30 S.W. 268
Court of Civil Appeals of Texas.

FESSMAN
v.
SEELEY. [1]

1 Rehearing denied.

March 6, 1895.

Appeal from district court, Bexar county; W. W. King, Judge.

Action in a justice court by Charles Fessman against W. B. Seeley. From a judgment of the district court affirming a judgment for defendant, plaintiff appeals. Affirmed.

West Headnotes (3)

[1] **Damages**
Construction of Stipulations

In an action to recover advanced payments for the tuition of plaintiff's son, who had been expelled from defendant's school, the evidence showed that it was the understanding of the parties that, in case of expulsion of the pupil for misconduct, advanced payments should be liquidated damages, and not recoverable. The rules of the school provided that there would be no reduction in case of withdrawals, and for the forfeiture of all payments, in case of expulsion. *Held*, that plaintiff could not recover.

3 Cases that cite this headnote

[2] **Justices of the Peace**
Presumptions

Though the transcript on an appeal by plaintiff from a justice court fails to show that any plea was made, it will be presumed that a general denial was entered.

[3] **Education**
Punishment; suspension or expulsion

Conduct of a pupil at a boarding school, in continually playing truant, and in finally leaving for his home, is ground for expulsion; the pupil's father refusing to permit the school teacher to whip his son for misconduct, and taking no steps himself to correct him.

3 Cases that cite this headnote

Attorneys and Law Firms

***268** R. P. Ingrum and Clark & Fuller, for appellant. H. P. Drought, for appellee.

Opinion

FLY, J.

This suit was instituted in the justice court by appellant to recover of appellee the sum of $200, which had been paid appellee for the board and tuition of Fritz Fessman, a son of appellant. There was judgment for appellee. Appellee taught a private school for boys in San Antonio, his charges being $400 for the entire school year, for each boy's board and tuition, one–half of which was payable in advance, the other half on February 1st. In the fall of 1893, appellant entered into a contract with appellee for the board and tuition of his son Fritz, and paid $200 in advance. Early in January, 1894, the appellant paid appellee the remaining $200, for the last half of the session. During January, 1894, Fritz was constantly playing truant, and finally, on January 24th, escaped from his teacher, and took a train for his father's home, in Eagle Pass. At different times during January, appellee wrote letters to appellant, informing him of the conduct of his son, and reminding him of the fact that the money paid in would be lost to him if he permitted his son to act in such a way as to necessitate expulsion. No notice seems to have been taken of

those letters, and no effort was made to restrain him; but, on the other hand, appellant refused to allow appellee to inflict corporal punishment upon the boy in order to enforce discipline. Appellee attempted to intercept the boy, and prevent his departure for Eagle Pass, but failed, and he afterwards wrote appellant that he would not receive him again. Appellee was justified in refusing to permit the boy to return. His continued truancy and final flight were such gross acts of insubordination as were calculated to subvert the good order and discipline of the school, and its welfare and continued prosperity demanded the exclusion of a student who was refractory and willfully disobedient. No fault could be laid at the door of appellee, as he did all in his power to restrain the boy, but was hindered and prevented in his discipline not only by the misconduct of the boy, but by the action of the father. The testimony is conclusive to our minds that it was the intention of the parties to the contract that in case of withdrawal, or expulsion of the boy, the advance payments should be liquidated damages. It is the plain import of ***269** the rules and catalogue furnished appellant, and the matter was explained to him by appellee before the school year began. On January 15th, appellee wrote appellant: "You have paid for his schooling, if he keeps away that money is lost. It is a matter of business for you to make Fritz understand that you will not allow him to throw your money away." This did not elicit any reply, or bring forth any effort to control the boy. Following the decision of the supreme court, in the absence of there being such a disproportion between the probable damages actually suffered and the amount advanced as to render it unconscionable, we are of the opinion that the intention of the parties must control, and that the amount advanced must be treated as stipulated or liquidated damages. In Durst v. Swift, 11 Tex. 273, it is said: "Where the agreement provides that a certain sum shall be paid in the event of performance or nonperformance of a particular specified act, in regard to which damages, in their nature uncertain, may arise, in case of default, and there be no words evincing an intention that the sum reserved, in case of a breach, shall be viewed only as a penalty, such sum may be recovered as liquidated damages. And there is nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases such an agreement fixes that which is almost impossible to be accurately ascertained, and in all cases it saves the expense and difficulty of bringing witnesses to that point. Where a certain sum is to be paid as liquidated damages, on the violation of an agreement, at law and in equity, both parties must abide by the stipulation." This case has been followed in several instances by the supreme court. Yetter v. Hudson, 57 Tex. 604; City of Indianola v. Gulf, W. T. & P. Ry. Co., 56 Tex. 606; Moore v. Anderson, 30 Tex. 230; Eakin v. Scott, 70 Tex. 442, 7 S. W. 777. In the last–named case it is said: "In the construction of these contracts, as in all others, the intention of the parties must govern." The use of the word "forfeiture" in the rules and catalogue does not necessarily mean that the amount advanced should be considered a "penalty." In the rules it is emphasized that there could be "no engagements for less than the school year, or its unexpired portion; no reductions for withdrawal; forfeiture of all payments in case of expulsion." The damages for a breach of the contract by a voluntary withdrawal, or by acting in such a manner as to necessitate expulsion, were clearly fixed by the parties in their contract, and it should be enforced. The transcript from the justice's court does not show that any plea was made by appellee, but the law will presume that a general denial was entered by the defendant. Appellant claimed that he was entitled to a return of $200 voluntarily paid by him to appellee for board and tuition for his son, and it devolved upon him to establish his claim, in the absence of any appearance whatever upon the part of appellee. Sayles' Civ. St. art. 1578; White v. Johnson, 5 Tex. Civ. App. 480, 24 S. W. 568. We are of the opinion that there is no error in the judgment of the district court, and it is affirmed.