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\* Oct. 2, 3.  
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\* Jan. 15.

GEORGE E. BALDRY (PLAINTIFF) . . . . . APPELLANT;  
AND  
JAMES MCBAIN AND ERNEST E. }  
JACK (DEFENDANTS) . . . . . } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

*Patent—Alleged infringement—Validity of patent—Means and methods of underpinning buildings—Lack of patentable improvement—Sufficiency of disclosure—Appeal—Presentation of matter after argument.*

Plaintiff appealed from the judgment of the Court of Appeal for Manitoba, 43 Man. R. 245, affirming judgment of Adamson J. (*ibid*) dismissing his action for alleged infringement of patent of invention relating to means and methods of underpinning buildings.

*Held:* Appeal dismissed. Having regard to the state of the art at date of the patent, the methods and devices in respect of which protection was claimed involved no patentable improvement.

Remarks, but no decision, on respondent's contention that, since, admittedly, the patentee's procedure would only be operable in soil of suitable consistency and condition, and since there was nothing in the patent defining, either by reference to soil composition or to locality, the places in which it would be operable, the patent was void for want of sufficient disclosure.

A communication advancing suggestions on a point, and in effect requesting reargument thereon, addressed to the Court after conclusion of the argument, without special leave given at the argument or subsequent to it, cannot properly be considered by the Court.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Manitoba (1), dismissing (Trueman J.A. dissenting) his appeal from the judgment of Adamson J. (2), dismissing his action for an injunction, damages,

\* PRESENT:—Duff C.J. and Rinfret, Lamont, Crocket and Kerwin JJ.  
(1) 43 Man. R. 245; [1935] 2 W.W.R. 593; [1935] 4 D.L.R. 160. (2) 43 Man. R. 245, at 245-248.

etc., for alleged infringement of patent of invention relating to means and methods of underpinning buildings. The appeal was dismissed with costs.

*R. S. Smart K.C.* for the appellant.

*F. Heap K.C.* and *J. R. Crawford* for the respondent.

The judgment of the court was delivered by

DUFF C.J.—The invention to which the patent relates, in respect of which the controversy on this appeal arises, is thus described in the appellant's factum:—

The means and methods of underpinning buildings covered by the patent provide for the creation of reinforced concrete piers directly under the footings of buildings. This is accomplished by first making a limited excavation under the footing of a building, then by means of a boring tool fitted to a jointed rod and handle, boring a hole downward from such excavation to a firm foundation, and the use of the excavation and hole so created as a forming for the concrete. Reinforcing material is then placed in the hole and excavation as may be required and the whole filled with concrete, and a pier head formed by the filling of the excavation under the footing. When the concrete in the pier and pier head is set, the space of a few inches between the pier head and foundation is filled with concrete tamped in so as to effectually fill the space and take the weight of the foundation.

The operators are enabled thus to create such pier working from the side of the wall of the foundation and the shaft of the boring tool is equipped with a guiding member, thus insuring a perfectly vertical hole. This results in the creation of a solid concrete pier being placed vertically under an existing foundation by a means which is claimed to be much less expensive and more effective and can be constructed much faster than by the old methods heretofore in use, such as digging down and putting in caissons before attempting to create a pier.

I have come to the conclusion that the learned trial judge and the three judges of the Court of Appeal who agreed with him were right in their view that, having regard to the state of the art at the date of the patent, the methods and devices in respect of which protection is claimed involved no patentable improvement. The learned trial judge in a short judgment expressed his findings and conclusions in these words:—

There is nothing new or novel about underpinning foundation walls by making a hole by digging or boring and filling it with concrete or other substance. There is nothing novel in using a boring tool with a guiding member to make such a hole. There is nothing new in using an operating line in sections where there is not plenty of headroom. The only thing in this patent which was relied on as being patentable was the use of an "operating line comprising a number of similar detachable sections connected one to the other by universal joints."

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It would seem to me that this is one of the very things which the universal joint itself is designed for and intended to do. A guiding member has been used with a boring tool driven by an operating line in sections. As shown in "Modern Underpinning" by White and Prentis (John Wiley & Sons, Inc., New York, and Chapman & Hall, Ltd., London) the universal joint has been used with augers to muck out sectional steel pipe piles when being put in place to underpin old walls. Can this be said to be an invention simply because concrete or cement is put in the hole instead of a driven steel pipe? The method described in this patent is simply doing exactly what has been done before except that the power is not applied or transmitted in a direct line. Now, this is the universal joint itself which was invented long ago.

I quote this passage in full because, it is very clear, I think, that there is ample evidence to support these findings; and, looking at the matter in a reasonable and practical way, they seem to be virtually conclusive against the appellant.

What was done, apparently, was to apply for the first time successfully in Winnipeg a very convenient procedure for underpinning buildings. The three most important features of this method consisted in the use of the universal joint, in the use of a guiding member to direct a boring tool, and in the use of the walls of an excavation sunk by the boring tool for the purpose of moulding a concrete pillar. As the learned trial judge points out, all the essential features of this system were in common use in New York for the same purpose, subject to this, viz., that, owing to the composition of the soil there, it is necessary, as a rule, first to drive down a casing in order to sustain the walls of the excavation while the concrete is introduced and is settling, and in order to prevent invasion by matter from the surrounding soil which might weaken the concrete structure. But, it was not disputed that the idea of using the walls of the excavation where the soil is suitable for the purpose of moulding the concrete pillar was no new idea. That is admitted and the learned trial judge has found it as a fact.

The procedure explained in the text book which was put in evidence, to which the learned trial judge refers, consists first in boring a hole, "mucking out," as the phrase is, then the sinking of a casing, and after that, the introduction of concrete. Under the patentee's system the casing is dispensed with. That, as I have said, admittedly was not a new idea.

To a skilled person having an adequate knowledge of the state of the arts involved, no exercise of inventive faculty would be required in devising the methods or the appliances, or the arrangements thereof, in respect of which protection is claimed, or in the application of them for the purpose defined. In other words, when the state of the art at the date of the patent is properly understood, it is clear, as it appears to me, that these things constituted no improvement proceeding from invention as contemplated by the patent law.

I express no opinion, however, upon the issue raised on behalf of the respondent as to the proof of infringement in fact. After the conclusion of the argument, a communication was addressed to the Court on behalf of the appellant in which it was suggested that, even if infringement had not been proved, there was sufficient evidence of threats of infringement. The communication was, in effect, a request for a reargument on the point which, in the circumstances, could not have been granted, even if it could properly (which it could not) be considered in the form in which it was presented. Apart from this, the plaintiff's case was not put upon that basis either at the trial, or in the Court of Appeal, or in the appellant's factum. In such circumstances, the Court could not, at this stage, (as matter of substance), permit such a contention to be advanced by an appellant.

Nor do I express any opinion upon another contention put forward by the respondent's counsel to the effect that there is no claim in respect of the patentee's procedure as a whole, but only claims in respect of method and separate claims in respect of devices. Nor do I pronounce upon the contention that, since, admittedly, the patentee's procedure would only be operable in soil of suitable consistency and condition, and since there is nothing in the patent defining, either by reference to soil composition or by reference to locality, the places in which it would be operable, the patent is void for want of sufficient disclosure. I express, as I say, no opinion upon this point, but there does appear to be some force in the suggestion that if the operability of the patentee's procedure in the soil found in Winnipeg were a circumstance, the discovery of which involved invention, then the patent, which makes no refer-

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ence to Winnipeg or any other locality, or to the matter of soil composition, stops short of a disclosure which would enable a person of ordinary skill to work the invention usefully without the necessity of the exercise of inventive ingenuity.

The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *O'Grady & O'Grady.*

Solicitor for the respondent: *J. R. Crawford.*

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