JONES *v.* MODEL LAUNDRY.

Opinion delivered December 9, 1929.

1. ASSIGNMENTS—OPEN ACCOUNT—SET-OFF.—The assignee of an open account takes subject to all rights of set-off then held by the debtor against the assignor.
2. SALES—CONSTRUCTION OF WARRANTY.—A warranty in a contract for the sale of a laundry machine: "One used 24 watts flat work ironer. New padding, new aprons, new cover, new feed ribbons, to carry guaranty, same as new machine,"—*held* to warrant the machine with the new equipment on it, and not merely the padding and other appliances, since the warranty should be read as one sentence, and as though there had been no period after the word "ironer."
3. SALES—IMPLIED WARRANTY.—The law implies, in the purchase of a new machine, a warranty that it is reasonably fit for the purpose for which it was to be used, and for which it was sold.
4. TRIAL—INSTRUCTIONS.—Requested instructions, which were not clear statements of the law, were properly refused.

Appeal from Faulkner Circuit Court; *W. J. Waggoner,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellants brought this suit against appellee, the Model Laundry of Conway, Arkansas, upon an open account for $530.34, claiming to be the assignees of the David Jones Company, an insolvent corporation of St. Louis, Mo., with whom the account was made.

The appellee admitted the purchase of the article from the David Jones Company, of the value of the amount of the account, but claimed certain credits on said account amounting to $32.19, and pleaded also as a set-off against the entire account the liability of the David Jones Company for damages to the appellee arising from the sale and warranty of a certain laundry machine sold to appellee by the said David Jones Company.

The answer alleged the purchase of the ironing machine from the David Jones Company for the price of $3,500, after said company had declined to deliver to it the machine purchased for $3,000, falsely and fraudulently representing that said machine had been disposed of; that the defendant had no opportunity to inspect the machine, which was falsely and fraudulently represented to be in perfect condition, as good as new, and had only been operated for six months, and that said selling company expressly warranted the machine to be in good condition. The memorandum contract of purchase reads: "1 used 24 watts flat work ironer. New padding, new aprons, new cover, new feed ribbons, to carry guaranty same as new machine;" that the said machine was not in good order or perfect condition at the time of sale nor when installed by the seller; that immediately after its installation it was discovered that it had been used for a much longer time than represented by the seller, and that there was a hidden crack in the steam chest, rendering it virtually worthless, altogether unsatisfactory and unfit for the purpose for which it was sold, which was well known to the seller at the time of making the sale; that by reason of the fraud and breach of warranty, the Jones Company had damaged the defendant in the sum of $3,500, and defendant pleaded as an offset as against the amount due by it to the said David Jones Company the said damages suffered.

It appears from the testimony that the sale of the machine was made by the David Jones Company to the appellee laundry company for the price stated in the pleadings, which was paid in money, and by negotiable promissory notes made to said Jones Company and transferred by it; that a written memorandum of sale was made by the selling agent, as set out already; that the machine was installed by the seller, and was discovered to be leaking steam, and finally to have a crack in the steam chest, which it would cost $1,000 or $1,500 to repair, if it could be done at all.

The court instructed the jury, and objections were made to several of the instructions given and refused, and from the judgment in favor of appellee this appeal is prosecuted.

C. A. Holland, for appellant.

R. W. Robins, for appellee.

KIRBY, J., (after stating the facts). It is first contended for appellant that the court erred in overruling its demurrer to the answer of appellee challenging its sufficiency, it being contended that the law does not warrant the set-off. The statute, § 477, C. & M. Digest, provides: "Nothing contained in this act shall change the nature of the defense, or prevent the allowance of discounts or set-offs, either in law or equity, that any defendant may have against the original assignor previous to the assignment, or against the plaintiff or assignee after the assignment." Also § 1197, C. & M. Digest, provides: "A set-off may be pleaded in any action for the recovery of money, and may be a cause of action arising either upon contract or tort." The general rule is stated in 24 R. C. L. 819, as follows: "The general rule is that the assignee of a chose in action, for the assignment of which no protection is especially provided by law, takes subject to all rights of set-off then held by the debtor against the assignor. Likewise the right of recoupment is attached to a contract and goes with it into whosoever hands the right may come to sue on the contract." See also 23 Enc. of Proc. 742, 744. In a suit between the assignee on a note against the maker, where it does not appear affirmatively that the assignment was made before the maturity of the note, the maker is entitled to all the defenses which he could have made against the note in the hands of the original owner. *Robinson* v. *Swigart,* 13 Ark. 71; *Ruddell* v. *Landers,* 25 Ark. 238. No error was committed therefore in overruling the demurrer.

There is no merit in appellant's contention that the warranty as set out in the memorandum of sale only re-

lated to the new padding and other new appliances, in stating, after mentioning them, "to carry guaranty same as new machine," the first part of the description being "1 used 24 watts flat work ironer," the obvious meaning being to guarantee the machine with the new equipment on it, "to carry guaranty same as new machine," and as though there had been no period after the word "ironer," and the whole of it had been one sentence. It is true the testimony does not show what guaranty was given with new machines, but the law implies in the purchase of a new machine a warranty that it is reasonably fit for the purpose for which it was to be used and for which it was sold. *Dyke* v. *Magdalena,* 171 Ark. 225, 283 S. W. 374; *Bixler Co.* v. *Hall,* 134 Ark. 96, 203 S. W. 257; *Indiana Silo Co.* v. *Harris,* 134 Ark. 218, 203 S. W. 581.

The undisputed testimony shows that the written guaranty was made in the memorandum contract of sale, and also the defective condition of the machine as delivered and installed, rendering it unfit for the purpose for which it was intended, in violation of the warranty, and that the damages suffered because of such condition were more in amount than the balance due on the account to the selling company purchased by appellants. The issue was fairly submitted to the jury on the instructions given, and the instructions requested by appellants were more in the nature of peremptory instructions and not clear statements of the law, and no error was committed in refusing to give them.

We find no error in the record, and the judgment is accordingly affirmed.