

entrusted to it—or at least the local incidents thereof.<sup>25</sup> Until then the Constitution will not only still *stand*, but also it will stand *still*.<sup>26</sup>

W. F. '37.

Editor's Note: The instant case was relied on by the Fifth Circuit Court of Appeals in declaring invalid the National Labor Relations Board Act (29 U. S. C. A. sec. 151) insofar as the Act authorized the Board to interfere with the relationships of employers and employees in steel mills, etc., which the court regarded as a "local" business. *National Labor Relations Board v. Jones & Laughlin Steel Co.* (C. C. A. 5, June 15, 1936) 3 U. S. Law Week. 1084.

DECEIT—AUTOMOBILES—SPEEDOMETERS.—In the case of *Jones v. West Side Buick Auto Co.*,<sup>1</sup> which was decided by the St. Louis, Missouri, Court of Appeals, the plaintiff alleged that he purchased a used automobile from the defendant. The defendant company had reconditioned the car for resale by making certain improvements and repairs which added to the car's appearance and value. The defendant charged a total of \$84.52 against his records for this reconditioning. Following this reconditioning, the defendant had the speedometer set back over 26,000 miles. The plaintiff looked at the car before he bought it and noticed the speedometer reading. Not until after the plaintiff bought the car did he discover the discrepancy between the speedometer reading and the true mileage.

The defendant maintained "that the mere turning back of the speedometer could not have constituted a representation. . . ."<sup>2</sup> Held, that a representation as to the mileage of a car is a representation as to a material fact and is just as effective a representation, when made by turning back the speedometer, as it would be if made by word of mouth or written guaranty.

This case does not present any innovation in the law.<sup>3</sup> The only novelty presented by this case is that the court held a speedometer reading to be a representation.

Only in Mississippi and Washington have similar cases arisen in the appellate courts. The leading Mississippi case is that of *Nash Mississippi Valley Motor Co. v. Childress*<sup>4</sup> in which case the plaintiff alleged that the

<sup>25</sup> Corwin, *Congress's Power to Prohibit Commerce—A Crucial Constitutional Issue* (1933) 18 Cornell L. Q. 477, 503.

<sup>26</sup> *Supra*, note 17.

<sup>1</sup> (May 5, 1936) 93 S. W. (2d) 1083.

<sup>2</sup> In this case the defendant also tried to defend his action by maintaining that setting back speedometers was a trade custom. The court refused to recognize the defense in the absence of proof of plaintiff's actual knowledge of the custom or that the custom was so well known as to impute knowledge of it to him. This point is well settled in Missouri: *Brown v. Strimple* (1886) 21 Mo. App. 338; *Hyde v. St. Louis Book & News Co.* (1888) 32 Mo. App. 298; *Fellows v. Dorsey* (1913) 171 Mo. App. 289, 157 S. W. 995; *International Shoe Co. v. Lipschitz* (1934) 72 S. W. (2d) 122.

<sup>3</sup> *Harper On Torts*, sec. 216 et seq.

<sup>4</sup> (1930) 156 Miss. 157, 125 So. 708; *Lizana v. Edward Motor Sales Co.* (1932) 163 Miss. 266, 141 So. 295.

defendant falsely represented through the medium of a speedometer that a used car had been driven only 8000 miles. The court held that: "Representations with reference to the mileage of a car constitute representations of a material fact. . . . The second hand value is largely dependent upon the number of miles it (the car) has gone." In the case of *Fosburg v. Couture*<sup>5</sup> the appellant misrepresented that his automobile was new and had not been operated more than 512 miles, as indicated by the speedometer on the car. In the *Fosburg* case the factual set-up differed slightly from those in the *Nash* case and in the *West Side Buick* case as in the former case the defendant made his representation orally and used the speedometer reading to prove his statement. In the Mississippi and the Missouri cases the representations were made solely through the use of the speedometer, no statements as to the mileage being given. In the *Fosburg* case the court said, "We cannot say, as a matter of law, that because a purchaser makes an independent investigation before purchasing an automobile he may not rely upon representations as to the distance the car has been operated, particularly when that representation agrees with the reading on the speedometer. Nor can we say, as a matter of law, that one has not been defrauded who purchases a car upon representation that it has traveled but 500 miles, when the testimony tends to show that it has been driven several thousand miles, and that such driving has damaged it."

In both the *Nash* case and the *West Side Buick* case the defendants tried to justify setting back the speedometer by maintaining that after the cars had been reconditioned they were as good as cars which had been run only as much as the speedometers indicated. The court in the instant case disposed of this purported defense by saying that the plaintiff is not "induced to buy a car upon which the speedometer reading has been admittedly lowered so as to represent the value of the improvements put upon the car, but instead that he is given or left to believe that he is buying a car which has been repaired and reconditioned after having been run only the number of miles shown on the speedometer."

In the aforementioned cases the courts worked out their solutions on the basis of the law of deceit. In the *Nash* and *Buick* cases the plaintiffs actually inspected the cars before buying them. Neither of the plaintiffs was in a position to inspect the truth of the speedometer reading while making the cursory examination of the car that a reasonably prudent man would make. Where the inspection cannot reveal the defect, it would seem that proper reliance on the seller is not excluded by inspection, and the warranty of fitness would be applicable.<sup>6</sup>

W. B. M. '38.

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EVIDENCE—PRIVILEGE—HOSPITAL RECORDS AS PRIMA FACIE CONFIDENTIAL COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT.—In a recent case, the widow brought suit on an insurance policy issued to her deceased husband. At the trial the defendant company, after proper identification, offered in

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<sup>5</sup> (1923) 126 Wash. 181, 217 Pac. 1001, 1002.

<sup>6</sup> *Priest v. Last* (1903) 2 K. B. 148; *Flynn v. Bedell Co. of Massachusetts* (1922) 242 Mass. 450, 136 N. E. 252, 27 A. L. R. 1504.