

ANGLIN, J.

JUNE 25TH, 1906.

## TRIAL.

## FLYNN v. KELLY, DOUGLAS, &amp; CO.

*Sale of Goods—Action for Price—Refusal to Accept—Contract—Telegraph—Agency of Telegraph Company—Mistake in Transmission—Evidence—Destruction of Original Dispatch—Secondary Evidence of Contents—Burden of Proof—Failure to Prove Contract—Non-delivery of Part of Goods Ordered—Delay in Shipment.*

The plaintiffs, fruit canners of St. Catharines, sued the defendants, merchants of Vancouver, B.C., for the price of a car of canned fruits and vegetables shipped to Vancouver in September, 1905, which the defendants refused to accept.

M. Brennan, St. Catharines, for plaintiffs.

A. C. McMaster, for defendants.

ANGLIN, J.:—In August, 1905, plaintiffs wrote to defendants a letter quoting prices of various canned goods, including beans, pears, plums, and cherries. Satisfactory proof of the loss of this letter was given, and secondary evidence of its contents received. It concluded with a request or suggestion that defendants should order by wire at the expense of plaintiffs. Defendants' witnesses, examined on commission, though they do not pretend to give the language of the letter, say it contained a distinct request to order by wire at the expense of plaintiffs. The evidence of the only witness called for plaintiffs is not at all clear that the passage in question fell short of a request and amounted merely to a suggestion that defendants should order by telegraph, and he admits that the plaintiffs offered to pay the charges of the telegraph company for any such message sent by the defendants. No copy of this letter appears to have been kept by the plaintiffs. Upon this evidence I should be obliged to hold, if necessary, that plaintiffs did request defendants to telegraph at their expense.

On 29th August plaintiffs received from the Canadian Pacific Railway Company the following despatch, upon which they paid the charges: "Vancouver, B.C., Aug. 29,