The action was tried without a jury at Hamilton.

G. S. Kerr, K.C., and W. L. Ross, K.C., for the plaintiffs.

J. W. Lawrason, for the defendant Duff.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that it was undoubted that no notice of dishonour was given to the defendant Duff; and the only question was whether a sufficient waiver of notice was shewn by certain letters which passed between him and the plaintiffs.

On the 27th November, 1915, Duff wrote to the manager of the plaintiffs' credit department that Alway had requested him (Duff) to write "regarding the note you hold against him, which I endorsed. He said he would like you to wait a few days . . . and I also hope you can give an extension of time." The plaintiffs answered this on the 9th December, saying, "We intend taking legal action unless Mr. Alway's account is satisfactorily reduced by Monday, December 13th." On the 11th December, Duff again wrote to the plaintiffs' manager, saying that the note was "only six weeks past due. . . . It is hardly possible to raise the amount at two days' notice. But I think I can promise you that you will receive it in a short time." There were no more letters from Duff, but the plaintiffs wrote to him on the 14th December, 1915, and again on the 8th January, 1916. This action was begun shortly afterwards.

The learned Chief Justice said that, even if Duff had written merely the letter of the 27th November, 1915, the case would hardly have been so favourable to him as Britton v. Milsom (1892), 19 A.R. 96, because, although the letter was written at the request of the maker, it contained an admission of the endorser's liability. Some of the cases cited in the Britton case shew that if there is an unequivocal promise to pay or admission of liability on the endorser's part, he is deemed to have waived notice of protest; and Duff's letter of the 11th December, especially when read with the earlier letter, was reasonably plain both as to the admission of liability and the promise to pay.

The onus of shewing that the defendant gave the promise or made the admission under a mistake of fact was upon him, and he had failed to discharge it: Maclaren on Bills of Exchange, 5th ed., p. 302; Falconbridge on Banking and Bills of Exchange, 2nd ed., p. 670; Byles on Bills, 17th ed., p. 283.

The Statute of Frauds was not applicable.

Judgment for the plaintiffs for the amount of the note with interest and costs.