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John Potter, David B. Potter, Jennie I. Potter, Sarah
Potter Gibbs, Nettie Potter Miles, May Potter
Stewart, Edith Potter Dewey v. Dr. W. H. Groves
Latter-Day Saints Hospital : Brief of Respondents

Utah Supreme Court

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T. D. Lewis; David T. Lewis; Attorneys for Plaintiffs and Respondents;

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6208
No. 6208

In
The Supreme Court
of the
State of Utah

JOHN POTTER, DAVID B. POTTER,
JENNIE I. POTTER, SARAH
POTTER GIBBS, NETTIE POTTER
MILES, MAY POTTER STEWART,
EDITH POTTER DEWEY,
Plaintiffs and Respondents,

vs.

DR. W. H. GROVES LATTER - DAY
SAINTS HOSPITAL, a Corporation,
Defendant and Appellant,

Appeal From the District Court of Salt Lake
County, Utah.

Honorable P. C. Evans, Judge

RESPONDENTS' BRIEF

T. D. LEWIS,
DAVID T. LEWIS,
Attorneys for Plaintiffs
and Respondents

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DR. W. H. GROVES LATTER-DAY
SAINTS HOSPITAL, a Corporation,
Defendant and Appellant,

RESPONDENTS' BRIEF

STATEMENT

This action was brought by the sole heirs of Jean Brown Potter, deceased, to recover damages for the death of their wife and mother while a patient at the hospital operated by appellant. The deceased, while a patient at the hospital, suffered a fall which broke her hip, and which caused her death shortly thereafter. It has been and is respondents' theory that the fall was the result of

the appellant hospital's negligence in failing to properly guard deceased at a time when they knew or should have known the patient needed restraint. This theory is pleaded in Paragraphs 6 and 7 of the complaint (Tr. 2-3; Ab. 3-4) and stated in counsel's opening statement to the jury. (Tr. 21-23). Judgment was entered in favor of respondents and against the appellant hospital upon the verdict in the sum of \$1,000.00 returned by the jury.

ARGUMENT

Appellant's 12th Assignment of Error and grounds 3, 4, 9 and 10 of their 13th Assignment question the sufficiency of the evidence to support a finding of negligence against the hospital.

THE EVIDENCE IS SUFFICIENT TO SUPPORT A FINDING OF NEGLIGENCE

We submit that the evidence is more than ample in this regard. Mrs. Potter, the deceased, entered the hospital upon February 16, 1939, suffered her fall upon February 20th and died upon February 23rd. Prior to her fall she had been a very nervous, restless patient. At times she had been irrational and out of her head, talking aimlessly and incoherently. Apparently the patient did not, upon occasion, know she was in a hospital at all. The daughter, Jennie, testified (Tr. 107; Ab. 17-18) in regard to her mother's mental condition:

"She Would tell us: 'See this beautiful new room in the hotel they moved me in.' The next time she would say, 'Oh, I don't like this room in this hotel.' Then she would change her mind about it. One day

she was talking to me, and then she started to laugh. She said, 'Oh, I thought we were down in Kress' shopping.' "

Mrs. Potter's condition was well known to the appellant hospital, for the Clinical Record (Exhibit A) shows the patient to be upon February 17th "very restless." This record for February 18th includes notations by the nurse on duty, that the patient's "mind is much confused," that the patient was "talking incoherently," that she was "very restless," that she was "irrational." February 19th shows these notations by the nurses: "Extreme restlessness," "still very restless," "patient is irrational," "very noisy and restless." February 20th reports the patient to be "very much confused" and her "condition unchanged."

The Clinical Record also shows that the patient did from time to time try to get out of bed. This Record for February 18th shows that the patient was "very restless—trying to get out of tent;" and during the night "irrational, tries to get out of bed." Upon the next day, February 19th, the day before her fall, the Clinical Record shows that the patient succeeded in getting out of bed. The record notation shows: "Patient out of bed."

We submit that it takes no expert to draw the conclusion that a patient who is "irrational" and "very much confused," and who "tries to get out of bed" and who does get "out of bed," needs to be watched or guarded. The Supreme Court of Minnesota, speaking in a case involving a pneumonia patient who, during a temporary delirium, fell or jumped from a hospital window, states:

"When a patient enters a hospital, knowing that the number of nurses is less than

the number of patients, he may not expect constant attendance, but the patient is entitled to such reasonable attention as his safety may require. (Citing authorities). If the patient is temporarily bereft of reason, and is known by the hospital authorities to be in danger of self-destruction, the authorities are in duty bound to use reasonable care to prevent such an act."

Mulliner v. Evangelischer Diakonniessenverein, etc., 175 Northwestern 699.

And in the instant case Mrs. Potter was watched and guarded until the night of her fall. Upon her admission to the hospital, upon the night of February 16th, sideboards were placed upon her bed by the hospital. (Tr. 230; Clinical Record, Feb. 16). Upon the nights of February 17th, 18th and 19th a special nurse employed by the Potter family was in constant attendance to the deceased. (Tr. 102; Ab. 17). But upon the night of February 20th no sideboards were in place and, at the suggestion of Rhoda Larsen, Supervisor of Nurses at the appellant hospital, the services of the special nurse were dispensed with. Miss Larsen testified that she told members of the Potter family:

"I told them, as far as their mother's condition was concerned and the treatment she had to have could very easily be taken care of by the floor nurses." (Tr. 233; Ab. 50).

It was upon this night, while totally unguarded, that Mrs. Potter suffered her fall, breaking her hip. Pneumonia set in almost immediately and she died upon February 23rd.

We repeat, that under these facts, it takes no expert to draw the conclusion that Mrs. Potter should have been guarded in some manner. But

such testimony is helpful, and appears in the record. Miss Leona Felix, a witness for the appellant hospital upon *direct* examination, in response to a question *put by counsel for the hospital* as to why she had placed a sideboard on Mrs. Potter's bed *after the fall*, answered in these words:

Q. "And why did you put the board on at all ?

A. *Well, it just seems like anything — any nurse would think, after getting out, if they got out once, they would try it again..*

Q. And that was the reason for putting it on?

A. Yes." (Tr. 284; inaccurately stated in Ab. 61).

It will be remembered that *prior* to her fall Mrs. Potter had tried to get, and had been, out of bed upon several occasions. "*Any nurse would think, after getting out, if they got out once, they would try it again.*" This was the opinion of the appellant hospital's own expert.

Compliance or 'non-compliance with the customary methods in hospitals does not furnish a controlling test of negligence.

"The generally accepted view is that customary methods or conduct do not furnish a test which is conclusive or controlling on the question of negligence, or fix a standard by which negligence is to be gauged. The standard of due care, is such care as a prudent person would exercise under the circumstances of the particular case, and conformity to customary or usual conduct or methods cannot amount to more than a circumstance of the case in determining

whether due care has been exercised. Accordingly, if the conduct pursued or the methods adopted in the particular case do not measure up to the ordinary care which would be exercised by a prudent person under the circumstances, negligence may be found to exist notwithstanding such conduct or methods were in accordance with those customarily pursued or adopted. The reason is that the usual mode of doing a particular thing may involve a lack of proper care”

45 Corpus Juris 707, et seq. See also, Jenkins v. Hooper Irr. Co. 13 Utah 100; 44 Pac. 829.

We submit that there was very satisfactory evidence of negligence upon the part of the hospital.

APPELLANT'S FAILURE TO PROPERLY GUARD MRS. POTTER WAS THE PROXIMATE CAUSE OF HER DEATH.

It is not denied by appellant upon this appeal that Mrs. Potter died as a result of the injuries she sustained in the fall occurring upon February 20th. However, under the heading of proximate cause, appellant in their 13th Assignment, grounds 5, 6, 7 and 8, state that there is no evidence in the record to show that even though the hospital had used ordinary care in the nursing of the deceased, still it would have been physically possible for the accident to have happened. To have offered evidence to negative this proposition would have been unique under the law of negligence. For example,

a man is struck and killed by a railroad train running at excessive speed and without lights. Having proved that the active negligence of the railroad caused the deceased's death, would it be necessary to show that had the train been going slow and had been burning lights the accident would not have happened? Emphatically not, although it is physically possible for a person to be killed by a slow moving, fully lighted train.

And in the case at bar, although it is *possible* for any person in a bed to fall out and suffer injuries, still it is the most reasonable of all assumptions that had the deceased been properly guarded she would not have so fallen. Experience has taught the layman that a fall from bed is an unusual occurrence and one that does not happen in the course of ordinary events. But every father and every mother knows that small children are in danger of falling from bed and that cribs have guards (sideboards) to prevent such an occurrence. And every nurse knows that an irrational person trying to get out of bed is apt to fall and should be restrained. The testimony of the witness Felix, above quoted, bears this out.

THE DECEASED'S CRITICAL CONDITION
UPON HER ADMISSION TO THE HOSPITAL DOES NOT RELIEVE THE HOSPITAL OF ANY DUTY TO PROPERLY TREAT, BUT ON THE CONTRARY INCREASES THE DEGREE OF CARE DUE THE PATIENT.

The examination of Mrs. Potter upon her admission to the hospital revealed her to be a seriously ill patient but that with proper treatment her condition could be improved. (Tr. 280; Ab. 60). Her critical condition most certainly did not relieve

the hospital from any duty it owed the patient. Such a cruel rule would shame the law. This patient's physical condition and her advanced age required the hospital to exercise additional caution and vigilance in treating her.

45 Corpus Juris, 701.

THE EVIDENCE IS OVERWHELMING THAT THE DECEASED FELL OUT OF BED.

Appellant's first and second grounds of their 13th Assignment and their 22nd Assignment claim there was no evidence to show deceased fell out of bed. Sufficient answer to this claim is to quote from the record without further comment.

The Clinical Record for February 21st at 12:20 A. M. shows:

"Talking— patient sitting on edge of bed with legs down — reached for the floor — fell as nurse entered the room. Complains left hip paining — helped back to bed. Crying and complaining of pain."

Dr. John Boorne, the examining physician of the hospital, in his report of the accident (first page of Exhibit A. the Statistical and Summary Sheet), reports the accident thus:

"Fell out of bed and broke hip. Soon after died of pneumonia."

In his direct testimony Dr. Boorne made this statement:

Q. "And what did you have in mind by that description, 'fell out of bed?'"

A. I merely meant that she — well, fell

out of the bed on the floor.” (Tr. 287 and not appearing in Appellant’s Abstract).

And the witness Felix who witnessed the fall, thought the deceased fell out of bed for she testified:

“*After she fell out* she was extremely restless and she did move around a great deal.” (Tr. 284; Ab. 61).

And Doctors Richards and Llewellyn, employees of the hospital, told Miss Jennie Potter that her mother had fallen out of bed for Miss Potter testified:

Q. “Did they (the doctors) say at that time anything about any injury to your mother?”

A. Yes, they told us about a fractured hip from falling out of bed, and they said they couldn’t do anything.” (Tr. 111; Ab. 19).

Appellant’s 10th Assignment complains of the following question asked the witness, Jennie I. Potter:

Q. “What, if anything, did you do by way of special nurse after the injury to your mother?” (Tr. 115; Ab. 21).

By the great weight of authority medical expenses which have been paid by the beneficiaries of a deceased person arising from the fatal injury complained of are proper elements for recovery.

17 Corpus Juris, 1338-9.

However in this case we submit that this particular question is moot, the trial court having not submitted this element of damage to the jury for consideration. (Instruction No. 9; Ab. 78). And we

here call attention to the trial court's Instructions Nos. 3, 4, 5 and 6 as fully presenting and submitting appellant's theory of the case to the jury contrary to appellant's contention in their 20th Assignment.

UNDER THE UTAH WRONGFUL DEATH
STATUTE THE PECUNIARY VALUE OF
THE LOSS OF SOCIETY AND COM-
PANIONSHIP AND LOSS OF SERVICES
OF THE DECEASED TO HER BENEFI-
CIARIES IS A PROPER SUBJECT OF IN-
QUIRY AND ELEMENT OF DAMAGE.

The trial court in its Instruction No. 9 submitted to the jury the question of the pecuniary loss, if any, sustained by the surviving husband and children by way of loss of society and companionship caused by the death of the mother; also the pecuniary loss, if any, sustained by the husband only through loss of services. Such a charge is proper and has long been the law of this State. In

Evans v. Oregon Short Line Railroad Co.,
37 Utah 431; 108 Pac. 638,

this Court in upholding this proposition at page 437 states:

“We think that, in connection with the evidence showing what the deceased has contributed to the family for support and maintenance, the wife and children may also show the affection the deceased entertained for them, his disposition and deportment toward them, his counsel and advice, and his care and kindly solicitude for their welfare insofar as these things were

made effective by his acts, and that the jury may consider all these things in connection with the evidence of the amount the deceased contributed for support, as aforesaid, in arriving at the amount which the widow and minor children shall receive as compensation for the injury sustained by them by reason of the death of the husband and father.”

And again at page 440 says:

“Whatever is allowed by the jury must be by way of pecuniary recompense for the loss sustained by the wife and minor children, and must be strictly limited (1) to what the evidence shows the deceased contributed, and thus would probably have continued to contribute to them in money or other means by way of support and as an accumulation to his estate; and (2) to the money value of the injury suffered by the wife and minor children by reason of the loss of the advice, comfort and society which they enjoyed prior to the death of the deceased and which would have continued for their benefit. If the evidence is to the effect that the widow and minor children suffered no loss upon the first ground because the deceased provided neither money nor other means of support, they still may be entitled to something upon the second ground, because the society of the deceased may have been a comfort and his advice of material assistance to them. Again, a wife and children may have lost little or nothing upon either or both grounds, and the jury should then compensate them only for what they have

lost, and, in case they have lost upon both grounds, they should receive compensation to the extent of their loss.”

Mrs. Potter for many, many years and up to the time of her last illness had been rendering real and tangible service to her husband. We quote from the testimony of the daughter:

Q. “She didn’t wait on your father?

A. Yes, she waited on my father.

Q. What did she do for him after October, 1938?

A. She kept care of his clothes, seeing that he was fed and dressed, and he is quite a care.” (Tr. 125; Ab. 24-5).

In other words the testimony of the daughter Jennie above was to the effect that her mother kept house for her father up to the time of her death. Mr. Potter, the husband, being a semi-invalid, no woman could render greater service. Such services, those usual to mothers and wives, are of real pecuniary value difficult though it be to place an exact dollar and cents value upon them.

No testimony was introduced, no claim was made, for any loss of services to the children and this element was not submitted to the jury. The element of loss of services was limited strictly to those suffered by the husband.

The husband and all the children were deprived of the society and companionship of their mother by her death. This loss represented a real pecuniary loss to them as much as is possible or usual in any case. The Potter family was a harmonious

and affectionate group. There was no discord. We again quote from the testimony of the daughter:

Q. "What was your mother's ability as a housewife? (Tr. 112; not in appellant's Abstract).

A. She had always been an excellent housewife.

Q. What was the relationship between your father and mother so far as being affectionate to each other? (Tr. 113; Ab. 19-20).

A. Well, they have been married for fifty-three years and they have always been happy together.

Q. And as to companionship?

A. Well, they were always together and they worked together in everything. There was no disharmony in our home at all.

Q. And what had been the conduct and attitude of your mother toward her children throughout her life and continuing on up to the time of her death?

A. Well, she was the grandest mother in the world, I think, and she had always been just grand to us. She has worked with us at all times and helped us in everything we have gone through."

Appellant quotes at length from *White v. Shipley*, 48 Utah 496; 160 Pacific 441, as being applicable to the facts in the case at bar. We submit that the *White* case is clearly distinguishable and in no way affects the law as we have stated it. In the *White* case *the* children of the deceased were not named in the complaint as beneficiaries, were not parties to the action, and the only mention of

them in the entire proceeding came upon cross examination and consisted only of the children's names, ages, and addresses. And then the trial court instructed the jury that the loss of society of the deceased to these children was to be considered by them in assessing damages. This instruction was held to be error and we agree, rightly so. But the facts in the White case are not those of the case at bar. *In the instant case the children of Mrs. Potter are named as beneficiaries, are parties plaintiff in the action, and their relationship with their mother was very carefully brought out for the jury's consideration.* The case at bar is the usual one where loss of society and pecuniary loss therefrom is shown to be a fact, not one where out of a clear sky the jury is allowed to speculate.

Appellant places some emphasis upon the testimony of Dr. Boorne to the effect that in his opinion Mrs. Potter would never recover from her heart ailment. In this respect we call attention to the fact that Dr. Boorne carefully avoided stating that Mrs. Potter was fatally ill. Quite on the contrary he testified that in his opinion her condition could be made better. He stated it thus:

"I thought her condition might be improved inasmuch as she was suffering at the time from lack of food and water . . . I knew we could improve the state of her nutrition, which might improve her sense of well being . . . but I doubted that she would ever recover." (Tr. 281; Ab. 60).

It is common knowledge that a person suffering a heart attack seldom if ever completely recovers. But lack of complete recovery does not mean death and it is well to keep in mind that Mrs. Potter had suffered an attack similar to this one

during May of the preceding year and *had* recovered sufficiently to render further service to her husband and comfort to her children. (Tr. 123; Ab. 24).

A HOSPITAL IS LIABLE FOR NEGLIGENCE OF ITS SERVANTS RESULTING IN DEATH OF A PAYING PATIENT, NOTWITHSTANDING THAT HOSPITAL IS ORGANIZED AS A CHARITY AND GIVES CHARITABLE SERVICE.

The above stated rule was laid down by this Court in

Sessions v. Thomas D. Dee Memorial
Hospital Ass'n, 89 Utah 222; 51 Pac.
(2d) 229.

And again upon second appeal in

94 Utah 460; 78 Pac. (2d) 645.

No reason exists to now change this rule for it is soundly based and, as stated by this Court, will soon carry the numerical weight of authority. New Hampshire follows the rule in their most recent decision,

Welch v. Frisbie Memorial Hospital, 9
Atlantic (2d) 761, (1939).

California has very recently adopted the rule as set out in the Sessions case.

Silva v. Providence Hospital of Oakland,
97 Pac. (2d) 798.

England v. Hospital of the Good Samaritan, 97 Pac. (2d) 812.

The Silva case is so similar to the case at bar both upon the facts and the law that we wish to call

special attention to it. We quote from the second paragraph of the opinion:

“The facts in the case are practically undisputed. Almost four years ago, while the plaintiff was a patient in the hospital and paying the amounts charged by it for the services rendered to her, she fell and fractured her hip by reason of the negligence of the hospital nurse in failing to equip her bed with a side-board. The hospital concedes the sufficiency of the evidence to support the findings on the issues of negligence, but it challenges the findings and conclusions of law upon a special defense of exemption from liability.”

After thoroughly examining the various authorities and theories concerned with the question of liability of charitable organizations the California Court concludes to follow the Sessions case and closes its opinion thus:

“This (citing the Sessions case) is not only the modern view but the one required by every principle of common justice. As one Court has said: ‘It is a principle of law, as well as morals, that men must be just before they are generous.’

Tucker v. Mobile Infirmary Ass’n, 191 Ala. 572; 68 So. 12; L.R.A. 1915D, 1167.

The judgment is affirmed.”

Mrs. Potter, the deceased, was a paying patient. This fact was first admitted by the appellant hospital in their original answer but later denied. The facts concerned with the question of payment were presented by stipulation and the

trial court found, as a matter of law, that the deceased was a paying patient and did not submit that matter to the jury. An examination of the transcript and exhibits clearly supports this finding, and we must urge the reading of the transcript from page 73 to page 89, inclusive, in order to present the stipulation on this matter fully.

It is admitted by the pleadings and the stipulation of the parties that the appellant hospital is a corporation of Utah engaged in the treatment, nursing and care of the general public for pay. (Tr. 2, 18; Ab. 2, 7). Also, that the Price First Ward is a separate corporation. (Tr. 19, 72; Ab. 8, 12). The deceased was a member of the Price First Ward and as such was admitted to the appellant hospital as what is designated as a Church case. (Tr. 21, 84). A charge for services rendered her was made in the sum of \$55.30 by the hospital. (Tr. 89; Ab. 14). For payment of this sum the appellant hospital looked to the Price First Ward as admittedly was the custom. (Tr. 82). *And upon March 17, 1939, a payment of \$10.00 was received by the hospital from Price First Ward.* There is no merit in appellant's contention that this payment was not paid for the services rendered Mrs. Potter for *Exhibit 1, the ledger account for Mrs. Potter, shows that the \$10.00 was credited upon her account and the balance due was reduced from \$55.30 to \$45.30.* The ledger account also contains the notation to "Collect from: Ward," supporting respondent's proof that payment was expected from the Price First Ward for the services rendered Mrs. Potter. The fact that but \$10.00 of the total charges was collected does not affect the fact of consideration for the Court will not question

the adequacy of consideration. The rule as stated in

13 Corpus Juris 365, is thus:

“So long as it is something of real value in the eye of the law. whether or not the consideration is adequate to the promise is generally immaterial in the absence of fraud. The slightest consideration is sufficient to support the most onerous obligation; the inadequacy, as has been well said, is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced.”

The fact that the appellant hospital expected and did receive compensation for the services it rendered Mrs. Potter leaves no escape from the proposition that the patient was a paying patient as far as the hospital was concerned. The charitable undertaking came entirely from the Price First Ward. However, should a proper case arise in which the question of the liability of a hospital to a non-paying patient must be determined we submit that the rule of the Sessions case should be interpreted to include non-paying patients. In the Silva case (California), above cited, a single Justice dissented from the prevailing opinion in which charitable institutions were held liable for negligent acts of their servants. We believe part of the dissenting opinion to be worthy of note:

“I cannot agree with the prevailing opinion for two principal reasons. In the first place, I challenge the test of exemption from liability based on the ability of the patient to pay. *A poor man is just as much entitled to good treatment at a*

hospital as a rich one and is just as much in need of it. Compare

Robinson v. Pioche, 5 Cal. 460-1.”

(Italics ours).

The Justice then bases his dissent upon the proposition that charitable institutions should enjoy general immunity.

And the Minnesota Court in the Mulliner case, heretofore cited, indicates it does not wish to distinguish between paying and non-paying patients for this Court states:

“In this case, the deceased paid for the services he expected would be rendered, but this may not be a controlling fact. We do not believe that a policy of irresponsibility best subserves the beneficent purposes for which the hospital is maintained. We do not approve the public policy, which would require the widow and children of deceased rather than the corporation, to suffer the loss incurred through the fault of the corporation’s employees, which would compel the persons damaged to contribute the amount of their loss to the purposes of even the most worthy corporation. We are of the opinion that public policy does not favor exemption from liability.”

West Virginia is emphatic in its position that there shall be no penalty upon poverty, saying:

“That such a hospital in its treatment of a rich patient shall be held to a greater degree of care than in its treatment of a pauper is not to be tolerated. Certain luxuries may be given the former which

the latter cannot get, and this for various reasons; but the degree of protection from unskilled and careless nurses must be the same in both cases."

Frantz Roberts v. Ohio Valley General Hospital, 127 S.E. 318; 42 A.L.R. 968, citing

Powers v. Massachusetts Homoeopathic Hospital, 109 Fed. 294; 65 A.L.R. 372.

The many authorities cited by appellant to the effect that non-paying patients cannot recover for negligent acts of employees of a charitable institution are all from States which grant this immunity in paying cases as well. We believe, therefore, that the reasoning of these cases is not applicable to the facts of the case at bar and the rule laid down in the Sessions case. Those States in which the rule of the Sessions case is established indicate or hold that there can be no distinction between a paying and a non-paying patient. The following cases are from those jurisdictions:

Alabama:

Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572; 68 So. 4,

(paying patient, but other Courts consider language of opinion all-inclusive).

Alabama Baptist Hospital Board v. Carter, 226 Ala. 109; 145 So. 443.

Florida:

Parrish v. Clark, 107 Fla. 598; 145 So. 848.

South Florida R.R. Co. v. Price, 32 Fla. 46; 13 So. 638.

Minnesota:

Mulliner v. German Evangelical Synod,
144 Minn. 392; 175 N.W. 699.

Geiger v. Simpson Methodist Episcopal
Church, 174 Minn. 389; 219 N.W. 463.

Oklahoma:

City of Shawnee v. Roush, 101 Okla. 60;
223 Pac. 354,

where the Court said exemptions of this kind were for the legislative and not the judicial branch of the government, citing the Tucker (Alabama) case, above.

Sisters of the Sorrowful Mother v. Zeidler,
183 Okla. 454; 82 Pac. (2d) 996.

City of Pawhuska v. Black, 117 Okla.
108; 244 Pac. 1114.

As we have heretofore pointed out, California now adheres to the rule of the Sessions case. But it is interesting to note that when the harsh rule limiting liability in that jurisdiction to cases involving negligent selection of nurses and employees was in effect that such limited liability *was a special defense which had to be both pleaded and proved by the charitable defendant.*

Lewis v. Young Men's Christian Ass'n,
273 Pac. 580.

The appellant in the instant case neither pleaded nor proved due care in its selection of employees.

We submit that the record is free of error and that the judgment should be affirmed.

Respectfully submitted,

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