by him, so far as he may find it reasonably practicable, and be reported to his employer if needful. And, in this regard, it can make little difference what is the grade of servant who is found to be negligent, except as superior authority may render the negligence more dangerous, and, consequently, increase at least the moral responsibility of any other servant, who, being aware of the negligence, should fail to report it" (p. 544). This reads well, but we find that, in applying it, we are not to inquire whether the servant injured *was* aware of the negligence, and failed to report it, nor whether it *was* reasonably practicable for him to guard against it or report. We are in all cases to assume this against the employee, and assume it conclusively, however improbable or even obviously false the assumption may be.* Why might not the same argument be carried further, and assume away the cause of action for the employer's personal negligence?

If we start with the primary assumption that the employer will be liable unless an exemption can be found in these arguments, we think it must be admitted that the arguments are unsatisfactory, and the exemption fails. In the first place, would such a contract of exemption be valid?

In *Railroad Company* v. *Lockwood*, 17 Wall. 357, a contract was considered between a railroad company and a drover who had cattle on the train. The drover had signed an express agreement to take all risk of injury to the cattle, and of personal injury to himself, upon the consideration that the cattle should be carried at less than tariff rates. The drover rode on the same train, upon a "drover's pass," which contained an express printed stipulation that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received upon the train. The contract was held invalid. Mr. Justice Bradley, delivering the opinion of the court, said: "The inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of its validity."

* Pages 545, 562, and generally throughout the chapter wherever the doctrine is applied. This is also the fair inference from the cases cited with approval.

If this be true of an express written contract, founded on a pecuniary consideration, between the company and a shipper, will it not apply with at least equal force to an unexpressed contract, unsupported by consideration, and, in point of fact, generally unthought of, assumed by legal fiction, between the company and its employee? A comparison of the wages commonly paid railway and other mechanical employees with those paid workmen in less hazardous pursuits excludes the idea that any compensation is paid, as a rule, beyond the value of the labor. If the contract of exemption were otherwise valid, could it be supported without consideration?

But, secondly, *does* the public interest, which forbids a shipper to make this contract for value, demand it of an employee without consideration?

We are told that the public wishes to shield the employer from a responsibility which would often be embarrassing. It is true that railway companies are already favored by the law in many ways upon this principle. They are permitted to exercise the high prerogative of eminent domain; extreme tension has been given to the rules of law in order to uphold municipal aid; and special privileges and grants are showered upon them by successive legislatures;—but we may well pause before conceding that public interest calls for further and more unrestrained indulgence in the way of absolution from any lawful responsibility to a considerable portion of the public.

Employees are a part, and a large and important part, of that public whose interest as a whole makes up this "public policy." If the companies could be ranked with "the public" on one side, and the employees, as a species of public enemies, on the other, then, indeed, we might resolve all doubts in favor of the former, on the score of public policy.

The "travelling public" might well doubt the policy of exempting the employer from responsibility for "accidents," when it happens that only employees are injured; and they might doubt the efficacy of telling the brakeman that he ought to watch the telegraph operator, a hundred miles away, and report the latter's negligence which causes a collision. The brakeman first knows of the negligence when he is called upon to apply the brakes, a