The defendants had dealings with Shields Brothers. On the 8th January, 1913, they gave Shields Brothers an order for maple roller blocks, and subsequently other verbal orders, and Shields Brothers promised to ship to the defendants all the lumber they got out. It appeared that the defendants had made advances to Shields Brothers, to be repaid in lumber, and also accepted drafts drawn on them by Shields Brothers, for which lumber was shipped or was to be shipped.

The defendants' manager stated that the words on the note referred to the maple roller blocks, which had not then been shipped but which he expected to be shipped by Shields Brothers in the winter of 1913-4. But Shields Brothers did not ship the lumber. On the 14th January, 1914, the plaintiffs advised the defendants that they held the note for $800, and on the 18th February, 1914, the defendants replied that, unless Shields Brothers shipped them the lumber in accordance with their contract, the note for $800, which they called a conditional note, would not be paid.

The action was tried in the County Court by MACBETH, Co.C.J., without a jury.

The learned County Court Judge gave judgment for the plaintiffs, stating his reasons in writing.

He said that the question he had to determine was, whether the note sued on was a negotiable promissory note, or an instrument expressed to be payable on the contingency of certain lumber being shipped as therein stipulated. He referred to Mr. Justice Russell's Commentary on the Bills of Exchange Act, pp. 65 et seq., and particularly to these passages (p. 67): "On the whole, it is difficult to see any good reason why the expression in the bill of an executory consideration should be held to invalidate it, unless, at all events, it could be read as the expression of a condition precedent to the obligation to pay the amount of the note." "The fact of the note being payable to order would very fairly rebut the presumption that it was intended to be conditional on the performance of the consideration." The learned County Court Judge did not find anything inconsistent with Mr. Justice Russell's opinion in the following cases, on which the defendants' counsel relied: Jarvis v. Wilkins (1841), 7 M. & W. 410; Drury v. Macaulay (1846), 16 M. & W. 146; Shenton v. James (1843), 5 Q.B. 199.

The learned Judge referred also to Jury v. Barker (1858), E.B. & E. 459; Siegel v. Chicago Trust and Savings Bank (1890), 23 N.E. Repr. 417; First National Bank of Hutchin-