

1905.—Flynn Bros., St. Catharines. Hundred refuge beans two fifty gallon pears three hundred tomatoes three fifty lombard plums twenty-five red pitted cherries must ship immediately wire car number Canadian Pacific. Kelly, Douglas, & Co.”

On 30th August plaintiffs sent in reply this message: “Aug. 30.—Kelly, Douglas, & Co., Vancouver, B.C. Have booked your order, will have same rushed forward. Flynn Bros.”

On 1st September plaintiffs received the following despatch: “Vancouver, B.C., Sept. 1st, 1905. To Flynn Bros. Goods must be shipped at once or cancel, advise Canadian Pacific car number, rush. Kelly, Douglas, & Co.”

On 5th September plaintiffs shipped 300 cases of tomatoes, 350 cases of plums, 100 cases of refuge beans, and 25 cases of red pitted cherries, and mailed an invoice for this “car-load” to defendants. On receiving this invoice on 13th September defendants telegraphed: “Vancouver, B.C., Sept. 13, 1905—Flynn Bros., St. Catharines, Ont. Cannot accept goods, only ordered fifty plums, wanted pears, you dispose elsewhere.”

On the same date defendants wrote explaining that their order had been for 50 cases of plums, and that they could not take any of the fruit because the pears ordered had not been sent. To this plaintiffs did not reply. The car reached Vancouver on 23rd September. On 2nd October defendants wrote plaintiffs confirming their telegram and letter of 13th September and informing plaintiffs that the car lay awaiting their disposition. On 7th October plaintiffs telegraphed defendants: “Goods shipped strictly according to order received; pears are ready to ship; you must accept goods; have written.” Defendants answered this message on 9th October, reiterating their refusal to accept. On 17th October they again wrote declining to accept and informing plaintiffs they would resist any attempt to hold them liable for the car of fruit.

The pears were in fact never shipped. Plaintiffs, in excuse for non-shipment of this part of the order, say that the balance of the order filled a car, and that the custom of the trade, their course of business with defendants, and the tenor of the telegraphic orders on which they acted, required shipments to be in car-loads, and justified their withholding