

SWINKEY v. CROW.

4-9287

234 S. W. 2d 36

Opinion delivered November 20, 1950.

1. APPEAL AND ERROR.—In appellant's action to recover damages to compensate the loss of a cow alleged to have been negligently killed by appellee, the finding on conflicting evidence that appellee was not guilty of negligence is supported by the evidence.
2. APPEAL AND ERROR.—The finding of the trial court sitting as a jury is as binding on appeal as the verdict of a jury.

Appeal from Pulaski Circuit Court, Third Division;
J. Mitchell Cockrill, Judge; affirmed.

O. D. Longstreth, Sr., for appellant.

George W. Shepherd, for appellee.

DUNAWAY, J. Appellant Swinkey brought this action to recover the sum of \$100 from appellee Crow as damages for the loss of a cow, which it was alleged was killed through the negligence of Crow.

About dusk on July 29, 1949, appellee was driving his automobile in a westerly direction on a gravel road near College Station in Pulaski County when he hit and killed the cow in question. This was one of two cows belonging to appellant which were crossing the highway from north to south at the point where the accident occurred. Appellant alleged that appellee was negligent in driving his automobile at an excessive rate of speed and in a reckless manner while under the influence of intoxicating liquor.

Appellee answered with a general denial and pleaded contributory negligence in that appellant knowingly per-

mitted his stock to run at large in a Stock Law District in violation of the law.

The case was submitted to the Court sitting as a jury, which resulted in a judgment for the defendant.

Several witnesses for appellant testified that appellee was driving at the rate of approximately sixty miles per hour a short distance behind another car which had thrown up a cloud of dust. Their testimony was that the lights on appellee's car were not burning, though it was growing dark.

Appellee and other witnesses in his behalf testified that he was driving at about thirty miles per hour and that he did have his lights on. Appellee's version of the accident was that he was driving along the highway when appellant's two cows suddenly jumped or ran from a ditch on the north side of the road and in front of his car. He dodged the first one, and cut his car to the left in an effort to avoid hitting the second one, which he was unable to do.

The Court made written findings of fact, the first of which was as follows: "From the evidence submitted the Court found the facts to be that the defendant was guilty of no negligence." On appeal this finding of the Court is treated the same as a jury verdict. Since there is no question of proper instructions in regard to contributory negligence, and there is substantial evidence to support the finding that the defendant was not guilty of negligence, this disposes of the case.

The judgment is affirmed.
