

extent of the liability of the appellant to return the empty cases and bottles.

The appellant pleaded that during the whole course of the dealings he was never called upon to pay for any of the cases or bottles in which the beer was shipped; that the trade custom (the appellant was a retailer) was not to charge the purchaser with cases or bottles, but to be content with a return of such as might reasonably be returned in the course of business; that there was a distinct arrangement with the respondent's agent that the appellant would not be responsible for the cases or bottles, but would return such of them as got back into his possession; and that the dealings were carried on in accordance with that understanding. There was no allegation that the cases and bottles that got back to the appellant were returned by him to the respondent.

The trial Judge found that the special arrangement set up by the appellant was not proved; and there was no reason for revising his finding of fact in that respect.

The invoices plainly indicated that both the beer and the cases were sold to the appellant—the former at the price quoted in the letter aforesaid, and the latter at the price mentioned in the lower part of the invoice.

It must be taken that the terms upon which the parties were dealing were those stated in the invoices, subject to this, that, in accordance with the custom of the trade, the appellant would be entitled to credit for what he had been charged for cases and bottles which he returned.

Evidence given by the respondent of the custom of the trade as to the payment for and the return of cases and bottles was not strictly admissible in reply; but the trial Judge had a discretion to permit the respondent to reopen its case; and the appellant could not have been taken by surprise, because he had made the custom of the trade an issue in the action.

The judgment should be varied by providing that the appellant shall have the privilege of returning, at any time within 60 days, any of the empties not previously returned, and shall be credited for such as he so returns at the price charged for them.

Otherwise the judgment is affirmed, and the respondent will be entitled to enforce it, unless the appellant gives security that he will pay what may ultimately be found to be owing by him and the costs of the action, or pays into Court the amount of the judgment and costs, subject to further order. The appellant is to pay the respondent's costs of the appeal.