

1956

Mamie J. Tempest v. James K. Richardson and Wilma L. Richardson : Brief of Respondents

Utah Supreme Court

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Recommended Citation

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

UNIVERSITY UTAH

OCT 30 1957

MAMIE J. TEMPEST,
Plaintiff and Appellant,

— vs. —

JAMES K. RICHARDSON and
WILMA L. RICHARDSON,
his wife,
Defendants and Respondents.

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Clerk, Supreme Court, Utah

BRIEF OF RESPONDENTS

Appeal from the District Court of the Third Judicial
District in and for the County of Salt Lake
Honorable A. H. Ellett, Judge

RAY, QUINNEY & NEBEKER and
ALBERT R. BOWEN

Attorneys for Respondents

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IN THE SUPREME COURT of the STATE OF UTAH

MAMIE J. TEMPEST,
Plaintiff and Appellant,

— vs. —

JAMES K. RICHARDSON and
WILMA L. RICHARDSON,
his wife,
Defendants and Respondents.

Case No.
8466

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

The respondents, hereinafter called the defendants, concede that appellant's Statement of Facts is correct in all material and substantial respects. Appellant will hereinafter be referred to as plaintiff. However, it is respectfully pointed out that references to the claimed acts of negligence alleged in plaintiff's complaint, which are mentioned in the Statement of Facts, are not established by any evidence.

The plaintiff's complaint, in substance, alleges that plaintiff asked to be directed to the lavatory on defendants' premises and that she was carelessly and negligently directed by Mrs. Richardson toward a certain door; that

the door to which plaintiff's attention was directed was constructed and maintained in a negligent manner so as to create a hidden trap unknown to plaintiff.

The record actually shows that no directions were asked or given and that plaintiff's attention was not directed to any door and in particular to the door which she opened. The record further shows that plaintiff and Mrs. Richardson were in the kitchen of defendants' home following a dinner in another part of the house. The two women were alone when plaintiff left the kitchen area by entering an adjacent hallway and at the same time stating, "I am going to the lavatory." Mrs. Richardson, one of the defendants, simply replied, "The light is on." (TR. 13-14)

Plaintiff's decision to open the cellar door, which was closed, and to step forward into a dark and unlighted void was not influenced or directed by any act or word of either defendant. The record is clear that Mr. Richardson was not present at the time and was completely unaware of what was happening. The record is likewise perfectly clear that Mrs. Richardson did not follow plaintiff into the hallway and therefore could not have been aware of plaintiff's movements or that she was about to open the door leading to the cellar steps. (D. 13-17) It is certain that plaintiff asked for no directions even after she had mistakenly entered a lighted bedroom or den thinking it was the lavatory. The statement made by Mrs. Richardson was clear and explicit that the lavatory light was on so that *plaintiff was advised*, if not warned, that *she should look for a lighted room* and not one in complete and total darkness.

STATEMENT OF POINTS

1. THERE IS NO GENUINE ISSUE AS TO A MATERIAL FACT.

(a) THE PLAINTIFF WAS A SOCIAL GUEST ENTITLED ONLY TO THE PROTECTION OWED TO A GRATUITOUS LICENSEE AND AS TO PLAINTIFF THE DEFENDANTS COMMITTED NO AFFIRMATIVE ACT OF NEGLIGENCE AND VIOLATED NO DUTY OWING TO THE PLAINTIFF.

(b) THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE

ARGUMENT

1. THERE IS NO GENUINE ISSUE AS TO A MATERIAL FACT.

(a) PLAINTIFF WAS A SOCIAL GUEST ENTITLED ONLY TO THE PROTECTION OWED TO A GRATUITOUS LICENSEE, AND AS TO PLAINTIFF THE DEFENDANTS COMMITTED NO AFFIRMATIVE ACT OF NEGLIGENCE AND VIOLATED NO DUTY OWING TO THE PLAINTIFF.

Plaintiff concedes in her brief that, as to the defendants' she occupied the status of a social guest. As such, plaintiff was a gratuitous, or, as is sometimes called, a bare licensee.

McHenry v. Howells, (Ore.) 272 P. 2d 210
 Taneian v. Meghrigian, N.J.) 99 Atl. 2d 207
 Keretian v. Asadourian, (Ill.) 110 N.E. 2d 679
 Lubenow v. Cook, (Conn.) 79 Atl. 2d 826

McNamara v. Hall, (Wash.) 233 P. 2d 852
 O'Brien v. Shea, (Mass.) 96 N.E. 2d 163
 Biggs v. Bear, (Ill.) 51 N.E. 2d 799
 Laube v. Stevenson, (Conn.) 78 Atl. 2d 693

It is most important to bear the status of the plaintiff constantly in mind because the authorities, so far as we have been able to determine, are unanimous in holding that the only duty which a host owes to a social guest is to refrain from *affirmative* acts likely to cause injury and to warn the guest of hidden or concealed dangers which the guest by the exercise of ordinary care cannot or may not see and avoid.

Taneian v. Meghrigian, *supra*
 Niebes v. Order of Eagles, (Ohio) 114 N.E. 2d 260
 Keretian v. Asadourian, *supra*
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 O'Brien v. Shea, *supra*
 McHenry v. Howells, *supra*

Furthermore, a host is not liable to a guest for ordinary acts of negligence.

Niebes v. Order of Eagles, *supra*
 Biggs v. Bear, *supra*

The rule is likewise well established that a social guest takes the premises of his host as he finds them and the host is only obligated to provide the guest with the same protection which he takes for himself and members of his own family, and no more.

Taneian v. Meghrigian, *supra*
 Vogel v. Eckert, (N.J.) 91 Atl. 2d 633
 McHenry v. Howells, *supra*
 Biggs v. Bear, *supra*

The law is also well established that a host is not the insurer of the safety of a social guest and is under no duty to reconstruct his premises for the safety of a guest.

Scheibel v. Lipton, *supra*
 McHenry v. Howells, *supra*

In two very respectable jurisdictions in this country it has been held that there must be evidence of willful and wanton injury before a host can be held liable to a social guest for injuries sustained on the premises of the host.

Keretian v. Asadourian, *supra*
 Gregory v. Loder, (N.J.) 185 Atl. 360

If the foregoing are the rules by which the conduct of the defendants is to be measured, and we submit that they are, then every issue of fact which must be decided is disclosed by the record now before this court and does not require the taking of any evidence to amplify that which is already made plain.

Plaintiff cites many cases in her brief in support of the proposition that summary judgment is improper if, upon the record, any material issue remains to be decided which if decided for the plaintiff would sustain a judgment in her favor. The defendants have no quarrel with the rule contended for but deny that the rule and the cases cited in support of it have any application to

this case. We will point out hereafter why no material issue of fact exists which could or might change the result of the trial court's ruling.

We cannot pass the contentions of the plaintiff without referring to the reasons which make summary judgment a desirable procedural remedy in applicable cases. The rule is designed to save the time and expense of parties, their counsel, witnesses, jurors and the courts when the record in a case discloses that it may be decided equitably and fairly to all concerned without the necessity for a trial. That this saving of time and expense is desirable needs no supporting argument. This court has recognized the desirability of the rule by adopting it as part of the rules of civil procedure applicable to all civil cases in this jurisdiction. Mr. Justice Crockett in his concurring opinion in the very recently decided case of *Holland v. Columbia Iron Mining Co.*, (*Utah*) 293 P. 2d 700, says this:

"It is true, indeed, that a summary judgment is a drastic remedy which the courts are, and should be reluctant to use. Yet it does have a salutary purpose in the administration of justice in not requiring the time, trouble and expense of trial, when the best showing the plaintiff can possibly claim would not entitle him to a judgment.

Viewing the evidence in the light most favorable to the plaintiff does not mean that the court should pick out all of the aspects thereof favorable to supporting plaintiff's claim and ignore those that indicate to the contrary. It means that the court surveys the whole picture, takes into consideration facts and inferences therefrom tending to favor the plaintiff's position, and also considers

other facts appearing which must be accepted as a matter of law, and weighs the whole matter against the background of legal precepts bearing on the problem. If when so viewed, reasonable minds could make findings that would make out a cause of action in accordance with the plaintiff's claims, summary judgment should not be granted; on the other hand, if it appears to the court that reasonable minds could not make findings which would establish a cause of action for the plaintiff, then the summary judgment is proper."

Based upon the proposition that when the whole picture presented by the record in this case is considered, reasonable minds could not make findings which would sustain a judgment for the plaintiff, the order of the trial court granting summary judgment should be affirmed.

There is no contention that the defendants did any affirmative act which caused plaintiff's injury. Since the authorities, which we have cited above, hold that a guest must accept the premises of his host as he finds them and the host is under no duty to rebuild or reconstruct his premises to make them safer for his guest than they are for himself and the members of his own family, no recovery may be predicated in this case upon the claim that the premises were negligently constructed or maintained.

The brief of the plaintiff discloses two propositions which are relied upon to support the claim that the summary judgment entered by the trial court was erroneous. They are: (a) That no warning was given by Mrs. Richardson that the particular door which plaintiff opened gave access to the cellar, and (b) that the manner in

which the stairway was constructed was defective and, therefore, as to the plaintiff, was negligent maintenance.

We have cited the cases above which fully sustain the defendants' position that it does not lie in the mouth of the plaintiff to criticize the construction of the house to which she had been invited for purely social purposes, therefore, we will make no further reference to that particular point in the plaintiff's brief.

The gist of plaintiff's argument regarding a lack of any warning is substantially as follows:

The plaintiff was unfamiliar with defendants' home and the location of the cellar stairs; that she entered the general area where the stairway was located, which fact was known to Mrs. Richardson, and the latter, being familiar with the claimed negligent way in which the stairway had been constructed with the door opening inwardly over a stairway with no top landing, was charged with the duty of warning the plaintiff to avoid opening this door.

This argument ignores entirely the fact that the lavatory to which plaintiff intended going was not anywhere near the cellar door. (See defendants' Exhibit 1 attached to plaintiff's deposition.) Plaintiff walked past the area where the lavatory was located and into an area where Mrs. Richardson could not reasonably be expected to assume the plaintiff would go. On the other hand Mrs. Richardson was entirely justified in assuming that the plaintiff would confine her wanderings to her announced destination. Furthermore, it is to be borne in mind that plaintiff was directed specifically to a lighted room, not to one which was in complete darkness. If any assumptions

are to be allowed in this case we submit that Mrs. Richardson had a right to assume that when she warned plaintiff that the light to the lavatory was on, plaintiff would not do as she did and open the cellar door and step into an unlighted area when she was totally unable to see into what dangers her path was leading her. An attempt is made to excuse the conduct of the plaintiff by contending that she followed the given directions and went to a lighted room which she discovered, upon entering, was not a lavatory but a den or a bedroom. Hence, it is argued, having gone into a room which was lighted she was then free to enter any room or area in the premises, lighted or unlighted, as she saw fit and if, in consequence, she fell down a stairway she could not see, the host must be held liable for her injuries. To us, the logic of this reasoning, to say the least, is obscure. Was plaintiff entitled to assume that because the bedroom was lighted, the lavatory was unlighted? Or was she justified in remaining silent and not advising Mrs. Richardson that she was lost or confused and in not asking her for further directions? We submit that she had been adequately advised as to what she would find when she got to the lavatory, namely, that it was lighted, and she should, as a reasonable person, have looked further for another lighted room or else she should have asked her hostess for further directions. We will discuss further under another section of this brief the conduct of the plaintiff in opening the cellar door and stepping forward into complete darkness.

The complete answer to plaintiff's argument that the defendants' house constituted a trap and that defendants were under a duty to warn plaintiff to avoid such trap will be found in the announced decisions to which refer-

ence is now made. Uniformly and, so far as we have been able to determine, unanimously, the courts, in considering situations such as the one disclosed by this record, have held that there can be no recovery for one in the position of the plaintiff. They also hold that a stairway such as the one here involved is not a trap and that failure of a host to warn a guest in the circumstances here presented is not negligence. For instance, in the case cited in appellant's brief, *McHenry v. Howells, supra*, the following factual situation is disclosed. Plaintiff, a social guest, fell in attempting to descend a stairway. She contended that the stairway was defectively constructed and constituted a trap of which defendants should have given warning. The case quotes fully the rules applicable to social guests, and regarding the matter of hidden defects and traps says:

"The evidence is directed solely to an alleged structural defect in the stairway and to the failure of defendants to warn plaintiff thereof. It is manifest that the alleged defect did not constitute a trap or hidden peril within the meaning of the law. The condition of the stairway was open and obvious; it could readily be observed by a person exercising ordinary care for his own safety. Defendants were under no obligation to reconstruct the stairway for the protection of the plaintiff. Plaintiff took the premises as she found them."

A non-suit granted on the defendants' motion was affirmed by the Supreme Court of Oregon. In the case of *Biggs v. Bear, supra*, the Supreme Court of Illinois said the following:

"Under the issues plaintiff was required to

prove that defendants violated a duty to warn her, their guest, of a dangerous arrangement of doors in their kitchen; and that while exercising due care and as a result of defendants' failure to warn her, and their further negligence in failing to light and guard, and provide a landing between the door and the steps of the rear stairway, she fell down the stairs and was injured."

In *Biggs v. Bear, supra*, as in the case under consideration, the plaintiff, a social guest, fell down some stairs when she opened a door after inquiring as to the location of a washroom. She opened a door away from her and stepped and looked simultaneously into a dark area. There was no light and there was no landing. There were three or four doors which looked alike. Plaintiff, being unfamiliar with the premises, did not know the plan or location of the stairs and no warning was given her. The Supreme Court of Illinois on these facts held that the plaintiff was a social guest, that she took the premises as she found them. The court further stated that a social guest becomes a member of the family of the host and cannot stand upon the duty owed to a business invitee and further held that a social guest cannot recover against a host for ordinary negligence. In deciding the case the court further stated:

"If a licensee (the plaintiff), the court properly directed the verdict, since there was no evidence of willful and wanton misconduct."

In deciding this case the Supreme Court of Illinois found that the situation presented by the facts did not constitute a trap. The situation revealed in that case is so

strikingly similar to the case under consideration as to be most startling. We submit that the case is controlling upon the right of the plaintiff to recover in this action.

The case of *Keretian v. Asadourian, supra*, involves facts of a similar nature where a guest fell down a stairway after being informed by her host that the bathroom was located in a hallway and who, in looking for the bathroom at the end of said hallway, opened a doorway leading downstairs and fell and was injured. It was likewise stated in that case that because there was evidence insufficient to establish that the host's failure to give the guest further directions and assistance was willful and wanton and in the absence of evidence of a conscious indifference to the consequences on the part of the host in failing to assist the guest, there could be no recovery.

Taneian v. Meghrigian, supra, was also a stairway case involving slightly different circumstances but in which a claim was made that the stairway used by the social guest had been defectively constructed. The court held that there could be no recovery and stated:

"One who comes on premises by express invitation to enjoy hospitality as a guest of the owner * * * has only the right of a licensee and must take the property as he finds it."

And stated further:

"Where one visits the private home of another as a social guest the owner is bound to take the same care of him that he takes of himself, and the other members of his family, and no more."

Another very interesting case on the question of whether a stairway constitutes a trap and one which involved, not as here a social guest, but a business invitee is *Hertz v. Advertiser Company* (Ala.) 78 S. 794. It must be borne in mind in considering this case that the rule as to business invitees and the duty imposed upon the owner of premises is much broader and much stricter than is the case where a purely social guest is involved.

It the *Hertz* case, *supra*, the plaintiff opened a door from a vestibule which led immediately to a stairway which was not protected by any landing. The stairway was unlighted and in proceeding the plaintiff fell and was injured. The door opened inwardly over the stairway. It will be observed that the door opened in exactly the same manner as is alleged in plaintiff's complaint in this case. It was held by the Alabama court that the plaintiff could not recover. The court specifically held that the stairway, as constructed, was not a trap and further held that plaintiff was guilty of contributory negligence for proceeding without first ascertaining that it was safe for her to do so. On the question of whether the stairway constituted a trap, the court said:

"This rule * * * does not apply to places strictly private, nor to places to which the public are not entitled or expected * * * to go."

And stated further:

"We agree * * * that the evidence fails to show that the defendant was guilty of * * * negligence in constructing a 'trap' or 'pitfall' on its premises, within the meaning of the * * * rule of law."

We will have further reference to make to this case when we discuss in another section of our brief the subject of contributory negligence.

The Alabama court cites from *Brugher v. Buchtenkirch*, (N.Y.) 60 N.E. 420, that a person must expect to find stairs in the hallways of buildings which case stated:

"* * * we know of no reason or custom which justifies one entering a strange house in assuming that the hall will continue at the same level."

The Alabama court quoted with approval a Massachusetts case, the name of which is not indicated as follows:

"We cannot think such a construction is of itself defective or negligent."

An interesting case on the subject of what constitutes a trap is *Alabama Great Southern v. Campbell*, (Ala.) 26 So. 2d 124. This case involved a railroad crossing into private land which was reached over a narrow road which crossed the defendant's tracks. The plaintiff's son driving the plaintiff's automobile over the crossing caught the wheels on the rails which prevented the driver from getting the car off the track. It was struck by a passing train and was damaged. It was claimed that the crossing was a trap. It was held there could be no recovery. After holding that the driver was a trespasser or a bare licensee, the court said:

"A trap has been defined as 'a danger which a person who does not know the premises could not avoid by reasonable care or skill.' 'Traps

must be intentionally set for the licensee.'

'Certainly the crossing involved in this case could in nowise be regarded as a trap.' "

Furthermore, the plaintiff in opening the door to the cellar and stepping inside entered into a portion of defendants' premises to which she had asked no permission to enter and to which no invitation had been extended.

The law is clear that when a social guest enters a portion of the host's premises to which no invitation has been extended, the guest cannot recover for injuries received on the portion of the premises thus entered. In such a situation there is not even a duty to warn even though a trap may exist in fact. *Laube v. Stevenson, supra, Lubenow v. Cook, supra, Hertz v. Advertiser Company, supra.*

It is plain from the record that the plaintiff was not asked or invited to visit the defendants' cellar. In opening the cellar door and entering she exceeded the limits of her right to use the defendants' premises and any untoward event occurring to her was a risk which she assumed herself. It is no answer for plaintiff to contend that she was unaware of the dangers into which her journey was leading her or that she should have been warned. As we have already pointed out, neither of the defendants knew what plaintiff was about to do.

Failure to warn even under such circumstances would not excuse the want of ordinary care on the part of the plaintiff. James K. Richardson was completely unaware of what was taking place and all that Mrs. Richardson knew was that plaintiff said she was going to the lavatory.

A duty to warn only exists when the host knows that the guest is exposed to dangers which he knows are con-

cealed from the guest or which the guest is unlikely to discover for himself and against which he should not be expected to protect himself.

Reference has already been made to the cases holding that stairways are not traps even when constructed as the one here involved was constructed. These cases likewise hold that stairways are not traps even though unlighted and even though they are constructed without landings. Social and even business guests are supposed to know that there is at least a possibility that when one opens a door on unfamiliar premises he may immediately encounter a stairway and that if he opens such a door and encounters darkness he should either be extremely cautious or not venture forward at all or until he can see where he is going.

Plaintiff in her brief relies upon the case of *Deacy v. McDonnell*, (Conn.) 38 Atl. 2d 181. That case involved a social guest of the servant of the defendants, who, in leaving the premises at night, fell because she did not see a step down to the porch and the servant failed to turn on the light so that she could see. Aside from the fact that the case announces a very questionable rule of law, it is very different from the facts here presented. The case is bad law because it held defendants liable to a social guest, not invited upon the premises by them, but by their servant in connection with the servant's social pursuits. It made the servant's act in failing to turn on the light the act of the defendants. The case is decided upon the theory that failure to turn on the light was negligence. It simply held that in the absence of so doing a warning should have been given to the plaintiff.

In the *Deacy* case the plaintiff was leaving the premises by a route she had to traverse or at least one which she might be expected to use. In this case the plaintiff was not expected nor did she have any reason to use the cellar steps in going to the lavatory. Furthermore, the *Deacy* case stands alone as one which imposed liability upon a host for injuries to a social guest in a situation not comparable to this case and is not in accord with the overwhelming weight of authority.

(b) THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE.

It should require no citation of authorities to sustain the proposition that a licensee, social or otherwise, is under a duty to exercise reasonable care for his own safety. This court has more than once announced such a rule in cases involving business invitees toward whom a much higher duty of care exists than toward a social guest.

Knox v. Snow, (Utah) 229 P. 2d 874

Scofield v. Sprouse Reitz, (Utah) 265 P. 2d 396.

In *Knox v. Snow*, *supra*, this court said:

"Plaintiff seeks to justify his failure to observe the danger which was clearly visible because his sole interest was in the tire on the rack; that he didn't see the ladder or the pit because he wasn't looking at the floor or wasn't watching where he was stepping * * * It thus becomes apparent that this is not a case where plaintiff used reasonable care for his own safety. A reasonable person

makes some observations along the path he chooses to follow.”

This court held the plaintiff in that case was guilty of contributory negligence as a matter of law for his failure to take reasonable care for his own safety.

In other jurisdictions involving both business invitees and social guests, the same rule has been announced in many cases.

Lubenow v. Cook, *supra*
 McHenry v. Howells, *supra*
 Hertz v. Advertiser Company, *supra*
 Brugher v. Buchtenkirch, *supra*
 McNaughton v. The Railway Company, (Iowa)
 113 N.W. 845

That such rules of conduct are reasonable can scarcely be denied. It is submitted that the plaintiff in this case did not conform to the rule which required her to take that care of herself which she should be reasonably expected to exercise and which, if so exercised, would have prevented any injury at all from occurring.

On page 10 of her brief plaintiff asks the question if one may be held negligent who opens a door and steps forward even though the space on the other side of it is dark and if one may not assume that where a door opens inwardly there will be a floor or platform beyond or if one is obliged to assume that open space will be encountered or a stairway. The answer to the first question is that when anyone steps blindly into a situation where he cannot see, he is negligent. In *Hertz v. The Advertiser Company, supra*, the court said as follows:

"We are of the opinion that the undisputed evidence showed plaintiff to have been guilty of negligence * * * if they (the premises) were not properly lighted, she should have been more careful in going out of the vestibule into the main office building. She had no right to assume that the floor of the office building was on the same level as the floor of the vestibule. There was a door between the two apartments, and this of itself was a warning to those entering, who were not acquainted, to ascertain whether the floor to the main building was on a level with the vestibule and sidewalk or whether it was reached by ascending or descending stairs. She is shown not to have exercised the slightest degree of care to ascertain what was beyond the door which separated the vestibule from the floor of the main office. Her own evidence shows that this door was shut, that she herself opened it, and stepped or walked right through as if the floor were on a level, and fell down the stairs in consequence of her own negligence, in failing to ascertain whether or not there were steps or stairs * * *."

We have already cited the quotation from *Brugher v. Buchtenkirch*, *supra*, to the same effect that one may not assume on entering a strange house that a hall will continue on the same level. To the same effect is a quotation from *Hoyt v. Woodbury*, (Mass.) 86 N.E. 772 in which the court said:

"Persons entering such buildings are charged with knowledge that they are not entering from a perfectly level sidewalk * * * etc."

And in *McNaughton v. The Railway Company*, *supra*,

the court had this to say as quoted in the *Hertz case*, *supra*:

"The fact that a door is there is a warning that it is the means of exit or of entrance from or to some other apartment and a way up or down stairs, or to a baggage-room, or to a closet; and no one has the right to assume, without knowledge, or its equivalent, the character of the place to which it affords access."

In *Scofield v. Sprouse Reitz*, *supra*, this court held that a business invitee could not assume that there was a railing surrounding a platform when the plaintiff fell from the platform as he turned to leave the premises without looking to see if there was a railing.

The plaintiff in this case did exactly the same thing as was done by the plaintiff in *Biggs v. Bear*, *supra*. There the plaintiff, not knowing which of three doors gave access to a washroom, opened the stairway door, stepped forward into darkness and fell down the stairway. We submit that the conduct of the plaintiff in this case was identical to that of the plaintiff in *Biggs v. Bear*, *supra*, and that, as a consequence, the plaintiff in this case has no better or superior right to expect recovery than the plaintiff in the case cited.

An analogous situation involving drivers of automobiles has been decided in several cases by this court, in which it has been held negligence for a driver to operate a car forward on a highway when he cannot see what is ahead of him. See *Nikoleropoulos v. Ramsey*, 61 *Utah* 465, 214 P. 304; *Dalley v. Mid-Western Dairy Products*

Co., 80 *Utah* 331, 15 P. 2d 309 and *Hansen v. Clyde*, 89 *Utah* 31, 56 P. 2d 1366.

If the foregoing cases constitute good law and if it is negligence for a driver to operate an automobile so that he cannot stop it within the distance he can see ahead of him, how may one step forward into blackness and escape the charge that he was negligent in so doing?

As the cases above cited hold, one who is upon premises with which he is unfamiliar may not assume any condition of safety beyond his range of vision, especially if concealed by darkness. One must assume that a stairway may lie behind a closed door and act accordingly. One may not assume that a platform will exist beyond such a door merely because it might be a good idea to have one. These rules apply with special force and emphasis to a social guest. Certain it is that the plaintiff had no right to assume that the door which she opened and stepped inside of, led to the lavatory. Furthermore, one should not be heard to complain if he proceeds into an area where he cannot see what lies before him, especially if he has been told specifically to look for an area which has been lighted for his protection.

It is respectfully submitted that the record here plainly shows that plaintiff was guilty of contributory negligence as a matter of law and to require the trial court to hear further evidence as to whether the lavatory light was actually on or off could serve no useful purpose. Counsel cites the correct rule of law applicable to this case from 38 *Am. Jur.*, Sec. 184, page 861, as follows:

“He will be deemed to have been guilty (of negligence) if it is shown that he knew or reas-

onably should have known of the peril and might have avoided it by the exercise of ordinary care."

CONCLUSION

Because the record in this case already conclusively shows that plaintiff was a social guest or a gratuitous licensee on the premises of defendants at the time of her injury, and it further appears that defendants were guilty of no active affirmative negligence toward her, and no situation existed which constituted a trap of which defendants had a duty to warn the plaintiff, and she herself by her own want of ordinary care brought about her injuries, the summary judgment entered by the trial court should be affirmed.

Respectfully submitted,

RAY, QUINNEY & NEBEKER and
ALBERT R. BOWEN

*Attorneys for Defendants
and Respondents*