township of Lobo claim. The third contingency provided for actually occurred. At the death of Mrs. Bolls in 1908, her daughter Mrs. Beaton, was alive and had lawful issue living. The executors are, in my opinion, bound to convey the farm to her in fee.

Costs of all parties out of estate—those of the executors as between solicitor and client.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. OCTOBER 27TH, 1913.

ROSCOE v. McCONNELL.

5 O. W. N. 172.

Mortgage—Deed Absolute in Form — Claim that Same by Way of Mortgage — Subsequent Option to Grantor to Repurchase—Circumstances Surrounding — Terms of — Default in Exercising—Acquiescence in Determination of Option — Transaction not a Mortgage—Evidence.

MIDDLETON, J., dismissed an action brought to have it declared that a conveyance of certain property absolute in form was by way of mortgage only, holding that the terms of and circumstances surrounding a subsequent option given by the grantee to the grantor for three months to purchase the property shewed that it was only intended that the grantor should have an option of repurchase for that period of time and that the original conveyance was not by way of mortgage only.

SUP. CT. ONT. (2nd App. Div.) affirmed above judgment with costs.

Samuel v. *Jarrah Timber and Wood Paving Corp.*, [1904] A. C. 323, distinguished.

Appeal from a judgment of HON. MR. JUSTICE MIDDLETON, dismissing the action.

The action was brought by Maglen Roscoe, daughter and administratrix of the estate of Thomas McConnell, deceased, to have it declared that a certain transaction carried out by deed from one James H. Simmons, bearing date the 20th of December, 1906, to the defendant of certain lands on Yonge street in the city of Toronto, and by a contemporaneous agreement between the defendant and the plaintiff's father, was in fact a mortgage transaction and not a *bona fide* sale to the defendant with a right of re-purchase by the father.