LOFTIN *v.* KING.

Opinion delivered March 21, 1932.

1. SET-OFF AND COUNTERCLAIM—ASSIGNMENT OF NOTE.—Under Crawford & Moses' Dig., § 1199, providing that "notes or other writings assigned to the defendant after the suit has been commenced against him shall not be allowed to be set off against the demands of the plaintiff," *held* that, where defendant sought to set off a

note indorsed to him after the suit was commenced, it may be shown by parol evidence that the note was assigned before the suit was commenced, since the written indorsement necessarily related back to that time.

2. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict supported by substantial evidence is conclusive on appeal.

Appeal from Franklin Circuit Court, Ozark District; *J. O. Kincannon,* Judge; affirmed.

STATEMENT BY THE COURT.

The sole question for determination on this appeal is whether the court erred in permitting a note upon which appellant was a maker to be set off against the note of appellee for a smaller amount, which appellant alleged had been purchased by appellee after suit was begun.

Appellant brought suit on May 25, 1931, against appellees Ivie King and Richard Peters on their note for $147 and interest, dated February 10, 1930. Summons and order of attachment was issued on the same day.

Defendants answered denying any indebtedness to the plaintiff, and by way of cross-complaint alleged they were the owners of a note for $450 upon which plaintiff was one of the makers, which they had bought from W. H. Battles prior to the beginning of the suit, and that they should be allowed a set-off of the amount and be allowed to recover $303, the difference in amount between the alleged indebtedness to appellant on the $147 note sued on and the $450 note they held against appellant, for which overplus judgment was asked on the cross-complaint.

A demurrer and answer was filed to the cross-complaint, in which it was denied that appellee purchased the note from Battles as alleged before the bringing of the suit, or that they were the owners, etc. A demurrer was filed to the answer to the cross-complaint because it did not show that the suit was brought in the name of the owners of the note.

It appears from the testimony that Henry Peters, father of Richard Peters, appellee, purchased the $450 note from W. H. Battles for his son in April, 1931, agree-

ing to pay therefor 33 1/3 per cent. of its face value, for use as an offset in the suit if it was not barred by the statute of limitations. Another witness, to whom Henry Peters went to purchase a note of Fred Lofton's for his son Richard Peters, testified that Peters told him that he already had a note he could use as a set-off in the case if he ascertained that it was not barred by the statute. Battles, from whom the note was purchased, said he sold the note to Mr. Peters for the agreed price of 33 1/3 per cent. for his son and delivered it to him in April, it being agreed that it was purchased on condition that it was not barred by the statute of limitations, and that Mr. Peters told him in April that he would make an investigation and pay him the 33 1/3 per cent. for it if it was not outlawed; and that Peters came back in July and said he would have to indorse it, but that he did not know when he discovered that the note was not outlawed. Said that Peters had not paid him anything on the note, but said that he had agreed to do so when he delivered it to him if he found it was not outlawed.

The said note was indorsed on the back: "Endorsed and made payable to Richard Peters without recourse to me this 23d day of July, 1931," and signed "W. H. Battles."

Appellee's witnesses explained the indorsement or date of it rather, as having been made after appellee was satisfied from the investigation made after the date of purchase in April that the note was not "outlawed."

The execution of the note sued on was admitted and that it had not been paid directly to Mr. Lofton, the defense thereto being the offset.

The court instructed the jury, which returned a verdict in favor of appellees, from which this appeal is prosecuted.

D. H. Howell, for appellant.

J. P. Clayton and *J. B. Perrymore,* for appellee.

KIRBY, J, (after stating the facts). Appellant insists that the court erred in not instructing the verdict in his favor, the note attempted to be used as an offset having

been purchased by appellee after the beginning of the suit as shown by the indorsement thereon.

Under the statute "bonds, bills, notes or other writings assigned to the defendant after suit has been commenced against him and the writ served" are not allowed to be set-off against the demands of the plaintiff. Section 1199, Crawford & Moses' Digest.

The testimony shows that appellee's father begun trying to find and purchase a note of appellant's immediately after his son, who lived in Detroit, wrote him that he was about to be sued by appellant upon a note he had given him. That he approached Battles and bought the note in April before the suit was brought, agreeing to pay 33 1/3 per cent. of the face value thereof, provided the note was not "outlawed" as he expressed it, and that he later found it was not barred by the statute of limitations. After some investigation he feared it might be barred and went to a holder of one of appellant's other notes to see about making a purchase of him, telling him that he had already bought one note but feared it might be outlawed. He ascertained some time before the trial of the case that the note was not barred by the statute of limitations and went to Battles, from whom he had purchased it sometime before, and told him it would be necessary for him to indorse it, and the indorsement was made at that time, rather than at the time of the sale thereof. Other testimony was also introduced explaining the indorsement of the note.

The jury was properly instructed as to the law and found a verdict against appellant. No error was committed in allowing the explanation made of the date of the indorsement on the note, the title to same having been acquired on the date of its sale and delivery to appellee's agent upon condition that it was not barred by the statute of limitations. The sale was to be effective at the date of delivery of the note, and the title passed then, since in fact the note was not barred by the statute of limitations as was later discovered to be the case, and

the purchaser was entitled to have assignment made as of the date of sale and delivery of the note and it necessarily related back to that time.

There was substantial testimony sufficient to support the verdict of the jury returned under correct instructions from the court as to the law of the case, and the verdict is conclusive. We find no error in the record, and the judgment is affirmed.