

FARGO, PRESIDENT AMERICAN EXP. CO., V.  
SOUTH EASTERN RY. CO. AND OTHERS.

*Circuit Court, D. Vermont.*                      October 22, 1886.

COSTS—EQUITY—CHANGING COURSE OF LEGAL  
DECISIONS.

After an injunction had been obtained in a suit in equity by the plaintiff express company, restraining the defendant railroad company from excluding the plaintiff's messengers and express matter from the defendant's railroad, the decree was changed, in accordance with the decision in *Express Cases*, 117 U. S. 1, S. C. 6 Sup. Ct. Rep. 542, 628, 1190, to a decree dismissing the bill, and for reference to a master to ascertain amount to be paid to the defendant railroad company for carrying plaintiff's messengers and express matter during the pendency of the injunction. *Held*, that defendant was entitled to have the bill dismissed, with costs, and costs allowed by master to whom matter had been referred.

In Equity.

*L. P. Poland*, for orator.

*W. D. Crane*, for defendants.

WHEELER, J. This suit was brought to restrain the defendants from excluding the orator's messengers and express matter from the defendant's railroad. A preliminary injunction was granted; following *Southern Exp. Co. v. St. Louis By. Co.*, 10 Fed. Rep. 210; *Fargo v. Redfield*, 22 Fed. Rep. 373. This injunction was made perpetual, following the same authority. After the decision in *Express Cases*, 117 U. S. 1, S. C. 6 Sup. Ct. Rep. 542, 628, 1190, this decree was changed to a decree dismissing the bill, and for a reference to a master to ascertain and report the amount of compensation to be paid to the defendant for carriage of the orator's messengers and express matter during the pendency of the injunction. The master has reported that amount to be \$1,046.92, and certified the defendants' costs before him.

It is now insisted that the former decisions upon this subject afforded so much ground for bringing the suit that the bill should be dismissed without costs. There is, however, no equity in the case in the orator's favor existing after the failure of the legal right which was supposed to warrant the bringing of the suit. He was not misled as to his legal rights by the defendants except by a course of legal decisions over which neither had any control. When decrees in suits brought upon reissued patents were changed, on account of the change in the course of decisions on that subject, the bills of complaint were dismissed with costs. *Coon v. Wilson*, 113 U. S. 268; S. C. 5 Sup. Ct. Rep. 537; *Wooster v. Handy*, 23 Blatchf. 112; S. C. 23 Fed. Rep. 49. The course of decision there had been much longer continued than that which preceded this bill, and the reason for denying costs to defendants much greater than in this case. The principles of those cases seem to require that this bill should be dismissed, with costs. <sup>907</sup> It is claimed that no costs before the master should be allowed, because it is stated that the defendants failed to establish a considerable part of their charges. On the other hand, it is stated that the orator made no offer of any compensation, and compelled the defendants to proceed before the master to obtain any. The costs before the master stand by themselves, and are to be allowed or disallowed according to the allowance made by him or the facts stated by him in his report. Nothing is said in this report upon this subject further than to state the amount allowed, and on that statement the defendants appear to be entitled to the costs before the master.

Objection is made to the fees of two persons claimed to be taxed for as witnesses before the master. The master states that they did not testify before him, and "for what purpose they were called did not appear." He has not allowed or disallowed their fees,

but submitted the question to the court. There is not enough stated to show that they should be allowed; and, as he has not allowed them, they must stand as disallowed.

Report accepted and confirmed, and orator decreed to pay to defendants the sum of \$1,046.92, mentioned in the report, with costs, except for the two witnesses who did not testify before the master, within 20 days.

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