

RAFAEL ZULUETA, PLAINTIFFS-APPELLEES, VS. PAN AMERICAN WORLD AIRWAYS, INC., DEFENDANT-APPELLANT*G.R. No. L-28589. January 08, 1973*

Ponente: CONCEPCION, C.J.

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Both parties in this case have moved for the reconsideration of the decision of this Court promulgated on February 29, 1972. Plaintiffs maintain that the decision appealed from should be affirmed in toto. The defendant, in turn, prays that the decision of this Court be "set aside x x x with or without a new trial, x x x and that the complaint be dismissed, with costs; or, in the alternative, that the amount of the award embodied therein be considerably reduced."

Subsequently to the filing of its motion for reconsideration, the defendant filed a "petition to annul proceedings and/or to order the dismissal of plaintiffs-appellees' complaint," upon the ground that "appellees' complaint actually seeks the recovery of only P5,502.85 as actual damages, because, for the purpose of determining the jurisdiction of the lower court, the unspecified sums representing items of alleged damages, may not be considered, under the settled doctrines of this Honorable Court," and 'the jurisdiction of courts of first instance when the complaint in the present case was filed on Sept. 30, 1965" was limited to cases "in which the demand, exclusive of interest, or the value of the property in controversy amounts to more than ten thousand pesos" and 'the mere fact that the complaint also prays for unspecified moral damages and attorney's fees, does not bring the action within the jurisdiction of the lower court."

We find no merit in this contention. To begin with, it is not true that 'the unspecified sums representing items or other alleged damages, may not be considered" — for the purpose of determining the jurisdiction of the court — "under the settled doctrines of this Honorable Court." In fact, not a single case has been cited in support of this allegation.

Secondly, it has been held that a claim for moral damages is one not susceptible of pecuniary estimation.[1] In fact, Article 2217 of the Civil Code of the Philippines explicitly provides that "(t)hough incapable of pecuniary computation, moral damages may be recovered if they are the proximate result of the defendant's wrongful act or omission." Hence, "(n)o proof of pecuniary loss is necessary" — pursuant to Article 2216 of the same Code — "in order that moral x x x damages maybe adjudicated." And "(t)he assessment of such damages x x x is left to the discretion of the court" — said article adds — "according to the circumstances of each case." Appellees' complaint is, therefore, within the original jurisdiction of courts of first instance, which includes "ail civil actions in which the subject of the litigation is not capable of pecuniary estimation." [2]

Thirdly, in its answer to plaintiffs' original and amended complaints, defendant had set up a counterclaim in the aggregate sum of P12,000, which is, also, within the original jurisdiction of said courts, thereby curing the alleged defect, if any, in plaintiffs' complaint. [3]

"We need not consider the jurisdictional controversy as to the amount the appellant sues to recover because the

counterclaim interposed establishes the jurisdiction of the District Court. *Merchants' Heat & Light Co. v. James B. Clow & Sons*, 204 U.S. 286, 27 S. Ct. 285, 51 L. Ed. 488; *O. J. Lewis Mercantile Co. v. Klepner*, 176 F. 343 (CCA. 2), certiorari denied 216 U.S. 620, 30 S. Ct. 575, 54 L. Ed. 641, x x x." [4]

"x x x courts have said that 'when the jurisdictional amount is in question, the tendering of a counterclaim in an amount which in itself, or added to the amount claimed in the petition, makes up a sum equal to the amount necessary to the jurisdiction of this court, jurisdiction is established, whatever may be the state of the plaintiffs complaint.1 *American Sheet & Tin Plate Co. v. Winzeler* (D.C) 227 F. 321, 324." [5]

Thus, in *Ago. v. Buslon*, [6] We held:

"x x x. Then, too, petitioner's counterclaim for P37,000.00 was, also, within the exclusive original jurisdiction of the latter courts, and there are ample precedents to the effect that 'although the original claim involves less than the jurisdictional amount, x x x jurisdiction can be sustained if the counterclaim (of the compulsory type)'—such as the one set up by petitioner herein, based upon the damages allegedly suffered by him in consequence of the filing of said complaint — 'exceeds the jurisdictional amount.' (Moore Federal Practice, 2nd ed. [1948], Vol. 3, p. 41; *Ginsburg vs. Pacific Mutual Life Ins. Co. of California*, 69 Fed. [2d] 97; *Home Life Ins. Co. vs. Sipp.*, 11 Fed. [2d] 474; *American Sheet & Tin Plate Co. vs. Winzeler* [D.C], 227 Fed. 321; 324; *Brix vs. People's Mutual Life Ins. Co.*, 41 P. 2d. 537, 2 Cal. 2d. 446; *Emery vs. Pacific Employees Ins. Co.*, 67 P. 2d. 1046, 8 Cal. 2d. 663)."

Needless to say, having not only failed to question the jurisdiction of the trial court — either in that court or in this Court, before the rendition of the latter's decision, and even subsequently thereto, by filing the aforementioned motion for reconsideration and seeking the reliefs therein prayed for — but, also, urged both courts to exercise jurisdiction over the merits of the case, defendant is now estopped from impugning said jurisdiction. [7]

Before taking up the specific questions raised in defendant's motion for reconsideration, it should be noted that the same is mainly predicated upon the premise that plaintiffs' version is inherently incredible, and that this Court should accept the theory of the defense to the effect that petitioner was off-loaded because of a bomb-scare allegedly arising from his delay in boarding the aircraft and subsequent refusal to open his bags for inspection. We need not repeat here the reasons given in Our decision for rejecting defendant's contention and not disturbing the findings of fact of His Honor, the Trial Judge, who had the decided advantage — denied to Us — of observing the behaviour of the witnesses in the course of the trial and found those of the plaintiffs worthy of credence, not the evidence for the defense.

It may not be amiss, however, to stress the fact that, in his written report, made in transit from Wake to Manila — or immediately after the occurrence and before the legal implications or consequences thereof could have been the object of mature deliberation, so that it could, in a way, be considered as part of the *res gestae* — Capt. Zentner stated that Zulueta had been off-loaded "due to drinking" and "belligerent attitude," thereby belying the story of the defense about said alleged bomb-scare, and confirming the view that said agent of the defendant had acted out of resentment because his ego had been hurt by Mr. Zulueta's adamant refusal to be bullied by him. Indeed, had there been an iota of truth in said story of the defense, Capt. Zentner would have caused every one of the passengers to be frisked or searched and the luggage of all of them examined — as it is done now — before resuming the flight from Wake Island. His failure to do so merely makes the artificial nature of defendant's version more manifest. Indeed, the fact that Mrs. Zulueta and Miss Zulueta were on board the plane shows beyond doubt that Mr. Zulueta could not possibly have intended to blow it up.

The defense tries to explain its failure to introduce any evidence to contradict the testimony of Mr. Zulueta as to why he had gone to the beach and what he did there, alleging that, in the very nature of things, nobody else could have witnessed it. Moreover, the defense insists, *inter alia*, that the testimony of Mr. Zulueta is inherently

incredible because he had no idea as to how many toilets the plane had; it could not have taken him an hour to relieve himself in the beach; there were eight (8) commodes at the terminal toilet for men; if he felt the need of relieving himself, he would have seen to it that the soldiers did not beat him to the terminal toilets; he did not tell anybody about the reason for going to the beach, until after the plane had taken off from Wake.

We find this pretense devoid of merit. Although Mr. Zulueta had look for a secluded place in the beach to relieve himself, beyond the view of others, defendant's airport manager, whom Mr. Zulueta informed about it, soon after the departure of the plane, could have forthwith checked the veracity of Mr. Zulueta's statement, by asking him to indicate the specific place where he had been in the beach and then proceeding thereto for purposes of verification.

Then, again, the passenger of a plane seldom knows how many toilets it has. As a general rule, his knowledge is limited to the toilets for the class — first class or tourist class — in which he is. Then, too it takes several minutes for the passengers of big aircrafts, like those flying from the U.S. to the Philippines, to deplane. Besides, the speed with which a given passenger may do so depends, largely, upon the location of his seat in relation to the exit door. He cannot go over the heads of those nearer than he thereto. Again, Mr. Zulueta may have stayed in the toilet terminal for some time, expecting one of the commodes therein to be vacated soon enough, before deciding to go elsewhere to look for a place suitable to his purpose. But he had had to walk, first, from the plane to the terminal building and, then, after vainly waiting therein for a while, cover a distance of about 400 yards therefrom to the beach, and seek there a place not visible by the people in the plane and in the terminal, inasmuch as the Terrain at Wake Island is flat. What is more, he must have had to take off part, at least, of his clothing, because, without the facilities of a toilet, he had to wash himself and, then, dry himself up before he could be properly attired and walk back the 400 yards that separated him from the terminal building and/or the plane. Considering, in addition to the foregoing, the fact that he was not feeling well, at that time, we are not prepared to hold that it could not have taken him around an hour to perform the acts narrated by him.

But, why — asks the defendant — did he not reveal the same before the plane took off? The record shows that, even before Mr. Zulueta had reached the ramp leading to the plane, Capt. Zentner was already remonstrating, at him in an intemperate and arrogant tone and attitude ("What do you think you are?"), thereby impelling Mr. Zulueta to answer back in the same vein. As a consequence, there immediately ensued an altercation in the course of which each apparently tried to show that he could not be cowed by the other. Then came the order of Capt. Zentner to off-load all of the Zuluetas, including Mrs. Zulueta and the minor Miss Zulueta, as well as their luggage, their overcoats and other effects handcarried by them; but, Mr. Zulueta requested that the ladies be allowed to continue the trip. Meanwhile, it had taken time to locate his four (4) pieces of luggage. As a matter of fact, only three (3) of them were found, and the fourth eventually remained in the plane. In short, the issue between Capt. Zentner and Mr. Zulueta had been limited to determining whether the latter would allow himself to be browbeaten by the former. In the heat of the altercation, nobody had inquired about the cause of Mr. Zulueta's delay in returning to the plane, apart from the fact that it was rather embarrassing for him to explain, in the presence and within the hearing of the passengers and the crew, then assembled around them, why he had gone to the beach and why it had taken him some time to answer there a call of nature, instead of doing so in the terminal building.

Defendant's motion for reconsideration assails: (1) the amount of damages awarded as excessive; (2) the propriety of accepting as credible plaintiffs' theory; (3) plaintiffs' right to recover either moral or exemplary damages; (4) plaintiffs' right to recover attorney's fees; and (5) the non-enforcement of the compromise agreement between the defendant and plaintiffs wife, Mrs. Zulueta. Upon the otherhand, plaintiffs' motion for reconsideration contests the decision of this Court reducing the amount of damages awarded by the trial court to approximately one-half thereof, upon the ground, not only that, contrary to the findings of this Court, in said decision, plaintiff had not

contributed to the aggravation of his altercation or incident with Capt. Zentner by reacting to his provocation with extreme belligerency, thereby allowing himself to be dragged down to the level on which said agent of the defendant had placed himself, but, also, because the purchasing power of our local currency is now much lower than when the trial court rendered its appealed decision, over five (5) years ago, on July 5, 1967, which is an undeniable and undisputed fact. Precisely, for this reason, defendant's characterization as exorbitant of the aggregate award of over P700:000 by way of damages, apart from attorney's fees in the sum of P75,000, is untenable. Indeed, said award is now barely equivalent to around 100,000 U.S. dollars.

In further support of its contention, defendant cites the damages awarded in previous cases to passengers of airlines,[8] as well as in several criminal cases, and some cases for libel and slander. None of these cases is, however, in point. Said cases against airlines referred to passengers who are merely constrained to take a tourist class accommodation, despite the fact that they had first class tickets, and that although, in one of such cases, there was proof that the airline involved had acted as it did to give preference to a "white" passenger, this motive was not disclosed until the trial in court. In the case at bar, plaintiff Rafael Zulueta was "off-loaded" at Wake Island, for having dared to retort to defendant's agent in a tone and manner matching, if not befitting his intemperate language and arrogant attitude. As a consequence, Capt. Zentner's attempt to humiliate Rafael Zulueta had boomeranged against him (Zentner), in the presence of the other passengers and the crew. It was, also, in their presence that defendant's agent had referred to the plaintiffs as "monkeys," a racial insult not made openly and publicly in the above-mentioned previous cases against airlines.

In other words, Mr. Zulueta was off-loaded, not to protect the safety of the aircraft and its passengers, but to retaliate and punish him for the embarrassment and loss of face thus suffered by defendant's agent. This vindictive motive is made more manifest by the note delivered to Mr. Zulueta by defendant's airport manager at Wake Island, Mr. Sitton, stating that the former's stay therein would be "for a minimum of one week," during which he would be charged \$13.30 per day. This reference to a "minimum of one week" revealed the intention to keep him there stranded that long, for no other plane, headed for Manila, was expected within said period of time, although Mr. Zulueta managed to board, days later, a plane that brought him to Hawaii, whence he flew back to the Philippines, via Japan.

Neither may criminal cases, nor the cases for libel and slander cited in the defendant's motion for reconsideration, be equated with the present case. Indeed, in ordinary criminal cases, the award for damages is, in actual practice, of purely academic value, for the convicts generally belong to the poorest class of society. There is, moreover, a fundamental difference between said cases and the one at bar. The Zuluetas had a contract of carriage with the defendant, as a common carrier, pursuant to which the latter was bounder a substantial monetary consideration paid by the former, not merely to transport them to Manila, but, also, to do so with "extraordinary diligence" or "utmost diligence." [9] The responsibility of the common carrier, under said contract, as regards the passenger's safety, is of such a nature, affecting as it does public interest, that it "cannot be dispensed with" or even "lessened by stipulation, by the posting of notices, by statements on tickets, or otherwise." [10] In the present case, the defendant did not only fail to comply with its obligation to transport Mr. Zulueta to Manila, but, also, acted in a manner calculated to humiliate him, to chastise him, to make him suffer, to cause to him the greatest possible inconvenience, by leaving him in a desolate island, in the expectation that he would be stranded there for a "minimum of one week" and, in addition thereto, charged therefor \$13.30 a day.

It is urged by the defendant that exemplary damages are not recoverable in quasi-delicts, pursuant to Article 2231 of our Civil Code, except when the defendant has acted with "gross negligence," and that there is no specific finding that it had so acted. It is obvious, however, that in off-loading plaintiff at Wake Island, under the circumstances heretofore adverted to, defendant's agents had acted with malice aforethought and evident bad faith.

If "gross negligence" warrants the award of exemplary damages, with more reason is its imposition justified when the act performed is deliberate, malicious and tainted with bad faith. Thus, in *Lopez v. PANAM*,^[11] We held:

"The rationale behind exemplary or corrective damages is, as the name implies, to provide an example or correction for public good. Defendant having breached its contracts in bad faith, the court, as stated earlier, may award exemplary damages in addition to moral damages (Article 2229, 2232, New Civil Code)."

Similarly, in *NWA v. Cuenca*,^[12] this Court declared that an award for exemplary damages was justified by the fact that the airline's "agent had acted in a wanton, reckless and oppressive manner" in compelling Cuenca, upon arrival at Okinawa, to transfer, over his objection, from the first class, where he was accommodated from Manila to Okinawa, to the tourist class, in his trip to Japan, "binder threat of otherwise leaving him in Okinawa," despite the fact that he had paid in full the first class fare and was issued in Manila a first class ticket.

Defendant cites *Rotea v. Halili*,^[13] in support of the proposition that a principal is not liable for exemplary damages owing to acts of his agent unless the former has participated in said acts or ratified the same. Said case involved, however, the subsidiary civil liability of an employer arising from criminal acts of his employee, and "exemplary damages x x x may be imposed when the crime was committed with one or more aggravating circumstances."^[14] Accordingly, the *Rotea* case is not in point, for the case at bar involves a breach of contract, as well as a quasi-delict.

Neither may the case of *Palisoc v. Brillantes*,^[15] invoked by the defendant, be equated with the case at bar. The *Palisoc* case dealt with the liability of school officials for damages arising from the death of a student (*Palisoc*) due to fist blows given by another student (*Daffon*), in the course of a quarrel between them, while in a laboratory room of the Manila Technical Institute. In an action for damages, the head thereof and the teacher in charge of said laboratory were held jointly and severally liable with the student who caused said death, for failure of the school to provide "adequate supervision over the activities of the students in the school premises," to protect them "from harm, whether at the hands of fellow students or other parties." Such liability was predicated upon Article 2180 of our Civil Code, the pertinent part of which reads:

"ART. 2180. The obligation imposed by Article 2176 is demandable not only for one's own act or omissions, but also for those of persons for whom one is responsible.

"x x x

x x x

x x x.

"Lastly, teachers or heads of establishments of arts and trades shall be liable for damages caused by their pupils and students or apprentices, so long as they remain in their custody. .

"x x x

x x x

x x x.

Obviously, the amount of damages awarded in the *Palisoc* case is not and cannot serve as the measure of the damages recoverable in the present case, the latter having been caused directly and intentionally by an employee

or agent of the defendant, whereas the student who killed the young Palisoc was in no wise an agent of the school. Moreover, upon her arrival in the Philippines, Mrs. Zulueta reported her husband's predicament to defendant's local manager and asked him to forthwith have him (Mr. Zulueta) brought to Manila, which defendant's aforementioned manager refused to do, thereby impliedly ratifying the off-loading of Mr. Zulueta at Wake Island.

It is next urged that, under the contract of carriage with the defendant Mr. Zulueta was bound to be present at the time scheduled for the departure of defendant's plane and that he had, consequently, violated said contract when he did not show up at such time. This argument might have had some weight had defendant's plane taken off before Mr. Zulueta had shown up. But the fact is that he was ready, willing and able to board the plane about two hours before it actually took off, and that he was deliberately and maliciously offloaded on account of his altercation with Capt. Zentner. It should also, be noted that, although Mr. Zulueta was delayed some 20 to 30 minutes, the arrival or departure of planes is often delayed for much longer periods of time. Followed to its logical conclusion, the argument adduced by the defense suggests that airlines should be held liable for damages due to the inconvenience and anxiety, aside from actual damages, suffered by many passengers either in their haste to arrive at the airport on scheduled time just to find that their plane will not take off until later, or by reason of the late arrival of the aircraft at its destination.

PANAM impugns the award of attorney's fees upon the ground that no penalty should be imposed upon the right to litigate; that, by law, it may be awarded only in exceptional cases; that the claim for attorney's fees has not been proven; and that said defendant was justified in resisting plaintiffs claim "because it was patently exorbitant."

Nothing, however, can be farther from the truth. Indeed, apart from plaintiff's claim for actual damages, the amount of which is not contested, plaintiffs did not ask any specific sum by way of exemplary and moral damages, as well as attorney's fees, and left the amount thereof to the "sound discretion" of the lower court. This, precisely, is the reason why PANAM, now, alleges — without justification — that the lower court had no jurisdiction over the subject matter of the present case.

Moreover, Article 2208 of our Civil Code expressly authorizes the award of attorney's fees "when exemplary damages are awarded," — as they are in this case — as well as "in any other case where the court deems it just and equitable that attorney's fees x x x be recovered," and We so deem it just and equitable in the present case, considering the "exceptional" circumstances obtaining therein, particularly the bad faith with which defendant's agent had acted, the place where and the conditions under which Rafael Zulueta was left at Wake Island, the absolute refusal of defendant's manager in Manila to take any step whatsoever to alleviate Mr. Zulueta's predicament at Wake and have him brought to Manila — which, under their contract of carriage, was defendant's obligation to discharge with "extraordinary" or "utmost" diligence — and, the "racial" factor that had, likewise, tainted the decision of defendant's agent, Capt. Zentner, to off-load him at Wake Island.

As regards the evidence necessary to justify the sum of P75,000 awarded as attorney's fees in this case, suffice it to say that the quantity and quality of the services rendered by plaintiffs' counsel appearing on record, apart from the nature of the case and the amount involved therein, as well as his prestige as one of the most distinguished members of the legal profession in the Philippines, of which judicial cognizance may be taken, amply justify said award, which is a little over 10% of the damages (P700,000) collectible by plaintiffs herein. Indeed, the attorney's fees in this case is proportionally much less than that adjudged in *Lopez v. PAN AM*,^[16] in which the judgment rendered for attorney's fees (P50,000) was almost 20% of the damages (P275,000) recovered by the plaintiffs therein.

The defense assails the last part of the decision sought to be reconsidered, in which — relying upon Article 172 of our Civil Code, which provides that "(t)he wife cannot bind the conjugal partnership without the husband's

consent, except in cases provided by law," and it is not claimed that this is one of such cases — We denied a motion, filed by Mrs. Zulueta, for the dismissal of this case, insofar as she is concerned — she having settled all her differences with the defendant, which appears to have paid her the sum of P50,000 therefor — "without prejudice to this sum being deducted from the award made in said decision." Defendant now alleges that this is tantamount to holding that said compromise agreement is both effective and ineffective.

This, of course, is not true. The payment is effective, insofar as it is deductible from the award, and, because it is due (or part of the amount due) from the defendant, with or without its compromise agreement with Mrs. Zulueta. What is ineffective is the compromise agreement, insofar as the conjugal partnership is concerned. Mrs. Zulueta's motion was for the dismissal of the case insofar as she was concerned, and the defense cited in support thereof Article 113 of said Code, pursuant to which "(t)he husband must be joined in all suits by or against the wife, except: x x x (2) If they have in fact been separated for at least one year." This provision, We held, however, refers to suits in which the wife is the principal or real party-in-interest, not to the case at bar, "in which the husband is the main party-in-interest, both as the person principally aggrieved and as administrator of the conjugal partnership x x x he having acted in this capacity in entering into the contract of carriage with PAN AM and paid the amount due to the latter, under the contract, with funds of the conjugal partnership," to which the amounts recoverable for breach of said contract, accordingly, belong. The damages suffered by Mrs. Zulueta were mainly an incident of the humiliation to which her husband had been subjected. The Court ordered that said sum of P50,000 paid by PANAM to Mrs. Zulueta be deducted from the aggregate award in favor of the plaintiffs herein for the simple reason that upon liquidation of the conjugal partnership, as provided by law, said amount would have to be reckoned with, either as part of her share in the partnership, or as part of the support which might have been or may be due to her as wife of Rafael Zulueta. It would surely be inane to sentence the defendant to pay the P700,000 due to the plaintiffs and to direct Mrs. Zulueta to return said P50,000 to the defendant.

In this connection, it is noteworthy that, for obvious reasons of public policy, she is not allowed by law to waive her share in the conjugal partnership, before the dissolution thereof.[17] She cannot even acquire any property by gratuitous title, without the husband's consent, except from her ascendants, descendants, parents-in-law, and collateral relatives within the fourth degree.[18]

It is true that the law favors and encourages the settlement of litigations by compromise agreement between the contending parties, but, it certainly does not favor a settlement with one of the spouses, both of whom are plaintiffs or defendants in a common cause, such as the defense of the rights of the conjugal partnership, when the effect, even if indirect, of the compromise is to jeopardize 'The solidarity of the family' — which the law[19] seeks to protect — by creating an additional cause for the misunderstanding that had arisen between such spouses during the litigation, and thus rendering more difficult a reconciliation between them.

It is urged that there is no proof as to the purpose of the trip of the plaintiffs, that neither is there any evidence that the money used to pay the plane tickets came from the conjugal funds and that the award to Mrs. Zulueta was for her personal suffering or injuries. There was, however, no individual or specific award in favor of Mrs. Zulueta or any of the plaintiffs. The award was made in their favor collectively. Again, in the absence of said proof, the presumption is that the purpose of the trip was for the common benefit of the plaintiffs and that the money had come from the conjugal funds, for, unless there is proof to the contrary, it is presumed "(t)hat things have happened according to the ordinary course of nature and the ordinary habits of life." [20] In fact, Manresa maintains[21] that they are deemed conjugal, when the source of the money used therefor is not established, even if the purchase had been made by the wife.[22] And this is the rule obtaining in the Philippines. Even property registered, under the Torrens system, in the name of one of the spouses, or in that of the wife only, if acquired during the marriage, is presumed to belong to the conjugal partnership, unless there is competent proof to the

contrary.[23]

PANAM maintains that the damages involved in the case at bar are not among those forming part of the conjugal partnership pursuant to Article 153 of the Civil Code, reading:

"ART. 153. The following are conjugal partnership property:

"(1) That which is acquired by onerous title during the marriage at the expense of the common fund, whether the acquisition be for the partnership, or for only one of the spouses;

"(2) That which is obtained by the industry, or work, or as salary of the spouses, or of either of them;

"(3) The fruits, rents or interests received or due during the marriage, coming from the common property or from the exclusive property of each spouse."

Considering that the damages in question have arisen from, inter alia, a breach of plaintiffs' contract of carriage with the defendant, for which plaintiffs paid their fare with funds presumably belonging to the conjugal partnership, We hold that said damages fall under paragraph (1) of said Article 153, the right thereto having been "acquired by onerous title during the marriage xxx." This conclusion is bolstered up by Article 148 of our Civil Code, according to which:

"ART. 148. The following shall be the exclusive property of each spouse:

"(1) That which is brought to the marriage as his or her own; "(2) That which each acquires, during the marriage, by lucrative title;

"(3) That which is acquired by right of redemption or by exchange with other property belonging to only one of the spouses;

"(4) That which is purchased with exclusive money of the wife or of the husband."

The damages involved in the case at bar do not come under any of these provisions or of the other provisions forming part of Chapter 3, Title VI, of Book I of the Civil Code, which chapter is entitled "Paraphernal Property." What is more, if "(t)hat which is acquired by right of redemption or by exchange with other property belonging to only one of the spouses," and "(t)hat which is purchased with exclusive money of the wife or of the husband,"[24] belong exclusively to such wife or husband, it follows necessarily that that which is acquired with money of the conjugal partnership belongs thereto or forms part thereof. The rulings in *Maramba v. Lozano*[25] and *Perez v. Lantin*,[26] cited in defendant's motion for reconsideration, are, in effect, adverse thereto. In both cases, it was merely held that the presumption under Article 160 of our Civil Code—to the effect that all property of the marriage belong to the conjugal partnership — does not apply unless it is shown that it was acquired during marriage. In the present case, the contract of carriage was concededly entered into, and the damages claimed by the plaintiffs were incurred, during marriage. Hence, the rights accruing from said contract, including those resulting from breach thereof by the defendant, are presumed to belong to the conjugal partnership of Mr. and Mrs. Zulueta. The fact that such breach of contract was coupled, also, with a quasi-delict constitutes an aggravating circumstance and can not possibly have the effect of depriving the conjugal partnership of such property rights.

Defendant insists that the use of conjugal funds to redeem property does not make the property redeemed conjugal if the right of redemption pertained to the wife. In the absence, however, of proof that such right of redemption pertains to the wife — and there is no proof that the contract of carriage with PANAM or the money paid therefor belongs to Mrs. Zulueta — the property involved, or the rights arising therefrom, must be presumed, therefore, to form part of the conjugal partnership.

It is true that in *Lilius v. Manila Railroad Co.*,^[27] it was held that the "patrimonial and moral damages" awarded to a young and beautiful woman by reason of a scar — in consequence of an injury resulting from an automobile accident — which disfigured her face and fractured her left leg, as well as caused a permanent deformity, are her paraphernal property. Defendant cites, also, in support of its contention the following passage from *Colin y Capitant*:

"No esta resuelta expresamente en la legislation española la cuestion de si las indemnizaciones debidas por accidentes del trabajo tienen la consideracion de gananciales o son bienes particulares de los conyuges.

"Inclinan a la solucion de que estas indemnizaciones deben ser consideradas como gananciales, el hecho de que la sociedad pierde la capacidad de trabajo con el accidente, que a ella le pertenece, puesto que de la sociedad son los frutos de ese trabajo; en cambio, la consideracion de que de igual manera que los bienes que sustituyen a los que cada conyuge lleva al matrimonio como propios tienen el caracter de propios, hace pensar que las indemnizaciones que vengan a suplir la capacidad de trabajo aportada por cada conyuge a la sociedad, deben ser juridicamente reputadas como bienes propios del conyuge que haya sufrido el accidente. Asi se llega a la misma solucion aportada por la jurisprudencia francesa." ^[28]

This opinion is, however, undecisive, to say the least. It should be noted that *Colin y Capitant* were commenting on the French Civil Code; that their comment referred to indemnities due in consequence of "accidentes del trabajo" resulting in physical injuries sustained by one of the spouses (which Mrs. Zulueta has not suffered); and that said commentators admit that the question whether or not said damages are paraphernal property or belong to the conjugal partnership is not settled under the Spanish law.^[29] Besides, the French law and jurisprudence — to which the comments of *Planiol and Ripert*, likewise, refer — are inopposite to the question under consideration, because they differ basically from the Spanish law in the treatment of the property relations between husband and wife. Indeed, our Civil Code, like the Spanish Civil Code, favors the system of conjugal partnership of gains. Accordingly, the former provides that "(i)n the absence of marriage settlements, or when the same are void, the system of relative community or conjugal partnership of gains x x x shall govern the property relations between" the spouses.^[30] Hence, "(a)ll property of the marriage is presumed to belong to the conjugal partnership, unless it be proved that it pertains exclusively to the husband or to the wife."^[31]

No similar rules are found in the French Civil Code. What is more, under the provisions thereof, the conjugal partnership exists only when so stipulated in the "capitulaciones matrimoniales" or by way of exception. In the language of *Manresa* —

"Prescindimos de los preceptos de los Codigos de Francia, Italia, Holanda, Portugal, Alemania y Suiza, porque solo excepcionalmente, o cuando asi se pacta en las capitulaciones, admiten el sistema de gananciales."^[32]

Again, *Colin y Capitant*, as well as the *Lilius* case, refer to damages recovered for physical injuries suffered by the wife. In the case at bar, the party mainly injured, although not physically, is the husband.

Accordingly, the other Philippine cases^[33] and those from Louisiana — whose civil law is based upon the French Civil Code — cited by the defendant, which similarly refer to moral damages due to physical injuries suffered by the wife, are, likewise, inapplicable to the case at bar.

We find, therefore, no plausible reason to disturb the views expressed in Our decision promulgated on February 29, 1972.

WHEREFORE, the motions for reconsideration above-referred to should be, as they are hereby denied.

Makalintal, Zaldivar, Fernando, Makasiar, Antonio, and Esguerra, JJ., concur.

Barredo, J, voted to modify the judgment by reducing the amount of the awarded damages and individualizing the

same, and now reserves the filing of a separate concurring and dissenting opinion in support of his vote.

Ruiz Castro, and Teehankee, JJ., took no part.

[1] Layda v. Court of Appeals, L-4487, Jan. 29, 1952; Yutuk v. Manila Electric Co., L-13016, May 31, 1961.

[2] Sec. 44(a), Rep. Act No. 296.

[3] See 38 Harvard Law Review, 744-751; 45 Yale Law Journal, 416.

[4] Ginsburg v. Pacific Mutual Life Ins. Co., 69 F. (2d) 97, 98.

[5] Home Life Ins. Co. v. Sipp., 11 F. (2d) 474, 476.

[6] L-19631, Jan. 31, 1964. Italics ours.

[7] People v. Casiano, L-15309, Feb. 16, 1961; People v. Roberts, L-15632, Feb. 28, 1961; People v. Fajardo, L-18257, June 30, 1966; Tijam v. Manila Surety & Fidelity Co., L-21450, April 15, 1968; Carillo v. Allied Workers' Association of the Philippines, L-23689, July 31, 1968; Rizal Light & Ice Co. v. Municipality of Morong, L-20993 and L-21221, Sept. 28, 1968; Tolentino v. Escalona, et al., L-26556, Jan. 24, 1969; Surigao Consolidated Mining Co., Inc. v. Philippine Land-Air-Sea Labor Union (PLASLU), L-22970, June 9, 1969; Rodriguez v. Court of Appeals, et al., L-29264, Aug. 29, 1969; Calderon, Jr. v. Public Service Commission and Milo, L-29228, April 30, 1971.

[8] Northwest Airlines, Inc. v. Cuenca, et al., L-22425, Aug. 31, 1965; Lopez, et al. v. Pan American World Airways, L-22415, March 30, 1966; Air France v. Carrascoso, et al., L-21438, Sept. 28, 1966.

[9] Articles 1733 and 1755, Civil Code of the Philippines.

[10] Article 1757, Civil Code of the Philippines.

[11] Supra.

[12] Supra.

[13] 109 Phil 495.

[14] Article 2230, New Civil Code.

[15] L-29025, October 4, 1971.

[16] Supra.

[17] Civil Code of the Philippines, Article 179.

[18] Ibid., Article 114.

[19] Id., Article 220.

[20] Paragraph (z) of Sec. 5, Rule 131 of the Rules of Court.

[21] *Codigo Civil Español*, by Manresa (1950 ed.), Vol. 9, pp. 548-549. "

[22] In support of this view, Manresa cites the resolutions of the Supreme Court of Spain of March 30 and May 6, 1904, as well as those of September 2, 1896, March 6, 1897, April 23, 1898, November 30, 1903 and September 20, 1907.

[23] Flores v. Flores, 48 Phil. 288; Guinguing v. Abuton, 48 Phil. 144; Bucoy v. Paulino, G.R. No. L-25775, April 26, 1968.

[24] Pursuant to Article 148.

[25] L-21533, June 29, 1967.

[26] L-22320, May 22, 1968.

[27] 62 Phil. 56, 64-65.

[28] Italics ours.

[29] Although Colin y Capitant actually said that the question has not been "expressly" settled under the Spanish law, they did not say that it has been "impliedly" settled and in what way.

[30] Art. 119, Civil Code of the Philippines.

[31] Art. 160, Civil Code of the Philippines, and Art. 1407 of the Civil Code of Spain.

[32] 9 Manresa, p. 552. Italics ours.

[33] Strebel v. Figueras, 96 Phil. 321; Araneta v. Arreglado, 104 Phil. 529; Soberano v. Manila Railroad Co., L-19407, Nov. 23, 1966.

CONCURRING AND DISSENTING

BARREDO, J.;

I agree with the majority's conclusion that the issue of jurisdiction rather belatedly raised by appellant Pan-Am (for short) cannot be sustained, but, upon a re-examination of the record in the light of the considerations so very ably presented and discussed in the motion for reconsideration, I find myself unable to join my brethren in overruling almost every point urged by distinguished counsel regarding the merits of appellees' claim, as if the subject motion were the most groundless ever filed with this Court. Indeed, I cannot recall any other instance wherein the Court found fault in practically all the arguments adduced in a motion, and yet, while it is true that an overall view of the whole case before Us dictates that judgment must be for appellees, still I am fully convinced that the correct foundation of appellant's liability to them cannot justify a wholly collective, instead of individual, award of damages, specially for what now appears to me, after deeper reflection, to be an excessive total amount of P780,502.85, of which only P5,502.85 represent actual and compensatory damages, whereas P500,000 are supposed to be for moral damages, P200,000 for exemplary damages and P75,000 for attorney's fees. Withal, I feel that the majority has failed to consider the corresponding legal import of the compromise agreement entered into by appellee, Mrs. Telly Albert Zulueta, with appellant Pan-Am in regard to her separate and individual cause of action in the premises, in consequence of which the portion of the original judgment of this Court pertaining to her should be eliminated.

At the outset, I must state that if it has taken me some time to prepare this separate opinion, it is because as I see them, the legal issues herein involved are unprecedented and rather complicated, and there is furthermore the important consideration that whatever final decision is rendered here will naturally have its corresponding telling effect on the legal relationship of all parties in air transportation contracts, which understandably cannot be at par in all respects with those between other common carriers and their passengers. Going over the motion for reconsideration, I felt all along that it deserves more than cavalier treatment, that there are points raised therein

that call for longer reflection and consideration than one would ordinarily give to a perfunctory rationalization, and that whatever time I took pondering on it would be rewarding to the interests of all concerned. Accordingly, when appellee's counsel filed on October 5, 1972 the motion seeking immediate payment of one-half of the amount adjudged in the decision now under review, which I feel cannot, in any event, be more than that to which appellees are totally entitled, I voiced the opinion that the said motion be granted, with corresponding qualifications, hoping that by such action of the Court the incontrovertible portion of appellees' claim would already be substantially satisfied and further damages to the appellees would thus be avoided, and in the meanwhile, each and every member of the Court would have more time to do justice, not so much to the obviously earnest effort and commendable ability of counsel displayed in the impressively prepared motion for reconsideration, as to the basic issues themselves presented for the Court's resolution, the implications of which are, to my mind, of invaluable interest to the air transportation business all over the world. I am not saying that the time I have had is unreasonably short, but I suppose anyone would understand that if that motion had been granted, I could have put my thoughts together in more logical order and could have expressed myself in better fashion.

I

On the issue of jurisdiction

As I have already stated earlier, appellant's attack on the jurisdiction of the lower court is untenable, but my reasons for this conclusion are quite different from those of the majority.

The majority classifies a claim for moral damages as "not capable of pecuniary estimation" within the meaning of Section 44(a) of the Judiciary Act. I do not see it that way. In its very essence, the concept of damages in our civil code, if not in the whole legal system, is that of pecuniary compensation for all kinds of injury. According to Senator Arturo Tolentino:

"Concept of Damages. — Damages may properly be defined as the pecuniary compensation, recompense, or satisfaction for an injury sustained, or as otherwise expressed, the pecuniary consequence which the law imposes for the breach of some duty or the violation of some right.

"Same; Distinguished from Injury.— Injury" is the wrongful act which causes loss or harm to another; while damages denotes the sum of money recoverable as amends for the wrongful act. The one is the legal wrong to be redressed; the other is the scale or measure of recovery."

To put it differently, all forms of reparation for any juridical breach are reduced to the payment thereof in money, the amount of which is either fixed in the pertinent legal provision or evaluated and determined by the court in the light of the attendant circumstances. The fact, however, that the court has to evaluate or determine the amount thereof does not make the "subject of the litigation" incapable of pecuniary estimation, for all that is meant by the law on damages is that in some instances, the ascertainment of the just amount of compensation must be made only after the court has weighed all the related factors and that it is not within the right of the aggrieved party to fix the same, albeit there are actually many instances in which plaintiffs have proposed their own estimates thereof in their complaints. On the other hand, what "is not capable of pecuniary estimation" under the above-mentioned provision of the law on jurisdiction is something the juridical nature of which is such that it can never be evaluated in terms of money, such as, for examples, the annulment of a marriage, the recognition or acknowledgment of a child, the abatement of a nuisance, and the like.

Now, what happens is that usually, actions like these include claims for damages that are prayed for as part of the reliefs demanded, and confusion is apt to arise as to which specifically is the subject of the litigation, the

annulment, the acknowledgment or the abatement, as the case may be, on the one hand, or, the damages or both, on the other. In other words, the error in this respect lies in the failure to distinguish the reliefs asked from the nature of the subject of the litigation itself, thereby ignoring that, in reality, all cases in which "the subject of the litigation is not capable of pecuniary estimation" come within the exclusive original jurisdiction of the Court of First Instance irrespective of the amount of damages claimed also by the aggrieved party as part of his reliefs, which can be even less than the amount fixed as the limit of the court's jurisdiction. Accordingly, in the present case, it is, in my opinion, indisputable that the damages claimed by appellees are susceptible of pecuniary estimation within the contemplation of Sec. 44(a) of the Judiciary Act, and since they amount to more than P10,000, the trial court had jurisdiction over the same.

Likewise, I cannot see my way clear to going along with the view supposedly sustained somewhere in American jurisprudence to the effect that the amount of a compulsory counterclaim "establishes" the jurisdiction of a court. I cannot imagine how the exercise of jurisdiction of a court can be held in conditional suspension, as it were, until the defendant files his counterclaim, which may not come at all. On the contrary, the clear and definite rule in this jurisdiction is exactly the other way around, which is, that it is the nature or amount of the subject of the plaintiff's action that is decisive as to which court is to exercise jurisdiction over his case, and if the defendant has any counterclaim, the latter, to be available within the same action, must be within the jurisdiction of the court in which plaintiff has properly filed his case, unless such counterclaim is compulsory, in which case, the same being essentially auxiliary or ancillary to the main controversy, considering that it arises out of or is necessarily connected with the transaction or occurrence that is the subject matter of the complaint, it is considered as absorbed, for jurisdictional purposes, by the latter,[1] albeit this exception does not obtain in inferior courts in view of the express provision of Section 5 of Rule 5 to the effect that "a counterclaim beyond the court's jurisdiction may only be pleaded by way of defense." [2]

As to permissive counterclaims, which are considered as separate actions in themselves, it is obvious that they must necessarily fall within the jurisdiction of the court in which the complaint has been filed. Section 8 of Rule 6 expressly so provides thus:

"SEC. 8. Counterclaim or cross-claim in the answer. — The answer may contain any counterclaim or cross-claim which a party may have at the time against the opposing party or a co-defendant, provided that the court has jurisdiction to entertain the claim and can, if the presence of third parties is essential for its adjudication, acquire jurisdiction of such parties." (Italics supplied.)

Incidentally, this is also the prevailing rule in the Federal Courts of the United States.[3] I may add at this point that the statement in *Ago v. Buslon*, [4] quoted in the majority opinion, which appears to be supported by American authorities holding the view at variance, in effect, with the foregoing rule, is actually obiter dictum, since, according to the decision itself, the parties had joined issues on the matter of title to the land in question, and also because the prayer of the complaint included that of "ordering the closing of the award" in controversy, hence the jurisdiction of the Court of First Instance over the case was beyond doubt, even without taking into account the amount of the defendant's counterclaim.

Disregarding already the fact that in their letter of demand, Exhibit K, appellees already were asking for P1,505,502.85, to my mind, what is truly decisive in the case at bar is that considering the allegations in appellees' complaint, and in the light of the very cases cited by appellant of awards of damages previously made by this Court to airplane passengers, whether for breach of contract or ex-quasi delicto, it is incontrovertible that appellant should have known from the very start that plaintiffs-appellees were demanding more than P10,000. The actual damages alone were placed by them at P5,502.55, and it is inconceivable that in specifically asking also formoral and exemplary damages and attorney's fees, they could have had in mind that these last three items

would amount to only less than P4,497.45. The best proof of this is that they did not file their action in a municipal or city court. The fact that they left the assessment of such damages to the sound discretion of the court is certainly no indication that their demand was for not more than P 10,000, for if that were their intention or their estimate, they would have surely manifested the same by filing their complaint in an inferior court, but since they filed their complaint in the Court of First Instance, it naturally follows that the amount obviously implied in said complaint could not be less than P10,000.

What is more, appellant must be presumed to have acted on that assumption, considering that it made a counterclaim for an amount within the jurisdiction of the Court of First Instance. Otherwise, it would have sought the dismissal of appellees' complaint on the ground of lack of jurisdiction. The fact however that appellant filed such counterclaim did not "establish" the jurisdiction of the trial court in the sense seemingly contemplated in the American cases cited in the majority opinion; rather, it only furnishes proof in the form of an implied admission of appellant that appellees' demand was well within the jurisdiction[^] province of said court. It is alone in this manner that the amount of appellant's counterclaim is relevant to the issue of jurisdiction now almost desperately being raised by it. And such being the case, it becomes unnecessary to consider the other ground invoked by the majority, namely, that appellant is guilty of laches or is in estoppel to question the jurisdiction of the trial court. Withal, as I have repeatedly demonstrated in various opinions I have already written in other cases, I have not yet been able to convince myself that such laches or estoppel is juridically possible or proper in regard to jurisdiction over the subject matter, notwithstanding the long list of cases cited by the majority upholding, erroneously, I maintain, various shades of alleged estoppel and laches that supposedly had the effect of validating, very often for reasons of convenience and practicality, actuations and actions of courts which otherwise, by clear mandate of the statute which this Court has held to be informed in public policy, do not come within the jurisdiction conferred upon them thereby.

II

As to the merits and amount
of the claims of appellees.

As in the matter of jurisdiction I have just discussed, I agree with the majority that even as to the merits of appellees' claim, in the final analysis, judgment should be for appellees, but I am for sustaining in some respects a number of the arguments adduced in the motion for reconsideration, particularly, those referring to the respective amounts of the damages each of the appellees are entitled to and what is equally important, the juridical foundations of appellant's liability to each of them. Besides, as I have already stated, it is my considered view that the compromise agreement between appellee, Mrs. Zulueta, and appellant should be given full force and effect.

Is there such a juridical concept
as a liability to a family?

If I understand correctly the thrust of the majority's discussion of appellant's liability to the appellees, the view being sustained is that appellant is liable for damages to the three Zuluetas, herein appellees, collectively, that is, as a family and not to each of them individually. Scrutinizing their discourse, however, I have come to the conclusion that while the novelty of the theory advocated is impressive, juridically, it is rather controversial, and in my humble opinion unacceptable.

To begin with, no precedent has been cited, and I feel none can be found, wherein any court has imposed liability in favor of a family as such, particularly, in a situation, like the one before Us now, wherein the appellees have not been shown to be the whole Zulueta family, but only three of its members. As far as I know, nowhere in the Civil Code is a family, to which it devotes special attention, as an institution, ever treated as a unit having rights

or obligation as such. In the celebrated case of *Lopez Pan American World Airways*, 16 SCRA 431, wherein the Court awarded the biggest amount of damages to airplane passengers before the case at bar, the plaintiffs were Vice-President Fernando Lopez and his wife, Mrs. Maria J. Lopez, and his daughter and son-in-law, Mrs. Alfredo Montelibano Jr. and Mr. Alfredo Montelibano Jr., all of whom were prejudiced by the same act on the same occasion by the same employees of defendant, still this Court awarded the damages separately and individually to each of them and not collectively to all of them as a family. As a matter of fact, in justifying the amount of the individual awards to Mrs. Lopez and Mr. Montelibano Jr. and Mrs. Montelibano Jr., this Court had to reason out at length thus:

"First, then, as to moral damages. As a proximate result of defendant's breach in bad faith of its contracts with plaintiffs, the latter suffered social humiliation, wounded feelings, serious anxiety and mental anguish. For plaintiffs were traveling with first class tickets issued by defendant and yet they were given only the tourist class. At stop-overs, they were expected to be among the first-class passengers by those awaiting to welcome them, only to be found among the tourist passengers. It may not be humiliating to travel as tourist passengers; it is humiliating to be compelled to travel as such, contrary to what is rightfully to be expected from the contractual undertaking.

"Senator Lopez was then Senate President Pro Tempore. International carriers like defendant know the prestige of such an office. For the Senate is not only the Upper Chamber of the Philippine Congress, but the nation's treaty-ratifying body. It may also be mentioned that in his aforesaid office Senator Lopez was in a position to preside in impeachment cases should the Senate sit as Impeachment Tribunal. And he was former Vice-President of the Philippines. Senator Lopez was going to the United States to attend a private business conference of the Binalbagan-Isabela Sugar Company; but his aforesaid rank and position were by no means left behind, and in fact he had a second engagement awaiting him in United States: a banquet tendered by Filipino friends in his honor as Senate President Pro Tempore (Tsa, pp. 14, 15, Nov. 25, 1960). For the moral damages sustained by him, therefore, an award of P100,000.00 is appropriate.

"Mrs. Maria J. Lopez, as wife of Senator Lopez, shared his prestige and therefore his humiliation. In addition she suffered physical discomfort during the 13-hour trip (5 hours from Tokyo to Honolulu and 8 hours from Honolulu to San Francisco). Although Senator Lopez stated that 'she was quite well' (Tsn., p. 22, Nov. 25, 1960) — he obviously meant relatively well, since the rest of his statement is that two months before, he was attacked by severe flu and lost 10 pounds of weight and that she was advised by Dr. Sison to go to the United States as soon as possible for medical check-up and relaxation (Ibid). In fact, Senator Lopez stated, as shown a few pages after in the transcript of his testimony, that Mrs. Lopez was sick when she left the Philippines:

'A. Well, my wife really felt very bad during the entire trip from Tokyo to San Francisco. In the first place she was sick when we left the Philippines, and then with that discomfort which she [experienced] or suffered during that evening, it was her worst experience.

I myself, who was not sick, could not sleep because of the discomfort.' (Tsn., pp. 27-28, Nov. 25, 1960).

"It is not hard to see that in her condition then a physical discomfort sustained for thirteen hours may well be considered a physical suffering. And even without regard to the noise and trepidation inside the plane — which defendant contends, upon the strength of expert testimony, to be practically the same in first class and tourist class — the fact that the seating spaces in the tourist class are quite narrower than in first class, there being six seats to a row in the former as against four to a row in the latter, and that in tourist class there is very little space for reclining in view of the closer distance between rows (Tsn., p. 24, Nov. 25, 1960), will suffice to show that the aforesaid passenger indeed experienced physical suffering during the trip. Added to this, of course, was the painful thought that she was deprived by defendant — after having paid for and expected the same — of the most suitable place for her, the first class, where evidently the best of everything would have been given her, the best

seat, service, food and treatment. Such difference in comfort between first class and tourist class is too obvious to be recounted, is in fact the reason for the former's existence, and is recognized by the airline in charging a higher fare for it and by the passengers in paying said higher rate. Accordingly, considering the totality of her suffering and humiliation, an award to Mrs. Maria J. Lopez of P50,000.00 for moral damages will be reasonable.

"Mr. and Mrs. Alfredo Montelibano, Jr., were travelling as immediate members of the family of Senator Lopez. They formed part of the Senator's party as shown also by the reservation cards of PAN-AM. As such they likewise shared his prestige and humiliation. Although defendant contends that a few weeks before the flight they had asked their reservations to be changed from first class to tourist class — which did not materialize due to alleged full booking in the tourist class — the same does not mean they suffered no shame in having to take tourist class during the flight. For by that time they had already been made to pay for first class seats and therefore to expect first class accommodations. As stated, it is one thing to take the tourist class by free choice; a far different thing to be compelled to take it notwithstanding having paid for first class seats. Plaintiffs-appellant now ask P37,500.00 each for the two but we note that in their motion for reconsideration filed in the court a quo, they were satisfied with P25,000.00 each for said persons. (Record on Appeal, p. 102). For their social humiliation, therefore, the award to them of P25,000.00 each is reasonable."

which individualization and discussion would have been unnecessary were there really such a rule as the liability-to-family theory or, the law, which the Supreme Court is to apply at all times, were that the damages awarded by it had the character of conjugal partnership property. Besides, it is implicit in the above holding regarding the sharing by Mrs. Lopez of the prestige of her husband, that the damages awarded to Vice-President Lopez were considered distinct and separate from those to his wife. Indeed, if appellant's liability is to the Zulueta family, assuming it was the family as such that was dishonored and humiliated by appellant's agents or employees, then Our judgment should have so stated instead of its being textually in favor of only three members thereof, the herein appellees.

It will probably be argued that in its true sense, the judgment of the Court is not really in favor of the Zulueta family as such but only of the three appellees jointly or together and called family only casually, but even such a pose cannot find support in law, whether appellant's liability to them be viewed as arising ex contract or ex quasi-delict or from any other provision of the Civil Code. The most that may be conceded, in this regard, is that in a sense, the damages suffered by the Zuluetas should be considered as having affected both of the spouses commonly, which community creates, as will be explained later, a distinct and different concept of damages in law from the damages allegedly suffered by their conjugal partnership as such and should, therefore, belong to the two of them share and share alike, without being governed by the laws related to conjugal partnership properties.

May the damages awarded
in this case be considered
conjugal property?

As I see it, the majority would base their refusal to give effect to Mrs. Zulueta's compromise agreement with appellant precisely on the predicate that the damages being awarded to appellees constitute part of the properties of the conjugal partnership of the Zulueta spouses. Frankly, and with due respect to the lengthy exposition of such theory in the majority opinion, I believe this is its weakest point. And the first obvious obstacle to this conceptualization is the fact that by their very terms, the judgments herein, both of this Court and of the trial court, are not in favor of the so-called conjugal partnership, represented by its manager, the husband, but of all "the (three) plaintiffs" namely, Mr. Zulueta, Mrs. Zulueta and Miss Zulueta. Indeed, how the damages suffered by the daughter, Miss Zulueta, personally and individually can be treated indistinctly as part of the conjugal partnership properties of her parents is beyond my comprehension. Even assuming that the majority's theory is

correct, I would still say that to put conceptual matters aright, and, incidentally, also for the protection of Miss Zulueta whose position might become problematical, in view of the strained relations-between Mr. and Mrs. Zulueta, who admittedly have been living separately for several years now, so much so that the wife has sought to settle her interests in this case individually by herself, it is necessary that Our award of damages should at least specify how much of it pertains to such conjugal partnership as such and how much to her, for, certainly, she is not a member thereof and neither can money belonging to her in her own right be mixed with the conjugal partnership properties without her or anybody knowing how much of it exactly is hers. I believe it is not proper under any legal reasoning to leave this matter of specifying how much of the judgment money is due her entirely at the disposal whether of Mr. Zulueta alone or of Mr. and Mrs. Zulueta jointly, or even to mere agreement among all three appellees, since Miss Zulueta, who is of age now (she was 19 years old when she testified in 1966) has distinct rights of her own in such award which neither her father nor her mother, much less the conjugal partnership, may legally deal with in their or its own right, specially because Mr. Zulueta went to court only as her guardian-ad-litem insofar as her interests are concerned. Moreover, unless the amount corresponding to her is fixed in the judgment, complications are bound to arise in relation to the obligations for which conjugal partnership properties are supposed to answer to creditors of the spouses, and personally, I do not want to be a party to the creation of such confusion which can eventually lead to law suits which it is Our policy and duty to forestall whenever possible by being more precise in Our decisions.

In the second place, I am convinced after mature deliberation that the damages herein involved cannot be juridically treated as conjugal property, having in mind the true concept and the basic elements of the conjugal partnership of gains as it is known and contemplated in our Civil Code.

How the question of conjugal property arose in this case.

The "family" or "conjugal" element was introduced into this case under the circumstances stated in Our decision as follows:

"On April 22, 1971, Mrs. Zulueta filed a motion alleging that she had, for more than two (2) years, been actually living separately from her husband, plaintiff Rafael Zulueta, and that she had decided to settle separately with PANAM and had reached a full and complete settlement of all her differences with said defendant, and praying, accordingly, that this case be dismissed insofar as she is concerned. Required to comment on said motion, PANAM expressed no objection thereto.

"Upon the other hand, plaintiff prayed that the motion be denied, upon the ground that the case at bar is one for damages for breach of a contract of carriage, owing to the off-loading of plaintiff Rafael Zulueta, the husband and administrator of the conjugal partnership, with the funds of which the PANAM had been paid under said contract; that the action was filed by the plaintiffs as a family and the lower court had awarded damages to them as such family; that, although PANAM had questioned the award of damages, it had not raised the question whether, the lower court should have specified what portion of the award should go to each plaintiff; that although Mr. and Mrs. Zulueta had, for sometime, been living separately, this has been without judicial approval; that Mrs. Zulueta may not, therefore, bind the conjugal partnership or settle this case separately; and that the sum given by PANAM to Mrs. Zulueta is believed to be P50,000, which is less than 3-1/2% of the award appealed from, thereby indicating the advisability of denying her motion to dismiss, for her own protection.

"Pursuant to a resolution, dated June 10, 1971, deferring action on said motion to dismiss until the case is considered on the merits, We now hold that the motion should be, as it is hereby denied. Indeed, '(t)he wife cannot bind the conjugal partnership without the husband's consent, except in cases provided by law,' (Article 172 of our Civil Code.) and it not been shown that this is one of the cases so provided. Article 113 of our Civil

Code, pursuant to which '(t)he husband must be. joined in all suits by or against the wife, except: xxx(2)If they have in fact been separated for at least one year x x x' — relied upon by PANAM — does not warrant the conclusion drawn therefrom by the latter. Obviously, the suit contemplated in subdivision (2) of said Article 113 is one in which the wife is the real party — either plaintiff or defendant — in interest, and, in which, without being so, the husband must be joined as a party, by reason only of his relation of affinity with her. Said provision cannot possibly apply to a case, like the one at bar, in which the husband is the main party in interest, both as the person principally aggrieved and as administrator of the conjugal partnership. Moreover, he having acted in this capacity in entering into the contract of carriage with PANAM and paid the amount due to the latter, under the contract, with funds of the conjugal partnership, the damages recoverable for breach of such contract belongs to said partnership."

Upon what circumstances does
the liability of appellant rest?

I believe that the best way to start an accurate analysis of the true foundation of the liability of appellant to appellees as well as of the correct nature of the damages herein involved, whether they constitute conjugal property or not, is by having a clear picture of just how the juridical relation between the parties herein arose and what actually happened between appellees and the employees of appellant that early morning of October 24, 1964 at the airport in Wake Island. As far as I can gather the facts from the record, and as reflected in Our decision and that of the trial court, what occurred was simply the following:

Appellees were on board appellant's Flight No. 841-23 from Honolulu on their way to Manila, having fully paid tickets therefor, although the evidence does not show from whom the money used to pay said tickets came. As the plane landed on the airport at about 4 o'clock that morning, the passengers were advised that they could disembark for a stopover of about 30 to 40 minutes. Mr. Zulueta admits having heard such advice. (Item 1, Exhibit J; pp. 6, 17 and 18, t.s.n., August 1, 1966.) When the flight was called for resumption about an hour later, only Mrs. Zulueta and Miss Zulueta were on board; Mr. Zulueta was nowhere within sight. According to Mrs. Zulueta, she wanted to go down from the plane to look for her husband, but she was not allowed to do this, and as she could not do anything about it, she just sat down, (p. 2, t.s.n., August 2, 1966) but it is uncontroverted that it was upon suggestion of the airport authorities, not hers, that the captain decided to wait even for half an hour more as he shut off the engines which he had already started after the doors of the plane had already been closed. The reason given for this decision was to avoid inconvenience to Mr. Zulueta, since there was not going to be any other flight thru Wake within a week. A first search which proved fruitless had already been undertaken around the premises of the terminal before the ramp was removed and the doors of the plane were closed; but just the same it was agreed to make a second one covering a larger area. It was after this manifestation of solicitous concern for Mr. Zulueta by appellant's employees that the incident in controversy took place.

During the second search, Mr. Zulueta was found walking towards the terminal. And what happened as he approached the group meeting him, which included his wife and daughter, was related on the witness stand by Mr. Zulueta himself thus:

"Q. When you saw your wife and daughter what happened?

A.

Then I started going towards the airplane. At the ramp, i do not know what they call it, as soon as they arrived there, there was a man who subsequently identified himself as Kenneth ' Sitton. He identified himself as the Airport Manager of. Wake Island. He did not ask me what happened, was I sick, he look at me and said, what in

the hell you think you are? Get on that plane. Then I said, what right have you to talk to me that way, I am a paying passenger. Do not treat me like this. And this started the altercation and then (sic) he said, do you know you held up the plane? And I answered this is not my fault, I was sick. Did it occur to you to ask me how I feel, then he said get on that plane.

Q. What happened?

A. We started discussing and (he) kept saying,

"You get on that plane" and then I said, I don't have to get on that plane." (Pp. 20-22, t.s.n., Aug. 1, 1966)

It was after this first encounter between Mr. Zulueta and Mr. Sitton[5] that the second incident took place. Let us hearken to Mr. Zulueta again:

"After a prolonged discussion, he said, give me your baggage tags and I gave him four baggage tickets or tags. I did not realize what he was up to until finally, I saw people coming down the airplane and police cars arrived and people were coming down the ramp.

I gave him the four baggage tags and a few minutes later, he brought three baggages and said, open them up. I said, to begin with, there is one baggage missing and that missing bag is my bag. Then I said, you cannot make me open these baggages unless your are United States customs authorities and when I arrive in the Philippines that can be opened by the Philippine Customs authorities but an Airport Manager cannot make me open my bags unless you do exactly the same thing to all the passengers. Open the bags of all the other passengers and I will open my bags.

Q. What did he say?

A.

He just kept on saying, Open your bag and (I) drew up my hand and said, if you want, you open yourself or give me a search warrant and I shall open this bag but give me a search warrant and then I asked, who is the Chief of Police, and he said, "I am the Chief of Police" then I said how can you be the Chief of Police and Airport Manager and then he started to talk about double compensation and by this time we were both quarreling and he was shouting and so with me. Then there was a man who came around and said "open the bag" and I said, show the Warrant of Arrest and do all the checking, and the discussion kept on going, and finally, I said, look, my fourth bag is missing and he said, "I don't give a damn." People at the time were surrounding us and staring at us and also the passengers. My wife and daughter all along had been made to sit on a railing and this man screaming and looking at my wife and daughter. Then he said, will you pull these three monkeys out of here? And I said, will you send my wife and daughter up to the plane which he did." (Pp. 22-25, t.s.n., August 1, 1966)

And the final denouement, according also to Mr. Zulueta, came thus:

"However, they have come down in their slippers and when they were allowed to return to the plane none of the defendant's personnel who had brought down the overcoats, shoes and handcarried items of my wife and

daughter ever offered to bring back these items to the plane, until I demanded that one of the defendant's should help my wife and daughter which he did. And then one man told me, because you refused to open your bag, "we shall hold you here in Wake Island." And when I asked, are we under arrest? And the man answered, no. And further stated your wife and daughter can continue their flight but you will not go to this flight and we will charge you \$13.30 a day. Then I said, Who are you to tell me these things, and he answered, I am the Manager. I said, put it in writing, then he left and in a few minutes he came back and handed me this letter, (witness referring to Exhibit D).

"Q. After handing this letter to you, what happened?

A.

I said, you have given me this, you can do as you please, especially you can keep us here. Let the plane take off, but I tell you this letter is my action. I think he realized what he was doing and he said if you open(ed) your baggages we will let you go, I said, no, but I am telling you these three bags are of my wife and daughter and one bag, my bag is in the plane and he said, "I don't give a damn." "You open the bags. I will leave the bags and proceed with the flight." Then I answered, nothing doing, you open the bags. Then he asked me if there is anybody in the State Department. Then I said who is under the United States Department, I want to meet him because I am the guest in the States Department in the year 1955 and I said you check with the Embassy of Manila with your Station Manager in Manila and ask who I am and he just kept saying, "Open your bag" and it was at this point another man approached me, a Captain of the ship with dark glasses and when I said I want to submit to the State Department they conferred and I said who is the United States Department I want to confront him and the Captain said you cannot do that. If you cannot open the bag you cannot go on the plane. I said you keep my bags but I want to go home. I realized then it was a case of "patigasan." And it was how to humiliate me. I told him that and I refused. Whatever I said I told them to let my wife and daughter go home. They were free to go home so they flew home and I stayed behind in Wake Island." (Pp. 25-29, t.s.n., August 1, 1966)

The letter referred to reads:

" 24 October 1964

Wake Island

"Mr. Zulueta:

Passenger abroad flight 84123

Honolulu/Manila

Sir:

We are forced to offload you from flight 84123 due to the fact that you have refused to open your checked baggage for Inspection as requested.

During your stay on Wake Island, which will be for a minimum of one weekt you will be charged S13.30 per day for each member of your party.

K. Sitton

Airport Manager, Wake Island

Pan American World Airways, Inc."

In the light of these facts, which I am taking as more or less established, I find myself unable to share the following conclusions of the majority:

"The records amply establish plaintiffs' right to recover both moral and exemplary damages. Indeed, the rude and rough reception plaintiff received at the hands of Sitton or Captain Zentner when the latter met him at the ramp ("what in the hell do you think you are? Get on that plane"); the menacing attitude of Zentner or Sitton and the supercilious manner in which he had asked plaintiff to open his bags ("open your bag," and when told that a fourth bag was missing, "I don't give a damn"); the abusive language and highly scornful reference to plaintiffs as monkeys by one of PANAM's employees (who turning to Mrs. Zulueta and Miss Zulueta remarked, "will you pull these three monkeys out of here?" the unfriendly attitude, the ugly stares and unkind remarks to which plaintiffs were subjected, and their being cordoned by men in uniform as if they were criminals, while plaintiff was arguing with Sitton; the airline officials' refusal to allow plaintiff to board the plane on the pretext that he was hiding a bomb in his luggage and their arbitrary and high-handed decision to leave him in Wake; Mrs. Zulueta's having suffered a nervous breakdown for which she was hospitalized as a result of the embarrassment, insults and humiliations to which plaintiffs were exposed by the conduct of PANAM's employees; Miss Zulueta's having suffered shame, humiliation and embarrassment for the treatment received by her parents at the airport (T.s.n., pp. 72-79.) — all these justify an award for moral damages resulting from mental anguish, serious anxiety, wounded feelings, moral shock, and social humiliation thereby suffered by plaintiffs." (Pp. 17-18, Decision)

"x x x. In the case at bar, plaintiff Rafael Zulueta was "off-loaded" at Wake Island, for having dared to retort to defendant's agent in a tone and manner matching, if not befitting his intemperate language and arrogant attitude. As a consequence, Capt. Zentner's attempt to humiliate Rafael Zulueta had boomeranged against him (Zentner), in the presence of the other passengers and the crew. It was, also, in their presence that defendant's agent had referred to the plaintiffs as "monkeys," a racial insult not made openly and publicly in the above-mentioned previous cases against airlines.

"In other words, Mr. Zulueta was offloaded, not to protect the safety of the aircraft and its passengers, but to retaliate and punish him for the embarrassment and loss of face thus suffered by defendant's agent. This vindictive motive is made more manifest by the note delivered to Mr. Zulueta by defendant's airport manager at Wake Island, Mr. Sitton, stating that the former's stay therein would be "for a minimum of one week," during which he would be charged \$13.30 per day. This reference to a "minimum of one week" revealed the intention to keep him there stranded that long, for no other plane, headed for Manila, was expected within said period of time, although Mr. Zulueta managed to board, days later, a plane that brought him to Hawaii, whence he flew back to the Philippines, via Japan." (Pp. 6-7, Resolution)

nor with those I have already quoted earlier on pages 13 to 15 of this opinion or the following:

"The defense assails the last part of the decision sought to be reconsidered, in which — relying upon Article 172 of our Civil Code, which provides that "(t)he wjfe cannot bind the conjugal partnership without the husband's consent, except in cases provided by law,' and it is not claimed that this is one of such cases — We denied a motion, filed by Mrs. Zulueta, forthe dismissal of this case, insofar as she is concerned — she having settled all her differences with the defendant, which appears to have paid her the sum of P50,000 therefor — "without prejudice to this sum being deducted from the award made in said decision.' Defendant now alleges that this is tantamount to holding that said compromise agreement is both effective and ineffective.

"This, of course, is not true. The payment is effective, insofar as it is deductible from the award, and, because it is due (or part of the amount due) from the defendant, with or without its compromise agreement with Mrs. Zulueta. What is ineffective is the compromise agreement, insofar as the conjugal partnership is concerned. Mrs. Zulueta's motion was for the dismissal of the case insofar as she was concerned, and the defense cited in support thereof Article 113 of said Code, pursuant to which '(t)he husband must be joined in all suits by or against the wife, except: xxx (2) If they have in fact been separated for at least one year.' This provision, We

held, however, refers to suits in which the wife is the principal or real party in interest, not to the case at bar, 'in which the husband is the main party in interest, both as the person principally aggrieved and as administrator of the conjugal partnership xxxhe having acted in this capacity in entering into the contract of carriage with PANAM and paid the amount due to the latter, under the contract, with funds of the conjugal partnership,' to which the amounts recoverable for breach of said contract, accordingly, belong. The damages suffered by Mrs. Zulueta were mainly an incident of the humiliation to which her husband had been subjected. The Court ordered that said sum of P50,000 paid by PANAM to Mrs. Zulueta be deducted from the aggregate award in favor of the plaintiffs herein for the simple reason that upon liquidation of the conjugal partnership, as provided by law, said amount would have to be reckoned with, either as part of her share in the partnership, or as part of the support which might have been or may be due to her as wife of Rafael Zulueta. It would surely be inane to sentence the defendant to pay the P700,000 due to the plaintiffs and to direct Mrs. Zulueta to return said P50,000 to the defendant.

"In this connection, it is noteworthy that, for obvious reasons of public policy, she is not allowed by law to waive her share in the conjugal partnership, before the dissolution thereof. (Civil Code of the Philippines, Article 179.) She cannot even acquire any property by gratuitous title, without the husband's consent, except from her ascendants, descendants, parents-in-law, and collateral relatives within the fourth degree. (Ibid, Article 114)

"It is true that the law favors and encourages the settlement of litigations by compromise agreement between the contending parties, but; it certainly does not favor a settlement with one of the spouses, both of whom are plaintiffs or defendants in a common cause, such as the defense of the rights of the conjugal partnership, when the effect, even if indirect, of the compromise is to jeopardize 'the solidarity of the family' — which the law (Id, Article 220) seeks to protect — by creating an additional cause for the misunderstanding that had arisen between such spouses during the litigation, and thus rendering more difficult a reconciliation between them.

"It is urged that there is no proof as to the purpose of the trip of the plaintiffs, that neither is there any evidence that the money used to pay the plane tickets came from the conjugal funds and that the award to Mrs. Zulueta was for her personal suffering or injuries. There was, however, no individual or specific award in favor of Mrs. Zulueta or any of the plaintiffs. The award was made in their favor collectively. Again, in the absence of said proof, the presumption is that the purpose of the trip was for the common benefit of the plaintiffs and that the money had come from the conjugal funds, for, unless there is proof to the contrary, it is presumed '(t)hat things have happened according to the ordinary course of nature and the ordinary habits of life.' (Paragraph (z) of Sec. 5, Rule 131 of the Rules of Court.)

"In fact, Manresa maintains (Codigo Civil Español, by Manresa 1950 ed., Vol. 9, pp. 548-549) that they are deemed conjugal, when the source of the money used therefor is not established, even if the purchase had been made by the wife. (In support of this view, Manresa cites the resolutions of the Supreme Court of Spain of March 30 and May 6, 1904, as well as those of September 2, 1896, March 6, 1897, April 23, 1898, November 30, 1903 and September 20, 1907). And this is the rule obtaining in the Philippines. Even property registered, under the Torrens system, in the name of one of the spouses, or in that of the wife only, if acquired during the marriage, is presumed to belong to the conjugal partnership, unless there is competent proof to the contrary. (Flores v. Flores, 48 Phil. 288; Guinguing v. Abuton, 48 Phil. 144; Bucoy v. Paulino, G.R. No. L-25775, April 26, 1968).

"PANAM maintains that the damages involved in the case at bar are not among those forming part of the conjugal partnership pursuant to Article 153 of the Civil Code, reading:

"ART. 153. The following are conjugal partnership property;

"(1) That which is acquired by onerous title during the marriage at the expense of the common fund, whether the acquisition be for the partnership, or for only one of the spouses;

"(2) That which is obtained by the industry, or work, or as salary of the spouses, or of either of them;

"(3) The fruits, rents or interests received or due during the marriage, coming from the common property or from the exclusive property of each spouse."

"Considering that the damages in question have arisen from, inter alia, a breach of plaintiffs' contract of carriage with the defendant, for which plaintiffs paid their fare with funds presumably belonging to the conjugal partnership, We hold that said damages fall under paragraph (1) of said Article 153, the right thereto having been 'acquired by onerous title during the marriage x x x.' This conclusion is bolstered up by Article 148 of our Civil Code, according to which:

"ART. 148. The following shall be the exclusive property of each spouse.

"(1) That which is brought to the marriage as his or her own;

"(2) That which each acquires, during the marriage, by lucrative title;

"(3) That which is acquired by right of redemption or by exchange with other property belonging to only one of the spouses;

"(4) That which is purchased with exclusive money of the wife or of the husband."

"The damages involved in the case at bar do not come under any of these provisions or of the other provisions forming part of Chapter 3, Title VI, of Book I of the Civil Code, which chapter is entitled 'Paraphernal Property.' What is more, - if '(t)hat which is acquired by right of redemption or by exchange with other property belonging to only one of the spouses,' and ' (t)hat which is purchased with exclusive money of the wife or of the husband,' (Pursuant to Article 148) belong exclusively to such wife or husband, it follows necessarily that that which is acquired with money of the conjugal partnership belongs thereto or forms part thereof. The rulings in *Maramba v. Lozano* (L-21533, June 29, 1967) and *Perez v. Lantin*, (L-22320, May 22, 1968) cited in defendant's motion for reconsideration, are, in effect, adverse thereto. In both cases, it was merely held that the presumption under Article 160 of our Civil Code — to the effect that all property of the marriage belong to the conjugal partnership — does not apply unless it is shown that it was acquired during marriage. In the present case, the contract of carriage was concededly entered into, and the damages claimed by the plaintiffs were incurred, during marriage. Hence, the rights accruing from said contract, including those resulting from breach thereof by the defendant, are presumed to belong to the conjugal partnership of Mr. and Mrs. Zulueta. The fact that such breach of contract was coupled, also, with a quasi-delict constitutes an aggravating circumstance and can not possibly have the effect of depriving the conjugal partnership of such property rights." (Pp. 10-13, Resolution)

In brief, the majority hold in these portions of the decision and the denial resolution that (a) the real cause of the off-loading of Mr. Zulueta was "to retaliate and punish him for the embarrassment and loss of face thus suffered by defendant's agent" and (b) the damages in question "fall under paragraph (1) of said Article 153, the right thereto having been 'acquired by onerous title during the marriage x x x.'", hence, they form part of the conjugal partnership properties of the Zulueta spouses. After a review of the whole record and further reflection on the legal issues involved, I do not find any reasonable alternative for me than to disagree.

The real cause of the offloading
was the refusal of Mr. Zulueta
to accede to the request or order
for him to open his bags coupled
with his irrational and belligerent
conduct — not retaliation.

To be sure, it cannot be denied that the decision to off-load Mr. Zulueta was deliberate on the part of appellant's agents, Mr. Sitton and/or Captain Zentner. It can even be said that in a sense, it was not entirely proper or wholly justified, but to accept Mr. Zulueta's testimony that "it was a case of patigasan" and it was how to humiliate me" (p. 28, ts.n., August 1, 1966) and to consider that said decision was an act of retaliation or punishment for the "extreme belligerence" and the daring of Mr. Zulueta to answer back and to categorically refuse and even challenge Mr. Sitton or Captain Zentner to open his bags without a search warrant, is certainly something else. I have gone over the whole evidence carefully, reading the testimonies of the material witnesses and the pertinent exhibits as many times as necessary to avoid missing relevant points, and I feel fully justified in saying that the majority's conclusion falls short of being fair and well-based. I am afraid substantial un rebutted relevant evidences have been overlooked, unwittingly I am sure, and that Mr. Zulueta's testimony that he and his companions were referred to as "three monkeys" has somehow aroused a discernible feeling of sympathy for them for obvious nationalistic or racial reasons, despite the utter dearth of evidence that the term was used precisely because appellees are Filipinos or of brown complexion.[6] Withal, one can hardly miss noting the seeming inconsistency in said opinions, namely: whereas it is contended, on the one hand, that by his adamant attitude, Mr. Zulueta had "exposed" Mr. Sitton and/or Captain Zeniner to "ridicule before (the) passengers and employees" at the airport at the time, on the other, these same agents of appellant are being faulted for having been the ones who subjected appellees to "embarrassment, insult and humiliation to which plaintiffs were exposed by (said) conduct of PANAM's employees."; No wonder, one has only to examine the attendant circumstances more closely and follow their development thru the various stages of the whole incident, of which there are mainly three, namely, first, when Mr. Zulueta was found, second, when he was being requested or ordered to open his bags, and third, when he was off-loaded, to perceive the flaws in the premises and conclusions of the majority.

The expressions uttered by
Mr. Sitton during the heated
altercation immediately after
Mr. Zulueta was found are not
actionable.

Truth to tell and disregarding the denial by appellant's agents of the impropriety of their language, the exchange of words between Mr. Zulueta and Mr. Sitton when they met after the former was found, if heated, was but natural under the circumstances and could, normally, be entirely passed by, having in mind the respective points of view from which they were uttered. Mr. Zulueta's unexpected and unexplained disappearance at flight time was delaying the resumption of the plane's scheduled trip to Manila, and I dare say that anybody in the airport manager's shoes in such a situation could not have been disposed to be graciously courteous and cordial. All of the members of the Court have experienced traveling at one time or another, and I am sure all of us will frankly admit that even as passengers, we feel irritated and inconvenienced when the flight we are to take suffers considerable delay, particularly when we know that the cause thereof is because a possibly inconsiderate passenger is taking his own sweet lime in accommodating himself. Such being the case, how can we assume or require that the airport manager or the pilot, upon whom the responsibility for any unpunctuality is bound to be at least partly pinned by those who might be damaged thereby, should be rigorously courteous and complacent in inquiring from the party concerned as to his whereabouts and the reasons that caused his failure to be on hand at boarding time?

In this particular case, what, after all, did Mr. Sitton tell Mr. Zulueta? According to Item 8 in the memorandum (Exhibit I) allegedly prepared by Mr. Zulueta shortly after the event, while he was still in Wake Island waiting for the next flight, "Arriving at ramp was met by PAA Mgr. (Sitton) who offensively demanded to know where I had been, etc." And in his testimony in court, he said: "... (T)here was a man who subsequently identified himself as

Kenneth Sitton. He identified himself as the Airport Manager of Wake Island. He did not ask me what happened, was I sick, he looked at me and said, what in the hell do you think you are? Get on that plane. Then I said, what right have you to talk to me that way, I am a paying passenger. Do not treat me that way, I am a paying passenger. Do not treat me this. And this started the altercation, and then he said, do you know you held up the plane?" (t.s.n. supra.)

I grant that in a sense these words of Mr. Sitton are rather unpleasant to one's ears, particularly to somebody in the place of Mr. Zulueta who claimed that he was sick and seemed to be by nature scrupulously assertive of what he believes to be his rights. But if it is considered that they were uttered more in exasperation and disgust because everybody else was being inconvenienced and annoyed by the delay caused by Mr. Zulueta's unexplained disappearance, rather than with the intent to malign or defame the person addressed, they could be understandingly overlooked, taking into account the circumstances just mentioned. And to make capital of them for the purpose of recovering supposed damages to feeling and reputation is, in my considered view, to expand the concept of damages in law beyond the natural bounds of human nature and experience, which I cannot conceive could ever be juridically assumed.

Moreover, We should not overlook the fact that Mr. Zulueta was duly informed; of the length of the stopover at Wake Island moments before he disembarked. This he admits in his testimony as well as in his memorandum, Exhibit J. Under the law, if riot the regulations, and our own common experience, appellant would have been perfectly within its- rights had its plane taken off without him, his absence at the airport terminal at boarding time being unannounced and unexplained even by his wife and daughter who were already on board. As a matter of fact, Mrs. Zulueta, herself a very intelligent and knowledgeable person in her own right, must have been aware of this, for the evidence on record does not show that she made any real protest when it was first announced that the plane would leave without her husband. Her own testimony in this respect runs thus:

"A. After we arrived at Wake Island, a stewardess approached me and pointed to the seat beside me. Then she asked me who was the passenger missing and I told her it was my husband; that (sic) she asked me where he was and I said to her that he went to the terminal building and that he was probably on his way up. Then she left me. Shortly thereafter, I heard an announcement that we were going to resume our flight. I stood up and informed them that my husband was still down the plane, so I asked that I go down the plane to look for my husband, but they refused, so there was nothing I could do about it but to sit down again." (p. 2, t.s.n., August 2, 1966)

The Code of Commerce is made applicable to common carriers by Article 1766 of the Civil Code of the Philippines and particularly to airlines, if by analogy, per *Mendoza vs. Philippine Air Lines, Inc.*, 90 Phil. 836. Articles 694 and 701 of this Code provide:

"Should the passenger not arrive on board at the time fixed, or should he leave the vessel without permission from the captain, when the latter is ready to leave the port, the captain may continue the voyage and demand the full passage price." (Article 694)

"The convenience or the interest of the passengers shall not obligate nor empower the captain to stand in shore or enter places which may take the vessel out of her course, nor to remain in the ports he must or is under the necessity of touching for a period longer than that required by the needs of navigation." (Article 701)

and the following commentary cited in PANAM's motion for reconsideration is in point:

"Hay ruptura de contrato entre capitán o armador y pasajero no llegare a bordo a la hora prefijada." (De Montello, *Código de Comercio Español*, 2nd Ed., Tomo IV, Vol. 2, p. 469.)

Accordingly, Mr. Zulueta had no reason to complain that he did not hear that he was being paged[7] and that the

attitude displayed by appellant's agents was less than considerate or exemplary. These agents had a duty to the other passengers also, that is, to be on time, not to speak of their continuing obligation to maintain a punctual and uninterrupted schedule for the benefit and convenience of the traveling public, and it was expecting too much from them to be kindly to and to sound unperturbed by a passenger whose unexplained disappearance had already delayed the flight for more or less half an hour. From the viewpoint of the regulations and the law, Mr. Zulueta had a corresponding duty to be on hand or within calling distance all the time, or to, at least, advise anyone concerned, even only his own wife, if he had any reason to fear he might not be ready by the time the flight would be called. With all his proven intellectual and social qualifications, Mr. Zulueta should be assumed to be aware of such obligation, and frankly, I do not feel inclined to accept Mr. Zulueta should be assumed to be aware of such obligation, and frankly, I do not feel inclined to accept Mr. Zulueta's explanation that he was too sick or too uncomfortably situated to tell anyone where he could be found. Neither can I follow the one-sided suggestion of the majority that Mr. Zulueta's not being on hand at boarding time, without letting anyone know, not even his wife or daughter, of possibility of being delayed, is excusable because; "It should, also, be noted that, although Mr. Zulueta's not being on hand at boarding time, without letting anyone know, not even his wife or daughter, of the possibility of his being delayed, is excusable because: "It should, also, be noted that, although Mr. Zulueta was delayed some 20 to 30 minutes, the arrival or departure of planes is often delayed for much longer periods of time. Followed to its logical conclusion, longer periods on time. Followed to its logical conclusion, the argument adduced by the defense suggests that airlines should be held liable for damages due to the inconvenience and anxiety, aside from actual damages, suffered by many passengers either in their haste to arrive at the airport on scheduled time just to find that their plane will not take off until later, or by reason of the late arrival of the aircraft at its destination." Much less can I find justification for the statement in the decision (p.16) that "Besides, PANAM's own witness and employee, Wayne Pendleton, testified that the plane could not take off at 4:30, as scheduled, because "we were still waiting for two (2) local passengers,"" seemingly intended to minimize the legal significance of Mr. Zulueta's non-availability at boarding time. The plain truth is that Mr. Zulueta was found only after about 20 minutes after the doors of the plane had already been closed and two engines had actually been started, and the only reason and why the captain desisted from proceeding was because of the suggestion of either Mr. Pendleton or Mr. Sitton that another search be conducted inasmuch as there would be no plane in Wake destined for Manila within the week - truly a liberal concession to Mr. Zulueta.

Of course, the choice of expressions by appellant's agents (whoever it was who exchanged words with Mr. Zulueta) was not excellent, but viewed objectively in the context of the environmental circumstances prevailing, I refuse to believe they are actionable. "What in (the) hell do you think you are?" is not an uncommon expression of molestation and annoyance. It is hardly, if ever, meant or considered as an offensive remark. As movant pointedly posits, it was once held by this Court that the utterance of the words "Agustin, putang ina mo" (Your mother is a whore"), considered in the light of the circumstances under which it was made, is not defamatory. The Court ruled then: "This is a common enough expression in the dialect that is often employed, not really to slander but rather to express anger or displeasure. It is seldom, if ever, taken in its literal sense by the hearer, that is, as a reflection on the virtues of a mother." (Reyes v. People, 27 SCRA 266). I am sure no one can say that the expression "Your mother is a whore" is in any sense less offensive than LCWhat the hell are you?."

From this viewpoint I am adopting, it is practically immaterial what in truth was Mr. Zulueta's reason for perambulating near the beach. Perhaps, it is true that, as he claimed, he had to answer a call of nature such as that he has described,[8] but how were the PANAM. people to know of his predicament, when he just disappeared in the darkness without advising anyone, not even his wife about his purpose? As far as they were concerned, he had considerably delayed the flight and was inconveniencing and giving cause for worry to all the other passengers. If they were rather excited and bothered and expressed such feelings in indecorous terms, could they be wholly

blamed for their attitude, and should their employer be responsible in damages for their somewhat faulty choice of words, considering the situation in which they were?

The request or order to open the bags was not unjustified.

Coming now the circumstances surrounding the request or order to Mr. Zulueta to open his bags, the majority holds that there was "manifest — lack of authority of the aforementioned representative of PANAM to issue (the command (to open the bags without a search warrant))." Again, I disagree.

There was a lot of rumpus and a heated altercation as to whether or not Mr. Zulueta should open his bags.[9] In the words of Mr. Zulueta, "I realized it was a case of 'patigasan.'" Of course, he concluded that it was "to humiliate me," but, calculated as his testimony must have been to give muscle and bone to his exaggerated claim for damages, such conclusion must be taken as more or less subjective, entirely oblivious as it is of the situation in which the PANAM personnel found themselves because of their concern about the feeling of the other passengers on account of his (Mr. Zulueta's) unusual disappearance and delay, which even at this point was still to be explained.[10]

The majority would create doubt as to the existence of the "bomb scare," so to speak, by emphasizing that the name of the "man from the State Department" who expressed concern about such a possibility was not revealed. My own impression is that such identity was of no material consequence. After all, Mr. Zulueta himself impliedly, at least, admitted that such a man had been mentioned to him. What is of real importance in this connection is that the "man from the State Department" and the "bomb scare" came into the picture even before Mr. Zulueta was found and, of course, before anyone could have guessed that he would be "extremely belligerent." And this point is pivotal, because it is my conviction that once it is clarified that the "bomb scare" did not arise because of the "extremely belligerent" attitude of Mr. Zulueta, it would be easily realized by any objective mind that the request or "command", to use the majority's pointed language, of the PANAM agents for the opening of Mr. Zulueta's bags was not prompted by a mere figment of their imagination nor was it an empty meaningless exercise of caution or prudence, much less an ill-conceived motive to molest or harass Mr. Zulueta in retaliation for his "extreme belligerence".

Now, how did the idea of a "bomb" come about? The un rebutted testimony of Captain Zentner in this regard was as follows:

"In the meantime, I went down and was waiting for the result of the search and it was at this time this man came up and approached me and said he was very concerned about the situation; that he had to say the word (which of a) bomb. The reason he was afraid to say it, is that it is one word we do not use around the aircraft. If you said it in the wrong time it is against the Federal law; even in just saying so he was quite reluctant in mentioning that but he qualified himself and he said he was with the State Department and he further said, my wife and children are on board and unless we can find this man and search his bags we don't want to continue." (pp. 62-63, t.s.a, October 18, 1966)

On cross-examination by appellees' counsel, he declared:

"Q.

In other words what the State Department said if you could not find this man and search his bag he and his family would get off at Wake?

A. Substantially that is the impression that he gave me.

Q. He did not threaten to sue the Pan American World Airways?

A. No.

Q. And his getting off was his own decision unless you find this man and his bag he and his family would get off?

A. That was his decision."

(p. 21, t.s.n., October 19, 1966.)

And, as I have already indicated, Mr. Zulueta was duly informed of such development, so much so that he even wanted to confront the man referred to by the captain.

Under the circumstances, what is the captain supposed to have done? In answering this question, the very first thing that one must bear in mind is the singularly peculiar nature of the contract of common carriage. Quoting from *Manresa*, this Court held *Yu Con V.?* Ipil, 41 Phil. 770, that the relationship between the parties therein partakes of "the conception of a trust" which, in the opinion of Justice Araulio, extends to both passengers and goods, (at p. 778). According to the Code Commission, "the high degree of care (on the part of the carrier) is imperatively demanded by the preciousness of human life, and by the consideration that every person must in every way be safeguarded against all injury." (Report of the Code Commission, p. 36.) This exhortation has been translated into hidebinding legal obligations which no stipulation of the parties can minimize, much less obliterate. The exacting provisions of the Civil Code on the matter are unequivocal in prescribing that:

"ART. 1733. Common carriers, from the nature of their business and for reasons of public policy, are bound to observe extra-ordinary diligence in the vigilance over the goods and for the safety of the passengers transported by them, according to all the circumstances of each case.

Such extraordinary diligence in the vigilance over the goods is further expressed in Articles 1734, 1735, and 1745, Nos. 5, 6, and 7, while the extraordinary diligence for the safety of the passengers is further set forth in Articles 1755 and 1756."

"ART. 1755. A common carrier is bound to carry the passengers safely as far as human care and foresight can provide, using the utmost diligence of very cautious persons, with a due regard for all the circumstances."

"ART. 1757. The responsibility of a common carrier for the safety of passengers as required in Articles 1733 and 1755 cannot be dispensed with or lessened by stipulation, by the posting of notices, by statement on tickets, or otherwise."

And precisely pertinent too are the following provisions:

"ART. 1759. Common carriers are liable for the death of or injuries to passengers through the negligence or wilful acts of the former's employees, although such employees may have acted beyond the scope of their authority or in violation of the orders of the common carriers.

This liability of the common carriers does not cease upon proof that they exercised all the diligence of a good father of a family in the selection and supervision of their employees."

"ART. 1763. A common carrier is responsible for injuries suffered by a passenger on account of the wilful acts or negligence of other passengers or of strangers, if the common carrier's employees through the exercise of the diligence of a good father of a family could have prevented or stopped the act or omission."

It must be presumed that PANAM's agents were duly aware of their responsibility in the premises. And it must go without saying that with particular reference to air transportation, the degree of diligence expected of the carrier's agents and employees must be such that they should not be allowed to take any conceivable risk. In my considered view, even common sense and ordinary prudence alone should dictate that the captain of an airplane must be recognized to have the widest latitude of discretion in devising and employing measures to ensure the safety of all his passengers and crew-members, whether the danger should proceed from the character of the goods to be carried or from the attitude and disposition of any passenger. In fact, I feel that any citation of authorities in this regard would be obviously superfluous. Just the same, however, I would like to refer to a relevant provision of the Code of Commerce relative to the inherent duties of the captain of _ a vessel, which I believe may be invoked here by analogy. It is Article 612 (5) which reads:

"ART. 612. The following obligations are inherent in the office of captain"

"x x x

x x x

x x x.

"5. To remain constantly with the crew on board the vessel during the time the freight is being taken on board and carefully watch the storage thereof; not to consent to any merchandise or goods of a dangerous character to be taken in, such as inflammable or explosive substances, without the precautions recommended for their packing, management and isolation; not to permit any freight to be carried on deck which by-reason of its disposition, volume, or weight makes the sailing difficult, and which may endanger the safety of the vessel; and if, on account of the nature of the merchandise, the special character of the shipment and principally the favorable season it takes place, he allows merchandise to be carried on deck, he must hear the opinion of the officers; of the vessel, and have the consent of the shippers and of the ship agent."

Like the captain of a boat, the pilot of an airplane should act only on the basis of absolute certainties when it comes to any matter which can potentially endanger the safety of the craft and/or its passengers and contents.

The absence of a specific legal provision or precept in regard to the duties and authority of the pilot is no excuse for the Court to ignore the existence of such duties and authority that are called for by the very nature of the juridical relation presented for its scrutiny and adjudication. Article 9 of the Civil Code explicitly enjoins that "No judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws." In *Cerrano vs. Tan Chuco*, 38 Phil. 392, this Court sanctioned the resort to analogy with another branch of law and in *Rubi vs. The Provincial Board*, 39 Phil. 660, the Court ruled that in such situations, the court must look towards the promotion of the general welfare. I dare say that it is a matter of public policy that the authority of the pilot of a plane to adopt measures to safeguard his plane against all kinds of possible danger should be recognized.

In a word, it is the inherent duty of the captain of an airplane to screen every piece of baggage or cargo with a view to avoiding the carrying of any which might endanger the safety of the plane and its passengers. Correspondingly, it must follow that it is clearly within the ambit of his unquestionable lawful authority to refuse to load any baggage or cargo not proven to his satisfaction to be harmless. To hold otherwise would render his faculty meaningless and what is worse, it would place the fate of the passengers, the crew, the cargo and the plane

itself, always at the mercy of the unscrutable designs of every Tom, Dick and Harry who might fancy to use his plane as a means of self-destruction for his own purposes. I refuse to believe that there is anyone among my brethren in the Court who considers the legal aspects of air travel in such light.

To be sure, I am not overlooking the consideration that Mr. Zulueta is not just an ordinary person, what with his credentials in the artistic and literary or intellectual world and his standing in society he took care to put out in bold relief in his evidence. I do believe that maybe the incident would not have worsened had the PANAM agents, taking cue from Mr. Zulueta's adamant attitude and his suggestion that they "ask who I am," stopped treating him as if he were really the type that could conceive blowing up a plane carrying his own wife and daughter. Instead of forthwith requiring him to open his bags, they could have explained to him that it was but in the interest of everyone for him to allow that his bags be examined, since at the moment it was imperative to allay the apprehension of the other passengers — that it was not their intention to impute any crime to him, but that in view of his sudden disappearance, without the knowledge of his wife and/or daughter, the immediate impression in the minds of said passengers that he had strong reasons to wish to be left behind was not entirely unfounded, and, accordingly, the suspicion that he might have meant his wife and daughter harm was not, therefore, totally far-fetched. Of course, it was to be expected that he would, as anyone else in his place, have taken offense just the same at the implication of being thought of as a despicable criminal, no matter if the tone and the language used by the PANAM agents had been the most appropriate, but it is just as certain that, being very intelligent, he would have understood the situation in which the said agents were, and most probably he would have ultimately acceded to the request for the inspection of his bags, albeit without necessarily forgiving and desisting from taking action relative thereto. The net result of the foregoing considerations is that the whole heated altercation about the opening of the bags and the mutually unyielding attitude of both parties resulted from nothing more than their precipitate misconception of each other's motivation — the PANAM agents did not want to take any chance of failing in their obligation to enforce maximum safety measures, whereas Mr. Zulueta felt he was being purposely humiliated — only because the said agents did not believe that Mr. Zulueta's protestations of being somebody bigger than they thought was enough guarantee of the plane's security and, on the part of Mr. Zulueta, because he regarded his constitutional right to privacy to be absolutely inviolate and, therefore, had to be emphatically asserted regardless of the need at that particular instance to restore the peace of mind of the other passengers he had himself disturbed with apprehensive thoughts by his own unusual conduct of just disappearing and not being on hand at boarding time. Verily, I cannot see how any bad faith can be attributed to any of those involved in such an unfortunate turn of events.

Neither am I ignoring the fact that for the majority, importance must be accorded to Mr. Zulueta's posture that only the customs or police authorities either of the United States or of the Philippines have the power to make him open his bags for examination and that a search warrant was indispensable for the purpose. As I view the situation, however, I am satisfied that the public interest involved in it should have suggested to Mr. Zulueta that actually there was no deliberate intent to invade or trench upon his constitutional rights and that, as I have discussed above, it was within the inherent lawful prerogative of the captain to take precautionary measures for the safety of all concerned. Under Article 357 of the Code of Commerce, which I have already shown may be applied by analogy, "if the carrier by reason of well-founded suspicion as to the correctness of the declaration of the contents of a package should determine to examine it," all it has to do is to have the examination done "in the presence of the shipper or of the consignee," no mention being made of any government authority. Otherwise stated, the most I would concede to Mr. Zulueta is that in the context of the specific facts of this case, he had the option to insist on his right to privacy of his personal belongings admittedly innocuous per se or suffer the sanction of his bags being left behind, even if he might be allowed to board and continue the flight without them. I am not prepared to hold that the requirement to open his bags could be resisted by an invocation of constitutional

rights, because I am more disposed to consider that it is a matter of public policy, more paramount than an individual's right to privacy, that the safety of air travel is maintained free from concessions and compromises in consideration of the variant personal status of the persons concerned. My considered view is that reliance should rather be exclusively on the sound judgment of the captain who after all is the one most responsible for such safety. And so, we come to the matter of the off-loading of Mr. Zulueta.

But the exercise of authority
in the premises did not warrant
the use of insulting language.

Before discussing the off-loading of Mr. Zulueta, however, I think it is pertinent to inquire first into the attitude and language and tone of the PANAM agents when they were asking Mr. Zulueta to open their bags, precisely to determine whether or not any cause of action sprang therefrom.

Recalling again what happened at this stage of the incident, all that the evidence reveals is that either Mr. Sitton or Captain Zentner insisted repeatedly in stern tones that Mr. Zulueta, "Open your (his) bags"; that when Mr. Zulueta called attention to the fact that one bag (his own) was missing, the rough answer was "I don't give a damn"; and worse, that somewhere in the course of the altercation, either Mr. Sitton or Captain Zentner let go the remark "pull these three monkeys out of here."

I have previously held in relation to the first encounter between Mr. Zulueta and Mr. Sitton or Captain Zentner that due to the feeling of more or less justified exasperation or disgust caused by Mr. Zulueta's delaying the flight, the rather discourteous language and decorum of the PANAM agents cannot be considered actionable, but I would be less than fair and considerate of the rightful feelings of appellees were I to exculpate appellant for the insulting treatment suffered by the former during that stage of the dispute regarding the opening of the bags. In this respect, I join the majority in finding and holding that what appellant's agents did was unwarranted and uncalled for.

It is to be admitted though that the evidence relative to the expression about three monkeys is quite shaky. In truth, the Court's conclusion that the utterance was in fact made rests solely on the testimony of Mr. Zulueta, uncorroborated either by his wife or daughter both of whom took the witness stand; it was vigorously denied by the PANAM agents, apart from not being mentioned at all in Exhibit J, Mr. Zulueta's own memorandum prepared while he was still in Wake Island shortly after the event, it appears, as pointed out in appellant's motion for reconsideration, to be not in logical sequence with the natural flow of the exchange of words between the parties related by Mr. Zulueta himself (pp. 167-169, Printed Motion for Reconsideration) and, of course, there is the following testimony given as rebuttal evidence, in answer to the questions of his own counsel, wherein no mention is made of "three monkeys":

"The testimony of this gentleman testified in essence is: All of them are kind to you. What have you to say about that?

"That is not correct. In two instances they used offensive language particularly Mr. Sitton.

What language did he use? Offensive and abusive. What words were used?

Get the hell on that thing. Open that garden bags. I don't give a damn."

Nevertheless, considering that it is of common knowledge that Americans readily resort to such or like expressions in similar situations, and that they do so not without intent to mock or to ridicule, I am more inclined to recognize the preponderance of the evidence in favor of appellees on this point.[11]

If not wholly justified,

the off-loading of Mr. Zulueta was,
at least, done in good faith.

I have already stated earlier in this opinion, that on the basis of the facts extant in the record, my conclusion is that the off-loading of Mr. Zulueta was not a vindictive act of retaliation on the part of appellant's agents. I am convinced that the captain's decision to off-load Mr. Zulueta was motivated by two reasons, namely, (1) the latter's refusal to accede to the request or order for him to open his bags and (2) his irrationally uncooperative and belligerent attitude "to such a degree that the captain fe(lt) he had lost command over the passenger." In various portions of his testimony, Captain Zentner explained his position thus:

"Q.

Whose decision was it lo leave Mr. Zulueta behind? "

A.

Mine.

Q.

Why did you make that decision Captain?

A.

Safety is the primary thing that a Captain of a plane is concerned about. As there might a bomb, we had to know. We cannot leave anything to maybe.

Q.

In this instance how many passengers were in your responsibility Captain?

A.

On this flight, approximately 110 passengers I believe.

Q.

And how many crew members?

A.

Ten.

Q.

Is that including yourself?

A.

Six and four. I believe from nine to 12, maybe 10 or 11 including myself.

Q.

Captain did you know Zulueta before this occasion?

A.

No.

Q.

Did you have any reason at all for wanting to cause him injury?

A.

No."

(Pp. 69-70, ts.n., October 18, 1966)

"Q.

Now, I understanding from what you are trying to testify today that your decision to offload Mr. Zulueta was based upon the fear that there might be a bomb in his luggage?

A.

Correct.

"Q.

Did anyone tell you they have seen Mr. Zuiqueta place something unusual in his luggage?

A.

No.

(P. 12, ts.n., Oct. 19, 1966, stenographer Alejo)

Q.

Again, you said in this Exh. 10 and I quote: he has offloaded together with his I ocked bags. Did you find out why he refused to unlock the bags to permit inspection so that he was off loaded together with his locked bags?

A.

What was the impression we gathered from him, he refused to open his bag for inspection and on top of that he was belligerent and irrational in his attitude towards me." (P. 8, t.s.n., Oct. 19, 1966, stenographer Alejo)

Q.

So therefore, if it was the decision of the Company, your impression was Mr. Zuiqueta is going to go on the flight as long as his bag would be checked but he objected to in checking his bag?

A.

I don't know what his intentions were. "He did not want to answer my question or his bags checked.

Q.

So, on one hand you had an American who said if you do not check his bag we are getting off and on the other hand you have a Filipino who said you cannot check my baggage and your decision was unless this Filipino allows his baggage to be checked, you won't allow him to board the plane?

A.

If the man had been President Johnson of the U.S. I would not allow him to continue under the circumstances. I would not allow him to take the flight. I will have to resign my position or he can fire me but as long as I have responsibility for so many lives I must (be) satisfied. (Pp. 23-24, t.s.n., Oct. 19, 1966, stenographer Alejo)

Q.

Now, Captain, you said that if the passenger was President Lyndon Johnson you'd have taken the same step or course of action that you had taken under the circumstances, is that correct?

A.

Yes sir, I would have taken the same step or course of action that I had taken under the circumstances if the passenger were President Lyndon Johnson.

Q.

What were those circumstances you were referring to, Captain?

A.

When a passenger gives rise to the suspicion, or by his behavior, or his conversation was carried to the point that it became irrational, or to such a degree that the Captain feels he has lost command over the passenger while aboard the aircraft, then he cannot for the sake of safety carry such passenger on board the plane.

Q.

What other circumstances you have in mind, if there was any other one?

A.

Another circumstance is when a passenger would not allow his luggage to be opened for inspection.

"Q.

Captain, after you had talked with Mr. Zulueta did you have any inkling or any information regarding his prior conduct during the flight from Hawaii to Wake which may have influenced you in your decision?

A.

Absolutely not. Only that after talking with him I found him to be in an unfriendly mood, uncooperative and belligerent in his attitudes." (p. 5, ts.n., Oct. 19, 1966, Stenographer Palisoc)

"Q. You said it was your decision to offload Mr. Zulueta, together with his locked bags, is that right?

A. Yes sir.

Q. In this Exh. 10, you said that due to his drinking and belligerent attitude, he was offloaded along with his locked bags. Now, which came earlier — the making of this report Exh. 10 or this letter Exh. D?

A. I cannot recall.

Q.

Mr. Zulueta never intimated to you that prior to the time this letter was made, he had already made it known to his wife that you were forced to offload him from Flight 841 due to the fact that he refused to open his luggage for inspection as requested?

A. No, sir.

Q. Did he or did he not tell that to you?

A. I cannot recall his saying that to me.

Q.

You had, for several times and again this morning, mentioned about Mr. Zulueta's being irrational. Will you please point to any portion of this Exh. 10 where you asked this word, "irrational?"

A. I did not use that word irrational in this report.

Q.

Actually, what you used in this report were the words: None friendly, uncooperative and belligerent, is that right?

ATTY. MISA:

I would like to have the word, "non friendly," changed to "unfriendly" as written.

COURT:

Any objection?

ATTY. DIOKNO:

No objection?

COURT:

Witness may answer.

WITNESS:

"A. What I used in this report are: uncooperative, unfriendly and belligerent.

ATTY. DIOKNO:

"Q. What about drunkenness?

A.

When I made reference to his drunkenness that was of no consequence in my report. What I can say is that his drunkenness had nothing to do with his being belligerent and unfriendly in his attitude towards me and the rest of the members of the crew.

"Q. For clarification. In other words, what you want this Court to believe is that you did not think his belligerent and unfriendly attitudes had anything to do with his drunkenness?

A. I did not specifically said here that drinking had anything to do with his belligerent and unfriendly attitude, (pp. 9-10, t.s.n., Oct. 19, 1966, stenographer Palisoc)

Mr. Kenneth Sitton, the airport manager, corroborated the foregoing briefly as follows:

"COURT:

"Q. Why did you say, "we were forced to off load him from the plane?

A.

We were forced to offload him from the plane because he did not appear willing to have his bag opened. He did not appear anxious to do so. It was against our will to hold him but because of his lack of cooperation we were forced to do what we did.

"Q. Is it not true that the reason why he was offloaded was because of the suspicion that he had some bomb explosive in his luggage?

A. We thought of the possibility.

(p. 34, t.s.n., Oct. 19, 1966, stenographer Palisoc)

So did also Mr. Wayne S. Pendleton, the customs service supervisor of PANAM, this wise:

"Q. What happened when you went over to speak to the Captain?

A.

The Captain told me that during the search, it had been announced to the passengers there would be slight delay. One of the passengers was missing and would be necessary to delay the aircraft while the search was being made for him and he said while the search was going on, he was approached by another passenger on the flight who explained to him, to Capt. Zentner, his fear not only for himself but his wife and children were with him and his wife was very worried about continuing with this flight. So the passenger informed the Captain, that it might be safer if he would speak to Mr. Zulueta to determine if he had a valid reason for not boarding at the time the flight was being scheduled to depart.

"Q. Now so what did you do when the Captain told you this?

A. I went back to the gate and told Mr. Zulueta the Captain would like to speak to you.

Q. And what did Mr. Zulueta do?

A. He went forward and conferred with the Captain privately perhaps for two or three minutes.

Q. How far away were you from Mr. Zulueta when they talked?

A. Twenty yards utmost, I would say.

Q. Did you observe what happened during that conversation?

A. I did not observe much. Mr. Zulueta raised his voice saying, "IT IS NONE OF YOUR BUSINESS."

Q. What was Capt. Zentners reaction to this?

A.

After exchanging few words, he came to me and said he was not satisfied with his explanation or his manner or demeanor about his behavior. He said, "I want his baggage taken out of the airplane and examined and will you please take out the baggage and find the bag and bring to us." (pp. 140-142, t.s.n., October 18, 1966)

From the above testimonies, I find it difficult to understand how the Court can justly hold that the PANAM agents acted "deliberately and maliciously" in a spirit of vindictive retaliation for the "extreme belligerence" of Mr. Zulueta. I am afraid, indeed, that the majority's position is rather extreme, that their rationalization is a little overpassionate and that their conclusions are somehow enfeebled by oversight of some considerations favorable to appellant which are not altogether unfounded and unmeritorious.

To quote from the majority resolution, "the defendant (PANAM) ... acted in a manner calculated to humiliate him (Mr. Zulueta), to chastise him, to make him suffer, to cause him the greatest possible inconvenience by leaving him in a desolate island, in the expectation that he would be stranded there for a 'minimum of one week' and, in addition thereto, charged therefor S13.30 a day." And from the decision, "It is next argued that plaintiff was, also, guilty of contributory negligence for failure to reboard the plane within the 30 minutes announced before the passengers debarked therefrom. This might have justified a reduction of the damages, had plaintiff been unwittingly left by the plane, owing to the negligence of PANAM personnel, or even, perhaps, wittingly, if he could not be found before the plane's departure. It does not, and can not have such justification in the case at bar, plaintiff saving shown up before the plane had taken off, and he having been off-loaded intentionally and with malice aforethought, for his "belligerent" attitude, according to Captain Zentner; for having dared — despite his being one of "three monkeys," — the term used by Captain Zentner to refer to the Zulueta family — to answer him

back—when he (Captain Zentner) [Although plaintiff may have mistaken him for Sitton] said: 'what in the hell do you think you are?' — in a way he had 'not been spoken to' in his 'whole adult life,' in the presence of the passengers and other PANAM employees; for having responded to a command of either Zentner or Sitton to open his (plaintiffs) bags, with a categorical refusal and a challenge for Zentner or Sitton to open the bags without a search warrant therefor, merely making manifest the lack of authority of the aforementioned representative of PANAM to issue said command and exposing him to ridicule before said passengers and employees. Besides, PANAM's own witness and employee, Wayne Pendleton, testified that the plane could not take off at 4:30, as scheduled, because 'we were still waiting for two (2) local passengers.'" (pp. 15-16, Decision.) And again from the resolution, "In the case at bar, plaintiff Rafael Zulueta was 'off-loaded' at Wake Island, for having dared to retort to defendant's agent in a tone and manner matching, if not befitting his intemperate language and arrogant attitude. As a consequence, Capt. Zentner's attempt to humiliate Rafael Zulueta had boomeranged against him (Zentner), in the presence of the other passengers and the crew. It was, also, in their presence that defendant's agent had referred to the plaintiffs as 'monkeys,' a racial insult not made openly and publicly in the above-mentioned previous cases against airlines. In other words, Mr. Zulueta was off-loaded, not to protect the safety of the aircraft and its passengers, but to retaliate and punish him for the embarrassment and loss of face thus suffered by defendant's agent. This vindictive motive is made more manifest by the note delivered to Mr. Zulueta by defendant's airport manager at Wake Island, Mr. Sitton, stating that the former's stay therein would be 'for a minimum of one week,' during which he would be charged \$13.30 per day. This reference to a 'minimum of one week' revealed the intention to keep him there stranded that long, for no other plane, headed for Manila, was expected within said period of time, although Mr. Zulueta managed to board, days later, a plane that brought him to

Hawaii, whence he flew back to the Philippines, via Japan." (pp. 6-7, Resolution)

In other words, for the majority, the captain's explanation should be completely discarded. It is entirely unworthy of any attention because "there was nothing, absolutely nothing to justify that the luggage of the missing person (Mr. Zulueta) should be searched, in order to ascertain whether there was a bomb in it" (p. 9, decision) and because "if there were an iota of truth in said story of the defense, Captain Zentner would have caused everyone of the passengers to be frisked or searched and the luggage of all of them examined — as it is done now — before resuming the flight from Wake Island." (p. 4, Resolution). Indeed, if there is "nothing, absolutely nothing," not even "an iota of truth" in the evidence of appellant in regard to the point at issue, I am only wasting my efforts and the valuable time of the Court, and probably taxing the patience of my learned colleagues, by putting forth this rather extended separate opinion. I would not be surprised if they inwardly, at least, fortified themselves with the thought that if I had any valuable point at all, I could have expressed the same in less time and in less words, paper and ink. I do wish very sincerely that the majority's decision and resolution and opinions were right in all respects, for this case is more important than just any other case, not so much because of the unusual enormity of the amount of damages awarded to appellees, but more because of the perilously adverse effect the Court's pronouncements here will have on the whole commercial aviation industry everywhere, and, what is always indispensable to me, the accuracy or inaccuracy of the juridical propositions they lay down for all the legal world to admiringly accept or disdainfully reject. Frankly, however, with due respect to the writer of the majority opinions, I am compelled to dissent therefrom precisely because I find in the evidence of both appellant and appellees some things which are, in my own humble and honest view, more than "nothing, absolutely nothing" and more than "iota of truth" and which are legally adequate to warrant alteration of the judgment in this case.

The extreme position of the majority is that in their view, only one, either Mr. Zulueta's or the PANAM agents' factual theory, can be believed, for they cannot co-exist. In other words, the respective positions of Mr. Zulueta and the PANAM agents as to the facts are mutually exclusive and the Court has no alternative but to choose only

either one of them. As to the passionate aspect of their position, it lies in their overemphasizing, if not exclusively seeing only, the supposed humiliation and embarrassment of the appellees in being rudely and indecorously treated as "three monkeys" which is unworthy of "his (Mr. Zulueta's) dignity and that of the people of his country" and of Mr. Zulueta being stranded in a desolate island in a bug-infested hotelroom with dirty linen and in abject discomfort and inconvenience, with nary a thought whatsoever of the situation in which PANAM agents were situated in view of the demands of their respective offices and the exigencies of absolute, never relative, safety at all moments in air travel, the answer to which should always be left to the judgment of the pilot. And the points they have overlooked, I shall presently venture to show.

To my mind, the fairer attitude to adopt in the case at bar is to give due consideration to the respective positions of both parties, since they are not necessarily diametrically adverse. As I have already intimated earlier, it may be true that Mr. Zulueta had to relieve himself in the beach, no matter how his story about it may impose upon the sense of propriety of some of us and bring us to the brink of incredulity, and, naturally, in such a circumstance, that the rather rough words of the PANAM agent who first met him could not have been sweet music to his ears, in like manner that his unexplained disappearance which had delayed the flight could not be expected to put the PANAM agents in any jovial mood to patiently and unperturbedly await his explanation and to deliberate as to what apt words to use to express their feelings about what was happening and weighing upon their responsibility to the rest of the passengers. It is in this same light that I strongly feel the off-loading of Mr. Zulueta should be viewed.

In other words, my position is that to decide this case with justice and fairness, it is unnecessary, much less warranted by the recorded evidence, to hold that it must be either the version of the captain or that of Mr. Zulueta that should be believed. My review of the testimonies and the exhibits before Us reveals that We do not have to close Our eyes to what the PANAM agents claimed about a "bomb scare," which in the natural course of human events does likely happen, just because We have to believe that Mr. Zulueta went to the beach and undressed and relieved himself and washed up with sea water in the most socially unorthodox manner, so entirely unbecoming his intellectual and social standing as to make the unbiased mind recoil almost in disbelief. Neither do We have to lend no ear to Mr. Zulueta's exceptionally unusual story, just because PANAM's agents considered Mr. Zulueta's sudden disappearance, unnoticed by his own wife and daughter, because he did not tell them beforehand, as basis for following up with precautionary measures the impression of one of the other passengers connecting such disappearance of Mr. Zulueta with the possibility that Mr. Zulueta was aware that something would happen in the next lap of the flight and he had, therefore, deliberately wished to be left behind. Accordingly, granting there are points of weakness in both versions, I cannot agree that Mr. Zulueta's account is entitled to exclusive survival as the sole truth.

I have already conceded earlier that Mr. Zulueta's having gone to the beach for the personal reason he alleged may be taken as sufficiently proven, contrary to the contention of appellant. At the same time, however, I am even more persuaded to also give credence to the declarations of appellant's witnesses regarding what they considered as sufficient basis for their insistence to have him open his bags and for their subsequent decision to off-load him. I must hasten to add though that this is not saying that I would necessarily hold that such off-loading was fully justified, albeit I must say that it is my considered conclusion that, in law, it was done in good faith and may not, therefore, serve as basis for the moral damages awarded in the decision in consequence of the resultant breach of the contract of carriage between appellant and appellee, Mr. Zulueta.

As I have already stated, the majority cannot see any other motive for Mr. Zulueta's off-loading by PANAM's agents than the latter's vindictiveness and deliberate and malicious intent to punish and to chastise Mr. Zulueta for his admittedly "extreme belligerence." That Mr. Zulueta was "extremely belligerent" is, of course, indubitable. I

reiterate, however, that the record does not justify the majority's conclusion that it was in retaliation therefor that PANAM's agent acted as they did.

As I see it, the majority could not give credence to the "bomb scare" testified to by PANAM's agents because of the following reasons advanced in the decision:

"Indeed, Captain Zentner did not explain why he seemingly assumed that the alleged apprehension of his informant was justified. He did not ask the latter whether he knew anything in particular about plaintiff herein, although some members of the crew would appear to have a notion that plaintiff is an impressario. Plaintiff himself intimated to them that he was well known to the U.S. State Department. Apparently, Captain Zentner did not even know the informant's name. Neither did the captain know whether the informant was really working for or in the State Department. In other words, there was nothing — absolutely nothing — to justify the belief that the luggage of the missing person should be searched, in order to ascertain whether there was a bomb in it; that, otherwise, his presence in the aircraft would be inimical to its safety; and that, consequently, he should be off-loaded.

"In fact, PANAM has not given the name of that 'man' of the State Department. Neither has the defense tried to explain such omission. Surely, PANAM's records would have disclosed the identity of said 'man,' if he were not a mere figment of the imagination. The list of passengers has been marked as Exh. A, and yet, PANAM has not pointed out who among them is the aforementioned 'man.'" (Pp. 8-9, Decision.)

"Defendant claims that the safety of its craft and of the other passengers demanded that it inspect Zulueta's luggage and when he refused to allow inspection that it had no recourse but to leave him behind. The truth is that, knowing that of plaintiffs four pieces of luggage, one could still have been — as it was — aboard, defendant's plane still flew on to Manila. Surely, if the defendant's pilot and employees really believed that Zulueta had planted a bomb in one of the bags they would not have flown on until they had made sure that the fourth bag had been left behind at Honolulu or until enough time had lapsed for the bomb to have been exploded, since presumably it had to have been set to go off before they reached Manila.

"At any rate, it was quite evident that Zulueta had nothing to hide; for the report of defendant's witnesses, Mr. Stanley L.E. Ho, U.S. Marshall on Wake, has this to say:

'About twenty minutes later while an attempt was being made to locate another piece of Mr. Zulueta's luggage, his daughter, Carolinda approached her father and wanted to get some clothes from one of the suitcases. Mr. Zulueta asked the undersigned if it was alright if he opened the suitcases and get the necessary clothes. To this I stated he was free to open his luggage and obtain whatever he needed. Mr. Zulueta opened a suitcase and took the dress from her then boarded the aircraft'" (Pp. 10-11, Decision)

"(a) Defendant did not make any attempt to inquire from any passenger or even the crew who knew Mr. Zulueta what his character and reputation are, before demanding that he open the bags; if it had done so, Miss Schmitz, the purser, and Col. Villamor would have vouched for plaintiffs; for Miss Schmitz believed she had flown before with the Zuluetas and they had been very nice people.

"(b) Worse, defendant's manager Sitton admits that Zulueta had told him who he was and his social position in Manila; still he insisted that the bags be opened. Moreover, some passengers had informed the supervisor that Zulueta was 'the impresario'; but they persisted in their

"(c) Defendant never identified the alleged State Department men who reportedly approached the Captain and expressed fear about a bomb, nor did they confront him — if he existed — with Mr. Zulueta despite Mr. Zulueta's request.

"(d) Defendant did not take any steps to put the luggage off-loaded far from its passengers and plane, a strange procedure if it really believed the luggage contained a bomb.

"(e) Defendant continued with the flight knowing one bag — Zulueta's bag himself —had not been located and without verifying from Honolulu if the bag had been found there, nor even advising Honolulu that a bag possibly containing a bomb had been left there, again an inexplicable procedure if they sincerely believed that Zulueta had planted a bomb;

"(f) Defendant's manager himself took Zulueta and his off-loaded bags, in his own car, from the terminal building to the hotel, which is also inconsistent with a serious belief that the luggage contained a bomb;

"(g) Defendant knew that while Zulueta's bags were on the ground, he had opened one of them with the permission and in the presence of the U. S. Marshall in order to enable his daughter to get a dress from the bag; nothing suspicious was seen; still defendant insisted on refusing to allow Zulueta to continue unless he opened and allowed inspection of the bags by them;

"(h) Defendant completely changed his tone and behavior towards the Zuluetas after the plane had arrived at Manila and the Captain learned that its Manila manager, Mr. Oppenheimer, was a friend of Zulueta"; (Pp. 13-14, Decision).

In brief, as far as the majority is concerned, PANAM's agents told the trial court a fishy story because (1) they did not specifically identify the "man from the State Department" who voiced suspicion about the "bomb" and (2) they failed to take into account who Mr. Zulueta was, for had they considered that because he was "the impresario," whatever that amounts to, and formerly "had been a guest of the State Department, and was a friend of or known to Mr. Oppenheimer, the Manila manager of PANAM, they would have realized the impossibility that he could have any bomb in his luggage. 1 regret I cannot join this position of the majority.

Laying aside, since it is not vitally decisive anyway, appellant's contention that the trial judge had unfairly denied it its full day in court, although I feel that His Honor's order giving appellant only one day more to present its other witnesses who would have had to come from distant places outside the Philippines may be justified only under the broad principle that trial judges have ample discretion in granting or denying motions for continuance or postponement, which is not a real guarantee that justice has been done, I believe, contrary to the majority's conclusion, that it is sufficiently shown in the evidence on record that in off-loading Mr. Zulueta, the PANAM agents acted within the scope of their authority and in compliance with what was demanded by their duty in the premises. Their decision could be an error of judgment, but surely, it cannot be said to have been arrived at as a result of a conspiracy among Captain Zentner, Mr. Sitton and the other PANAM employees involved and with malice aforethought.

The first consideration which to my mind shakes to its very foundation the conclusion of the majority is that there is not the slightest indication in the testimonies of the appellees that the PANAM agents were ever seen by them talking together as if trying to confabulate with each other and to concoct their posture. The evidence is clear that Captain Zentner, Mr. Sitton and Mr. Pendleton acted separately in the earlier stages of the whole incident and, that later on, the latter two merely took orders from Captain Zentner, as should always be the case in such situations. Indeed, even if it were assumed hypothetically and only for the sake of argument, that said agents had had actually the opportunity and disposition to sit down together and had tried to contrive how to punish and chastise Mr. Zulueta; it would be difficult to conceive that given the circumstances then obtaining, with the other passengers, naturally annoyed already by the lateness of the flight, whom they had to pacify and who must have been pressing them to act with speedy dispatch, they could have devised spontaneously by themselves the idea of connecting Mr. Zulueta with a "bomb", particularly, when it is considered that, as Captain Zentner himself made clear in his declaration before the court, even the mere indiscreet mention of the word bomb which might produce a scare among the passengers could be a possible federal offense. Besides, we can assume that the said agents

knew of the confusion and inconvenience they would cause the said other passengers who would have to disboard, as they did, and to suffer waiting until the luggage of Mr. Zulueta could be identified and segregated from the rest for examination, which they also in fact did. I don't believe the said agents would have been prepared to create that much cause for complaint from their other customers just to get even with Mr. Zulueta. Of course, I know that according to appellant's own evidence, the other passengers took calmly and without protest the order for them to disembark and wait, but that was precisely because they saw no reason why they should not cooperate with the captain under the circumstances, namely, that by his unexplained disappearance, Mr. Zulueta had made himself suspect.

Second, I do not see any absolute need for the captain or the airport manager to have known exactly the identity and/or to have revealed to Mr. Zulueta of the "man from the State Department" who confided to him his fears about the bomb. Anyway, nowhere in his testimony and that of his companions does it appear that Mr. Zulueta ever denied categorically that he was carrying a bomb. All he was insisting on was that only the customs and/or police authorities had the authority to question him and examine his bags and that he wanted to confront that "man from the State

Department." Besides, in the situation in which the captain found himself with the apprehension expressly conveyed to him by that man, on the one hand, and, on the other, confronted as he was by Mr. Zulueta who was already obviously boiling in anger because of his encounter with Mr. Sitton, it is rather difficult and expecting the unusual for us to think that he would deliberate as coolly as we have been able to do in the serene conference room of this Court or to think in the quiet atmosphere of our individual chambers, and thereby exercise the best judgment as to how to deal with a belligerent passenger who had placed himself in suspicious circumstances and consequently realize that the better thing to do is to yield to the requested confrontation. Withal, while the person concerned had a right to voice his fears to the captain, he might not have been ready for such confrontation for obvious reasons, like that of being made subject of a suit, civil or criminal, and so, the captain could not be fully at liberty to identify him to Mr. Zulueta. As far as the captain was concerned, however, the conjecture of this man did not appear absolutely and entirely baseless, and for the fulfillment of his duty to ensure as absolutely as he can the safety of his passengers by being certain himself of the complete absence of danger, such expression of fear for himself and his family by that man, was enough reason, in the light of the attendant circumstances just mentioned, for the captain to act as he did.

The majority would also give decisive importance to the fact that Mr. Zulueta is ;the impresario¹, probably meaning he is a man of talent and distinction, and that such fact was more or less conveyed to the PANAM agents, just as the majority would consider very material the evidence that Mr. Zulueta had mentioned that he had at one time been a guest of the State Department apart from being a friend of Mr. Gppenheimer, as already stated above. I do not see it that way. My considered opinion is that these considerations would not have made much of a difference in the mind of Captain Zentner or Mr. Sitton, given the other circumstances confronting them, namely, the mysterioust disappearance of Mr. Zulueta, which he unraveled only after the plane had already departed, his "extremely belligerent" and uncooperative attitude, and his refusal to allow inspection of his bags, which objectively speaking, could conceivably be the reaction precisely of one who had something to hide. Maybe it was an exaggeration for the Captain to say that he would not have changed his posture even if it were President Johnson who was in Mr. Zulueta's unfriendly and hostile pose, but it is nonetheless understandable why at that moment the captain paid no heed to Mr. Zulueta's real identity. After all, there was the safety of all the other passengers weighing on his sense of responsibility, and he had to act without further loss of time. Besides, since when has the social, political, intellectual, artistic or even religious status of a man been an absolute immunity against a sudden abnormality driving him to do the unexpected, or of his being seized by a moment of irrationality, perhaps of desperation, causing him to be so obfuscated and close-minded as to commit the most

shocking crime, entirely out of character, as far as his credentials are concerned, and probably without really meaning to do it? I reiterate that maybe, in a strict sense, the captain's decision can be considered as an error of judgment, assuming the opportunity for mature reflection and deliberation was there, but again, I must emphatically say, I cannot impute to it "malice aforethought."

The most telling circumstance
indicating "bomb " report was
not imaginary.

Furthermore, there is one circumstance indisputably established in the record, which the majority has notably overlooked, and which, to my mind, belies beyond peradventure of doubt the theory that the "man from the State Department" was a fictional character and the "bomb" report was a figment of the captain's imagination. I refer to the incontrovertible and simple fact that Captain Zentner and the other PANAM agents at the airport had already acted on the said "bomb" report even before Mr. Zulueta was found and, naturally, before anyone could divine that he would be as "extremely belligerent" as to cause the PANAM agents to think, if that were really the case, of retaliating in kind and of imputing to him said "bomb." Let us not forget that according to the captain, it was the unusualness of the disappearance of Mr. Zulueta that gave rise to the suspicion in the mind of the "man from State Department" that Mr. Zulueta had decided to be left behind probably knowing that something was going to happen with the plane between Wake and the next landing point. Perhaps, it may be said that such inference was a little wild, but I cannot say that in the premises, there "was nothing, absolutely nothing" to justify the captain's decision to act on the report, considering again that he has to act always in favor of the possibility of danger in order to correspondingly avoid all conceivable risks affecting the maximum safety of the flight, to which PANAM was inextricably obligated and to which all its passengers are unqualifiedly entitled.

The majority rationalizes that "had there been an iota of truth in said story (about the bomb) of the defense, Captain Zentner would have caused everyone of the passengers to be frisked or searched and the luggage of all of them examined." Why? Why bother all the passengers when it was Mr. Zulueta's conduct alone that was suspicious? It was, I repeat, Mr. Zulueta's unorthodox conduct that gave birth to the fear about a "bomb," what need was there then to involve the other passengers?

It may be added, in this connection, that according to the evidence, the other passengers did not complain and, in fact, they appreciated the search, notwithstanding it delayed them for more than two hours. This, to my mind, only indicates quite strongly that all of them were convinced of its necessity, in concurrence with the captain. How then can We, sitting here in the calm atmosphere of our chambers, with the advantage of having reassuring hindsight as our guide, unlike the captain who had to act on the spur of the moment and in the face of unexpected and intense antagonism, rightly rationalize that the captain acted with absolutely no basis whatsoever?

Assuming the "bomb " scare could
have been overlooked, Mr. Zulueta's
"extremely belligerent": attitude may
still be considered in determining
whether or not PANAM's agents acted
in bad faith.

Before taking up the other ground which the PANAM agents invoked for off-loading, Mr. Zulueta, namely, his "uncooperative, unfriendly and belligerent" demeanor, I would like to make it clear that in the above discussion, it was not my intention to convey the slightest idea that I am in any way convinced that Mr. Zulueta had a bomb in his luggage. And in relation particularly to the majority's view that the captain had "nothing, absolutely

nothing" to justify his going along with the suspicion of the "man from the State Department," I am not saying that the captain was fully justified in acting on the basis alone of that man's apprehension. What I mean is that there were additional circumstances which, if taken into account, would explain the over-all perspective in the light of which the captain acted, namely, the mysterious aspects of Mr. Zulueta's failure to be on hand at boarding time — most of all, the fact that neither his wife nor his daughter who were sitting right next to him in the plane could not give any explanation therefor and were practically resigned to proceed with the flight without him, for as Mrs. Zulueta herself testified, "— I asked that I go down the plane to look for my husband, but they refused, so there was nothing I could do about it but to sit down again." (p. 2. t.s.n., Aug. 2, 1966) In the words of Captain Zentner, "suspicion arose and we could not afford to risk the lives of the passengers on board the plane. Their safety is our paramount and utmost concern" (p. 7, ts.n., Oct. 19, 1966, Stenographer Palisoc.) and "safety is the primary thing that a captain is concerned about. As there might be a bomb, we had to know. We cannot leave anything to maybe"; (p. 43, infra.) "As flight captain, it is my solemn duty to see to it that the passengers v/ere transported in the safest manner possible. There is no compromise whatsoever." (also p. 7, ts.n., Oct. 19, 1966, Stenographer Palisoc.)[12] Honestly, I cannot disregard the reasonableness of such an explanation, knowing as I ought to know as a judge, not unlike the rest of mankind, the stringent requirements for the sake of safety in air travel. Withal, I might have had a different view had this matter of the bomb been brought up for the first time at the trial, for in such a case, it could be considered as a belatedly hatched defense; but it being clear that it arose even before Mr. Zulueta could be known as "extremely belligerent," I am constrained to look at it in a more objective light than that in which the majority apparently has viewed it, and to give it due consideration in appreciating the decision of the captain to act on it the way he did, which I say cannot and ought not to be categorized as in bad faith.

It being the finding of the majority
that Mr. Zulueta was "extremely
belligerent, " which finding is more
than justified by the evidence, if
for no other reason than such
"extreme belligerence, " his off-loading
cannot be deemed to have been done
in bad faith.

To avoid any misunderstanding and misconception, I shall quote once more, for the purpose of my next point, the following pertinent testimony of Captain Zentner.

"Q.

Now, Captain, you said that if the passenger was President Lyndon Johnson you'd have taken the same step or course of action that you had taken under the circumstances, is that correct?

A.

Yes sir, I would have taken the same step or course of action that I had taken under the circumstances if the passenger were President Lyndon Johnson.

Q.

What were those circumstances you were referring to, Captain?

A.

When a passenger gives rise to the suspicion, or by his behavior, or his conversation was carried to the point that it became irrational, or to such a degree that the captain feels he has lost command over the passenger while aboard the aircraft, then he cannot for the sake of safety carry such passenger on board the plane.

"Q. What other circumstances have you in mind, if there was any other one?

A. Another circumstance is when a passenger would not allow his luggage to be opened for inspection.

Q. Captain, after you had talked with Mr. Zulueta did you have any inkling or any information regarding his prior conduct during the flight from Hawaii to Wake which may have influenced you in your decision?

A. Absolutely not, only that after talking with him I found him to be in an unfriendly mood, uncooperative and belligerent in his attitudes." (p. 5, t.s.n., Oct. 19, 1966, Stenographer Palisoc)

Stated briefly, even if the "bomb scare" were to be disregarded, still the captain did not find himself in condition to allow Mr. Zulueta to reboard. In the words again of Captain Zentner, Mr. Zulueta had already "give(n) rise to suspicion" and, on top of that, "his behavior or his conversation was carried to the point that it became irrational, or to such a degree that I felt that I had (the captain feels he has) lost command over the passenger while aboard the aircraft, I could no longer, (then he cannot) for the sake of safety, carry such passenger on board the plane," added, of course, to the "circumstance — (that the) passenger (Mr. Zulueta) would not allow his luggage to be opened for inspection." I submit that such reaction of the captain is not altogether unreasonable, much less whimsical and capricious or malicious and conceived in bad faith. As I see it, carrying a passenger who emphatically shows he is disposed to engage the captain in heated debate and who, with "extreme belligerence," challenges, if not defies his authority, exercised in the interest of the safety of all, is just as potentially dangerous and risky as having a time bomb on board. It is easy to say that a lone passenger can anyway be, without much difficulty, overpowered by the other members of the crew should he attempt to commit anything untoward to the captain, but it is just as plain to me that there are no fixed standards by which one can foresee what such a passenger might actually do, and it is not unimaginable that he might proceed in such an unexpected manner as to make the assistance of others unavailing. In any event, I believe I am completely safe in saying that ordinary prudence alone, not anymore "utmost diligence of very cautious persons," which is the measure of care required by law of common carriers under the above-quoted provisions of Article 1755 of the Civil Code, would dictate that such passenger should not be allowed to reboard, until he reduces his intransigence and truculence to such a degree as in the judgment of the captain, he would be able to safely cope with.

As a matter of fact, that was exactly what Captain Zentner did. It is indisputable that Mr. Zulueta was told that if

he would only open his bags, he would be allowed to reboard, but oddly enough, Mr. Zulueta chose instead to consider the matter as "a case of patigasan" (a contest of adamance or stubbornness) and refused to give due allowance to the situation confronting the captain vis-avis the anxiety and concern of the other passengers and to the captain's duty in the premises. To impute bad faith to the captain in such circumstances does not square with my sense of fairness and justice nor with my understanding of the law on common carriers, particularly the mutual and corresponding rights and duties of both the carrier and the passenger thereunder.

The readiness of PANAM agents
to allow Mr. Zulueta to re-
board if he would only permit
examination of his bags belies
theory of retaliation.

I repeat that, as if desirous to end the unfortunate incident by bending a little backward, the PANAM agents informed Mr. Zulueta that, in spite of everything, he could reboard, if he would only permit that his bags be examined. To my mind again, this particular circumstance is also the incontrovertible proof that the PANAM agents were not actuated by ill-will towards Mr. Zulueta in retaliation for his "extreme belligerence." In effect, the PANAM agents expressed willingness to take chances in regard to the possibility of the "bomb" being in the unfound bag of Mr. Zulueta and said bag's being somewhere in the plane as well as his "extreme belligerence," so he could rejoin his family, provided he showed a disposition to temper his adamance and reduce to the minimum the ground for their fear about the "bomb" by allowing the examination of the three bags in dispute. After all, as regards the bag that could not be found, the captain was convinced, after the thorough search that had been conducted by the plane and airport personnel, inclusive of taking down all the baggage from the plane, (p. 22, t.s.n., Oct. 19, 1966, Stenographer Palisoc), that the same "was left behind in Honolulu," so much so that according to him, "I would not have taken off if I thought it was still aboard," (p. 67, ts.n., Oct. 18, 1966), hence, his remaining problem was only the said three bags, one of which had already been actually opened by Miss Zulueta. Apparently, however, the majority cannot see it that way.

In fact, it is reasoned out that mere was such instance in the course of the altercation between Mr. Zulueta and the PANAM agents when Miss Zulueta opened one of said bags to get a dress therefrom and "nothing suspicious was seen." I grant that such circumstance is worth considering, but I deny that it should be deemed conclusive. It must be remembered that Mr. Zulueta was present when this happened, and naturally, it can be surmised, from the viewpoint of the captain, that it is possible the bomb was not in said bag and that is why Mr. Zulueta did not object to its opening.

In any event, at such point in the controversy between Mr. Zulueta and the captain, the issue was no longer as to whether or not the former had a bomb in his luggage, but already as to whether or not he would maintain his "extreme belligerence" and thus continue to be a potential menace or risk to the safety of the plane by reason of his turbulence, regardless of whether or not he had a bomb hidden in the plane, as I have already explained above.

The majority further contends that the "vindictive motive (of the PANAM agents) is made more manifest by the note delivered to Mr. Zulueta by defendant's airport manager at Wake Island, Mr. Sitton, stating that the former's stay therein would be for a minimum of one week, during which he would be charged \$13.30 per day. This reference to a 'minimum of one week' revealed the intention to keep him there stranded that long, for no other plane, headed for Manila, was expected within said period of time ..." (pp. 6-7, Resolution). If the majority were not making a mountain out of a molehill, in a manner of speaking, they would have recalled that it was precisely to avoid that Mr. Zulueta suffer such inconvenience that the captain decided contrary to the usual practice, to switch off the two engines he had already started when Mr. Zulueta's absence was noted, to wait for even half an

hour more, so the PANAM people could further search for him, in view whereof they would have realized that the references to the "minimum of one week" and the "\$13.30 per day" were nothing but pure statements of fact. Hopefully, perhaps, Mr. Sitton made such references to induce Mr. Zulueta to show a little cooperativeness and thereby provide them with more assurance of the requisite peace in mind for the captain, the crew and the other passengers during the flight. Unfortunately, Mr. Zulueta was in no mood to be persuaded; he could not be moved from his adamantly resolute position because he had to win the "patigasan" at all cost.

It may be argued that even if the PANAM agents were really serious about the "bomb," instead of off-loading Mr. Zulueta, they still had the option of retaining the bags and allowing him to leave with the plane. As a matter of fact, Mr. Zulueta himself suggested to the PANAM agents that they "keep my bags, but I want to go home." (p. 28, t.s.n., Aug. 1, 1966) At first glance, this contention sounds plausible, but it takes but a moment of reflection to perceive that it is flawed by the obvious consideration that taking Mr. Zulueta along would not have solved the problem of his intransigence, unless it were assumed that such compromise arrangement might have lessened his aggressiveness and disposition to be quarrelsome, which again is purely conjectural. Besides, there is the additional point that assuming something had happened with the contents of any of the bags, thus confirming the fear which was being entertained regarding them, PANAM would have had some kind of a problem getting hold of Mr. Zulueta, once he would have disembarked at Manila, what with the absence of any extradition treaty between the United States and the Philippines, Wake Island being a United States territory.

It is my position, therefore, that if it were true that the PANAM agents were motivated by pure vindictiveness rather than by the desire to comply with the demands of the public interest involved in the safety of the plane and of all on board thereof, they would not have offered to allow him to reboard under any circumstance. The fact that they implied they would consider the incident about the "bomb scare" terminated if Mr. Zulueta would only permit examination of his bags, just so there would be no reason for anyone to say that the captain was so imprudent as to desist from taking safety measure only because Mr. Zulueta was tenaciously standing his ground, simply goes to show that the PANAM agents had no malice or any retaliatory intent in their minds. Had Mr. Zulueta yielded, they would have felt correspondingly relieved and reassured that Mr. Zulueta would no longer create unmanageable trouble during the flight. Indeed, without Mr. Zulueta indicating a tendency to be less assertive and aggressive, the captain could not be assured of the peace of mind indispensably needed for his job.

All things considered, the off-loading of Mr. Zulueta constituted a breach of the contract of carriage, but there was no bad faith in it.

I have gone to great lengths in analyzing all the circumstances surrounding the incident in controversy because I sincerely believe that the decision of the majority renders less than justice to PANAM. I feel very strongly that due consideration has not been given to the situation in which the PANAM agents were placed by Mr. Zulueta's unusual disappearance and unexpected "extreme belligerence." Even granting that he had to go to the beach because he had to do what he claims he did and that he really did it, I cannot understand why the reaction "Who do you think you are ... Get on that plane" of either Captain Zentner or Mr. Sitton should be considered such a cardinal sin as to warrant Mr. Zulueta, in turn, to be so angrily heated up as to be blinded completely to the consideration that his own fault of not being available at departure time, without anyone being able to explain his unusual conduct, could not have placed these gentlemen in any jovial mood for any "open-minded" inquiry. Even if these words were uttered rather rudely, he should have realized that, after all, the PANAM agents were more or less agitated because they felt that Mr. Zulueta had held up the flight in violation of every passenger's part in the

contract of carriage, namely, to be on hand at the scheduled departure time of the plane.[13] In the very ticket of Mr. Zulueta, Exhibit Q, it is expressly provided that "passengers shall — arrive at the airport by the time fixed by the carrier/"

Of course, I agree with the majority that in connection with the incident wherein the PANAM agents were asking Mr. Zulueta to open his bags for inspection, there was no justification for any of said agents to insult the Zuluetas, but I reiterate, I cannot say that in the light of the specific circumstances attending the demand, Mr. Zulueta's objection to such request or order was well-founded.

And anent the off-loading of Mr. Zulueta, I am afraid the majority's position is rather emotional and one-sided. I can grant that taking all circumstances together, the decision of the captain may have been an error of judgment, but I find it unfair to hold that it was ill-motivated and a deliberate act of vindictiveness and bad faith. Had the captain decided to leave, as he was on the verge of doing, before Mr. Zulueta was found, there would have been hardly any question that no cause of action would have accrued in favor of the latter,[14] but it being plain that he was at the terminal already and ready to board when the plane actually left, the issue as to whether or not he should have been left behind hinges on the truth and sufficiency of the ultimate ground alleged by the captain, namely, the "extreme belligerence" of Mr. Zulueta in stubbornly refusing to permit examination of his bags. Viewed from the standpoint of the captain who had the right to insist on absolute assurance of cooperativeness and non-belligerence of all on board, he could be right, but, on the other hand, it may also be said that he should have made an effort to rise above the din of Mr. Zulueta's arrogance and truculence, and, taking into account his intellectual and social standing and his willingness to leave his bags behind, of which the captain was informed before he made his decision, the captain could have leaned in favor of taking him along, without his bags. In other words, the situation did not necessarily limit the captain's course of action, the above alternatives being open to him. It is true he could have erred either way, possibly face disaster, had he taken the first option, or, on the other hand, respond for the consequent breach of the contract of carriage which the second choice entails. His situation was certainly a difficult one, but, all things considered, I am persuaded that he did err in his judgment, since, to my mind, taking Mr. Zulueta along was not really as grave a potential risk as the captain may have cautiously conceived. Accordingly, I hold that appellant has to answer for the damages for breach of its contract of carriage with Mr. Zulueta, albeit I cannot condemn the captain's decision as proceeding from bad faith, vindictiveness, malice afore-thought and deliberate ill-will, contrary to the finds of the majority.

Accordingly, appellant is liable to Mr. Zulueta for damages resulting from the breach of their contract of carriage, separately, also for those caused by the insulting language used by its agents in reference to the three appellees.

Summarizing now the legal implications of the whole unfortunate incident involved in this case, my conclusions are as follows:

- For the error of judgment of Captain Zentner resulting in the off-loading Mr. Zulueta, appellant is liable to him for breach of the contract of carriage, it being indisputable that it failed in its obligations to take him to his destination stipulated in said contract.
- There being no clear showing that appellant's agents acted in bad faith, the damages for which appellant should

answer must be limited to actual ones, and cannot include moral damages.

- Although it has been established that appellant's agents employed insulting language in dealing with the appellees, the liability therefor cannot be predicated on contractual breach but on quasi-delict under Article 2176, read together with Articles 2180 and 2219 (7), of the Civil Code of the Philippines.

- In any event, the damages awarded in the decision are manifestly excessive.

- Additionally, as I have already intimated at the outset of this opinion, and in the light of the above conclusions, Mrs. ZuJueta's compromise agreement should be given full force and effect.

The legal basis of appellant's liability is not ex-contractu coupled with quasi-delict but these two separately and independently from each other.

In the foregoing discussion, I purposely broke up the incident here in question into three phases, namely: first, the altercation between Mr. Zulueta and the first PANAM agent who met him when he was found coming from the beach; second the rumpus about the demand that Mr. Zulueta open his luggage; and third, the off-loading of Mr. Zulueta. This approach, I believe, lends to easier comprehension and determination of the true legal nature of appellant's liability and of the amount of the damages appellees should recover. On the other hand, the majority has viewed the incident as a one whole transaction, thereby conveniently arriving at the conclusion that this case is one of "breach of contract as well as a quasi-delict" (p. 8, Resolution) in such a way that the coupling of these two sources of liability "constitutes an aggravating circumstance" for purposes of assessing the damages suffered by the conjugal partnership. I humbly submit such conceptualization cannot stand close scrutiny. I am afraid it defies elementary and axiomatic principles in the law on obligations and contracts as well as the basic and central concept of what juridically are conjugal partnership properties.

- No cause of action by either party as to first phase of their controversy.

Thus, as I have already made clear earlier above, the heated encounter and exchange of strong words between Mr. Zulueta, on the one hand, and either Mr. Sitton or Captain Zentner, on the other, when Mr. Zulueta reappeared proceeding from the dark beach did not give rise to any cause of action, for the simple reason that assuming the version of appellees to be true, about the rude conduct and rather harsh words uttered by the PANAM agent then, it is quite clear to me that in the light of the attendant circumstances, and looking at the matter more from the realistic than the legalistic angle, either both parties equally had their respective good reasons for acting as each of them did, or, both of them were overexcited and precipitate on account of their respective peculiar situations, hence it is best to declare that neither of them has a remedy against the other relative to the first phase of their controversy, notwithstanding that perhaps it may even be said that whereas the PANAM agent could have hardly guessed what happened to Mr. Zulueta, the latter knew or ought to have known that he had held up the departure of the plane.

- In connection with the second phase, appellant is liable ex-quasi-delicto for the insults heaped by its agents on appellees.

With respect to what happened during the second phase of the incident in controversy, I have already shown that although I hold the view that the PANAM agents' demand that Mr. Zulueta should open his bags or luggage for inspection is within their lawful authority and Mr. Zulueta's invocation of his constitutional right to privacy is unavailing, I believe that appellees did not deserve being referred to as "monkeys" and such other words as appellees claim were employed by said agents. Such uncalled for acts of appellant's agent constitute torts, (Worcester vs. Ocampo, 22 Phil. 42) for which appellant is directly liable to appellees under Article 2180 of the Civil Code of the Philippines, (Air France vs. Carrasco, 28 SCRA 155), and, consequently, the award of moral damages therefor to appellees is explicitly sanctioned by Article 2219(7) of the same code.

It is to be noted that nowhere in the decision do the majority stated categorically the Court's specific ruling regarding the real source of appellant's liability to the appellees. While peace-meal references to seemingly applicable provisions of the Civil Code are made here and there, no concrete, definite and easily recognizable statement of the legal basis of such liability appears in the whole text thereof. Of course, there are quotations in it from American decisions together with the ruling of this Court in Air France vs. Carrasco, supra., but, if these quotations do indicate approval of what are contained therein, still there is no formulation and postulation by the Court of their ultimate implications. It is already in the resolution denying appellant's motion for reconsideration where we find the following significant propositions: On p. 85 "Accordingly, the Rotea case is not in point, for the case at bar involves a breach of contract, as well as a quasi-delict," and on p. 13, "The Fact that such breach of contract was coupled, also, with a quasi-delict constitutes an aggravating circumstance and cannot possibly have the effect of depriving the conjugal partnership of such property rights "

- Comparison of Air France vs.

Carrasco with Fores vs. Miranda.

To be sure, this Court did hold in Air France vs. Carrasco, supra the following:

"A contract to transport passengers is quite different in kind and degree from any other contractual relation. (Philippine Refining Co. vs. Garcia, et al., L-21871 and L-21962, September 27, 1966) And this, because of the relation which an air-carrier sustains with the public. Its business is mainly with the travelling public. It invites people to avail of the comforts and advantages it offers. The contract of air carriage, therefore, generates a relation attended with a public duty. Neglect or malfeasance of the carrier's employees, naturally, could give ground for an action for damages.

"Passengers do not contract merely for transportation. They have a right to be treated by the carrier's employees with kindness, respect courtesy and due consideration. They are entitled to be protected against personal misconduct, injurious language, indignities and abuses from such employees. So it is, that any rude or discourteous conduct on the part of employees towards a passenger gives the latter an action for damages against the carrier. (4 R.C.L., pp. 1174-1175)

"Thus, 'Where a steamship company (an air carrier is a common carrier; and air transportation is similar or analogous to land and water transportation. Mendoza vs. Philippine Air Lines, Inc., 90 Phil. 836, 841-842) had accepted a passenger's check, it was a breach of contract and a tort, giving a right of action for its agent in the presence of third persons to' falsely notify her that the check was worthless and demand payment under threat of ejection, though the language used was not insulting and she was not ejected.' (Austro-American S.S. Co. vs. Thomas, 248, F. 231) And this, because, altho the relation of passenger and carrier is 'contractual both in origin and nature' nevertheless 'the act that breaks the contract may be also a tort.' (Id, p. 233) And in another case, 'Where a passenger on a railroad train, when the conductor came to collect his fare tendered him the cash fare to a point where the train was scheduled not to stop, and told him that as soon as the train reached such point he would pay the cash fare from that point to destination, there was nothing in the conduct of the passenger which justified the conductor in using insulting language to him, as by calling him a lunatic,'

(Lipman vs. Atlantic Coast Line R. Co., 93 S.E. 714, 716) and the Supreme Court of South Carolina there held the carrier liable for the mental suffering of said passenger.

"Petitioner's contract with Carrascoso is one attended with public duty. The stress of Carrascoso's action as we have said, is placed upon his wrongful expulsion. This is a violation of public duty by the petitioner air carrier — a case of quasi-delict. Damages are proper." (18 SCRA, pp. 167-169)

In other words, under this ruling, there can be cases in which "the act that breaks the contract may be also a tort," which is the Anglo-American equivalent, although in a broader sense, of the Spanish-Philippine concept of quasi-delict. (Report of the Code Commission, pp. 161-162.) While such a notion is as correct as saying that the same negligent act may produce civil liability arising from crime and give ground at the same time for an action for quasi-delicto or culpa extra-contractual (Garcia vs. Barredo, 75 Phil. 607; Diana vs. Batangas Transportation Co., 93 Phil. 391), it is not juridically possible for a party to be liable in a civil action on all three scores, ex-contractu, ex-delicto and ex-quasi-delicto, nor even on any two of them at the same time. Former Justice J.B.L. Reyes, easily the most distinguished and probably knowledgeable civilian who has ever sat in this Court, made this point abundantly clear in *Fores vs. Miranda*, 105 Phil. 266 in the following words:

"The difference in conditions, defenses and proof, as well as the codal concept of quasi-delict as essentially extra contractual negligence, compel us to differentiate between action ex-contractu, and actions quasi ex-delicto, and prevent us from viewing the action for breach of contract as simultaneously embodying an action on tort."

And as if to leave no room for doubt to skeptics regarding the juridical foundation of this ruling, he made in the said case this authoritative dissertation;

"Anent the moral damages ordered to be paid to the respondent, the same must be discarded. We have repeatedly ruled (*Cachero Vs. Manila Yellow Taxicab Co., Inc.*, 101 Phil., 523; 54 Off. Gaz., [26], 6599; *Necesito, et al vs. Paras*, 104 Phil., 75; 56 Off. Gaz., [23] 4023), that moral damages are not recoverable in damage actions predicated on a breach of the contract of transportation, in view of Articles 2219 and 2220 of the new Civil Code, which provide as follows:

'ART. 2219. Moral damages may be recovered in the following and analogous cases:

- (1) A criminal offense resulting in physical injuries;
- (2) Quasi-delicts causing physical injuries;

X X X

X X X

X X X

ART. 2220. Willful injury to property may be a legal ground for awarding moral damages if the court should find that, under the circumstances, such damages are justly due. The same rule applies to breaches of contract where the defendant acted fraudulently or in bad faith.'

By contrasting the provisions of these two articles it immediately becomes apparent that:

- (a) In case of breach of contract (including one of transportation) proof of bad faith or fraud (dolus), i.e., wanton or deliberately injurious conduct, is essential to justify an award of moral damages; and
- (b) That a breach of contract can not be considered included in the descriptive term "analogous cases" used in

Art. 2219; not only because Art. 2220 specifically provides for the damages that are caused by contractual breach, but because the definition of quasi-delict in Art. 2176 of the Code expressly excludes the cases where there is a "pre-existing contractual relation between the parties."

'ART. 2176. Whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relation between the parties, is called a quasi-delict and is governed by the provisions of this Chapter.'

"The exception to the basic rule of damages now under consideration is a mishap resulting in the death of a passenger, in which case Article 1764 makes the common carrier expressly subject to the rule of Art. 2206, that entitles the spouse, descendants and ascendants of the deceased passenger to 'demand moral damages for mental anguish by reason of the death of the deceased' (Necesito vs. Paras, 104 Phil., 84, Resolution on motion to reconsider, September 11, 1958). But the exceptional rule of Art. 1764 makes it all the more evident that where the injured passenger does not die, moral damages are not recoverable unless it is proved that the carrier was guilty of malice or bad faith. We think it is clear that the mere carelessness of the carrier's driver does not per se constitute or justify an inference of malice or bad faith on the part of the carrier; and in the case at bar there is no other evidence of such malice to support the award of moral damages by the Court of Appeals. To award moral damages for breach of contract, therefore, without proof of bad faith or malice on the part of the defendant, as required by Art. 2220, would be to violate the clear provisions of the law, and constitute unwarranted judicial legislation.

"The Court of Appeals has invoked our rulings in *Castro vs. Aero Taxicab Co.*, R.G. No. 49155, December 14, 1948 and *Layda vs. Court of Appeals*, 90 Phil., 724; but these doctrines were predicated upon our former law of damages, before judicial discretion in fixing them became limited by the express provisions of the new Civil Code (previously quoted). Hence, the aforesaid rulings are now inapplicable.

"Upon the other hand, the advantageous position of a party suing a carrier for breach of the contract of transportation explains, to some extent, the limitations imposed by the new Code on the amount of the recovery. The action for breach of contract imposes on the defendant carrier a presumption of liability upon mere proof of injury to the passenger; that latter is relieved from the duty to establish the fault of the carrier, or of his employees, and the burden is placed on the carrier to prove that it was due to an unforeseen event or to force majeure (*Cangco vs. Manila Railroad Co.*, 38 Phil., 768, 777). Moreover, the carrier, unlike in suits for quasi-delict, may not escape liability by proving that it has exercised due diligence in the selection and supervision of its employees (Art. 1759, new Civil Code; *Cangco vs. Manila Railroad Co.*, supra; *Prado vs. Manila Electric Co.*, 51 Phil., 900).

"The difference in conditions, defenses and proof, as well as the codal concept of quasi-delict as essentially extra contractual negligence, compel us to differentiate between action ex contractu, and actions quasi ex delicto, and prevent us from viewing the action for breach of contract as simultaneously embodying an action on tort. Neither can this action be taken as one to enforce on employee's liability under Art. 103 of the Revised Penal Code, since the responsibility is not alleged to be subsidiary, nor is there on record any averment or proof that the driver of appellant was insolvent. In fact, he is not even made a party to the suit.

"It is also suggested that a carrier's violation of its engagement to safely transport the passenger involves a breach of the passenger's confidence, and therefore should be regarded as a breach of contract in bad faith, justifying recovery of moral damages under Art. 2220. This theory is untenable, for under it the carrier would always be deemed in bad faith, in every case its obligation to the passenger is infringed, and it would be never accountable for simple negligence; while under the law (Art. 1756) the presumption is that common carriers acted negligently (and not maliciously), and Art. 1762 speaks of negligence of the common carrier.

"ART. 1756. In case of death of or injuries to passengers, common carriers are presumed to have been at fault or to have acted negligently, unless they prove that they observed extraordinary diligence as prescribed in Articles 1733 and 1755."

"ART. 1762. The contributory negligence of the passenger does not bar recovery of damages for his death or injuries, if the proximate cause thereof is the negligence of the common carrier, but the amount of damages shall be equitably reduced."

"The distinction between fraud, bad faith or malice in the sense of deliberate or wanton wrong doing and negligence (as mere carelessness) is too fundamental in our law to be ignored (Arts. 1170-1172); their consequences being clearly differentiated by the Code.

"ART. 2201. In contracts and quasi-contracts, the damages for which the obligor who acted in good faith is liable shall be those that are the natural and probable consequences of the breach of the obligation, and which the parties have foreseen or could have reasonably foreseen at the time the obligation was constituted.

"In case of fraud, bad faith, malice or wanton attitude, the obligor shall be responsible for all damages which may be reasonably attributed to the non-performance of the obligation."

"It is to be presumed, in the absence of statutory provision to the contrary, that this difference was in the mind of the lawmakers when in Art. 2220 they limited recovery of moral damages to breaches of contract in bad faith. It is true that negligence may be occasionally so gross as to amount to malice; but that fact must be shown in evidence, and a carrier's bad faith is not to be lightly inferred from a mere finding that the contract was breached through negligence of the carrier's employees."

These juridical populations have earned iteration and reiteration in several subsequent decisions of this Court, among them: *Mercado vs. Lira*, 3 SCRA 124, *Martinez vs. Gonzales*, 6 SCRA 331 and *Soberano vs. Manila Railroad Company*, 18 SCRA 732, to name only some of them — which is enough convincing proof of their correctness. In *La Mallorca vs. Court of Appeals*, 17 SCRA 739, it was farther held that an action for damages or quasi-delict is incompatible with the claim for breach of contract, although the two causes of action may be joined together in one complaint or alternative ones, And if it should be asked how it happened that Justice Reyes concurred with Justice Conrado Sanchez in *Air France vs. Carrascoso*, supra., I believe that all that has to be said is that in truth and to be very accurate, the real thrust of the opinion in said case is that Air France was liable for breach of contract in bad faith and not for such "breach (of contract) as well as for quasi-delict," as may be indubitably gleaned from the finding and holding that, "the manager not only prevented Carrascoso from enjoying his right to a first class seat; worse, he imposed his arbitrary will; he forcibly ejected him from his seat, made him suffer the humiliation of having to go to the tourist class compartment—just to give way to another passenger whose right thereto has not been established. Certainly this is bad faith. Unless, of course, bad faith has assumed a meaning different from what is understood in law. For 'bad faith' contemplates a "state of mind affirmatively operating with furtive design or with some motive of self-interest or ill will or for ulterior purposes" (at pp. 166-167). Surely, this is not inconsistent with *Fores vs. Miranda*, and anything else said by Justice Sanchez indicating a different view is necessarily obiter dictum.

b. The difference between Anglo-American
and Philippine-Spanish laws on the
point in issue.

Withal, the portion of the Carrascoso opinion, quoted by the majority, which holds that "passengers do not contract merely for transportation" but "they have (also) the right to be treated by the carrier's employees with kindness, respect, courtesy and due considerations, etc." such that "any rude or discourteous conduct on the part of

the employees towards a passenger gives the latter an action for damages against the carrier" is taken from American jurisprudence, 4 RCL 1174-1175, and is along the same direction as the other American decisions like *Lipman v. Atlantic Coast and Cavev. Seaboard Airline* referred to in the footnotes on pp. 18-19 of the majority decision. Said rulings are undoubtedly expressive of the American law on the point hereunder discussion, but it is to me obvious that the statement in 15 ALR, 2nd 133, Sec. 13, cited in 14 Am. Jur. 2d, p. 481 to the effect that "it is held in nearly all jurisdictions, if not universally that a carrier is liable to a passenger for humiliation and mental suffering caused by the abusive or insulting language directed, at such passenger by an employee of the carrier" must be read in the light of *Fores vs. Miranda* which definitely recognizes the separate substantiality of the liability for tort or *cuasi-delicto* committed in the course of a breach of contract from that of the liability *ex-contractu* arising from the same act. No doubt, the ultimate and consequent relief to which the passenger may be entitled would probably be materially the same amount and the carrier (employer) would have to answer directly for it, even under the Philippine-Spanish juridical concept enunciated in *Fores*, but this is no reason for refusing to distinguish, for it is not proper to foreclose presently inconceivable situations that might make the distinction material, and, in any event, it is best to look at all legal problems in their correct perspective. May I add, at this juncture, that it is not a matter of choice for the court as to which legal reasoning is better, that of American jurisprudence adopted by Justice Sanchez in *Carrascoso* and followed in turn by the majority in the present decision and resolution or that of Justice Reyes in *Fores*, it is simply that our own jurisprudence is definitely clear and settled on the point, and if national pride and dignity should ever be thought of in relation to this case, I would prefer that it should be on this legal aspect that this Court be emotional rather than in regard to the word "monkeys" used by-appellant's agents, which strictly speaking, is not always intended in its literal sense.

Incidentally, it is interesting to mention here, for purposes of the present case because of its peculiar setting, that in the same section of the annotations on Carriers in 14 American Jurisprudence, Second Series, cited by the majority, it is stated that the liability of a carrier imposed under the above-mentioned rulings "cannot be predicated upon a mere imperative demand of an employee of the carrier or his stem manner in addressing a passenger nor ... alone on a passenger's own opinion of the propriety of an employee's language or on the epithets by which the passenger characterizes such language ... (and) such liability is denied where there has been a mutual exchange of abusive language between the employee of the carrier and the passenger, although the courts have been reluctant to find in favor of the carrier even in those cases in which the language of the passenger has been a factor in bringing about the abusive language on the part of the carrier's employee," which only means that, as I have pointed out above, fairness and justice require that in determining the liability of carrier's in cases like the present, the conduct of the carrier's employee is not the sole criterion, but equal attention and consideration must be given to the attitude of the passenger.

Going back to the legal principle under discussion, it may also be noted that in all previous cases wherein this Court held the carriers liable for breach of contract in bad faith^[15] the qualifying element of bad faith was part of the very same causative act of breach itself and not in addition thereto. Thus, in all of said cases, the transfer of the offended parties, who were passengers with first-class tickets to the third-class section in violation of their respective contracts of carriage were held to have been in bad faith because they were made only to accommodate other passengers, and without any just cause. In other words, the bad faith in all said cases was constitutive of the very operative acts violative of the contract of carriage. In the case at bar, on the other hand, the offloading of Mr. Zulueta is in every sense separable from the abusive or insulting language attributed to appellant's employees while they were demanding that Mr. Zulueta open his bags, and consequently, the tort resulting from such verbal offense is juridically independent of the contractual breach of not taking him to his destination and it may, therefore, be considered as a distinct cause of action and ground for relief from the one for contractual breach.

c. No condition in contracts nor

in suppletory Philippine law
 on contract making carrier
 liable for improper conduct
 towards passenger, the liability
 therefor being ex-cuasi-delicto,
 not ex-contractu.

Indeed, the terms of the explicit contract between appellees and appellant which are the tickets, Exhibits Q, R and S, contain no provisions relative to the particular point in controversy. Neither does Section 4 Chapter 111, Title VIII of the Civil Code, which is the law on common carriers, and much less any part of the general law on contracts and obligations, and, for that matter, the still enforceable provisions of the Code of Commerce. Nor can Article 21 on Human Relations of the Civil Code be invoked in this connection, for the simple reason that said article may be relied on only when there are no applicable statutory norms, and in the present case, as already stated, Articles 2176 in relations to Articles 2180 and 2219 (7) govern. Thus, it is clear that unless this Court wants to incorporate Anglo-Saxon judicial doctrines into our law in substitution of the well founded juridical postulates pointed out by Justice Reyes in *Fores vs. Miranda*, the liability of appellant to appellees for the tort committed by its agents in using offensive language against them must be treated as a separate and distinct cause of action independent of the breach of the contract of carriage consisting of the off-loading of Mr. Zulueta.

- The relief to which appellees
 are entitled cannot be more than
 for actual damages to Mr. Zulueta
 arising from breach of contract
 and also for actual or compensatory
 as well as moral and exemplary
 damages to all three of appellees
 born of quasi-delict.

a. Actual damages of Mr. Zulueta
 could have been more than proven.

With the juridical nature of the appellant's liability thus clarified, the granting of relief to the appellees is not a problem at all. It is indubitable, for instance, that indeed, as the majority holds, Mr. Zulueta is entitled to actual or compensatory damages, which according to the evidence are the following:

"PAA Tkt. No. 026091, per Sharp

Travel Service Co., Inv. No.20648

Pl,649.70

U.S. \$100 Advanced in Wake,

per Sharp Travel Service Co.,

390.00

Inv. No. 20648

"PLDT long distance overseas calls,

to and from Wake Island, per PLDT

Inv. Ser. No. 24383

46.20

PLDT long distance calls to

Pasig, per PLDT 10/25 & 10/26

.35

PLDT to Wake Island, per PLDT Inv.

Ser. No. 23-377, Oct. 24

5' .75

Two bottles of Napoleon Brandy,

broken at the MIA by Pan Am Personnel

upon arrival of Mr. R. Zulueta

58.50

Damage to personal property—broken

phono records and perfume bottles

caused by misloading and mishandling

of baggage at Wake Island

by Pan Am personnel

366.70

Disruption of operations of San

Lorenzo School, Inc., of International

Relations, Inc., and of

other entities with which Mr. and

Mrs. Zulueta are connected

1,250.00. "[16]

albeit I can imagine he must have suffered a lot more, since he lost a number of days of opportunity to earn other income. It is equally true, however, that, as shown above, since appellant's agents did not act in bad faith, he cannot recover moral damages.[17] To allow such recovery, would be to violate the clear provisions of the law and constitute unwarranted judicial legislation (*Mercado vs. Lira*, supra.)

b. Collective award of damages for quasi-delict is not legally tenable.

As regards the quasi-delict committed by appellant's agents, there can also be no question that appellees are entitled to damages therefor. I do not believe, however, that it is proper to grant them a collective award as the majority had done. To start with, reading the majority opinions, one is easily impressed that the aggregation of the award to appellees may have somehow contributed to the hugeness of the amount thereof, which naturally is unjust or unfair to appellant.

While the three appellees do belong to a single family, it is undeniable that the honor and prestige of each of them do not belong to all of them in common. In the context of the specific quasi-delict herein involved, consisting of the rude conduct and insulting language of appellant's agents, it appears clear to me that the causative act of referring to appellees as "three monkeys" must have been understood by everyone concerned to have been meant more for each of the appellees individually, rather than collectively. In any event, the injurious consequence of said slander cannot be said to have impaired or prejudiced their social standing as a group; rather, it must be their respective individual and personal honor and prestige or reputation that have been damaged. Paraphrasing Justice Ozaeta in *Lu Chu Sing, et al. vs. Lu Tiong Gui*, 76 Phil. 669, 679, in the eyes of the law what was imputed to Mr. Zulueta is not imputable to his wife and daughter, who had personalities of their own, separate and distinct from his, and whose rights and obligations were not merged with his, such that his name and reputation were not also theirs and the invasion of his right was not an invasion of theirs. If at all any collective concept may be perceived in regard to said award in any sense, it is difficult to conceive that in law and in fact the humiliation and shame suffered by them may be considered as also collective for purposes of granting them relief. It is quite evident that the three of them did not have common interests to protect, since as already stated each of them could legally be interested only in his or her own personal honor and reputation, and whatever sympathy each of them might have for the fate of the other, is not actionable. No less than the distinguished writer of the opinions in the case at bar adopted for this Court in *Strebel vs. Figueras*, 96 Phil. 321, a case also involving defamation, the rule in American Jurisprudence as follows:

"Injury or Wrong to Another.—In law mental anguish is restricted as a rule, to such mental pain or suffering as arises from an injury or wrong to the person himself, as distinguished from that form of mental suffering which is the accompaniment of sympathy or sorrow for another's suffering or which arises from a contemplation of wrongs committed on the person of another. Pursuant to the rule stated, a husband or wife cannot recover for mental suffering caused by his or her sympathy for the other's suffering." (15 Am. Jur., pp. 597-598) (italics supplied.)

Justice J.B.L. Reyes made the same rulings, in essence, in *Araneta vs. Arreglado*, 104 Phil 529, citing *Strebel*. Applied to the case at bar, the foregoing rulings dictate that each of the appellees is entitled to separate relief.

Besides, it is only consistent with fundamental principles that the damages to be awarded to each of the appellees should be individualized in accordance not only with their respective personal circumstances but also with the varying factors that affect the measure of the damages to which each of them is entitled. For instance, Mr. Zulueta should be held to have suffered most, considering his personal qualifications, enumerated in the complaint and substantiated by the evidence, which may be conceded to be deserving of higher compensation than those of his

wife and daughter, likewise alleged in the complaint and proven at the trial. (Lopez vs. Pan-American Airways, supra.) On the other hand, the fact that in a large sense it may be said that he provoked the whole incident, and then his refusal, according to Mr. Sitton, to talk with the latter inside his office, where their disagreement may be discussed in comparative privacy and, principally, his extreme belligerence are factors which should reduce the award of damages to him but not those to his wife and daughter, inasmuch as said factors do not exist insofar as they are concerned. In fact, even the majority opine that the award of damages to him should be mitigated because of his own conduct. Under these circumstances, I hold that it is not legally proper to maintain the collective award made in Our decision. I reiterate that because of the circumstances peculiar to each of them, We would be remiss in the performance of our judicial duty should We leave the proportioning of relief awarded in Our decision in the hands of the parties themselves. Already We are officially and formally advised that the Zulueta spouses have separated and, what is of more relevant importance, Mrs. Zulueta has entered into a compromise with appellant in respect to her share. We can thus imagine what difficulties their daughter, Miss Zulueta, is liable to encounter in making her parents agree on how much should pertain to her. Indeed, as I have already mentioned at the outset, under the theory of conjugal partnership adopted by the majority, to which I do not agree, the creditors of her parents whose credits are collectible from the conjugal partnership properties will not just allow Miss Zulueta to gobble up the assets of said partnership to their prejudice. We can, therefore, see that We would only be spawning more litigations if We did not do now what is incumbent upon Us to do. I submit that justice demands that We should avoid such an undesirable situation. Pertinently, according to Section 3 of Rule 35, in a situation like this, "the Court may (even) require the parties (the Zuluetas) to file adversary pleadings as between themselves" in order to "determine their ultimate rights and obligations."

(1) Reasons against the conjugal-
partnership-proper theory-theory
of the majority

In a way, the collective award made by the majority is merely the consequence of the theory advanced in the decision and elucidated in the resolution that the damages herein involved constitute conjugal partnership property of the Zulueta spouses. Again, I find this theory unacceptable for the following reasons:

(a) Miss Zulueta is not a
member of the partnership
and has nothing to do with
it — she has her own damaged
honor and reputation to be repaired.

It is incontestable that factually there are three aggrieved parties in this case, Mr. Zulueta, Mrs. Zulueta and Miss Zulueta. Assuming for a moment that the damages to the first two or to either of them may be considered conjugal partnership property, how about those sustained by Miss Zulueta? We cannot disregard the fact that each of the appellees, including Miss Zulueta, have their respective rights and obligations, apart, of course, from their individual honor and reputation, and that all these things have their respective legal import to each of them, on the basis of which they may have personal and individual legal relations with their parties. If only because the damages due Miss Zulueta individually cannot by any means form part of the conjugal partnership properties of her parents, since she has her own honor and reputation that were damaged separately from theirs and which have to be repaired, and, furthermore, she has her own rights and obligations to which these damages are inherently related, I cannot see the point in the majority's insistence that the award in this case should remain in its collective form. Personally, I confess I overlooked this very important flaw when I concurred in the decision, but now that I realize it, I would consider myself guilty of sheer stubbornness, if I did not dissent from the present resolution.

(b) Damages whether actual or moral are merely compensatory of what an aggrieved party loses, hence it is incompatible with the basic principle of the conjugal partnership of properties, which is that of a partnership of gains.

It is likewise beyond dispute that like actual or compensatory damages, the exclusive purpose of moral damages is no more than reparation, restoration or compensation. The only difference between actual or compensatory damages, on the one hand, and moral damages, on the other, is that the former relate to material injury while the latter contemplate injury to the feelings. In other words, the former compensate or restore what has been physically or pecuniarily lost whereas the latter are intended to heal wounded sentiments and no more — not a bit more. Speaking for a unanimous Court in *Malonzo vs. Ga'lang*, 109 Phil. 16, and as if adding further light to his pronouncement in *Mercado vs. Lira*, *supra.*, to the effect that "the amount of moral damages — should be such as may be reasonable and just under the circumstances in (each) given case", Justice J.B.L. Reyes ruled out any idea of either reward and premium, on the one hand, or punishment and penalty, on the other, being in any degree contemplated in the true concept of moral damages thus:

"Finally, with respect to moral damages, we are inclined to agree with petitioner that these damages are not recoverable herein, notwithstanding the finding of the trial court and the Court of Appeals that his complaint against respondents was clearly unfounded or unreasonable. It will be observed that unlike compensatory or actual damages which are generally recoverable in tort cases as long as there is satisfactory proof thereof (Art. 2202), the Code has chosen to enumerate the cases in which moral damages may be recovered (Art. 2219). Alike enumeration is made in regard to the recovery of attorney's fees as an item of damage (Art. 2208). But the two enumerations differ in the case of a clearly unfounded suit, which is expressly mentioned in Art. 2208 (par. 4), as justifying for award of attorney's fees, but is not included in the enumeration of Art. 2219 in respect to moral damages. It is true that Art. 2219 also provides that moral damages may be awarded in 'analogous cases' to those enumerated, but we do not think the Code intended 'a clearly unfounded civil action or proceedings' to be one of these analogous cases wherein moral damages may be recovered, or it would have expressly mentioned it in Art. 2219, as it did in Art. 22-08; or else incorporated Art. 2208 by reference in Art. 2219. Besides, Art. 2219 specifically mentions 'quasi-delicts causing physical injuries,' as an instance when moral damages may be allowed, thereby implying that all other quasi-delicts not resulting in physical injuries are excluded (*Strebelvs. Figueras*, 96 Phil., 321), excepting, of course, the special torts referred to in Art. 309 (par. 9, Art. 2219) and in Arts. 21, 26, 27, 28, 29, 30, 32, 34 and 35 on the chapter on human relations (par. 10, Art. 2219).

"Furthermore, while no proof of pecuniary loss is necessary in order that moral damages may be awarded, the amount of indemnity being left to the discretion of the court (Art. 2216), it is, nevertheless, essential that the claimant satisfactorily prove the existence of the factual basis of the damage (Art. 2217) and its causal relation to defendant's acts. This is so because moral damages, though incapable of pecuniary estimation, are in the category of an award designed to compensate the claimant for actual injury suffered and not to impose a penalty on the wrongdoer (*Algara vs. Sandejas*, 27 Phil., 284). The trial court and the Court of Appeals both seem to be of the opinion that the mere fact that respondent were sued without any legal foundation entitled them to an award of moral damages, hence they made no definite finding as to what the supposed moral damages suffered consist of. Such a conclusion would make of moral damages a penalty, which they are not, rather than a compensation for actual injury suffered, which they are intended to be. Moral damages, in other words, are not corrective or exemplary damages."

It may be added perhaps that the Civil Code precisely provides for exemplary damages which may be assessed

whenever it is necessary to impose more than compensatory and moral damages, as a measure of punishment or correction and to set an example for the public good. (*Lopez vs. Pan-American etc. supra.*)

Such being the case, it does not need much argument to show that not all the damages to which the Zulueta spouses are entitled in this case can be conjugal partnership property. Since the actual and moral damages which may be awarded to them merely replace whatever material or sentimental losses or injuries they have suffered, the same cannot be wholly considered as either the earnings or profits which are categorized in the law on conjugal partnerships as gains or "ganancias". The only portions of the said damages which may be deemed as pertaining to the category of earnings or profits of the spouses are those that correspond to their unearned income and hospital expenses. (Civil Code of the Philippines by Senator Tolentino, Vol. I, pp. 361-362; *Bismorte vs. Aldecoa*, 17 Phil. 480; *Lilius vs. Manila Railroad*, *infra.*)

Article 142 of the Civil Code defines the conjugal partnership of gains as follows:

"ART. 142. By means of the conjugal partnership of gains the husband and wife place in a common fund the fruits of their separate property and the income from their work or industry, and divide equally, upon the dissolution of the marriage or of the partnership, the net gains or benefits obtained indiscriminately by either spouse during the marriage."

Substantially, this is the same as Article 1392 of the Civil Code (of Spain) which was in force here before the present Code, but it will be noted that the change in phraseology served to accentuate not only the nature of the component elements of the so-called conjugal partnership of properties but also how they come into being. The Spanish text of Article 1392 reads:

"Mediante la sociedad de gananciales, el marido y la mujer haran suyos por mitad, al disolverse el matrimonio, las ganancias o beneficios obtenidos indistintamente por cualquiera de los conyuges durante el mismo matrimonio."

and it is translated in Fisher's Civil Code of Spain thus:

"ART. 1392. By virtue of the conjugal partnership the earnings or profits obtained by either of the spouses during the marriage shall belong to the husband and the wife, share and share alike, upon the dissolution of the marriage."

In other words, whereas the old provision refers broadly or vaguely to "ganancias o beneficios" or "earnings or profits," for which reason the system itself is aptly denominated as "sociedad de gananciales," the new one makes it abundantly clear that what are contemplated are "fruits of their separate property and the income from their work or industry," which are what Manresa precisely elucidates this wise:

"El fondo comun de la sociedad, o sea de ambos esposos, destinado a las necesidades comunes o al cumplimiento de todas las cargas y obligaciones inherentes a la misma sociedad, se halla formado por dos elementos esenciales: los frutos o rentas de los bienes particulares de cada conyuge, y los productos obtenidos con su trabajo. Las adquisiciones realizadas con el sobrante de esos frutos y productos despues de cubiertas todas las obligaciones de la sociedad, son tambien comunes.

"La sociedad produce efectos entre los socios. Con relacion a terceros, la sociedad y su jefe, que es el marido, se identifican, como veremos en su lugar.

"El Art. 1.392 no pretende definir la sociedad de gananciales, pero da clara idea de su contenido. Es una sociedad constituida mediante el matrimonio entre el marido y la mujer, por virtud de la cual, ponen en comun los frutos de sus bienes privativos y su trabajo o industria, y hacen suyos, por mitad, al disolverse la union, las ganancias o beneficios obtenidos indistintamente por cualquiera de los conyuges durante el matrimonio.

"Este efecto esencialísimo de sistema, marcado en el artículo antes citado, que estamos comentando, es el que da nombre a la sociedad, cuyo objeto económico debe ser el acrecentamiento del caudal familiar y la obtención de ganancias (gananciales) o beneficios, que la ley, en la imposibilidad de conocer la proporción en que deben pertenecer a cada cónyuge, en relación a su esfuerzo y a su capital, ordena se distribuyan con completa igualdad."

"x x x

x x x

x x x.

"I, Productos del trabajo.— Como dice Laurent, la mayor parte de las comunidades sólo se componen de los productos del trabajo de los asociados, por ser el solo bien que los futuros esposos poseen; este bien sirve de base a todo lo demás, en el principio de la riqueza y el apoyo de la moral.

"El num. 2. del Art. 1.401 no admite exclusión de ninguna clase, Ya se trate de un jornal o salario devengado periódicamente por trabajos manuales de más o menos importancia, ya de sueldos, honorarios o derechos en el ejercicio de un cargo o profesión, ya de los productos de una empresa industrial o mercantil, ya de una recompensa por obras o servicios; ya sean los trabajos industriales, agrícolas, comerciales, científicos, artísticos o literarios; ya, en fin, se obtengan los beneficios por uno solo de los cónyuges o por ambos, todo es ganancial, y todo se entiende pertenecer por mitad tanto al marido como a la mujer.

"Lo único procedente en ciertos casos será distinguir cuidadosamente lo que debe ser considerado como donación, aunque remuneratoria, y lo que es realmente producto del trabajo o industria de alguno de los cónyuges,

"Un literato insigne publica obras notables, obteniendo los derechos inherentes a la propiedad literaria; un industrial obtiene determinados privilegios; un abogado ilustre, un médico de renombre, un cantante famoso, un torero arriesgado, obtienen crecidos productos con la venta de sus obras, o de sus géneros, ganan sumas fabulosas en el ejercicio de igual ambos cónyuges; y cuanto en el día de la disolución exceda al caudal privativo de cada uno, y al importe de las deudas, se reparte con igualdad.

"Este resultado puede parecer injusto; pero ni los casos apuntados son frecuentes, ni puede desconocerse la influencia, a veces decisiva, que el cónyuge que nada gana tiene en la conservación de lo ganado. En este aspecto de la cuestión nos referimos a cuanto quedó expuesto en las ideas generadas al principio de este tomo.

"II. Frutos.— El num. 3. del Art. 1.401, considera gananciales los frutos, rentas o intereses percibidos o devengados durante el matrimonio, procedentes de los bienes comunes o de los peculiares de cada uno de los cónyuges.

"Por de pronto, sólo habrá frutos o rentas de los bienes de cada cónyuge; más tarde, durante la sociedad y por subrogación. con esos mismos frutos o con los productos del trabajo, se adquirirá tal vez un capital común, que a su vez producirá nuevas rentas o frutos.

"En la frase frutos, rentas o intereses, la ley comprende toda clase de frutos naturales, industriales o civiles provenientes del capital, todos los productos o utilidades que los bienes puedan proporcionar. La sociedad de gananciales tiene derecho a todo cuanto pueda considerarse como frutos, según las reglas establecidas para el usufructo. Los artículos 1.402, 1.403 y 1.405, corapletan el pensamiento del legislador, resolviendo casos que pudieran ofrecer alguna duda en la materia que examinamos.

"La ley se refiere con la palabra percibidos a los frutos naturales o industriales y con la palabra devengados a los frutos civiles. Unos y otros han de haber sido percibidos o devengados durante el matrimonio." (Manresa,

Codigo Civil Español, pages 476; 506-508)

There is thus a discernible emphasis on the thought that the effort or labor on the part of any or both of the spouses, whether this be actual or presumed, must be the creative factor of the "earnings of profit" in order for any of these to form part of the conjugal partnership properties. This is even made clearer by the enumeration in Article 153 of what "are conjugal partnership property,"⁵¹ namely:

"(1) That which is acquired by onerous title during the marriage at the expense of the common fund, whether the acquisition be for the partnership, or for only one of the spouses;

"(2) That which is obtained by the industry, or work, or as salary of the spouses, or of either of them;

"(3) The fruits, rents or interests received or due during the marriage, coming from the common property or from the exclusive property of each spouse."

Even the new provision regarding "things acquired by occupation, such as fishing and hunting" conveys the same underlying idea. While the new provision, Article 154, which provides that 'the share of the hidden treasure which the law awards to the finder or proprietor belongs to the conjugal partnership' seems to refer to something acquired without labor on the part of the spouses, the truth is that such hidden treasure is viewed by the Code as fruit of the property of the spouse in which it is found, under Article 153 (3). Manresa explains the reason for this classification as follows:

"Tesoro.— Tambien ofrece alguna dificultad decidir si los tesoros, descubiertos durante el matrimonio, en la parte perteneciente al inventor, deben o no considerarse bienes gananciales.

"Desde luego, cuando el tesoro no se descubre por casualidad, sino a fuerza de trabajos realizados de acuerdo o con consentimiento del propietario del terreno, no cabe duda de que debe considerarse como ganancial.

"Mas si el tesoro se descubre casualmente, es un don de la fortuna, una ganancia casual impensada. No cabe en ninguno de los numeros del Art. 1.401, porque ni es fruto, aunque se encuentre en terreno de alguno de los conyuges, ni es producto del trabajo o la industria, ni es adquisicion a titulo oneroso con fondos del caudal comun.

"El tesoro es, desde luego, adquisicion a titulo lucrativo, porque no exige equivalente alguno por parte del descubridor. Esto resolveria tal vez la cuestion si no existiera el Art. 1.406, que considera las ganancias del juego, son tambien de la fortuna, como bienes gananciales. Otros Codigos. o resuelven la cuestion directamente o declaran ganancial lo adquirido por hechos fortuitos, como loteria, juego, apuesta, etc. Esto ocurre en los Codigos de la Republica Argentina y Uruguay, aquello en los de Chile y Columbia.

"El Art. 1.731 delCodigo de Chile dice: 'La parte del tesoro, que segun la ley pertenece al que lo encuentra, se agregara al haber del conyuge que lo encuentre, y la parte del tesoro que, segun la ley, pertenece al dueño del terreno en que se encuentra, se agregara al haber de la sociedad, si el terreno perteneciere a esta, o al haber del conyuge que fuera dueño del terreno.'

"Algo significa que los dos expresados Codigos, cuyo sistema de gananciales representa una comunidad relativa mas extensa, no consideran ganancial el tesoro descubierto en esas circunstancias. Teniendo esto en cuenta, y ademas, que en nuestroCodigo no se declara expresamente ganancial lo adquirido por donde la fortuna o por hecho fortuito, que el Art. 1.406 resuelve un caso especial que a lo mas puede extenderse a toda clase de ganancia en juego, rifa o apuesta, pero no a adquisiciones de naturaleza, en parte distinta, como la que nos ocupa, y que el Articulo 1.396 considera privativo en general de cada conyuge lo que adquiere por titulo gratuito, pudiera deducirse que el tesoro descubierto por casualidad durante el matrimonio por uno de los esposos, pertenece exclusivamente al inventor en la parte que le asigna la ley.

" Sin embargo, no consideramos la mas acertada esta solucion. Aunque el tesoro sea una adquisicion gratuita

porque no exige equivalente alguno, no puede equipararse al titulo lucrativo, base de adquisicion privativa de los conyuges. En estas adquisiciones hay una persona transmitente, llamese donante o testador, que designa y determina la persona del adquirente, presumiendose con logica su voluntad de que el donatario, legatario o heredero, no comparta los bienes con otras personas distintas, aunque se trate de un conyuge. La ley y los mismos testadores y donantes tienden siempre a conservar los bienes en la familia, a impedir que pasen a familias extranas, y este fin quedaria fnistrado con harta facilidad y frecuencia, si los bienes donados o legados se considerasen gananciales. Hay, pues, en cuanto a esas adquisiciones, una base y una razon para decidir.

"Nada de esto ocurre respecto a los tesoros descubiertos por casualidad. La suerte designa la persona del adquirente, y no se pretende la conservacion de los bienes en una determinada familia, ni por la ley, ni por la voluntad del dueno, que es desconocido. Se trata de un donde la fortuna, de- un hecho fortuito, como el resultado del juego o de la loteria; se trata de una ganancia casual obtenida durante el matrimonio, y logico es que no se prive de ella a una sociedad que precisamente tiene por objeto la comunicacion de las ganancias. Por esto juzgamos que debe considerarse la mitad del tesoro adjudicada por la ley al inventor, ganancial, y estimarse el caso comprendido en el Art. 1.406, que se refiere al juego y a las ganancias obtenidas por otras causas que eximan. de restitucion." (Manresa,Codigo Civil Español pages 510-511.)

In contrast, under Article 148, what either of the spouses "acquires during the marriage by lucrative title" is exclusive property- of the spouse making the acquisition. And the obvious reason for all of these distinctions and clarifications is the human and realistic consideration that any earning or profit of the spouses, not derived from their respective private properties and without any effort on their part, is the product of their common and never ceasing effort to help each other directly or indirectly in the promotion of their common interest and welfare. Such is the concern of the law for their common industry that even in the absence of a marriage, properties acquired by a man and a woman living together as husband and wife through their work and industry are made governable by the rules on co-ownership. (Art. 144)

It is, therefore, inconceivable how the majority has come to the conclusion that the damages herein in question should be considered conjugal property of the Zulueta spouses. Indeed, from the point of view of a married couple, it is to me absurd to think that what a husband or wife is awarded by way of reparation of or compensation for what he or she has lost or for injuries or damage he or she has suffered constitutes "ganancia" on the part of any or both of them. I agree that under the biblical injunction followed in the common law and, fundamentally, also in our Civil Code that marriage makes the husband and the wife but one, any injury to either of them is necessarily an injury to both, still I cannot get away from the fact that damages awarded for such injury cannot be treated as earning or profit, it being evident that nothing new is added by it to their respective properties.

(b.1) In this jurisdiction, it is settled that the body of each spouse is his or her own patrimony, and necessarily, compensation for any injury suffered by it is private property of the injured spouse; their honor cannot be treated differently.

According to Senator Tolentino, "In the regime of conjugal partnership of gains, there are three separate patrimonies: (1) the patrimony of the husband, (2) that of the wife, and (3) that of the conjugal partnership. Each of these has its own assets and liabilities. It is a cardinal principle that the spouses cannot modify these patrimonies. Separate property of one spouse cannot by agreement be made conjugal property, nor can conjugal property be converted into separate property. The personal debts of one spouse, chargeable against his property, cannot be assumed by the conjugal partnership, nor those of the partnership charged against one spouse. This does not mean that property in one patrimony cannot be transmitted to, or utilized by another; nor does it mean that

debts of one patrimony cannot be paid by funds of another. All these can be done, provided that there is no impairment or prejudice to any patrimony. When there is any transmission, direct or indirect, of value from one patrimony to another, or when there is a reduction of one patrimony in favor of another, there must be a restoration of the equilibrium by means of an indemnity which must be paid by the patrimony benefited to the one which was diminished."

Manresa expresses the same view thus:

"No hay en la comunidad de gananciales, como en otras mas extensas, transmision alguna de la propiedad de los bienes de un conyuge al otro, confundiendo lo que debe permanecer separado, porque es propio e individual de las personas que, al unirse, no deben perder parte alguna de su patrimonio. Pero nace una personalidad nueva con fines especiales y con necesidades propias, y si a tales necesidades y fines no ha de sacrificarse el capital privativo de los conyuges, nada en cambio mas natural que a ello se destinen los productos de su capital, y las ganancias del trabajo, industria, o profesion de los esposos, y que si a fuerza de ahorros y sacrificios o de esfuerzos para reunir y conservar, queda en ese fondo comun un sobrante o exceso, ese exceso se adjudique a aquellos a quienes legiu'mamente pertenece, a ambos esposos, no a uno solo de ellos, a titulo de jefe o de administrador." (Manresa, *Codigo Civil Español*, page 472.)

Accordingly, when what is lost to any of the patrimonies is replaced or paid, such replacement or payment must belong to the patrimony that has suffered the loss. As Manresa explains, both the private properties of each spouse as well as their conjugal properties are composed of two groups: with respect to their private properties: (1) "Capital propio directamente de cada uno de los conyuges" and (2) "Bienes privativos de cada conyuge por sustitucion o subrogacion," (Id., pp. 491-496) and as regards conjugal properties: (1) "Bienes gananciales directos" and (2) "Bienes gananciales por subrogacion." (Id., pp. 506-516) It follows then that what is paid as compensation for what belongs to one patrimony is nothing more than "bienes por sustitucion o subrogacion" of that patrimony.

At one juncture during the deliberations of this case, I expressed the thought to my learned colleagues that because of the biblical injunction aforementioned that when a man and a woman marry, they become but one in all respects — including their bodies and their honor—perhaps it might be proper to consider these as their common properties, but studying the point further, I have come to the realization that in this respect, the law deviates somehow from the rule of the bible. Thus, it is settled in this jurisdiction that the body of the wife is her own patrimony and damages awarded for injuries suffered by it constitute her paraphernalia by "sustitucion o subrogacion." In *Lilius vs. Manila Railroad Co.*, 62 Phil. 56, this Court, making special reference to the fact that damages for personal injury to one of the spouses is not mentioned in the enumerations in Article 1396 of the old Civil Code (now Article 148) and in Article 1401 (now Article 153) of what respectively are exclusive properties and what are conjugal property, rules thus:

"It is contended that damages awarded for personal injury are not classified as separate property of each of the spouses in Article 1396 of the Civil Code and they should therefore be presumed conjugal. In answer to this, Article 1401 of the same Code, in enumerating the property belonging to the conjugal partnership, does not mention damages for personal injury.

"The question raised by these appellants is one of first impression in this jurisdiction and apparently has never been passed upon by the Supreme Court of Spain.

"The following comment is found in *Colin y Capitant*, Vol. 6, pages 217 and 218:

"No esta" resuelta expresamente en la legislacion espanola la cuestion de si las indemnizaciones debidas por accidentes del trabajo tienen la consideracion de gananciales o son bienes particulares de los conyuges.

"Inclinan a la solucion de que estas indemnizaciones deben ser consideradas como gananciales, el hecho de que

la sociedad pierde la capacidad de trabajo con el accidente, que a ella-le pertenece, puesto que de la sociedad son los frutos de ese trabajo; en cambio, la consideracion de que de igual manera que los bienes que sustituyen a los que cada conyuge lleva al matrimonio como propios tienen el caracter de propios, hace pensar que las indemnizaciones que vengan a suplir la capacidad de trabajo aportada por cada conyuge a la sociedad, deben ser juridicamente reputadas como bienes propios del conyuge que haya sufrido el accidente. Asi se llega a la misma solucion aportada por la jurisprudencia francesa.'

"From the above it appears that there are two distinct theories as to whether damages arising from an injury suffered by one of the spouses should be considered conjugal or separate property of the injured spouse. The theory holding that such damages should form part of the conjugal partnership property is based wholly on the proposition, also advanced by the Manila Wine Merchants, Ltd., that by the injury the earning capacity of the injured spouse is diminished to the consequent prejudice of the conjugal partnership. Assuming the correctness of this theory, a reading of the decision of this court in G.R. No. 39587 will show that the sum of P10,000 was awarded to Sonja Maria Lilius 'by way of indemnity for patrimonial and moral damages.' The pertinent part of that decision on this point reads:

'Taking into consideration the fact that the plaintiff Sonja Maria Lilius, wife of the plaintiff Aleko E. Lilius is — in the language of the court, which saw her at the trial — "young and beautiful and the big scar, which she has on her forehead caused by the lacerated wound received by her from the accident, disfigures her face and that the fracture of her left leg has caused a permanent deformity which renders it very difficult for her to walk," and taking into further consideration her social standing, neither is the sum of P10,000, adjudicated to her by the said trial court by way of indemnity for patrimonial and moral damages, excessive.'

"It should be added that the interest on that sum is part of the damages 'patrimonial and moral' awarded to Sonja Maria Lilius.

"Furthermore, it appears in the decision of the trial court in G.R. No. 39587 that Aleko E. Lilius claimed the sum of P10,000 as damages on account of the loss of the services of Sonja Maria Lilius as secretary and translator, her particular work as a member of the conjugal partnership. The trial court disallowed this claim and neither of the plaintiffs in that case appealed to this court.

"In view of the foregoing it is held that the sum of P10,000 with interest thereon awarded to Sonja Maria Lilius as damages is paraphernal property." (pp. 63-65)

All local text writers, among them, Justice J.B.L. Reyes and Judge Ricardo Puno, in their "An Outline of the Philippine Civil Law," Vol. I, p. 183, Senator Tolentino in his "Civil Code of the Philippines," Vol. I, p. 361, Senator Ambrocio Padilla in his "Civil Law — Civil Code Annotated," Vol. I, p. 554 (1971 Ed.), Judge Edgardo Paras in his "Civil Code of the Philippines Annotated," Vol. I, p. 457, Judge Eduardo Caguioa in his "Comments and Cases on Civil Law," Vol. I, p. 254 (1967 Ed.), and Atty. Desiderio Jurado in his "Civil Law Reviewer," p. 72 (1965 ed.), are unanimous in unquestionably adopting the same view. Indeed, having in mind the categorical tone of the foregoing ruling of this Court as well as the considerations I have discussed above, I am at a loss to understand the insinuation suggested very equivocally in the majority resolution to the effect that "this opinion[18] is, however, undecisive, to say the least" (p. 14, Resolution).

From another point of view, since under Article 163, "the fines and pecuniary indemnities imposed upon" the spouses "shall not be charged to the conjugal partnership," it stands to reason that conversely and upon the principle that these matters are purely personal, the indemnities to them for personal injury do not accrue to the partnership.

(b.2) Damages for injury to honor.

In the light therefore, of this Court's ruling in *Lilius*, the only question that remains is whether or not injury to the honor of a spouse should be treated differently from injury to his or her body. I have tried to look for precedents on the point, but unfortunately I have been unable to find any. Senator Tolentino suggests that "damages for injuries to feelings such as those from libel or slander would ... be separate property" of the spouse injured, (*I Tolentino, supra.*, p. 361) but the American cases cited by him in support of this view reveal, however, that they are based on specific statutory provisions. Be that as it may, there does not seem to be any reason in logic or principle why damage to the honor of a spouse can or must be viewed in a different light from injury to his or her person. The majority has not elucidated; in fact this point is not even discussed at all in the opinions, except where it is stated as a premise and as conclusion at the same time, that the differences between this case and *Lilius* are that there the injury was physical whereas here it is moral, and there the aggrieved party was the wife, whereas here it is the husband. Not one reason is given why such factual variations should call for a different conclusion, which is precisely the legal point to be settled. I am of the considered view, however, that while neither the human body nor a man's honor may be considered as property, all rights related thereto pertain exclusively, legally speaking, to each of the spouses individually, considering that they are peculiarly personal to him or her whose body or honor is concerned. While it is possible to conceive of family honor as a fact, it is the individual honor of the members thereof that alone can be the object of a cause of action, the family not having any juridical personality to sue as such. Moreover, the term family cannot be confined to just some of the members thereof but to all, thus giving rise to insurmountable practical problems in the enforcement of their joint rights, not to speak of how the judgment is to be made in favor of each and all of them. As already mentioned earlier, even only among the three appellees in the case at bar, their varying respective personal circumstances which the law requires to be taken into account in assessing damages make it impossible not to individualize and to speak of a joint award to all of them collectively.

As a parting shot, the majority resolution points out that "*Colin y Capitant*, as well as the *Lilius* case, refer to damages recovered for personal injuries suffered by the wife. In the case at bar, the

party mainly injured, although not physically, is the husband." The trouble, however, as I have already observed, is that no reason at all is given for the attempted distinction, simply because none exists. Does the majority mean that in case of injury to the husband, there is another law that governs? If there is any such law, where is it?

(b.3) Refutation of the majority view
based on the presumption that
plane tickets of appellees were
purchased from conjugal fund.

As I understand the majority opinions, the arguments supporting the conclusion that the damages herein involved constitute conjugal property of the Zulueta spouses center around the fact that the plane tickets used by the Zuluetas were presumably purchased from conjugal funds, hence the damages here in controversy come under Article 153 (1) of the Civil Code. The majority's rationalization in respect to this point runs thus:

"x x x Obviously, the suit contemplated in subdivision (2) of said Article 113 is one in which the wife is the real party — either plaintiff or defendant — in interest, and, in which, without being so, the husband must be joined as a party, by reason only of his relation of affinity with her. Said provision cannot possibly apply to a case, like the one at bar, in which the husband is the main party in interest, both as the person principally aggrieved and as administrator of the conjugal partnership. Moreover, he having acted in this capacity in entering into the contract of carriage with PANAM and paid the amount due to the latter, under the contract, with funds of the conjugal partnership, the damages recoverable for breach of such contract belongs to said partnership." (Decision, pp. 21-22)

"x x PANAM maintains that the damages involved in the case at bar are not among those forming part of the conjugal partnership pursuant to Article 153 of the Civil Code, reading:

'ART. 153. The following are conjugal partnership property:

' (1) That which is acquired by onerous title during the marriage at the expense of the commonfund, whether the acquisition be for the partnership, or for only one of the spouses;

'(2) That which is obtained by the industry, or work or as salary of the spouses, or of either of them;

'(3) The fruits, rents or interests received or due during the marriage, coming from the common property or from the exclusive property of each spouse.'

"Considering that the damages in question have arisen from, inter alia, a breach of plaintiffs' contract of carriage with the defendant, for which plaintiffs paid their fare with the funds presumably belonging to the conjugal partnership, We hold that said damages fall under paragraph (2) of said Article 153, the right thereto having been 'acquired by onerous title during the marriage x x x.' This conclusion is bolstered up by Article 148 of our Civil Code, according to which:

'ART. 148. The following shall be the exclusive property of each spouse:

'(1) That which is brought to the marriage as his or her own;

'(2) That which each acquires, during the marriage, by lucrative title;

'(3) That which is acquired by right of redemption or by exchange with other property belonging to only one of the spouses;

'(4) That which is purchased with exclusive money of the wife or of the husband.'

"The damages involved in the case at bar do not come under any of these provisions or of the other provisions forming part of Chapter 3, Title VI, of Book I of the Civil Code, which chapter is entitled 'Paraphernal Property.' What is more, if '(t)hat which is acquired by right of redemption or by exchange with other property belonging to only one of the spouses,' and '(t)hat which is purchased with exclusive money of the wife or of the husband,' (Pursuant of Article 148.)belong exclusively to such wife or husband, it follows necessarily that which is acquired with money of the conjugal partnership belongs thereto or forms part thereof. The rulings in *Maramba v. Lozano* (L-21533, June 29, 1967) and *Perez v. Lantin* (L-22320, May 22, 1968), cited in defendants motion for reconsideration, are, in effect, adverse thereto. In both cases, it was merely held that the presumption under Article 160 of our Civil Code — to the effect that all property of the marriage belong to the conjugal partnership — does not apply unless it is shown that is was acquired during marriage. In the present case, the contract of carriage was concededly entered into, and the damages claimed by the plaintiffs were incurred, during marriage. Hence, the rights accruing from said contract, including those resulting from breach thereof by the defendant, are presumed to belong to the conjugal partnership of Mr. and Mrs. Zulueta. The fact that such breach of contract was coupled, also, with a quasi-delict constitutes an aggravating circumstance and can not possibly have the effect of depriving the conjugal partnership of such property rights." (Resolution, pp. 12-13.)

(b.3.1) The role of Mr. Zulueta
is being projected beyond
what it really is.

To start with, it must be noted that the aforequoted statement in the decision that "the husband (Mr. Zulueta) is main party in interest, both as the person principally aggrieved and as administrator of the conjugal partnership" is not entirely accurate. The allusion to Mr. Zulueta as the "main party in interest" unduly blows up his personality thereby giving this action a collective character, but the truth is that he was the principal character in the incident

in question only from the factual point of view, for legally, his wife and his daughter are no less real parties-in-interest in this case than he is as regards the quasi-delict committed directly against them and for which they are entitled to individual relief. To my mind, to over-emphasize Mr. Zulueta's role in this case at the expense of his wife and daughter is to be unfair not only to the latter but more importantly to their creditors. Furthermore, the reference to Mr. Zulueta as being the party aggrieved "as administrator of the conjugal partnership" is an attribution to him of a personality or capacity that he never claimed whether in the pleadings, in the evidence in the court or in the brief filed with this Court—not even by insinuation. As a matter of fact, the conjugal partnership aspect of this case was never an issue in the lower court and came into the picture only when Mrs. Zulueta's compromise of her interests herein was brought to Our attention shortly before this appeal was decided. Incidentally, this is the first time I hear of an action being instituted by the administrator of a conjugal partnership in such capacity. And if that were really the case here, then why were Mrs. Zulueta and Miss Zulueta named as parties yet? Moreover, what is expressly alleged in the second amended complaint is that Mr. and Mrs. Zulueta have come to court as guardians-ad-litem of Miss Zulueta and not in any other capacity. At any rate, from the procedural angle, if in fact and in law there is anything here that can be considered conjugal partnership property, it does not and will not cease to be so whether or not Mr. Zulueta appeared as administrator of the conjugal partnership.

(b.3.2) Whose funds were used
in the purchase of the
tickets is not decisive;
there is no group contract
here.

Turning now to the legal significance given by the majority to the purchase of the plane tickets used by the appellees, it is, I submit, of no consequence that the same were paid from the conjugal funds, even if this be the presumption in the absence of any contrary showing. In the firstplace, as I have already explained, the appellant's liability to Mrs. Zulueta and Miss Zulueta, arose exclusively from quasi-delict, and not from the contract of carriage. Consequently, whatever be the character of the purchase of their tickets and assuming for a while, without conceding, that "the rights accruing from the said contracts (the contract of carriage evidenced by their tickets) including those resulting from the breach thereof by the defendant are presumed to belong to the conjugal partnership," these points are irrelevant insofar as the award to them are concerned. Of course, as regards the award to Mr. Zulueta, the portion thereof corresponding to the breach of the contract of carriage committed by appellant by off-loading him without full justification may be affected by the above arguments of the majority, but not what is due him for the quasi-delict also committed against him. I shall refer to this award more extensively anon.

In the second place, the allegation of the second amended complaint and the evidence of appellees are clear to the effect that the tickets for the three of them were purchased as individual ones -and not under a group arrangement. And I deny the presumed premise that "the purpose of the trip (of appellees from Honolulu to Manila) was for their common benefit." Not even the invoked presumption that "things have happened according to the ordinary course of nature and the ordinary habits of life" can denote such an inference. In my opinion, the enjoyment and benefits derived from a trip by a group are never common among its members, even when the trip is made with the same objective. In any event, the tickets being individual, the contracts evidenced thereby are separate and independent contracts. Indeed, it is quite far-fetched to say that had there been no quasi-delict in this case and all that had happened had been that Mr. Zulueta was off-loaded for an unjustifiable cause, Mrs. Zulueta and Miss Zulueta could just the same have been plaintiffs together with Mr. Zulueta in a collective suit such as what the majority believes this one to be. Withal, if everytime a married man or woman purchases a plane ticket, the

ensuing contract of carriage is deemed to be for the conjugal partnership, then no carrier should ever allow any married woman to acquire such a ticket for her own trip without first securing the express consent of her husband, the administrator of the conjugal partnership — which, as far as I know, would really be something very new in the air transportation industry.

(b.3.3) Neither the letter of Article 153 (1) nor the spirit behind it can be properly invoked in this case.

As may be seen in the above-quoted portions of the majority opinion, answering the contention of appellant's counsel that the damages here in question cannot be conjugal partnership property because they are not among those enumerated in Article 153, the majority points out that they come under paragraph (1) of said Article referring to "that which is acquired by onerous title during the marriage at the expense of the common fund, whether the acquisition be for the partnership, or for only one of the spouses" because "the contract of carriage was concededly entered into, and the damages claimed by the plaintiffs were incurred, during the marriage. Hence, the rights accruing from said contract, including those resulting from the breach thereof by the defendant, are presumed to belong to the conjugal partnership of Mr. and Mrs. Zulueta." Again, I submit that this position of the majority overlooks certain decisive juridical, considerations pointing to the opposite conclusion.

At the outset, it must be borne in mind that what were directly purchased or acquired with conjugal fund were the plane tickets and, correspondingly, the right to use the same in travelling from Honolulu to Manila. As far as Mrs. Zulueta and Miss Zulueta are concerned, they realized all the benefits derivable from their respective tickets. It was Mr. Zulueta alone who was not able to make the trip stipulated in the contract. Clearly, therefore, in that respect, only Mr. Zulueta is entitled to damages under his contract.

Now, the first question that arises is, may these damages due to Mr. Zulueta be considered as conjugal just because he used conjugal fund in paying for his ticket? For a more concrete perspective view of this particular issue, it must be stated that the only damages which Mr. Zulueta is entitled to recover for breach of his contract of carriage are actual damages, there being no showing of bad faith on the part of appellant's agents. These damages consist of expenses paid presumably again from conjugal fund. Accordingly, it is unquestionable that they are conjugal. Assuming, however, that Mr. Zulueta is entitled to exemplary damages, disregarding any doubt I have on the matter, and considering that the policy of the law is to favor the conjugal partnership, I am more inclined to agree, until further development of the pertinent legal provisions should clearly indicate otherwise, that such exemplary damages may be considered as conjugal property. With respect, however, to moral damages, whether these be in relation to the breach of the contract of carriage or to the quasi-delict committed by the appellant's agents, I maintain that the same cannot be conjugal property.

The theory of the majority seems to be that inasmuch as conjugal fund was used in purchasing his ticket, all rights accruing from the ensuing contract of carriage are necessarily conjugal. I do not see it that way. It must be considered that even under the position taken by the majority to the effect that the liability of appellant arises from both contract and tort at the same time, the inescapable implication is that there is a tort aspect therein. On the other hand, the effects of that tort are purely personal to each of the appellees. For instance, they affect directly the honor of Mrs. Zulueta which undoubtedly is her own patrimony; if the family honor was in any way involved, it is indubitable that her own was damaged separately and in a manner necessarily different, juridically speaking, from those of the other appellees. As I have explained earlier, with quotations from Manresa and Senator Tolentino, it is a cardinal principle that the spouses cannot modify their respective patrimonies vis-a-vis each other's and that of

the conjugal partnership. In other words, separate property of one spouse cannot by agreement be made conjugal nor vice-versa. I cannot believe that it is within the contemplation of the system of the conjugal partnership of gains, fundamentally characterized by its being formed from "ganancias o beneficios" and "Fruits and income from their work or industry," to permit that, as a consequence of a contract involving the use of conjugal fund, the indemnity for loss or damage to that which is inherently of the individual patrimony of the husband and the wife should devolve to the patrimony of the conjugal partnership. Since when and under what legal reasoning can it be sustained that damage or injury to the honor of the husband or the wife may in any sense be a "ganancia o beneficio" or a "fruit or income from their work or industry"? Corollarily, how can indemnity or compensation in reparation of such damage or injury be "ganancia o beneficio" or "fruit or income from the work or industry" of the spouses?

From another angle again, the primary objective of the formation of the conjugal partnership of gains is to have a common fund to answer for the obligations of the spouses contracted in the common interest of the family, thereby solving the problems of who of the two spouses should primarily answer for them and from whose resources they should be satisfied. But there are also obligations for which the spouses are individually liable, and for these, they answer with their own patrimonies. Thus, it would be unfair to the creditors of the spouses who look to their respective patrimonies for the satisfaction of their credits for the Court to hold that any part of these patrimonies may be transformed into conjugal property to answer for obligations of the partnership by means of a contract entered into by the husband or the wife without their knowledge, much less their intervention and consent. As far as the creditors of the partnership are concerned, they are not prejudicial because the partnership is supposed to be reimbursed for whatever has been taken from its fund.

III

Based on all the considerations I have discussed in this opinion, it is my conclusion that the judgment in this case should be modified in the sense that judgment should be against appellant to pay appellees as follows:

- To appellee, Mr. Rafael Zulueta:

- (a) P3,394.00 as actual damage? caused by his having been off loaded;
- (b) P425.00 as actual damages for personal things he carried on board which were broken;
- (c) P50,000.00 as exemplary damages; and
- (d) P125,000.00 as moral damages for quasi-delict;

- To appellee Mrs. Telly A. Zulueta:

- (a) P1,683.85 as actual damages caused by quasi-delict; and
- (b) P 125,000.00 as moral damages for quasi-delict;

- To appellee Miss Carolinda Zulueta:

- (a) P75,000.00 as moral damages; and

- To the three appellees to be shared by them proportionately:

- (a) P75,000.00 for attorney's fees.

In addition, appellants shall pay the costs.

By way of clarification, I feel that the P500,000.00 collectively awarded in the decision to appellees as moral damages is excessive. As I have said earlier, the cause of the excess is attributable in part to the fact that the award is collective. It is not very easy to make a correct collective appraisal of the varying factors related to each of the appellees which have to be taken into account, apart from the human tendency to be overimpressed when assessing collective damage or injury. Moreover, having in mind all the attendant circumstances, it is quite possible that the other passengers before whom the appellees were loudly referred to as "three monkeys" and otherwise ridiculed and embarrassed may not have taken the words and conduct of appellant's agents as actually intended to place appellees in contempt, since said passengers must themselves have felt aggrieved also by Mr. Zulueta's having disappeared mysteriously and thereby delaying the flight, apart from the fact that he somehow caused them no little alarm on account of the "bomb scare" that gave occasion for the putting down of all their baggage. It may be said that they stared at the Zuluetas, not necessarily or entirely because of the insulting words of appellant's agents nor their indecorous attitude towards appellees, but also because the said passengers had reasons of their own to feel bothered by Mr. Zulueta's "extreme belligerence." I am convinced that equal awards of P125,000 each as moral damages to Mr. and Mrs. Zulueta should be adequate to compensate for the injury to their feelings and reputation they have suffered. Actually, Mr. Zulueta's personal qualifications should entitle him to more than what Mrs. Zulueta should get, but, as already explained earlier, there are extenuating circumstances which appellant may invoke insofar as he is concerned. Proportionately, an award of P75,000 to Miss Zulueta is fair enough.

According to the evidence, the actual damages due Mr. Zulueta on account of his having been off-loaded amount to only P3,394.00, which he spent for plane fare in returning to Manila from Wake Island and making long distance calls while there. This amount includes P1,250.00 for the disruption of the operations of San Lorenzo School, Inc., of International Relations, Inc. and other entities with which he was connected. Mrs. Zulueta is entitled to an equal amount for the same purpose.

Apart from the P3,394.00, Mr. Zulueta should also be paid P425.00 for his personal things he carried on board but which were broken either in transit or at the airport, which constitutes a separate liability of appellant.

It will be noted that I have included an item of P50,000 for exemplary damages. This is related to the breach of the contract of carriage. I believe this award is justified.

I am not unaware that the tendency of the precedents in this Court is to allow exemplary damages in cases of breach of contract only when the defendant has acted "in a wanton, fraudulent, reckless, oppressive or malevolent manner" in accordance with Article 2232 of the Civil Code, and in cases of quasi-delicts, only when the defendant has acted "with gross negligence" pursuant to

Article 2231. In fact, appellant cites all these precedents in its motion for reconsideration.[18] I am of the view, however, that the cited articles are not intended to exclude all possibilities for the imposition of exemplary damages. I submit that the provisions of Article 2229 to the effect that:

"Exemplary or corrective damages are imposed, by way of example or correction for the public good, in addition to the moral, temperate, liquidated or compensatory damages."

are broad enough to serve as basis for the court's exercise of sound discretion in awarding exemplary damages whenever it feels it is necessary to do so "by way of example or correction for the public good." It is my considered opinion that in line with the objective to make common carriers render the best service possible and spare no effort in making their employees and agents observe utmost care and proper conduct in their relations with the passengers, exemplary damages may be awarded in instances like the present one. For the purpose of

setting an example for the public good, appellant should be made to pay exemplary damages, in order that it may see to it that corrective measures are taken to prevent any of its agents and employees from causing moral injury or, for that matter, any injury to any of its passengers. This is easily possible by supervising closely its employees and reminding them periodically of their duties and obligations to the riding public, and when necessary, by imposing appropriate sanctions. It is obvious that in the case at bar, no evidence has been presented by appellant along these points.

And in connection with the compromise agreement between Mrs. Zulueta and appellant, it is beyond question that except for P1,683.85, her actual damages, which are clearly conjugal because they cover hospital expenses and loss of earning, the P125,000 moral damages to which she is entitled are considered settled completely.

As in the case of the actual damages of Mrs. Zulueta, the actual damages of Mr. Zulueta, together with the exemplary damages due him, should accrue to the conjugal partnership.

CONCLUSION

Summary of disagreements with the majority.

Before closing, it seems convenient and proper that I make a summary of my disagreements with the majority opinions.

Regarding the general aspects of this case, I disagree with the majority on two points, namely, (1) their view that the liability of appellant is founded on breach of its contract of carriage,[19] coupled with tort, for which reason the cause of action of appellees is viewed as only one for all of them, and consequently, (2) that the award should be collective. I maintain that the breach of contract and the tort involved here are separate sources of liability related to different acts of appellant's agents, hence the corresponding causes of action of appellees should be deemed separate and individual and, consequently, the award to them cannot and should not be collective.

With respect to specific considerations, I disagree with the majority on the following points, inter alia: (1) Considering the incident between Mr. Sitton or Captain Zentner, on the one hand, and Mr. Zulueta, on the other, immediately after he was found as a separable area of possible liability, I find that the conduct of appellant's agents thereat, although not very proper, may not be a cause of action from any point of view. The majority considers said conduct as part of the cause of action based on discourtesy and abuse.

(2) Regarding the altercation related to the inspection of Mr. Zulueta's luggage, my position is that, in the light of the attending circumstances which made appellant's agents apprehensive about the plane's safety, it was within their authority, nay, it was their duty imposed by law and the nature of their occupation, to require Mr. Zulueta to permit examination of his bags without the need of any search warrant or the presence of any police or customs authority, but, on the other hand, there was no justification for them to insult and humiliate appellees, hence appellant is liable for quasi-delict, whereas the majority considers the said agents' demand entirely unwarranted and, because they insisted on it, with accompanying harsh and insulting language, appellant's liability in the premises is part of the breach of contract and tort already mentioned.

(3) I agree with the majority that there was breach of his contract of carriage in the off-loading of Mr. Zulueta, but I dissent from the finding that appellant's agents acted in bad faith.

(4) I disagree with the majority's assessment of the amount of the damages that should be awarded to appellees, the same being excessive; furthermore, I hold, differently from the majority, that the award to appellees should be separate and individual to each of them as outlined above.

(5) I also disagree with the majority's pose that all the damages due appellees are conjugal property of the Zulueta

spouses for two basic juristic reasons: (a) said damages are merely reparative and cannot in any sense be gains, hence inapposite to the essentially characteristic concept of the conjugal partnership of gains, and (b) the legal effects of the tort in this case are purely personal to each of appellees and consequently belong to their respective patrimonies, exclusive of the patrimony of the conjugal partnership; and also (c) because, in effect, the majority's position disregards the separate and individual interest of Miss Zulueta involved herein, which cannot in any sense be deemed absorbed in or merged with the interest of her parents.

(6) Consistently with my preceding views, I naturally disagree with the majority's ruling that the compromise agreement entered into by Mrs. Zulueta with appellant may not be given effect.

It goes without saying that this summary should be understood in the light of all the points I have discussed at length in this opinion.

MY VOTE

WHEREFORE, my vote is that the judgment be modified in order to conform with the foregoing considerations and conclusions.

[1] See *De Leon v. Santiago Syjuco, Inc.*, L-3316, Oct. 31, 1951, 90 Phil. 311; *Carpenav. Manalo*, L-13143, April 26, 1961, 1 SCRA 1060.

[2] *Calo v. Ajax International, Inc.*, L-22485, March 13, 1968, 22 SCRA 996, 998-999, but I have my reservations as to the philosophical consistency of the section referred to with the consideration that the jurisdiction of inferior courts is in a sense proportional to the more or less lower qualifications required of its judges, since I am not clear as to why a judge may not determine the merits of a claim over P10,000 because of his limited qualifications and yet he can uphold a defense of the same amount with the effect of resolving finally the validity of the basis of the defendant's claim, even if only partially up to P10,5000, which the defendant may not claim anymore in the court of proper jurisdiction by way of affirmative relief.

[3] *McCarthy v. M- & M. Transportation Co.* (D. Mass. 1946) 9 F.R. Serv. 13b 21, easel; *Marks v. Spitz* (D. Mass. 1945) 8 F.R. Serv. 13 62, case 1; *Perm Sport Service Inc. v. Goldstein* (Wd Pa 1940) 3 F.R. Serv. 13 b. 21 Case 2.

[4] 10 SCRA 202, 206.

[5] The record is obscure as to who of appellant's employees or agents first talked to Mr. Zulueta. The decision suggests "plaintiff may have mistaken him (Captain Zentner) for Sitton. "Appellant's evidence indicates it was Mr. Pendleton But the correct identity is immaterial in this discussion because I am using as a basis Mr. Zulueta's own testimony.

[6] Later in this opinion I will show the meagerness of the evidence regarding the utterance of the word monkeys which utterance, by the way, was denied by appellant's agents.

[7] The un rebutted testimony of Mr. Pendleton is to the effect that passengers were paged at least three times and Mr. Zulueta once by name. (pp. 44-47, t.s.n., August 18, 1966)

[8] After all, Mr. Sitton, appellant's witness, admitted that Mr. Zulueta mentioned it to him after the plane had gone and they were already in the hotel, (p. 14, t.s.n., October 19, 1966, Palisoc)

[9] Mr. Zulueta revealed later at the hotel that two of the bags were not even locked. (Exh. J; Item 35)

[10] As already stated in footnote 8, hereof, Mr. Zulueta revealed to Mr. Sitton his personal reason for going to the beach only after "the aircraft had already departed, and this was at our hotel" This testimony of Mr. Sitton is un rebutted.

[11] The legal consequence of this finding is discussed later.

[12] The captain even explained that had the suspicion arisen while the plane was in midair, he would have been compelled by the regulations, under pain of being suspended for its violation, to land at the nearest airport and conduct a search, even if in doing so, he would have had to jettison a corresponding portion of the plane's valuable fuel.

[13] 14 Am. Jur. 2d, p. 482, *infra*.

[14] In Exhibit B; presented by appellees it is expressly stipulated that "Flights cannot be held for passengers arriving late and no responsibility will be accepted in said cases."

[15] *Air France vs. Carrasco*, *supra*., *Lopez vs. Pan-American World Airways*, *supra*., and *Northwest Airlines, Inc. vs. Cuenca*, 14 SCRA 1063.

[16] There being no concrete evidence as to how much of the P2,500 in the last item alleged correspond to each of spouses, it may be conceded that they suffered equally. With respect to the broken bottles of brandy and other personal properties, they are included here for convenience, the amounts being relatively small, although they represent damages to property which constitute a separate breach.

[17] *Rex Taxicab Co., Inc. vs. Bautista*, L-15392, Sept. 30, 1960; *Lira vs. Mercado*, L-13353, Sept. 29, 1961; *Martinez vs. Gonzales*, L-17570, Oct. 30, 1962; 6SCRA331.

[18] It is not clear whether what is referred to is the opinion of this Court in *Lilius* or that of *Colin y Capitant*, but the fact is that both are discussed in the same breath.

[18] Printed Motion for Reconsideration, pp. 107-113 and 135-139.

[19] There being three separate tickets involved here, I am at a loss as to what the majority refers to as the contract of carriage violated by appellant, for even assuming Mr. Zulueta acted as administrator of the conjugal partnership in purchasing the tickets, it is inconceivable how he could have purchased Miss Zulueta's ticket also in that capacity.

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