purchases of livestock and sales thereof and although a gross profit of $766.76 is shown, as expenses charges and taxes exceed the profit, a net loss of $2,466.49 is shown for the period.

The statement for the year 1945 (Ex. A-25) shows sales of $2,526.47 with cost of sales of $2,241.83 disclosing, therefore, a gross profit of $284.64 against which expenses of $5,852.69 must be deducted, thus showing a loss of $5,518.05.

The 1946 farming operations show sales of $5,184.73 and cost of sales of $442.79 with a gross profit therefor of $4,205.94 from which expenses must be deducted, thus disclosing a loss of $1,847.72.

In 1947, sales were in an amount of $8,543.12 and the cost thereof was $9,562.19, showing a gross trading loss of $1,018.98, to which must be added expenses of $6,762.93. thus giving a loss of $7,781.91.

In 1948 the statement discloses sales from farming and lumbering activities of $7,568.74 with cost thereof of $7,557.88, giving a gross profit of $10.86 with expenses of $3,310.57, thus disclosing a loss of $3,299.71.

Exhibit R-12, on the other hand, which contains the figures setting forth sales of land less cost of land, cost of sales and development costs, indicates that for each of the years involved, there was a profit. There was a gross profit of $9,906.59 for the year 1945, $7,475.40 for 1946, $6,006.44 for 1947, $5,309.60 for 1948, $5,190.26 for 1949, $2,175.24 for 1950, $1,760.73 for 1951, $3,427.07 for 1952, $3,063.17 for 1953, nil for 1954, $6,238.50 for 1955, $3,858 for 1956, $3,858.01 for 1957 and $1,231.28 for 1958.

It is against the above background that the respondent has assessed the appellant.

Although there have been many decisions as to whether profits on the sale of land are of a capital or income nature, it is still practically impossible to define with certainty the boundary line between income and capital gains. A solution to many of these problems has been found in a combination of factors, such as the intent of the taxpayer, the fact that it was an isolated transaction, the relationship to the taxpayer's ordinary mode of business and the nature of the transaction, each of which alone may not lead to inferences of trade but which, taken together with many other

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circumstances in their totality, may convince a court that the transaction under investigation is one of a capital nature.

To ascertain here whether the profits made by the appellant with respect to its farmlands are profits from a venture in the nature of trade, it is necessary to ascertain whether the exclusive purpose in the appellant's mind when it embarked on the acquisition was to exploit it as a farm or whether it was acquired also with a view to reselling it at a profit depending on the opportunities that would arise.

There is no question that the 67 acres of water frontage were purchased for the purpose of reselling them at a profit and that is what the appellant did consistently from the year of acquisition 1944 to 1958, when the land was sold to the National Capital Commission.

The only matter remaining is, therefore, to determine whether having embarked upon the purchase and sale of the 67 acres abutting the river (which is less than 10 percent of the total area purchased) as it did was the appellant's intention as far as the balance of the land was concerned, exclusively to farm it, or had it a dual intent as suggested by counsel for the respondent of holding this land and developing it until it became ripe for profitable disposition and in the interim deriving some income from some farming activities and rental of the property.

In considering the question whether the appellant had, at the time of acquisition, what is sometimes referred to as a "secondary intention" to resell the farmland when circumstances made that desirable, it is important to consider (as I had occasion to mention in *Paul Racine, Amédée Demers, François Nolin v. M.N.R.*[1]) just what that involves. It is not sufficient to find merely that, if the purchaser had at the time of the purchase, stopped to think about it, he would have had to admit that, should a sufficiently strong inducement be presented to him at some time after acquisition, he would resell.

As mentioned in the above case:

> ...Every person buying a house for his family, a painting for his house, machinery for his business or building for his factory would be obliged to admit, if the person were honest and if the transaction were not based exclusively on a sentimental attachment, that if he were offered a sufficiently high price a moment after the purchase, he would resell.

[1] [1965] 2 Ex C.R. 335; [1965] C.T.C. 150 at 159; [1965] D.T.C. 5102.

It therefore appears that the fact a person purchasing property for some capital purpose could be induced to resell if a sufficiently high price were offered to him is, however, not sufficient to turn a capital acquisition into a venture in the nature of trade. It is not a "secondary intention", if one chooses to use that terminology. To give a capital acquisition transaction the dual character of being at the same time a venture in the nature of trade, the purchaser must have had at the time of the acquisition, the possibility of resale in mind as an operating motivation for the acquisition. As a finding that such motivation existed will have to be based on inferences from the surrounding circumstances rather than direct evidence of what was in the purchaser's mind, the whole course of conduct of the appellant has to be examined and assessed.

When a taxpayer has, upon purchasing a farm, sold over a period of 14 years, 123 river lots for approximately $60,000 and approximately 60 acres of choice farmland and has retained 80 percent of the land on which it has farmed, the eventual sale of the farmland, and the inferences drawn from the farming operations tend to become somewhat muddied by the trading operations of the river lots as well as the sales made of the farmland.

It then takes very cogent evidence indeed to clear up the murky waters in order to find, if the evidence so enables, a true and sole intent on the part of the taxpayer to farm that part of the land retained for 14 years and on which farming operations were conducted and farming rental revenue was received during that period of time.

The farming intent here of the appellant can be found only in the actions and intent of its incorporators Louis Baker and the Betcherman brothers and it is through these people only, and in their conduct, that a solution lies.

When, however, one has regard to the fact that the taxpayer is a closely held company none of whose shareholders or officers had, at any time prior to the transactions under review, speculated in real estate (the Baker brothers were engaged in the distribution of lumber and the purchase and resale of scrap material and the Betcherman brothers were in the scrap business only) and to the fact that its shareholders and officers, one of whom had a background of farming, out of an avowed inclination and desire to farm

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and carry on as gentlemen farmers (this was corroborated by Mr. Fitzsimmons, a real estate broker), caused it to buy a large area of farmland, situated some seven miles from the outskirts of a city, together with all the equipment and stock comprising 80 head of cattle, with the declared purpose of farming, and to the fact that farming operations were carried on on the farm by the corporation itself for four years (although without making any profits) and then because, through illness, the main incorporator, Baker, was no longer able to supervise the farming operation, by a tenant farmer from whom a rental was obtained commencing at $500 a year and subsequently increased to $850 a year, and to the fact that, such land acquired in an area at some distance from a metropolitan area was (notwithstanding numerous requests from potential purchasers) held for 14 years and then sold to the National Capital Commission because of anticipated expropriation, the almost irresistible inference must be that the taxpayer did not have in mind as an operating motive, when it acquired the land, the idea of selling it at a profit.

Retention of the land for 14 years by the appellant was, however, subjected to a strong attack on the part of the respondent in that refusal to part with the farmland during this period would be equally consistent with the view that the incorporators also had a speculative intent because, under the provisions of the *Ontario Planning Act,* when an area has reached the stage where it is covered by a subdivision control by-law (and Ex. R-31 indicates that on August 31, 1947, all of the northerly and southerly portions of the appellant's land were covered by a subdivision control by-law) then one is prohibited from selling any parcels of land less than 10 acres in size unless it is from a registered plan of subdivision. If the appellant had wanted to start selling any frontage on the highway, for instance, there would be a prohibition unless it registered a plan of subdivision and, if such a plan was registered, taxes on the property would jump considerably. Respondent suggested that it would, therefore, be more advisable to work on the scheme whereby the appellant would try to dispose of all land on No. 444 before subdividing any further portions of its lands.

There appears to me to be a simple answer to the above submission in that numerous witnesses stated that from the

year 1945 up to the actual sale of the property, and particularly during the life of Louis Baker and up to his death in 1949, there were a great number of requests by people interested in purchasing lots. Had the appellant wanted to enter into a plan of disposing of lands by way of subdivision, or otherwise, there was ample opportunity for it to do so particularly during the years 1944, 1945 and 1946 when there were no subdivision restrictions nor zoning or control by-laws. The lots were in such demand during that period, or even later, that their sale would have enabled the appellant to sell parcels of land or even subdivide profitably without incurring municipal taxes. The holding of the land by the appellant under these circumstances would be consistent with the appellant's intent to use it for farming purposes.

Both of the leases to Corrigan contained a clause reserving appellant's right to sell any portions of concession I closely abutting the highway with a *pro rata* reduction of rent according to the acreage sold which, of course, would tend to indicate that at this stage, i.e., four years after the purchase and at a time when Louis Baker was ill, the incorporators were giving some thought to the possibility of selling some of the highway abutting farm lots. They, however, made no sales of these parcels of land although, as already mentioned, they could well have done so in view of the numerous people interested in purchasing lots and the above clause must, under these circumstances, be considered as a simple measure of caution.

The intent of the appellant to retain the land for farming purposes or for whatever rental it could get from it is further confirmed by the manner in which it dealt with the farm section of its property. As late as in 1956, one of the barns burnt down and although the appellant had no obligation to rebuild it, it spent $5,300 of the insurance monies received to have it rebuilt on a larger scale. In 1957, the buildings were repainted and money was expended to provide a watering system for the purpose of breeding cattle or for irrigation purposes and this also is consistent with the purpose for which the farmland was acquired originally.

Now, although losses were sustained in the appellant's farming operations, this is not too surprising as in most

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cases where gentlemen farmers are concerned, the monetary profits are never too rewarding. Mr. Baker and Mr. Betcherman gratified their desire to farm and this was their sole intention of running this farm as a hobby, of being able, with their family, to go there on weekends or Sundays and of allowing Mr. Baker, who had had an interest in farming for a long time, to keep up this avocation. The evidence discloses that the initial investment in the farming end of the land was substantial and considerable funds were invested in livestock, fowls, equipment and in tilling the soil and ploughing many acres and this sufficiently indicates the seriousness of the interest of the principals of the appellant in farming.

The speculative intent of the original incorporators is further negated in that it is most unlikely that they could have foreseen, in 1944, the changes that would take place in relation to this land located some six to seven miles from the city of Ottawa, surrounded by farms with no subdivision of land adjacent, close to only a small settlement of mostly summer cottages and with no transportation facilities. It appears to me that one would have had to have an amazing degree of prescience to have foreseen in 1944 the creation of the Green Belt in the west part of the city, the actual boundaries of which were defined in 1953 only. If Fitzsimmons, a man engaged in the real estate business for a great many years, and the Booth people, had had that foresight, they would not have accepted an offer of $26,000 for the property.

The statement of the sole surviving incorporator, Alexander Betcherman, that when the purchase was made the sole intention of the incorporators was to farm it as gentlemen farmers and that this was their sole motivation at the time, has remained uncontradicted; nor was he cross-examined on this point and, therefore, given an opportunity of accepting or meeting a conflicting version of the reasons given to justify or explain this transaction.

Furthermore, there would seem to be here no surrounding circumstances from which the inference could be drawn that at the time of the acquisition, there was a secondary motivation or that the farmlands were acquired as a speculation or that there was an intent formed to purchase these lands for the purpose of turning them into a profit (which

here clearly falls within the category of a windfall gain) and it, therefore, follows that this appeal succeeds.

Before parting with this case, I should now, as promised to counsel at trial, deal with a matter of procedure in respect of the manner in which admission of facts and of documents should be dealt with at the trial.

Under Rules 146 and 147 of the General Rules and Orders of this Court, any party may call upon the other party to admit any document as well as any specific fact or facts mentioned in a notice to the other party and in case of refusal or neglect to admit, after such notice, the cost of proving such document or fact or facts, whatever the result of the action may be, shall be paid by the party so neglecting or refusing, unless at the hearing or trial, the Court certifies that the refusal to admit was reasonable.

The parties in the present instance took full advantage of this procedure for which they must be commended as it certainly shortened the trial considerably. A notice to admit facts was served on each party and a response was obtained from each of them.

The appellant listed and repeated in his response all the facts specified in the notice to admit. In some cases, he made no comment opposite a particular fact or facts (in which case it or they were admitted). In other cases, he noted some qualification opposite a fact or facts. In still other cases, he merely denied the admissibility of such fact or facts as being irrelevant.

The respondent, on the other hand, listed those facts which he was prepared to admit outright and those which he was prepared to admit subject to some qualification. He refrained from referring to those facts that he was asked to admit which, for some reason, he did not wish to admit.

Having thus obtained the admissions in the above form, a question was raised as to what to do with them at trial in order to insure that they form part of the record. There was a further question as to what to do with the schedules, plans, documents or exhibits referred to in some of the admissions.

The reply to a notice to admit facts, as well as the notice itself, should both be filed as part of the case of the party

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who served the notice to admit if that party chooses to use the reply for one or both of the following purposes:

(a) as proof of a fact that is part of the case that he is proving whether such fact has been admitted as demanded or has been admitted as a qualified form of the fact demanded, or

(b) as proof of the refusal by his opponent to admit a fact upon which proof he may, at the appropriate time, found an application for costs under the second paragraph of Rule 147.

If the reply contains a qualified admission that he does not accept, counsel should, when filing it, indicate for the record that he elects to treat that response as a refusal to admit the fact that his opponent was asked to admit.

If a party receives a reply to a notice to admit that he decides not to use for either of the above purposes, he should not file it.

When a document has been admitted pursuant to a notice under Rule 146, the party may tender the document as having been so admitted. Documents, plans or schedules related to the facts the other party is called upon to admit and mentioned therein or mentioned in the qualifications to the facts admitted which counsel requesting the admissions of facts is also prepared to accept, should also be tendered as admitted. In such a case, the document should not be proven by a witness as such proof unnecessarily increases the costs.

Where there has been a refusal to admit a document pursuant to a notice to admit, the party who served the notice may file the notice to admit and the response in order to found an application for costs under Rule 146.

When there has been no response to a notice to admit documents or facts, a party who wishes to apply for costs under Rules 146 or 147 will have to be in a position to prove service of the notice and also his opponent's failure to respond.

Questions as to relevancy or other questions as to admissibility of evidence should be raised by the objecting party when proof is submitted based upon admissions in exactly the same way as when evidence is tendered in any other way.

In all such cases where facts required to be admitted are admitted but are contested as being irrelevant or as being for some other reason inadmissible, an objection should be made to their acceptance. Such objection can either be resolved immediately by the Court or the decision can be reserved. If the matter is resolved immediately and the objection maintained, the admission does not go in. If the decision is reserved, such facts go in, subject, however, to the subsequent decision of the Court as to their admissibility.

In every case where a party has failed or refused to admit a fact or a document, he should ask the Court to determine and certify before the completion of the hearing or trial, that he was reasonable in so failing or refusing to admit. Otherwise, such failure or refusal will result in the costs of proof being payable by the party who failed or refused to admit.

In this case the admissions were dealt with in conformity with the views that I have just expressed, which, in my opinion, encompass a proper and suitable procedure.

The appeal is therefore allowed with costs.