HOW RELIABLE IS THE CASE OF AMERICAN PRES. LINES V. KLEPPER?

HECTOR A. MARTINEZ * MA. LUISA J. HILADO *
DELIA S. TANTUICO *

"The work of a judge is in one sense enduring and in another sense ephemeral. What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which new structures will be built. The bad will be rejected and cast off in the laboratory of the years."[1] Every decision handed down by the judiciary is subject to this test. It is the task of lawyers and students of the law to scrutinize every decision lest that which should be cast off be accepted and given the force of a precedent, and that which should be rejected and cast off be allowed to endure. It is in this spirit that we venture to write this article.

PROBLEMS INVOLVED

On Nov. 29, 1960, the Supreme Court laid down a decision which reopens the questions of the validity and binding effect of stipulations in a bill of lading limiting the extent of a common carrier's liability for damages to goods shipped under such bill of lading, as well as problems of conflict of laws. In the case of *American Pres. Lines Ltd. v. Richard Klepper, et al.*,[2] the Supreme Court upheld the validity and binding effect of such stipulation and limited the amount recoverable by the shipper only to the extent stipulated in the bill of lading. In that case, Klepper brought an action to recover ₱6,729.50 as damages sustained by his goods which he shipped aboard the SS Pres. Cleveland at Yokohama, Japan, destined to Manila, Philippines. Clause 17 of the bill of lading limited the amount recoverable by the shipper for damages to his goods to $500 unless a higher valuation be declared in writing by the shipper. The trial court awarded full damages and disregarded clause 17. This was affirmed by the Court of Appeals on the authority of the case of *Mirasol v. Robert Dollar Co.*,[3] to the effect that the stipulation was not binding upon the shipper because "neither the plaintiff nor any agent of his signed the bill of lading; neither has agreed to the two clauses just recited. In fact, the plaintiff received the bill of lading only after he had arrived in Manila." The shipping company, while admitting liability interposed a petition for review contending that

* Member, Student Editorial Board, *Philippine Law Journal*, 1961-62.
[1] Cardozo, Nature of Judicial Process; *Cardozo Selected Readings*, p. 182.
[2] G.R. L-15671, Nov. 29, 1960.
[3] 53 Phil. 125 (1929).

its liability cannot exceed $500, pursuant to clause 17 of the bill of lading and Sec. 4(5)[4] of the Carriage of Goods by Sea Act.[5] This contention was upheld by the Supreme Court saying that the "respondent cannot elude its provision (of the bill of lading) simply because they prejudice him and take advantage of those that are beneficial." It added that "the fact that respondent shipped his goods on board the ship and paid the corresponding freight thereon shows that he impliedly accepted the bill of lading as if it has been actually signed by him or by another person in his behalf. This is more so where respondent is both the shipper and the consignee of the goods. These circumstances take this case out of our ruling in the Mirasol case and places it within our doctrine in the case of *Mendoza v. PAL.*"[6] As regards the applicability of the Carriage of Goods by Sea Act, the court said that it has only a suppletory effect to the New Civil Code which is controlling.

Two main problems will be treated in this paper. The first will be the problem of choice of law which will govern the validity of the bill of lading, specifically, the disputed clause 17; and the second the problem of the validity and binding effect of that stipulation.

PROBLEM OF CHOICE OF LAW

Considering the fact that the contract of carriage was entered into in Japan but to be performed in the Philippines, a problem of choice of law arises. More specifically, the question is what law governs the validity of clause 17 of the bill of lading which limits the extent of liability of a common carrier. Is it the Japanese law which is the *lex loci celebrationis,* or Philippine law, the *lex loci solutionis?* The question arises because of the apparent difference between the Japanese and the Philippine law on the point.[6]

---

[4] Sec. 4(5) of the Carriage of Goods by Sea Act provides: "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in the amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration if embodied in the bill of lading, shall be *prima facie* evidence, but shall not be conclusive on the carrier."

[5] G.R. L-3678, Feb. 29, 1952.

[6] The Civil Code of the Philippines in Art. 1749 provides: "A stipulation that the common carrier's liability is limited to the value of the goods appearing in the bill of lading unless the shipper or owner declares a greater value, is binding."

The Commercial Code of Japan on the other hand, provides in Art 577—"A carrier shall not be relieved of liability in damages for any loss of, injury to or delays in arrival of the good unless he proves that neither he, the forwarding agent, any of his employees nor any other person employed in respect of the carriage, has failed to exercise due care in connection with the receipt, delivery, custody, and carriage of goods" and in Art. 510 "In cases of total loss of the goods, the amount of damages shall be determined by the value prevailing at the destination on the day on which they should have been delivered."

Thus, since under Philippine law, the stipulation limiting the extent of the carrier's liability is valid, the petitioner cannot be held liable beyond $500. On the other hand, under Japanese law, it seems that such stipulation is invalid because of the apparent absence of a provision authorizing such stipulation. Therefore, the petitioner is liable for the actual damages suffered by the shipper—P6,729.50.

Unfortunately, the Supreme Court in this case did not make any express findings or declarations as to what law shall govern the validity of such stipulation. The Supreme Court by invoking Art. 1753 [7] of the Civil Code and without making clear its stand as to the conflicts problem involved, made a general assumption that the Philippine law should control. Perhaps this attitude of the Supreme Court may be justified on the ground that the litigants failed to allege and prove the Japanese law and that under that law the stipulation is void. Because of this failure, the Supreme Court rightly presumed that the foreign law is similar to the Philippine law.[8]

But should a case arise where a similar stipulation is considered void by the *lex loci celebrationis,* should the Philippine courts enforce the stipulation on the ground that under Arts. 1753 and 1749 [9] of the Civil Code such stipulation is valid? Or should it apply the *lex loci celebrationis* and consider the stipulation void? At least three possible theories attempt to solve this problem: the *lex loci celebrationis,* the *lex loci solutionis* and the *lex loci intentionis.*

LEX LOCI CELEBRATIONIS—The advocates of this theory maintain that the law of the place where the contract was celebrated —in this case, Japanese law— should determine the validity of the stipulation and if it is void there, it should be void everywhere. The underlying basis of this theory is that a contract becomes binding only when the acts of the parties have the sanction of law, and the only law which can provide that sanction is the law of the place where the act or acts were done, consistently with the territorial character of laws, based on the traditional limitation of sovereignty.[10] Others base this theory on the assumption that since the parties executed their contract in a foreign country, they are deemed to have voluntarily subjected themselves to the laws of that country —also, consistently with the theory of sovereignty.

The Supreme Court seems to follow this theory when in a 1909 decision involving the capacity of a person to enter into contract, it said: "No rule is better settled than that matters bearing upon the execution, interpretation and *validity* of a contract are determined by the law of the place where the contract was made." [11] Dean Jo-

---

[7] Art 1753 provides: "The law of the country to which the goods are to be transported shall govern the liability of the common carrier for their loss, destruction or deterioration."

[8] Lim v. Collector, 36 Phil. 472 (1917); Miciano v. Brimo, 50 Phil. 867 (1924); Fluemer v. Hix, 55 Phil. 851 (1932); *In re* Testate Estate of Suntay, G.R. L-3088, July 31, 1952; *In re* Intestate Estate of Suntay, G.R. L-3088, July 31, 1954.

[9] Art. 1753, *Supra,* note 7.

Art. 1749 provides: "A stipulation that the common carrier's liability is limited to the value of the goods appearing in the bill of lading unless the shipper or owner declares a greater value, is binding."

[10] Beale, J. H., *Summary of the Conflict of Laws* (3rd ed.) 1949, p. 274.

[11] Insular Government v. Frank, 13 Phil. 236, 239-240 (1909).

vito Salonga vigorously criticized this statement of the Court as an unfortunate dictum by which our courts should not be tied down.[12] However, in a later decision,[13] the Supreme Court reaffirmed the dictum pronounced in the *Frank* [14] case. In that case, the Supreme Court upheld the validity of a stipulation between the carrier and shipper which exempted the carrier from any loss or damage under any circumstances whatever, since by the *lex loci celebrationis*, such stipulation was valid. However, since the enforcement of such stipulation in its broadest sense would run counter to the public policy of the Philippines, which requires carriers to exercise due diligence, the Supreme Court construed the stipulation as merely exempting the carrier from his liability as insurer of the goods and not from his liability due to negligence.

LEX LOCI SOLUTIONIS—Under this theory, the law of the place where the contract is to be performed—in this case, Philippine law—should govern the intrinsic validity of the contract. The adherents of this theory maintain that the place of performance is the "seat" of the contract and therefore should govern the validity of the contract. They maintain that the contract has its real and most substantial connection with that place because performance is the final aim of the contract.[15]

This seems to be the rule followed by Arts. 1753 and 1749 of the Civil Code and which the Supreme Court in the Klepper case attempts to follow.

LEX LOCI INTENTIONIS—This rule allows the parties, subject to certain limitations, to choose the law which shall govern the validity and binding effect of their contract. In the absence of an express choice, the court determines the legal system applicable, on the theory either of "implied choice" by the parties on the basis of the facts and circumstances of the case, or of "hypothetical choice" for the reason that the law elected by the court has the most substantial and real connection with the contract. The advantages of this theory are: (1) it enables the parties to exercise ample freedom to contract; (2) it protects the legitimate and rational expectations of the parties; and (3) it promotes and stabilizes international trade and commerce.[16] Most legal systems today follow this theory because of the tremendous growth of trade and commerce brought about by modern methods of communication and transportation.[17]

---

[12] Salonga, J. R., *Private International Law* (2nd Ed.) 1957, p. 303.
[13] Bryan v. Eastern and Australian SS Co., 28 Phil. 310 (1914).
[14] *Supra*, note 11.
[15] Savigny, F. K. von, *System des Heutigen Romischen Rechts*, VIII, 1849. pp. 198-199.
[16] Salonga, *op. cit.*, p. 289.
[17] Rabel, E., *The Conflict of Laws*, 2nd Vol., p. 357.

Of these three competing and conflicting theories, which law should be adopted in the Philippines? Should the Philippines follow the *lex loci intentionis* and limit the applicability of Arts. 1753 and 1749 or should these provisions be applied in all cases even though there is a stipulation to the contrary? Do Arts. 1753 and 1749 revoke the cases of *Frank* and *Bryan* [18] in so far as the latter hold that the *lex loci celebrationis* is controlling?

We maintain that the Philippines in order to stabilize and promote international trade and commerce should adopt the *lex loci intentionis* despite the express provisions of Arts. 1753 and 1749. It should give effect to the will of the parties rather than apply Arts. 1753 and 1749 indiscriminately to all contracts of carriage. Because the Philippines cannot just ignore to its own prejudice the inevitable expansion of commerce and the continuous shrinking of the world due to advances being made in science, particularly, in the field of transportation and communication, it is of primary importance that international trade and commerce be stabilized and promoted. This can be done by giving the parties ample freedom to contract and choose the law that should govern their contract, and by protecting and giving effect to their rational and justified expectations.

The acceptance of the *lex loci intentionis* on this point, must necessarily result in the restriction of the application of Arts. 1753 and 1749. This, we believe, can be done because Art. 1753 is not mandatory except in so far as the application of a foreign law would clearly and palpably offend some important public policy or sense of morality of the Philippines. It merely provides a solution in conflict cases. No public policy would be offended if by refusing to apply Art. 1753 we have to disregard Art. 1749 since Art. 1749 is merely a permissive provision which authorizes the carrier to limit the extent of his liability. On the other hand, it would be beneficial not only to the country but also to the parties themselves to limit their application in certain cases. We maintain that Art. 1753 applies only where there is an absence of express or implied agreement between the parties as regards the particular legal system to be applied. If the parties expressly or impliedly stipulate that a particular legal system should govern their contract, such legal system should be applied and all the incidents and consequences of the contract should be determined by that law. The application of Art. 1753 only in cases where there is an absence of choice, express or implied, necessarily makes it the "hypothetical choice" of the parties. This is so not only because in most cases the place of performance is the "seat"

[18] *Supra*, note 13.

of the contract but also because we cannot entirely disregard a provision of law which we must give effect in the manner we think most logical. Thus, if the parties should enter into a contract of carriage the validity of which is made subject to the *lex loci celebrationis*, and one of the stipulations of the contract happens to be void by that law but valid under Arts. 1753 and 1749 of the Civil Code, we believe that the Philippine courts should apply the *lex loci celebrationis* pursuant to the will of the parties and declare that particular stipulation void.[19] It would be unjust if, in order to validate the entire contract, one party can invoke the *lex loci celebrationis* as agreed upon and then also rely on the *lex loci solutionis* which is entirely out of the contemplation of the parties, to the prejudice of the other party. Having chosen a particular law, they must be bound, in the absence of a contrary agreement by all the consequences of the application of that law.

In the light of the stand we take, we are therefore of the opinion that Art. 1753 of the Civil Code superseded the *Frank* and *Bryan* cases [20] except where there is an express or implied stipulation to the effect that the *lex loci celebrationis* shall govern the validity of the contract. If there is no express or implied stipulation as to what law governs, the *lex loci solutionis*, pursuant to Art. 1753 and not the *lex loci celebrationis* shall govern.

VALIDITY AND BINDING EFFECT

Even though the Philippine law on common carriers is applied, we believe that the Supreme Court made an error in limiting the extent of the liability of the carrier. But before discussing this point, it would be prudent on our part to examine the correctness of a dictum made by the court in the case at bar lest it might be invoked as authority on the point. In holding that the carrier is liable for negligence, the court made a careless statement which we may characterize as unfortunate. The court said: "it (common carrier) can only be exempt therefrom (damages) for causes enumerated in Art. 1734." [21] This is erroneous. Although Art. 1734 apparently means that the carrier is not liable if the loss or destruction is due to causes enumerated therein, that is not what the article means. It simply means that as soon as the carrier proves that the

[19] Salonga, *op. cit.*, p. 307.
[20] *Supra*, notes 11 and 13.
[21] Art. 1734 of the Civil Code provides: "Common carriers are responsible for the loss, destruction, or deterioration of the goods, unless the same is due to any of the following causes only:
(1) Flood, storm, earthquake, lightning, or other natural disaster or calamity;
(2) Act of the public enemy in war, whether international or civil;
(3) Act or omission of the shipper or owner of the goods;
(4) The character of the goods or defects in the packing or in the containers;
(5) Order or act of competent public authority.

loss or destruction is due to the causes enumerated therein, the burden of proof to show that the carrier is negligent is shifted to the shipper.

Art. 1733 requires that the carrier must exercise extraordinary diligence in the vigilance over the goods. As soon as the goods are damaged while in the possession of the carrier, a *prima facie* presumption of negligence immediately arises [22] and the shipper has only to prove the existence of the contract and the breach thereof in order to be able to recover damages.[23] To be exempted from liability, the burden of proof is on the carrier to show that it exercised the extraordinary diligence required by law.[24] But should the carrier prove that the damage was due to causes enumerated in Art. 1734, the burden of proof shifts to the shipper. In such a case, in order that the shipper may recover damages, he must establish the negligence of the carrier by affirmative proof. The presumption of negligence is destroyed.[25] Thus, even though the goods are damaged due to causes enumerated in Art. 1734, the carrier may still be held liable if it did not exercise the due diligence to prevent, minimize or forestall the loss.[26]

Going over to the main point of discussion, we believe that the decision of the Court of Appeals is more in consonance with the weight of authority, with the provisions of the Civil Code, and with the public policy behind the liability of the common carrier.

Art. 1749 of the Civil Code provides that "a stipulation that the common carrier's liability is limited to the value of the good appearing in the bill of lading, unless the shipper or owner declares a greater value, is binding." The reason for this provision is that it is contrary to the principles of justice that a shipper may understate value in order to reduce rate and then recover a larger value in case of loss.[27] Even before the adoption of this provision, our Supreme Court had already upheld the validity of such stipulations.[28]

---

[22] Art. 1735 of the Civil Code provides: "In all cases other than those mentioned in Nos. 1, 2, 3, 4, and 5 of the preceding article, if the goods are lost, destroyed or have deteriorated, common carriers are presumed to have been at fault or to have acted negligently, unless they prove that they observed extraordinary diligence as required in Art. 1733"; Mirasol v. Robert Dollar Co., *Supra*, note 3.

[23] Cangco v. Manila Railroad Co., 38 Phil. 768 (1918); De Quia v. Manila Electric Railroad and Light Co., 40 Phil. 706 (1920); Del Prado v. Manila Electric Co., 52 Phil. 900 (1929).

[24] Art. 1735, *Supra*, note 22.

[25] G. Martini, Ltd. v. Macondray and Co., 39 Phil. 934 (1919).

[26] Art. 1739: "In order that the common carrier may be exempted from responsibility, the natural disaster must have been the proximate and only cause of the loss. However, the common carrier must exercise due diligence to prevent or minimize loss before, during and after the occurrence of flood, storm, or other natural disaster in order that the common carrier may be exempted from liability for the loss, destruction or deterioration of the goods. The same duty is incumbent upon the common carrier in case of an act of the public enemy referred to in article 1734, No. 2.

Art. 1742: "Even if the loss, destruction, or deterioration of the goods should be caused by the character of goods or the faulty nature of the packing or of the containers, the common carrier must exercise due diligence to forestall or lessen the loss."

[27] Padilla, A. and Campos J., Jr., *Transportation*, 1959, p. 48.

[28] Heacock v. Macondray, 42 Phil. 205, 208 (1921); Freixas v. Pacific Mail Steamship, 42

In the case of *Heacock v. Macondray* [29] the court said: "There are three kinds of stipulations often made a bill of lading. The first is one exempting the carrier from any and all liability for loss or damage occasioned by its own negligence. The second is one providing for an unqualified limitation of such liability to an agreed valuation. And the third is one limiting the liability of the carrier to an agreed valuation unless the shipper declares a higher value and pays a higher rate of freight. The first and second kind of stipulations are invalid as being contrary to public policy, but the third is valid and enforceable."

There is no question therefore that such stipulations are valid not only by express provisions of the Civil Code but also by weight of authority in the Philippines as well as in the United States.[30] But the question is when are the parties bound by such stipulations? Article 1750 of the Civil Code provides that "a contract fixing the sum that may be recovered by the owner or shipper for the loss, destruction or deterioration of the goods is valid, if it is reasonable and just under the circumstances and *has been fairly and freely agreed upon.*" Thus, two requisites are necessary: (1) it must be just and reasonable under the circumstances; and (2) it must be fairly and freely agreed upon. It may be admitted that clause 17 is not unreasonable since it grants the shipper the right to recover damages to the full extent provided the actual value of the goods has been declared. But was the shipper granted the opportunity to declare the actual value of the goods? Has the shipper knowledge of clause 17? In other words, can it be established that the stipulation was fairly and freely agreed upon by the shipper?

The Supreme Court said yes for two reasons and then invoked the case of *Mendoza v. PAL.*[31] It reasoned out that since the shipper took advantage of the provisions in the bill of lading, it cannot elude those provisions which are prejudicial to him. But the court did not show in what manner the shipper has taken advantage of the bill of lading so as to estop him to deny the provisions of the bill of lading. Moreover, there is no showing that the shipper has in any manner agreed to the stipulation in the bill of lading. The Supreme Court also argued that the fact that the goods were shipped on board and the corresponding freight paid thereon shows that the shipper impliedly accepted all the stipulations in the bill of lading. It seems that the court lost sight of the nature of the bill of lading in ques-

Phil. 198 (1921).

[29] *Supra*, p. 208.

[30] Hart v. Pennsylvania Ry. Co., 112 U.S. 331 (1884); Union Pacific Ry. v. Burke, Advance Opinions 1920-1921, p. 318; Adams Express Co. v. Croninger, 226 U.S. 491, 492; Reid v. Fargo, 130 CCA 285 (cited in Heacock v. Macondray, *supra*).

[31] *Supra*, note 5.

ion which is essentially an adhesion contract. An adhesion contract is one which has already been prepared in advance by one party and all that the other party has to do is to accept or reject the contract. Because of this, before a person can be bound by that contract, it is a necessary condition that he must not have been deprived of his freedom of choice. Otherwise, there is no consent, no meeting of the minds, as to the terms and conditions thereof. We are of the opinion, therefore, that before a party can be bound by any stipulation in an adhesion contract, it must be clearly and satisfactorily shown that the party expressly or impliedly agreed to such stipulation. The facts of the case at bar do not show that Klepper expressly or impliedly accepted the stipulations in the bill of lading. On the contrary, the bill of lading was not signed and it was only received after Klepper arrived in Manila. The theory of the court that there was implied acceptance because of the fact of shipment and payment of the corresponding freight is weak. Acceptance necessarily presupposes that there was knowledge. Without knowledge, there can be no acceptance. At the time the goods in question were shipped and the freight paid, Klepper had no knowledge of clause 17. Had the bill of lading been delivered to Klepper at the time of shipment of the goods and payment of the freight, then, perhaps the court is right in saying that there was implied acceptance. Klepper would then have the opportunity to declare the actual value of the goods. Or had klepper signed the bill, he could be charged with knowledge of all the terms and conditions of the bill of lading. But as it was, when Klepper made the shipment and paid the freight, no bill of lading had been issued to him and Klepper assumed that the carrier would be liable for any loss to the goods which may be due to negligence. When Klepper arrived in Manila, he received the unsigned bill of lading one of the stipulations of which was clause 17. Can we say that under these circumstances, he agreed to all the stipulations of the bill of lading? Can we say that by presenting the bill of lading which he received only when he was in Manila, to the carrier to demand possession of the goods, he had impliedly accepted the bill of lading in its entirety?

The stand we take has support not only in Philippine cases but also in American cases. In the case of *Mirasol v. Robert Dollar Co.*[32] plaintiff was not charged with knowledge of the stipulation limiting the carrier's liability printed at the back of the bill of lading in fine prints. Therefore the extent of Mirasol's right of recovery was not limited to the amount stipulated. In the case of *Dychangco v. PAL*[33] the liability of the defendant was not

[32] *Supra*, note 3.
[33] 52 O.G. No. 4, p. 2028 (1955).

limited to ₱200 as printed on the plaintiff's ticket on the ground that the plaintiff *had never signed* the ticket nor had it been proved that the clause written in small prints in the ticket had been explained to her. The evidence also failed to show that the clause had been voluntarily accepted by her. The court stated the rule that where the shipper has not clearly and expressly agreed to the condition or clause impressed on the ticket, this clause does not limit the pecuniary liability of the defendant in case of the loss of goods, citing the cases of *Mirasol v. Robert Dollar Co.*[34] and *Ysmael v. Barretto.*[35] It even went further stating that under Art. 1744, one of the requisites to the validity of stipulations limiting the carrier's liability is that such stipulations must be *in writing, signed by the shipper or owner.* Although such condition is not a requisite under Art. 1750 the court was of the opinion that this same rigid criterion is required by Art. 1750. In *Ostroot v. NP. Railway Co.*[36] where plaintiff did not sign any receipt, bill of lading, or other contract with respect to the shipment or transportation of his goods, nor was any bill of lading delivered to him personally by the defendant railway company, the court allowed full recovery. It said: "Such contracts are exceptions to the common-law liability for the loss of goods and they should be carefully scrutinized by the courts and only enforced when it is made to appear that they are just and reasonable and were fairly entered into by the shipper, with full freedom of choice." In *O'malley v. Great Northern Railway Co.*[37] the stipulation limiting the carrier's liability was not held binding because of the fact that the contract in question was presented to him shortly before the departure of the train and which plaintiff *signed without reading or knowing its contents.* Here again, the court did not hold the plaintiff bound by the stipulation because it could not be said that he had fairly and expressly agreed to such stipulation.

Finally, the Supreme Court in invoking the case of *Mendoza v. PAL* [38] was of the opinion that the action being based on a contract of carriage, the bill of lading as evidence thereof is conclusive as to the terms and conditions of the contract. We think that the Mendoza case is not applicable to the case at bar, *firstly,* because that case was an action to recover special damages and not actual damages, and, *secondly,* in that case, the bill of lading was delivered to the shipper-consignee at the time the goods were placed on board the plane. Although parol evidence is inadmissible to vary the contract or explain contractual stipulations in a bill of lading, nevertheless,

[34] *Supra,* note 3.
[35] 51 Phil. 90 (1927).
[36] 127 NW 177 (1910).
[37] 90 NW 974 (1902).
[38] *Supra,* note 5.

"before the rule can be applied, it must appear that a bill of lading was intended by the parties to represent the contract between them, that all prior negotiations leading up to the issuance of the bill were made in contemplation of its execution; if it should appear that a bill of lading was not intended by the parties to be the contract of carriage, parol evidence is admissible to establish the real contract. . . . A bill of lading to have binding force must have been delivered to and accepted by a shipper, because, until a shipper assents to a bill, there is no meeting of the minds which is necessary to a binding contract; therefore, where it appears that a bill of lading was never delivered, parol evidence is admissible to show the terms of the contract of carriage." [39]

A thorough examination of the cases and the law will show that the rigid requirements must be complied with before the carrier's liability can be limited by stipulations to that effect. Before a shipper can be bound by such stipulation, it must be satisfactorily shown that the shipper expressly or impliedly agreed to such stipulation. We venture to say that the reasons behind this attitude of the courts, and the spirit animating the law, are the policy considerations involved in this particular kind of contract. Considering that contracts of adhesion, such as bills of lading, are agreements in which one party's participation is limited to mere adherence to a document drafted in advance and insisted upon by a usually powerful enterprise, courts must be cautious in protecting the rights of those who enter into such contracts so as to prevent abuses on the part of the party drawing up the contract. The inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, are factors to be taken into account by the courts. "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business." [40] If the customer had any real freedom of choice, if he had a reasonable and practical alternative and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of its employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair and of no concern to the public. But the condition of things is entirely different and especially so under the modified ar-

[39] 9 Am. Jur., Sec. 427, p. 682.
[40] New York Central Railroad v. Lockwood 21 L.Ed., 627, 640 (1873).

rangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations whose position in the body politic enables them to control it. They do in fact control it and impose such conditions upon travel and transportation as they see fit which the public is compelled to accept. These circumstances furnish an additional argument if any were needed to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of policy and morality.[41] These are the policy considerations which the court should have taken into consideration in reaching its conclusions. An unjustifiable disregard of these policy considerations would lay the doors wide open to evasion and abuse on the part of common carriers.

CONCLUSION

In view of all the foregoing, we conclude that it is doubtful whether the case of *American Pres. Lines v. Klepper* can be regarded as precedent regarding the binding effect of stipulations in a bill of lading limiting the common carrier's liability. We, however, agree with the Supreme Court that the Carriage of Goods by Sea Act has only suppletory effect to the Civil Code. The latter being of later enactment, it impliedly repealed all provisions of law inconsistent with it.[42] It is hoped that the judicial slips pointed out be not repeated should a similar case as the one under consideration be brought to our courts.

---

[41] Summerlin v. Seaboard Air Lines R. Co., 47 S 551 (1908).
[42] Art. 2270 of the Civil Code repeals all laws inconsistent with it.