

Grafton, }
Apr. 6, 1926. }

STATE v. LEON HAMEL.

APPEAL, from a conviction in a municipal court, upon a charge of keeping spirituous liquor for sale. The defendant filed a special plea alleging that he had been convicted of and punished for the same offense in the federal court. The plea was overruled by *Sawyer, J.*, who allowed a bill of exceptions.

Clark B. Frost, solicitor, for the state.

Napoleon J. Dyer and *Frank P. Tilton* (*Mr. Dyer* orally), for the defendant.

Per Curiam. The case is governed by *State v. Gendron*, 80 N. H. 394.

Exception overruled.

Hillsborough, }
May 4, 1926. }

ARTHUR GIANARIS v. ARMON S. MANGURIAN.

CASE, for malpractice. Trial by jury and verdict for the defendant. Transferred by *Doe, J.*, on exceptions to the exclusion of evidence and to the refusal to grant requests for instructions.

Arthur B. Hayden, for the plaintiff.

Irving E. Forbes and *Doyle & Doyle*, for the defendant.

Per Curiam. In the absence of brief or argument for the plaintiff, no error is apparent in the exclusion of evidence, and the exceptions thereto are overruled. *Barsantee v. Hartford*, 73 N. H. 616; *Drake v. Insurance Co.*, 78 N. H. 604.

As to the other exceptions, none of the evidence is transferred. It is therefore impossible to say what the evidence tended to show relative to the defendant's duty and liability, and it cannot be told from the case or its amendment whether the requests, either all or some, should have been granted. It does not appear whether they were applicable to the evidence. Since requested instructions, although correctly stating rules of law, are properly refused when they are inapplicable to the facts disclosed by the evidence (*Rowell*

v. *Chase*, 61 N. H. 135; *Douyette v. Railway*, 69 N. H. 625; *Wheeler v. Railway*, 70 N. H. 607; *Saucier v. Company*, 72 N. H. 292; *Hart v. Railroad*, 72 N. H. 410; *Terrell v. Payne*, 81 N. H. 164, 168), the failure to transfer the evidence leaves the propriety of the requests incapable of decision, and examination of their validity as legal propositions is therefore uncalled for.

Exceptions overruled.

Municipal Court }
of Manchester, }
May 4, 1926. }

WLADJASK MOSKWA v. NICHOLAS J. NASSIKAS & a.

ASSUMPSIT, for milk sold and delivered. Trial by the court. Verdict for the plaintiff.

During October, November, and the first five days of December, 1924, the plaintiff delivered one hundred and fifty-four cans of milk to the defendants, who are dealers in milk. The agreed price was fifty cents per can.

On December 2, a milk inspector took a sample of the plaintiff's milk at the defendants' plant, and upon the following day he took a second sample. Tests showed that both samples were adulterated with water. The defendants mixed the plaintiff's milk with other milk and sold it in the usual course of business. They did not know that any part of it was adulterated, until the above tests were made. There was no evidence as to the number of cans delivered by the plaintiff upon December 2 and 3.

Upon the foregoing facts the court found a verdict for the plaintiff for seventy-seven dollars. "The question whether upon the foregoing facts, the verdict for the plaintiff can be sustained" was reserved and transferred from the municipal court of Manchester by *Perkins, J.*

Timothy J. Howard, for the plaintiff.

James A. Broderick, for the defendant.

Per Curiam. There can be no recovery for the purchase price of goods which the vendor could not legally sell. *Albertson v. Shenton*, 78 N. H. 216; *Dunbar v. Locke*, 62 N. H. 442; *Bliss v. Brainard*, 41 N. H. 256; *Lewis v. Welch*, 14 N. H. 294; *Roby v. West*, 4 N. H. 285. Adulterated milk could not legally be sold. Laws 1917, c. 156, s. 1.