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In the matter of the death of James Pugh (Great Britain, Panama)

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XXXVII.

IN THE MATTER OF THE DEATH OF JAMES PUGH¹.

PARTIES : Great Britain, Panama.

SPECIAL AGREEMENT : Convention of October 15, 1932.

ARBITRATOR : James J. Lenihan.

AWARD : Washington, D.C., U.S.A., July 6, 1933.

Policeman's responsibility.—Use of force in the performance of his duty.—Endeavour to make an arrest.—Resistance of party.—Attack on policeman.—Use of force.—Clubbing.—Death of party.—Effect of party's fault on the responsibility of policeman.—State responsibility for action of police force.

¹ For bibliography, index and tables, see end of this volume.

Agreement.

[See beginning of Award below.]

HIS MAJESTY'S GOVERNMENT IN THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND IN THE NAME OF AND REPRESENTING HIS MAJESTY'S GOVERNMENT IN THE IRISH FREE STATE *v.* THE GOVERNMENT OF THE REPUBLIC OF PANAMA.

In the Matter of the Death of James Pugh.

BEFORE JAMES J. LENIHAN, *Arbiter.*

July 6, 1933.

A convention having been made and entered into, on October 15, 1932, between His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland in the name of and representing His Majesty's Government in the Irish Free State, by His Majesty's Envoy Extraordinary and Minister Plenipotentiary to Panama, Sir Josiah Crosby, and The Government of The Republic of Panama, by the Secretary of Foreign Affairs of said Government, the Honorable J. Demostenes Arosemena, wherein and whereby it was agreed to submit to the decision of the undersigned, as Arbiter, the following questions, to wit:

(a) Did the Panamanian police agents Manuel de J. Tunon and Jose Cardoze exceed the powers reasonably vested in an agent of the public order in the exercise of his functions when, on Sunday, 30 June, 1929, they endeavored to take to the police station in the City of Colon the Irishman James Pugh who, it is affirmed, was in a state of intoxication, and as a result of such excess did the death of the said James Pugh occur?

(b) In the event that such excess did exist, and that by reason thereof the death of James Pugh occurred, is there certainty that the acts of the agents Manuel de J. Tunon and Jose Cardoze were malicious, voluntary, and consequently, culpable, and should the Panamanian Government, therefore, be considered obliged to pay to the British Government an indemnity for such death?

(c) If the Panamanian Government ought to pay to the British Government an indemnity, what should the indemnity amount to?

and

It being agreed, in Article 2 of said convention, that the submission of these questions to this arbitration "does not imply in any way whatsoever that the authority of the Panamanian courts, and, consequently, that of the tribunal of jurors which, on 25 October, 1929, in the Superior Court of the City of Panama, found the two police agents Manuel de J. Tunon and Jose Cardoze not guilty, is not recognized", and it being further agreed, in Article 3 of said convention, that the Arbiter should not, therefore, "enter

upon appreciations of the verdict rendered by the tribunal of jurors, but shall in view of the events which took place in the City of Colon on Sunday the 30th of June, 1929, between the police agents Tunon and Cardoze and the Irishman James Pugh, and taking into consideration solely for the finding of the facts the proofs which with regard thereto are to be found in the record, decide *ex æquo et bono* on the questions" above set forth; and

Cyril Marriott, Esq., having been duly designated as special representative of His Majesty's Government in this arbitration and Dr. Gregorio Miro having been duly designated as such special representative of the Government of the Republic of Panama; both such designations and appointments being under authority of and in conformity with the provisions of Article 7 of said convention; and

It being agreed, in Article 9 of said convention, that the expenses of this arbitration should be taxed in our judgment and paid in equal parts by the respective Governments; and

It being further agreed, in Article 10 of said convention, that the parties will accept as final our decision within the terms of the convention without right to move for reconsideration or to appeal of any kind; and

The Government of the Republic of Panama having filed with us the "record" referred to in Article 3 of said convention, said record being that of the investigation, including the written testimony of witnesses, into the death of James Pugh and of the indictment and prosecution of the policemen Tunon and Cardoze in the courts of the Republic of Panama for the crime of homicide allegedly growing out of Pugh's death at their hands; and

The parties having filed with us their respective briefs within the times and provisions of Article 5 of said convention, the final brief having been filed on April 11, 1933; and

The case being now fully submitted and we having examined the record and briefs and being fully advised in the premises.

We now find the facts, set forth our conclusions and render our opinion as follows:

FINDINGS OF FACT.

I. James Pugh of the Irish Free State was, on June 30, 1929, a seaman employed on the *S.S. Parismina*. On that date he was about 45 years of age, about five feet eleven inches in height, and weighed about 190 pounds. He was apparently a man of strong build and in good physical condition. His skin was white, thick, and tough.

II. His ship was apparently in port at Cristobal, Canal Zone. Pugh went ashore and proceeded to Colon, Republic of Panama. Just when he came ashore, the record does not disclose, but, in any event he was in "Harry's Bar" in Colon at 7 a.m. on June 30, 1929. At that time he had been drinking and appeared to be slightly under the influence of liquor.

III. When one Luis Hernandez, an Indian of the San Blas country, and barkeeper at "Harry's Bar", began his work at 7 a.m., Pugh ordered a drink and had some more thereafter, for which drinks he paid. Afterwards he gambled with Hernandez for more drinks and won. He had been drinking regularly in "Harry's Bar" from 7 a.m. until about 10 a.m.

IV. At about 10 a.m. he seated himself at a table with a woman who had come into the place. He then ordered more drinks for himself and the woman. When he had had drinks served to the value of one dollar and twenty-five cents (\$1.25) he ordered more but Hernandez demanded

payment of the one dollar and twenty-five cents (\$1.25) and refused to serve more drinks unless payment was made. Pugh became surly, refused to pay, and ordered Hernandez to serve more, stating that if Hernandez did not continue to serve, he, Pugh, would not pay what he already owed. Thereupon, Hernandez sent a fellow-countryman of his, who was in the place, for a policeman.

V. The countryman found Manuel de J. Tunon, Policeman No. 659 of the Panama National Police Force, on Avenida Herrera, Colon, and told the policeman of the trouble in "Harry's Bar". Tunon could not speak English, and, therefore, went in search of a comrade, who could. He found Jose Cardoze, Policeman No. 242 of the Panama National Police Force in front of No. 71 Eleventh Street, Colon. Cardoze could speak English. Tunon told Cardoze of the trouble in "Harry's Bar".

VI. Policemen of the National Police Force of Panama are uniformed and equipped with fire-arms and police clubs, as are the policemen of many of the nations of the world.

When inducted into the police force, they are required to take an oath of office, which, among other things, provides:

that in no case shall I make use of the arms which the Government placed in my hands, except to defend the law, the fatherland and justice; that I shall not employ them against individuals, except when, having exhausted all means of persuasion I have no other recourse than the means of force to defend my person, in case of attack, or the authority of the laws, or the execution of the orders given to me, or the prosecution of criminals and their submission to authority.

Both Tunon and Cardoze took and subscribed to such oaths.

VII. Both Tunon and Cardoze were smaller men than Pugh; neither was as strong as he; and neither was physically able to cope with him in physical combat.

VIII. Tunon and Cardoze proceeded to "Harry's Bar". When they arrived, they asked as to the trouble. When Hernandez stated that he had not paid the one dollar and twenty-five cents (\$1.25), Pugh protested that he had paid and attempted to strike Hernandez, whereupon Hernandez sought refuge behind the bar. Pugh then turned on the policemen and called them a vile name, telling them that he would not pay and telling them also to get out of the place. Cardoze then told Tunon to place Pugh under arrest and Cardoze then stepped out of the place.

IX. As above stated, Pugh had been drinking heavily for some hours and had reached an ugly and pugnacious mood. He was apparently determined not to submit willingly to arrest and was also apparently of the view that the police should not and could not arrest him.

X. Somehow Tunon succeeded in getting Pugh out of the bar without serious mishap to himself and he proceeded to take Pugh to the police station on foot. They proceeded along Bolivar Avenue and when they reached a point near the International Cabaret, Pugh physically resisted arrest and struck the policeman, knocking him down. Seeing this, Cardoze came to Tunon's aid and struck him with his club. Pugh continued to strike them and at them with his fists and the officers struck Pugh with their clubs on the arms, side, and head. Pugh's strength, condition and physical prowess were such that neither nor both of the policemen could subdue him

nor protect themselves from his attacks by physical force alone and they were compelled to use their clubs upon him in order to subdue him and to defend themselves.

XI. As they passed the International Cabaret, Pugh was resisting arrest and striking and attempting to strike the policemen and at the same time attempting to ward off the blows of their clubs. At a point just past the alley which runs between the International Cabaret and the cantina of You Hing, Pugh fell backward from the sidewalk striking the fenders of an automobile and from there to the paved street. He struck the street full length on his back. From this position he did not rise but lay there unconscious, a condition from which he never rallied.

XII. Pugh was taken to the Charity Hospital in Colon where he died a short time after his arrival.

XIII. No blood was drawn on Pugh. He was examined by Dr. Rodolfo Peralta Ortega, Director of the Charity Hospital, who found no exterior marks of violence and who determined that death was due to cerebral hemorrhage. He was also examined slightly by Dr. Carlos Biebarach, Official Physician of the Police, who observed livid body marks in the right back and back region. He was also examined, through curiosity only, by Dr. E. W. Billick, physician and surgeon of Colon Hospital, who did not see external marks or blows on Pugh's head.

XIV. Generally when a blow is received with a bruising arm such as a policeman's club there is produced a blood tumor; other times it breaks the hairy skin.

XV. After Pugh's death, his body was taken from Charity Hospital to Colon Hospital. That afternoon, the body was delivered to Mr. C. H. Hewett of the United Fruit Company at Cristobal who, on the same day, shipped the body from Colon to the Board of Health Laboratory, Gorgas Hospital, Ancon, Canal Zone, where it arrived in the evening of the same day. Mr. Hewett requested that the body be embalmed and autopsied.

XVI. The body was embalmed on the morning of July 1st and was autopsied on the afternoon of the same day. The autopsy was performed by Dr. Raymond O. Dart, pathologist of Gorgas Hospital.

XVII. The autopsy showed, that prior to the time of the injuries sustained by him on June 30th, Pugh was evidently in excellent physical condition. Under the heading "External Examination" it is stated that "the dorsal surfaces of both shoulders, arms and hands are thickly sprinkled with large brown freckles. The skin elsewhere is white, but thick and tough" and that "this examination gave no indication of the severe contusions in the subcutaneous tissues".

Under the heading "Skull", it is stated that "the vault and the base of the skull show no evidence of fracture or traumatic injury. All bony cavities are clear."

Under the heading "Throat and Neck", it is stated that "the condition of the subcutaneous tissues found in this region are described elsewhere" and we find such description under the heading "Muscles and Subcutaneous Tissues" wherein it is stated that

wide flaps were dissected on the back from head to the sacral region. These revealed extensive contusions of the subcutaneous tissues. The largest of these is spread over an area on the right side of the back from the

upper border of the shoulder to below the angle of the scapula and from the midline to the junction of the lateral and posterior surfaces of the chest wall. The subcutaneous tissues and the muscles in this region are dark red in color, hemorrhagic, and pulpified in the center. A similar large area of contused subcutaneous tissues and muscles occurs on the left posterior surface of the neck from the base of the skull to the upper surface of the left shoulder and from the middle of the lateral surface of the neck nearly to the spine. The tissues are similar in appearance to those of the back.

XVIII. The "Anatomical Diagnoses" are as follows:

Dislocation, slight, 5th cervical vertebra.
 Rupture, complete, 5th intervertebral fibro-elastic cartilage.
 Rupture, partial, transverse, anterior longitudinal ligament, cervical region.
 Rupture, multiple, partial, ligamenta flava, cervical region.
 Hemorrhage, severe, subdural, spinal cord and base of brain.
 Hemorrhage, petechial, traumatic, spinal cord.
 Contusions, severe, hemorrhagic, multiple, scalp, neck and back.
 Contusions, scalp, right frontal region.
 Persistent thymus.

The "Cause of Death" is given as "Homicide by clubbing" and the "Contributory" element is stated to be "Dislocation of 5th cervical vertebra; severe subdural hemorrhage."

XIX. The "anatomical diagnoses" made by the pathologist, Dr. Dart, were the result solely of his autopsy of the body and his conclusions as to the cause of death and the contributory cause were based upon his diagnoses. He had no information as to the details of the altercation between Pugh and the police and states that Dr. Billick of the Colon Hospital had stated to him over the telephone that he, Dr. Billick, had "heard that the deceased had been involved in an altercation" with the police "in Colon about eleven in the morning" and that "no papers accompanied the body".

XX. James Pugh died from injuries to his back and neck and from a severe subdural hemorrhage, which injuries and hemorrhage were due to a clubbing received by him at the hands of policemen Tunon and Cardoze in Colon sometime between 10 and 11 a.m. on June 30, 1929.

XXI. Such injuries as James Pugh received from the clubbing by the police were so received by him while resisting lawful arrest and while he was engaged in administering physical punishment to the arresting officers.

James Pugh was so acting at the time as to compel the use of their clubs upon him by the police in order to subdue him, to protect themselves, to defend the authority of the laws of Panama, and to compel his submission to the lawful authority of the police power of Panama.

The police agents, Manuel de J. Tunon and Jose Cardoze did not exceed the powers reasonably vested in them, as such agents, in using their clubs on Pugh as hereinabove set forth. Their actions in so using their clubs were not malicious, but such actions were compelled by James Pugh himself. Their actions in so using their clubs were not voluntary, but were involuntary on their part; being caused by the actions of James Pugh himself.

XXII. Upon assuming his duties, the Arbiter directed that the briefs of the parties to be filed with him, under the provisions of Article 5 of the con-

vention, should be so filed in both the English and Spanish languages and such briefs were so filed by the parties.

XXIII. Due to this direction of the Arbitrator, His Majesty's Government has incurred expenses in the sum of forty-three dollars and seventy-five cents (\$43.75) as the cost of translating the original brief from the English into the Spanish language and in the further sum of thirty-one dollars and fifty cents (\$31.50) as the cost of a similar translation of the reply brief. Claims for these sums have been filed with us.

It does not appear what, if any, expenses have been incurred by the Government of the Republic of Panama for translations from the Spanish into the English language of the answering and counter-reply briefs filed with us by that Government and no claims have been filed with us for any such translations.

XXIV. Under Article 3 of the convention, it was agreed that the Arbitrator should take "into consideration solely for the finding of the facts the proofs which with regard thereto are to be found in the record." The "original record" is that of the investigation had by the Panamanian authorities into the death of Pugh and of the indictment and prosecution of policemen Tunon and Cardoze in the Panamanian courts for such death. This record is in Spanish.

Not being sufficiently familiar with the Spanish language to warrant our study of such record in that language, we found it necessary to have it, as well as the convention which was also in Spanish, translated into the English language. The greatest expense incurred by us was as to such translations.

The total expenses, including the cost of translations, stenographic costs, etc., is the sum of one hundred forty-five dollars and twenty cents (\$145.20).

JAMES J. LENIHAN,
Arbitrator.

CONCLUSIONS.

On the foregoing of Findings of Facts, the Arbitrator concludes:

1. That the Panamanian police agents Manuel de J. Tunon and Jose Cardoze did not exceed the powers reasonably vested in agents of the public order when they endeavored to take James Pugh to the police station in Colon, Republic of Panama, on June 30, 1929.

2. That the death of James Pugh did not occur as the result of any excess by police agents Manuel de J. Tunon and Jose Cardoze of powers reasonably vested in them as agents of the public order.

3. That the clubbing administered to Pugh by said police agents was so administered in defense of themselves and while compelling his submission to the lawful authority of the laws of Panama.

4. That the actions of said police agents in the use of their clubs on the person of Pugh were not malicious nor voluntary and were not, therefore, culpable.

5. That James Pugh came to his death, through his own fault, while attempting to resist lawful arrest and while engaged in unlawfully attacking police officers of Panama in the lawful discharge of their duties.

6. That this claim of His Majesty's Government against the Government of the Republic of Panama should be denied and dismissed.

7. That the claims of His Majesty's Government in the amounts of forty-three dollars and seventy-five cents (\$43.75) and thirty-one dollars and fifty cents (\$31.50) respectively should be denied and dismissed.

8. That the expenses of this arbitration in the total sum of one hundred forty-five dollars and twenty cents (\$145.20) as fixed by the Arbiter should, as agreed in Article 9 of the convention, be paid in equal parts by both Governments.

JAMES J. LENIHAN,
Arbiter.

OPINION.

1. That James Pugh came to his death as a result of clubbing by the police, there can be no question. The record abundantly supports the conclusion. The doctors who concluded that death was due to cerebral hemorrhage and who, because the body showed no exterior marks of clubbing, inferentially, at least, determined that the hemorrhage might have been the result of physical defects, reached their conclusion as a result of a superficial examination. But the pathologist, Dr. Dart, reached his conclusion, that death was due to clubbing, after an autopsy of the body. He, too, found no marks on the body which might reasonably evidence a severe clubbing, but Pugh was apparently a powerful man and the pathologist found that his skin was thick and tough. It was in the subcutaneous tissue that Dr. Dart found the real pathological evidence of the clubbing and what he found, as set forth in Findings XVII and XVIII, amply sustains his conclusion of death by clubbing. The fall into the street, whether a direct fall from the sidewalk without an intervening obstacle or one from the sidewalk onto the fender of an automobile and thence into the street, was but an incident.

2. The real problem here is to determine whether the clubbing was justifiable or was unlawful. Panamanian police, like the police of practically all nations, are equipped with weapons, including clubs. No one can or does contend that a policeman's club is an ornament only to be lightly twirled in his hand as he proceeds upon his tour of duty. It has such use, to be sure, and to the great majority of potential lawbreakers, such use had a deterring effect. But the primary duty of a policeman is to preserve law and order and the primary use of the club, with which he is equipped, is to compel submission to lawful authority when physical effort is insufficient for such compulsion.

The policeman's club is at once a dangerous and a necessary instrument in his hands—dangerous to him and to the recalcitrant. We say it is dangerous to the recalcitrant, because he must submit to lawful arrest and if he would, under such circumstances, match his superior physical powers with those of the policeman in order to resist arrest, he must suffer the consequences; and a real consequence is the possible and lawful use of the club upon him. And the citizen who would violate the law and then add to it a further violation by physically attacking the policeman, who is lawfully and under his sworn obligation attempting to arrest him, has no complaint if he suffers physical violence by the hands of the police or by his club should the policeman's hands prove ineffective. The right of the individual must ever be maintained, but the right of society is superior. A fundamental right of

society is the right to law and order and the further right to compel obedience thereto by the individual. A first line of defense of law and order is the line of police. Obedience to law is not a matter of individual choice but is a matter of compulsion. Such being the necessary situation in organized society, the obedience must be compelled by the use of force when that becomes necessary. Nor may submission to law be measured by the physical powers of the individual. If he is physically able to resist and is succeeding in resisting the policeman who is attempting to compel his submission, then the policeman can and must compel his submission by the use of the club which society has furnished the policeman for that very purpose. These, of course, are self-evident propositions but, too frequently we think, are they overlooked by the few who somehow feel that because a policeman's duties at times require the use of physical force, he must always and at all times and under all circumstances be physically able to physically defend himself and to compel submission by the use of his physical powers alone. Such people, of course, are completely oblivious to the fact that a policeman's weapons are not ornaments and have very definite uses in proper situations.

On the other hand, we have said that the club is dangerous to the policeman. It is and should be dangerous to him when he uses it unlawfully. His unlawful use of it should and does subject him to criminal prosecution and civil liability and it goes without saying that it should subject him to dismissal from his position. His responsibility is great and his position is delicate because he must not use his club when unnecessary and he must use it when necessary. Should he be remiss in either situation, he is and should be culpable. It is impossible to set forth the situations which demand and justify his use of his club, but what a policeman needs is judgment because if he has good judgment, he himself will generally recognize the propriety of its use when the occasion arises. And if he lacks judgment he has no place on the force because he then is a menace to, instead of a guardian of, society. A little authority is a dangerous thing and when the exercise of that authority is fortified with weapons the danger is enhanced. Add to that the fact that a policeman in exercising his authority is, of necessity, frequently drawn into brawls, fights and melees and we have a picture which should cause us to pause when selections are made. We give it as our view that the seriousness of a policeman's duties are too frequently overlooked when they are appointed. True it is that the great majority of them are excellent men, of sound judgment, and unspoiled by their authority. But there is a minority, whose authority goes to their heads, who seem to feel that it is their business to be uncivil, whose actions and manner invite the anger and resentment of citizens, who have a habit of seeking trouble, who have not the slightest idea of the real situations which would justify the use of their weapons and who, therefore, use them recklessly and unlawfully. As we said before, such men are in the minority but the fact remains that they, like the majority, are armed and one of a few of them can do untold damage to a community and too frequently cause unjustifiable and unnecessary injuries and even death to individuals.

3. We reiterate that it is impossible to set forth the situations which demand and justify the use of a club by a policeman. Rather can we arrive at a conclusion by a study of a particular case. And so, in this case, we might first set forth some situations wherein the use of the club would be unjustified and where, as a consequence, the police would be culpable.

Pugh was drunk, but that fact would not justify clubbing him. He called the officers vile names; again the use of the club would be wrong. Suppose when the policeman laid hold of him, he held back, but did not strike or attempt to strike the policeman; still the club should not be used. Suppose he struck at the policeman and missed and the policeman was well able to handle him physically; there would be little excuse for clubbing him. Suppose he struck the policeman and the policeman necessarily struck him once with his club and subdued him; the policeman would be culpable were he to continue clubbing him. Suppose it was necessary to club him several times and that Pugh then fell down and was obviously subdued; further clubbing by the policeman would be unjustified.

But, as has been seen, we have not found such situations in this case.

4. Difficult as is the determination of the situations in which a policeman may and must use his club, it is much more difficult to determine as to how he should use it.

Naturally, much depends upon the circumstances of a particular case. So far as we know, no case of a policeman's culpability in the use of his club has turned upon the degree of force he used in a single blow. Indeed, it would seem that since the club is used in the heat and turmoil of a melee or fight, it would be quite impossible to attempt to measure the blow. The purpose of the blow is not to kill, but merely to stun or weaken. And yet a light blow upon one man might cause his death whereas a heavy blow on another might not even stun him. Again, one blow might be sufficient in one situation and several blows might be necessary in another. So, too, a blow aimed at a non-vital spot might land on a vital spot. In fine, there does not seem to be any possibility of precisely controlling the blows, once they become necessary. And so again the individual who invites the use of a policeman's club is in the unenviable and precarious position of taking his chances upon the results thereof. Of course, a large powerful policeman has no real cause to use his club at all upon a weak prisoner and were he to do so with all his force, the force of the blow might be a material circumstance in the determination of his culpability. But, as we view this case, such considerations do not enter into our conclusions.

5. This case offers no exception to general experience in the matter of conflict of testimony. Some of the witnesses state that the police maltreated Pugh; that they belabored him with their clubs without any reason therefor; that Pugh did not attack the police, but that they attacked him; that Pugh was submitting to and not resisting arrest. On the other hand, other witnesses state that Pugh was beating the police with his fists; that the police struck him with their clubs to defend themselves from his blows; that Pugh was not submitting to arrest but was violently resisting arrest.

Naturally all of these witnesses testified as to what they saw on the street. None of them knew what had happened at "Harry's Bar". We should say that when a policeman is seen belaboring an unarmed person with his club, the first impression is that he is maltreating such person. And we should say further that such impression would prevail even though the prisoner were resisting arrest because, after all, the natural sympathy of the onlooker is with the unarmed person and his natural criticism is of the armed person for the reason that there is a real abhorrence of the use of a club or a weapon upon an individual who is using his fists only.

Like all cases, however, we must view them according to law and our conclusion must be based upon all the material facts and not upon part of them.

And so in this case material links in the chain are to be found in "Harry's Bar", and when considered in relation to the melee on the street, the conclusion is, we think, inescapable that James Pugh came to his death through his own fault and not through any excess of the powers reasonably vested in Manuel de J. Tunon and Jose Cardoze as police agents of the Republic of Panama.

6. James Pugh was a strong man, engaged in work which required and contributed to his strength. Prior to 7 a.m. on June 30, 1929, he had been drinking and from that hour to after 10 a.m. he was drinking steadily in "Harry's Bar". When the police arrived, he was drunk. His drinking did not effect his equilibrium or physical powers but apparently did befuddle his mental processes.

We doubt not that he was, when not in his cups, a peaceable man and we visualize him as a good-hearted Irishman. On the other hand, we doubt not that he knew his physical strength and was not averse to using it in defense of himself and his real or imaginary rights.

But, as the events here show, liquor evidently made him ugly and pugnacious when he believed he was being crossed and then his strength readily asserted itself.

When he had contracted a bill of one dollar and twenty-five cents (\$1.25) and then ordered more drinks for himself and companion, the bar-tender demanded payment before serving more. Pugh immediately assumed a surly attitude and threatened to pay nothing unless more drinks were served. Obviously, the bar-tender was well within his rights in demanding payment and in refusing to serve more. Obviously, too, Pugh was well without his rights in refusing to pay. In view of Pugh's surly and pugnacious attitude, it was but natural that the bar-tender should send for the police.

After the arrival of the two policemen, and upon the bar-tender telling them of Pugh's refusal to pay, Pugh, seemingly oblivious to the policemen or their authority, attempted to strike the bar-tender compelling him to seek security behind the bar. Did Pugh show any evidence of submitting to the authority of the police? He did not. On the contrary, he gave them every indication of utter contempt for them and their authority. He called them a vile name and then peremptorily ordered them to get out of the place. Surely, his attitude was surly and pugnacious.

But it is to be noted that even after this display of contempt and pugnacity and after his calling them the vilest name that a man may be called, the police did not lose their tempers. They did not start in to belabor him with their clubs. What happened is that one of the police, Cardoze, left the place and left to his comrade, Tunon, the duty of taking Pugh to the station; should that be necessary.

So far as this record shows, policeman Tunon was not having great difficulty in taking Pugh to the station on foot until they reached a point near the International Cabaret. There is no evidence that Pugh struck the policeman or that the policeman struck Pugh prior to their arrival near the cabaret. But when they reached that point, Pugh struck the policeman and knocked him down. That Pugh was the aggressor, we have no doubt. The actions of the police in "Harry's Bar" do not fit in with a conclusion that one of them struck Pugh first. On the other hand Pugh's condition, his ugly mood and pugnacity displayed in the bar and his utter contempt for the two officers and their authority, all support the witnesses who testified that he struck Tunon and knocked him down.

It is clear that Pugh was then determined not to submit to arrest and it is clear that he proposed to use his physical strength to defeat arrest. He knocked Tunon down and Tunon was no physical match for him. It is also clear to us that Pugh did not stand idly by after knocking Tunon down. Apparently, about this time Cardoze came to the aid of his comrade. It was already demonstrated that Tunon was no physical match for Pugh and it was reasonable for Cardoze to believe that he was not physically able to subdue him. In such situation, it was in the natural sequence of things that Cardoze should use his club.

Since Pugh had attacked Tunon and knocked him down and since Cardoze was no more physically able to cope with him than was Tunon, and in view of Pugh's attitude, it is unreasonable to conclude that Pugh spent the minutes between the knocking down of Tunon in front of the cabaret and his fall at the alley alongside the cabaret, in merely warding off the blows of the police clubs. Rather do we conclude that after he was first struck with a club, he spent the intervening minutes in striking or attempting to strike the police and in warding off their blows. In fine, there was a general fight or melee between the police and Pugh and, as in all such fights or melees, both offensive and defensive tactics were indulged in by all the parties thereto.

Pugh came to his death as the result of clubbing but he received the clubbing while resisting the police and while striking them. In the circumstances, we find no evidence of a deliberate killing of him by the police; nor do we find any evidence of the police so using their clubs as to charge them as for a killing. To put it another way, there is no more evidence of a use of the clubs to kill Pugh than there is of a use of Pugh's fists to kill the police. What the record discloses to us is the unfortunate and accidental death of Pugh brought on by himself by reason of his resistance to arrest, his striking the police and the consequent lawful use of their clubs on him without any intent, actual or constructive, of killing him but for the sole purpose of lawfully compelling his submission and of defending themselves.

7. Having decided that Tunon and Cardoze did not exceed the powers reasonably vested in them as police agents of the Republic, it necessarily follows that their actions were not malicious, voluntary and consequently culpable.

It, therefore, becomes unnecessary for us to decide whether the Panamanian Government should "be considered obliged to pay to the British Government an indemnity for such death" had we decided that the policemen did exceed their powers and that their acts were "malicious, voluntary, and consequently, culpable."

8. It will be noted that we have confined ourselves to the facts with relation to Pugh's death. All other alleged matters, such as the prosecution of the policemen in the Panamanian courts, etc., could only be material, if material at all within the purview of this arbitration, in the event we had found that the policemen did exceed their powers and that their acts were malicious, voluntary, and consequently culpable.

9. The representative of His Majesty's Government has filed with us, apparently to be taxed as costs and expenses under the terms of the convention, two bills for expenses incurred in having his briefs, filed with us, translated from the English into the Spanish language; the bills being for the sums of forty-three dollars and seventy-five cents (\$43.75) and thirty-one dollars and fifty cents (\$31.50) respectively.

The Arbiter is not sufficiently familiar with the Spanish language to attempt to decide the case on a record and briefs in that language. In view of the diversity of languages of the two parties, we directed that all briefs should be filed in both the English and Spanish languages. We did this, not only for our own convenience but also for orderly and expeditious procedure. As is seen, our direction has caused the expense claimed to his Majesty's Government. But the matter is as broad as it is long because it may be assumed that our direction has caused a like expense to the Government of Panama in having the briefs of its representative translated from the Spanish into the English language.

Article 9 of the convention provides:

The amount of expenses occasioned by the arbitration herein agreed to shall be taxed by the Arbiter in the judgment and paid in equal parts between the Government of the Republic of Panama and the British Government. It is understood that there shall not figure in said expenses those corresponding to the payment of fees to the special representatives that may be designated in accordance with Article 7 as, in the event of said designation, each Government shall pay, without any obligation on the part of the other, the amount of the fees of its respective representative.

The literal language of the article does not preclude the taxation of the expenses of either or both parties in the matter of having their briefs translated in order to comply with our directions because the only specific expense which is precluded is that of fees of the representatives. But it could as successfully be contended and as reasonably concluded that stenographic and messenger expense, as well as the cost of paper and materials, should, on the same reasoning, be taxed.

We think, however, that the intent of the parties was that no expenses incurred by either of the parties in presenting their case should be taxed and that all their respective expenses, including the expenses of their translations, should be paid respectively by themselves. We have, therefore, denied and dismissed the claims of His Majesty's Government for the expense of the translation of the briefs of its representative.

The full purpose of Article 9 was to take care of such expenses only as the Arbiter might incur. We have asked no honorarium or fee for our services, it being perfectly agreeable to us to act in this matter as a friendly neutral to both Governments without compensation and with the sole purpose of rendering such assistance as we are capable of in settling their differences. But, of course, it was recognized that we might have expenses in the matter and, because of our limited familiarity with the Spanish language and because it was agreed that we should find our facts from a record which was in Spanish, an expense of the Arbiter known to both parties at the time of our selection as Arbiter and at the time of agreeing that the facts should be found from such record, was the expense of having the record translated from the Spanish into the English language.

The greatest expense to have incurred is that of such translation; the cost thereof being ninety dollars and twenty cents (\$90.20). We have also incurred other expense for a translation of the convention which we had made and which we submitted to the parties. In addition there are the usual incidental expenses of stenographic expense, messenger service, etc.

The total amount of our expense has been the sum of one hundred forty-five dollars and twenty cents (\$145.20) which, under Article 9, should be

paid in the sums of seventy-two dollars and sixty cents (\$72.60) by each Government.

10. Conformable with our Findings and Conclusions, judgment is being made and entered this date.

Dated this 6th day of July, 1933, at Washington D.C., U.S.A.

JAMES J. LENIHAN,
Arbiter.

JUDGMENT.

By virtue of the authority conferred upon me by the respective parties in their convention dated October 15, 1932, and

Conformable with and pursuant to the Findings of Facts made, and Conclusions reached, and the Opinion rendered by me on this date under the authority of said Convention,

It is ordered, adjudged and decreed this 6th day of July, 1933, at Washington, D.C., U.S.A., that the claim of His Majesty's Government against The Government of The Republic of Panama and growing out of the death of James Pugh be and the same is hereby denied and dismissed.

It is further ordered, adjudged and decreed that the claims of His Majesty's Government in the respective sums of \$43.75 and \$31.50 as the cost of translating the briefs submitted on behalf of said Government and the same are hereby denied and dismissed.

It is further ordered, adjudged and decreed that the expenses of this arbitration be and they are hereby taxed and assessed in the total sum of \$145.20.

It is further ordered, adjudged and decreed that the said expenses be paid one half or \$72.60 by His Majesty's Government and one half or \$72.60 by The Government of The Republic of Panama.

JAMES J. LENIHAN,
Arbiter.
