

be susceptible of proof might be that the friend was on his neighbour's premises and was killed by the falling of the lamp, known to be insecure, and according to the *King* case, unless it could be proved that the deceased was lawfully, or with the defendant's licence, on his premises, then the inference would be that he was a trespasser to whom the neighbour owed no duty.

It seems to us that such a question is eminently one on which the opinion of a jury might be asked under proper directions and having due regard to the character of the deceased and the surrounding circumstances; and that when a case has been tried by a jury who have not passed on the question, an appellate court should not usurp the functions of the jury, unless, upon the evidence adduced, it is reasonably clear that no other conclusion can possibly be drawn than that which the appellate court adopts.

#### THE RULE IN SHELLEY'S CASE.

In a recent number of this Journal (vol. 47, p. 363), we offered some observations on the case of *Re McAllister*, 24 O.L.R. 1, and ventured to ask whether the rule in Shelley's case is to be considered to be abrogated in Ontario. The case went to appeal and the decision of the Court of Appeal affirming the decision of the Divisional Court is now reported, 25 O.L.R. 17, and after perusing the judgments of the learned judges of the Court of Appeal who gave reasons for their decision we are inclined to think that the answer to our inquiry ought to be in the affirmative.

As far as the abstract merits of the case go, we may frankly admit in the outset that we have no doubt that both the Divisional Court, and the Court of Appeal have really given truer effect to the obvious intention of the testator, than they would have done had the rule in Shelley's case been applied. But no one has ever supposed that the rule in Shelley's case was devised for the purpose of effectuating the intention of test-