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Applicability of the General Maritime Law in the Local Navigable Waters of Puerto Rico

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NOTES

APPLICABILITY OF THE GENERAL MARITIME LAW IN THE LOCAL NAVIGABLE WATERS OF PUERTO RICO

Introduction

The constitutional requirement of uniformity in the maritime law, a doctrine enunciated by the Supreme Court in the now famous case of *Southern Pacific Co. v. Jensen*,[1] established that state legislation or state court decisions may not substantially alter the characteristic features of the general maritime law.[2] The occasion for this historic pronouncement was an attempt by the State of New York to apply its local compensation act to a longshoreman[3] injured and killed while unloading a ship on navigable waters and berthed at a New York pier. Characterizing the action as one of maritime cognizance, the Supreme Court declared the application unconstitutional, stating that:

> [N]o such [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the char-

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[1] 244 U.S. 205 (1917).

[2] The general maritime law provides the seaman with maintenance and cure, as well as full wages for the length of the voyage, if he becomes sick or injured while in the service of his ship. In addition the doctrine of unseaworthiness entitles him to an indemnity for injuries received as a consequence of some defective condition of the ship or its appurtenances. See The Osceola, 189 U.S. 158, 175 (1903). In 1920 Congress added the Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958), to the general maritime law. The Jones Act provides that "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. . . ." 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958). The effect of the Jones Act was to enable a seaman to maintain an action for personal injuries at law or in admiralty, Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924), and to make unavailable to his employer the affirmative defenses of assumption of risk, the fellow servant rule or contributory negligence. See Brown v. C. D. Mallory & Co., 122 F.2d 98, 100 (3d Cir. 1941).

[3] In 1926, the Supreme Court held that a longshoreman was entitled to sue under the Jones Act. International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926). But the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424 (1927), 33 U.S.C. § 901 *et seq.* (1958), subsequently passed by Congress provided an exclusive remedy against the employer. See GILMORE & BLACK, ADMIRALTY 251 (1957).

acteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.[4]

The doctrine of uniformity has since become firmly entrenched and the work of the courts in this area has largely been a matter of determining whether state legislation has in fact interfered with the required uniformity, since the states, despite the doctrine, retain some power to legislate concerning maritime matters.[5]

Recently, however, the First Circuit has upheld the application of the Puerto Rico Workmen's Accident Compensation Act[6] to Puerto Rican-employed seamen injured on the local navigable waters of the island.[7] The decision admittedly creates an area of lack of uniformity in the maritime law,[8] but the court justified this seeming violation of the constitutional requirement on the ground that Puerto Rico as a commonweath was not subject to the same constitutional restrictions as the states.[9] It is the purpose of this note to determine the significance of the *Jensen* doctrine in the context of Puerto Rican waters.

Historical Prelude to Uniformity

The Constitution extends the judicial power to "all Cases of admiralty and maritime Jurisdiction."[10] In the Judiciary Act of 1789, Congress vested this exclusive admiralty jurisdiction originally in what are now the federal district courts, but saved to suitors in all cases the right of a common-law remedy when the common law was competent to give it.[11] Consequently, it early became settled

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[4] Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917).

[5] *Ibid.* See also Grant Smith-Porter Co. v. Rohde, 257 U.S. 469 (1922); Western Fuel Co. v. Garcia, 257 U.S. 233 (1921).

[6] P.R. LAWS ANN. tit. 11 § 1 (1955).

[7] Flores v. Prann, 282 F.2d 153 (1st Cir. 1960), *cert. denied*, 29 U.S.L. WEEK 3284 (U.S. March 27, 1961). This decision has no doubt caused a good deal of consternation in admiralty circles, since its practical effect is to deprive injured seamen, whose employers are covered by the Puerto Rico Workmen's Accident Compensation Act, of the broad recovery available under the general maritime law and the appendaged Jones Act, and to substitute the more limited recovery of the workmen's compensation act. See Freedman, *Recent Trends in the Controversy Over the Extension of Workmen's Compensation into Maritime and Railroad Fields*, 4 NACCA L.J. 229, 230-33 (1949). The Puerto Rico Workmen's Accident Compensation Act provides that: "When an employer insures his workmen or employees in accordance with this chapter, the right herein established to obtain compensation shall be the *only* remedy against the employer. . . ." P.R. LAWS ANN. tit. 11, § 21 (1955). (Emphasis added.)

[8] Flores v. Prann, 282 F.2d 153, 157 (1st Cir. 1960), *cert. denied*, 29 U.S. L. WEEK 3284 (U.S. March 27, 1961).

[9] *Id.* at 155.

[10] U.S. CONST. art. III, § 2.

[11] 1 Stat. 77 (1789) (now 28 U.S.C. § 1333 (1958)).

that the federal courts sitting in admiralty had exclusive power to hear maritime actions in rem,[12] whereas a concurrent jurisdiction existed at law in the federal and state courts to hear maritime actions in personam.[13] Throughout the nineteenth century these jurisdictional divisions had substantive as well as procedural overtones, due to the fact that the maritime law and the common law were considered as two separate and distinct bodies of law, each supreme in its own forum.[14] Hence a federal district court sitting in admiralty was presumed to look to the maritime law as the source of its substantive rules, whereas the same court hearing a maritime action on the law side, as well as a state court, was presumed to draw upon the common law for its substantive rules. As a concrete example, a federal district court sitting in admiralty would apply the admiralty rule of divided damages to a maritime tort case involving negligence by both parties,[15] but the same court hearing the action on its law side and the state courts would apply the common law rule of contributory negligence.[16]

This dual conceptualism engendered problems, for if state courts hearing maritime actions in personam drew on the common law for their substantive rules, then it would seem to follow that it was within the power of the states to change, alter or modify that law by legislation or judicial decision. Indeed the dissenting opinion of Justice Holmes in the *Jensen* case argued that the "saving to suitors" clause of the Judiciary Act clearly recognized the existence of such a power:

> It might be asked why, if the grant of jurisdiction to the courts of the United States imports a power in Congress to legislate, the saving of a common-law remedy, i.e., in the state courts, did not import a like if subordinate power in the States.[17]

Even a brief glimpse at Supreme Court history bears out the proposition that to some extent the states have a power to add to the body of substantive rules applicable to maritime actions. Where the maritime law prescribed no remedy state statutes had been permitted to fill the gaps. Thus, a state statute providing an in rem lien upon

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[12] The Glide, 167 U.S. 606 (1897); The Moses Taylor, 71 U.S. (4 Wall.) 411 (1866); Slocum v. Mayberry, 4 U.S. (2 Wheat.) 1 (1817).

[13] Schoonmaker v. Gilmore, 102 U.S. 118 (1880); Leon v. Galceran, 78 U.S. (11 Wall.) 185 (1870).

[14] See Palfrey, *The Common Law Courts and the Law of the Sea*, 36 HARV. L. REV. 777, 779 (1923).

[15] The Max Morris, 137 U.S. 1, 14-15 (1890); See also The "Sunnyside," 91 U.S. (1 Otto) 208, 216 (1875); The Continental, 81 U.S. (14 Wall.) 345 (1871).

[16] Belden v. Chase, 150 U.S. 674 (1893); Atlee v. Packet Co., 88 U.S. (21 Wall.) 389, 395 (1874).

[17] Southern Pac. Co. v. Jensen, 244 U.S. 205, 223 (1917) (dissenting opinion).

a domestic vessel for repairs in her home port was upheld, though the proceeding being in rem was confined to a federal district court.[18] Likewise, it was held that a state statute fixing pilotage fees [19] and a state statute giving damages for death caused by tort [20] could create rights enforceable in the federal courts. But where the maritime law had spoken, state legislation was declared invalid. Hence a state statute creating an in rem lien upon a foreign vessel was declared an unconstitutional interference with the exclusive admiralty jurisdiction of the federal courts, since the maritime law provided such a remedy.[21] Similarly state attempts to authorize in rem admiralty proceedings in state courts were declared unconstitutional infringements of the exclusive federal jurisdiction.[22] The majority opinion in the *Jensen* case acknowledged that to some extent the states had power to legislate in maritime matters, but it drew the line at legislation which would disrupt the uniformity and harmony of the maritime law or destroy its essential characteristics.[23] However, the decision of the First Circuit in *Flores v. Prann* [24] has precluded the operation of the *Jensen* doctrine in Puerto Rico, and thus recognized a power to legislate in maritime matters in that commonwealth, greater than that which resides in the states.

Uniformity as a Constitutional Concept

The *Jensen* case shattered the nineteenth century notion of two systems of law supreme in their respective forums, and substituted for it the "doctrine of the supremacy of admiralty over the common law." [25] The theory was that the constitutional extension of the judicial power "to all Cases of admiralty and maritime Jurisdiction," imported the adoption of a federal maritime law coextensive with that jurisdiction,[26] and bound the federal courts in the exercise of the judicial power, as well as the state courts, to draw from this common source so as to effect a uniform maritime policy.

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[18] The Lottawanna, 88 U.S. (21 Wall.) 558 (1874); Peyroux v. Howard & Varion, 32 U.S. (7 Pet.) 324 (1833).

[19] *Ex parte* McNiel, 80 U.S. (13 Wall.) 236 (1871); Cooley v. Board of Wardens, 53 U.S. (12 How.) 298 (1851).

[20] The Hamilton, 207 U.S. 398 (1907).

[21] The Roanoke, 189 U.S. 185 (1903).

[22] The Glide, 167 U.S. 606 (1897).

[23] See Southern Pac. Co. v. Jensen, *supra* note 17, at 216.

[24] 282 F.2d 153 (1st Cir. 1960), *cert. denied*, 29 U.S.L. WEEK 3284 (U.S. March 27, 1961).

[25] See Dodd, *The New Doctrine of the Supremacy of Admiralty Over the Common Law*, 21 COLUM. L. REV. 647 (1921).

[26] The majority opinion in Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917), quoted with approval the following statement by the Supreme Court in *The Lottawanna*: "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of

From this premise it followed that if the federal maritime law prescribed rights in a particular area, any inconsistent state-created rights in the same area would destroy the desired uniformity and amount to an unconstitutional invasion of the paramount federal judicial power.[27] In certain respects the doctrine rang true with past history. State-created liens against domestic vessels operated locally in an area where federal law had not spoken, and were enforced in federal courts.[28] On the other hand state-created liens against foreign vessels invaded an area in which the federal law already existed, and were declared unconstitutional infringements of the exclusive federal jurisdiction.[29] Viewed in this respect the same thing was true in *Jensen,* since the state compensation commission had attempted to provide a remedy inconsistent with that which the federal maritime law as interpreted by the federal courts was competent to provide.[30]

The dissenting opinions of Justices Holmes[31] and Pitney[32] in *Jensen* acknowledged the diverse sources of the maritime law, apparently adopting the theory prevalent in the nineteenth century, and denied the existence of a federal maritime law, at least as a single corpus juris adopted by the Constitution. Both opinions refer to instances of state-created rights enforceable in federal courts as testamentary of the diverse origins of our maritime law. However, as already mentioned, these cases would seem to be distinguishable, though perhaps not wholly satisfactorily, on the ground that the states were then acting locally in areas where federal law had prescribed no remedies, and the statutes if adopted would create no area of lack of uniformity.

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maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country." *Id.* at 215.

[27] See Southern Pac. Co. v. Jensen, 244 U.S. 205, 216-17 (1917). See also Dodd, *supra* note 25: "It appears to be Mr. Justice McReynold's view [writing for the majority in *Jensen*] . . . that entirely apart from any implied power of legislation in Congress the federal courts have, under the sanction of the Constitution, in some mysterious manner established a federal code of admiralty law which is not to be impaired either by state courts or state legislatures. According to his view of the matter it is the judicial power of the court rather than the legislative power of Congress which is interfered with by the statute in question." *Id.* at 656.

[28] See cases cited, note 18 *supra.*

[29] The Roanoke, *supra* note 21.

[30] See note 2 *supra.* Although the Jones Act recovery was not available in 1917, the general maritime law remedies as described by the Supreme Court in *The Osceola* were applicable.

[31] Southern Pac. Co. v. Jensen, 244 U.S. 205, 220 (1917) (dissenting opinion).

[32] *Id.* at 226 (dissenting opinion).

Regardless of the merits of the *Jensen* case, the fact remains that the doctrine was adopted. A subsequent congressional attempt to avoid the result achieved in *Jensen* by amending the "saving to suitors" clause of the Judiciary Act so as to preserve "to claimants the rights and remedies under the workmen's compensation law of any state," [33] was declared unconstitutional in *Knickerbocker Ice Co. v. Stewart.*[34] The Court recognized that the amendment was an attempt to circumvent the *Jensen* decision,[35] and stated that Congress, when exercising its paramount legislative power in the maritime area, had to do so uniformly.[36] The obvious effect of the amendment was to sanction the diverse compensation laws of the several states, and thus to permit an invasion of the federal judicial power by the states.[37] A similar but more limited amendment designed to effect the same results was struck down in *Washington v. W. C. Dawson & Co.*[38] on the same grounds. There the Court reaffirmed the decisions in *Jensen* and *Knickerbocker* in the following words:

> Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application. . . . This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees;[39] but it may not be delegated to the several States. *The grant of admiralty and maritime jurisdiction looks to uniformity; otherwise wide discretion is left to Congress.*[40]

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[33] 40 Stat. 395 (1917).

[34] 253 U.S. 149 (1920).

[35] *Id.* at 163.

[36] *Id.* at 160. The Court made the following statement: "To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose (of the constitutional grant of judicial power); *and to such definite end Congress was empowered to legislate. . . .*" *Ibid.* (Emphasis added.)

[37] *Id.* at 163. "[W]e conclude that Congress undertook to permit application of Workmen's Compensation Laws of the several States to injuries within the admiralty and maritime jurisdiction. . . ." *Ibid.* See also Dodd, *The New Doctrine of the Supremacy of Admiralty Over the Common Law,* 21 COLUM. L. REV. 647 (1921): "The remaining case, that of *Knickerbocker Ice Co.* v. *Stewart,* is important . . . mainly as reemphasizing the doctrine of the *Jensen* case that it is the judicial power conferred upon the federal courts by the admiralty clause rather than the legislative power impliedly conferred upon Congress that makes such state laws as the New York Workmen's Compensation Act invalid." *Id.* at 663.

[38] 264 U.S. 219 (1924).

[39] This dictum remark would seem to indicate that Congress could constitutionally alter even those parts of the general maritime law that were impliedly adopted by the Constitution, provided it did so uniformly. But Congress apparently could not withdraw the rights available under the general mairtime law from a particular area, leaving local legislation to operate in its stead, while at the same time allowing the maritime law to prevail in the other areas under the federal jurisdiction.

[40] Washington v. W. C. Dawson & Co., 264 U.S. 219, 227-28 (1924). (Emphasis added.)

Nevertheless, on the assumption that the constitutional requirement of uniformity did not apply to Puerto Rico, the First Circuit in *Flores v. Prann*[41] decided that a congressional grant of control over local navigable waters[42] sanctioned the application of the island's compensation act to seamen injured on local waters.[43]

The plain import of the decisions involving the states seems to be that the constitutional extension of the judicial power to all cases of admiralty and maritime jurisdiction presumed the adoption of a federal maritime law, to which the state and federal courts were bound to look as the source of their substantive law. The constitutional grant was also viewed as the vehicle by which the original framers of the Constitution sought to effect a uniform maritime policy. Therefore, to the extent that states created rights inconsistent with already existing federal rights, they unconstitutionally destroyed the desired uniformity and invaded the judicial power of the federal courts. Recently, Mr. Justice Frankfurter summarized the concept of uniformity as follows:

> Article III impliedly contained three grants. (1) It empowered Congress to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the Supreme Court" . . . (2) *It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law "inherent in the admiralty and maritime jurisdiction" . . . and to continue the development of this law within constitutional limits.* (3) It empowered Congress to revise and supplement the maritime law *within the limits of the Constitution.*[44]

It remains to be inquired, therefore, whether the unique commonwealth status of Puerto Rico can overcome the uniformity requirements of the Constitution.

Should the Status of Puerto Rico Preclude the Operation of the Jensen Doctrine?

During the first half of the twentieth century the political status of Puerto Rico has evolved from that of a conquered territory ceded

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[41] 282 F.2d 153 (1st Cir. 1959), *cert. denied*, 29 U.S.L. WEEK 3284 (U.S. March 27, 1961).

[42] In the second organic act for the island Congress provided: "That the harbor areas and navigable streams and bodies of water and submerged lands underlying the same in and around the island of Porto Rico and the adjacent islands and waters . . . be, and the same are hereby, placed under the control of the government of Porto Rico. . . ." 39 Stat. 954 (1917), 48 U.S.C. § 749 (1958).

[43] See Flores v. Prann, 282 F.2d 153, 157 (1st Cir. 1959), *cert. denied*, 29 U.S.L. WEEK 3284 (U.S. March 27, 1961). *"Our problem is . . . not one of constitutional limitations.* It is one of statutory interpretation." *Id.* at 156. (Emphasis added.)

[44] Romero v. International Terminal Operating Co., 358 U.S. 354, 360-61 (1959). (Emphasis added.)

by a peace treaty[45] to that of a commonwealth freely associated with the United States.[46] This very unique commonwealth status is without parallel in the American union; and, needless to say, the relationship of the island to the mainland presents problems which in many ways are not completely analogous to the federal-state relationship. Nevertheless, the island, although not in fact a state, has been treated as comparable to a state for some purposes.[47]

But the issue within the framework of the present discussion is whether the Constitution applies to Puerto Rico as it does to the states. That this question should even arise is initially not easy to comprehend, and bears some explanation. With the acquisition of Puerto Rico this country was faced with a unique and difficult problem. The island and its people were the products of a totally different culture. Their language, customs, heritage and institutions had been largely molded by Spain and the Spanish Civil Code. Hence, if the Constitution with its common-law tradition were immediately and totally imposed upon the island the effect would be to compel the people to operate under an alien system which they could not possibly appreciate or understand.

To meet the exigencies of the situation the Supreme Court developed the doctrine of "incorporation"[48] starting with the so-called *Insular* cases.[49] This theory classified the territories as "incorporated" and "unincorporated," the former being considered as future states to which the entire Constitution extended *ex proprio vigore*, while to the latter were extended only certain of its provisions.[50] The notion that the Constitution did not extend in its entirety to an unincorporated territory, which Puerto Rico was considered,[51] but

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[45] The island of Puerto Rico was acquired by the Treaty of Paris, 30 Stat. 1754 (1899), ending the Spanish-American War. See Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. PITT. L. REV. 1 (1953).

[46] In a report to the United Nations concerning the status of Puerto Rico in the American union, the State Department included a letter from Governor Munoz of Puerto Rico to the President, which expressed the island's status as follows: "Puerto Rico became a Commonwealth in free and voluntary association with the United States, and its people have now attained a full measure of self-government." See 28 DEP'T STATE BULL. 584, 588 (1953).

[47] See Mora v. Mejias, 206 F.2d 377, 387 (1st Cir. 1953). See also 15 U. PITT. L. REV. 170 (1953).

[48] See Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823 (1926).

[49] DeLima v. Bidwell, 182 U.S. 1 (1901); Downes v. Bidwell, 182 U.S. 244 (1901).

[50] See Granville-Smith v. Granville-Smith, 349 U.S. 1, 5 (1955).

[51] See Balzac v. Porto Rico, 258 U.S. 298, 305 (1922). See also Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823 (1926), in which the author surmises that incorporation has been associated with a promise of ultimate statehood. *Id.* at 834. See also, Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. PITT. L. REV. 1 (1953): "Puerto Rico, which has never been incorporated, has moved in a different direction [from the Philippine Islands]. Its present commonweath status is

that certain of its provisions operated to restrict Congress in dealing with that territory, had the dual advantage of permitting Congress a relatively "free hand" in legislating for a territory not ideally suited for statehood, while at the same time preserving that reverence for the Constitution so inherent in the American mind.[52] This very practical doctrine is attributed to the concurring opinion of Mr. Justice White [53] in *Downes v. Bidwell*,[54] wherein he stated that:

> In the case of the territories . . . when a provision of the Constitution is invoked, the question which arises is not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable.[55]

But the doctrine produced some surprising results. For example, the constitutional right to trial by jury has been held to apply to incorporated territories [56] and to the District of Columbia,[57] but not to unincorporated territories on the ground that it was not so fundamental a right as to be applicable by operation of the Constitution itself.[58] This latter result was particularly surprising in the case of Puerto Rico inasmuch as its citizens had become citizens of the United States in 1917 by operation of the second Organic Act.[59] Recently, the Supreme Court, in *Reid v. Covert*,[60] held that the constitutional guarantees in the Bill of Rights attached to American citizenship, and were not confined to the continental United States. In discussing the *Insular* cases the Court stated: "[N]either the cases nor their reasoning should be given any further expansion." [61]

Although the *Covert* opinion levelled some criticism at the "incorporation" theory, it is by no means clear that its criticism refers to anything more than the constitutional guarantees in the Bill of Rights. But regardless of the present status of the "incorporation" theory, it is clear that at least some parts of the Constitution extend to the territories. Hence, in determining whether Puerto

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unprecedented in our American history and has no exact counterpart elsewhere in the world. Clearly that status precludes neither ultimate statehood nor ultimate independence." *Id.* at 5.

[52] See Coudert, *supra* note 51, at 850.

[53] *Id.* at 826.

[54] 182 U.S. 244 (1901).

[55] *Id.* at 292.

[56] See Rassmussen v. United States, 197 U.S. 516 (1905) (Alaska).

[57] Callan v. Wilson, 127 U.S. 540 (1888).

[58] Balzac v. Porto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904) (Philippine Islands). Hatchett v. Government of Guam, 212 F.2d 767 (9th Cir. 1954).

[59] 39 Stat. 953 (1917). An organic act is an act of Congress conferring the powers of government upon a territory. See *In re* Lane, 135 U.S. 443, 447 (1890).

[60] 354 U.S. 1 (1957).

[61] *Id.* at 14.

Rico has the power to supplant the general maritime law, the more immediate question would seem to be whether the constitutional requirement of a uniform maritime law applies to Puerto Rico as it does to the states.

Before Puerto Rico was ceded to the United States its maritime law was prescribed by Book III (entitled "Maritime Commerce") of the Spanish Code of Commerce of 1886.[62] Upon cession to the United States, the navigable waters of Puerto Rico became subject to the exercise of the sovereign authority of this country. Congress exercised this authority when in Section 9 of the Foraker Act,[63] the original organic act for the island, it included Puerto Rico within one of the six great coasting districts of the United States and admitted the island "to all the benefits of the coasting trade of the United States." [64] The Act further provided that the "coasting trade . . . shall be regulated in accordance with the provisions of law applicable to such trade . . . ," [65] indicating that our domestic shipping laws were to be applied in Puerto Rico. In addition the Foraker Act nationalized all Puerto Rican vessels.[66] These steps leave little doubt that the island assumed an immediate role in the overall maritime activity of the United States. The Foraker Act also expressly reserved control of the island's local harbor areas and navigable waters to the United States,[67] thus apparently barring the island from exercising even a limited police power over those waters. After a careful review of these initial actions, the First Circuit, in *Guerrido v. Alcoa S.S. Co.*,[68] reached the conclusion that:

> [A]lmost from the day of the Spanish cession of Puerto Rico to the United States it was recognized that the navigable waters of the island were to be regarded as navigable waters of the United States subject to the federal jurisdiction.[69]

This same statement was quoted with approval in *Flores v. Prann*,[70] and yet on both occasions the First Circuit permitted the *local* compensation act to apply, first to longshoremen and finally to seamen. These results are even more surprising in view of the following statement by the First Circuit in *Guerrido*:

> One of the purposes of the establishment by the Constitution of the rules of the general maritime law as part of the laws of the United States was to

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[62] See Guerrido v. Alcoa S.S. Co., 234 F.2d 349, 352 (1st Cir. 1956).
[63] 31 Stat. 77 (1900).
[64] 31 Stat. 79 (1900).
[65] *Ibid.*
[66] *Ibid.*
[67] 31 Stat. 80 (1900).
[68] 234 F.2d 349 (1st Cir. 1956).
[69] *Id.* at 354.
[70] 282 F.2d 153, 156 (1st Cir. 1960), *cert. denied*, 29 U.S.L. WEEK 3284 (U.S. March 27, 1961).

preserve harmony and uniformity in maritime matters in both the international and interstate relations of the country. This purpose was best to be promoted *if* the rules of maritime law thus established were to be regarded as applicable and enforceable throughout the whole extent of the navigable waters over which the United States has authority to exercise jurisdiction, which after 1899 included the navigable waters of Puerto Rico.[71]

It is clear, therefore, that the First Circuit recognized that the Constitution established a federal maritime law and sought uniformity in that law, and also that the navigable waters of Puerto Rico were navigable waters of the United States and subject to federal jurisdiction. Nevertheless, in each instance the Court held that, *absent an express extension of the general maritime law* to Puerto Rico,[72] the island might supplant it by local legislation passed in virtue of a grant by Congress of control over local navigable waters.[73]

It is certainly true that acts of Congress have in many cases been expressly extended to the territories.[74] Nevertheless, the general maritime law is not an act of Congress, but a part of the Constitution by adoption, and the Constitution requires that law to operate uniformly. If the constitutional requirement of uniformity is to have any meaning it would certainly seem to extend *ex proprio vigore* to the navigable waters of the United States.[75] Even assuming the "incorporation" theory retains any vitality and the applicability of parts of the Constitution to the unincorporated territories requires a provision by provision analysis, it would still seem to follow that as the navigable waters of Puerto Rico form an essential part of the navigable waters of the United States, they too are bound by the constitutional requirement of uniformity. Consequently, the First Circuit would seem to have erred in drawing an analogy between congressional legislation, which in many instances is expressly made applicable to territories, and the general maritime law which extends by the Constitution *ex proprio vigore* to the nav-

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[71] See Guerrido v. Alcoa S.S. Co., *supra* note 62, at 352. (Emphasis added.)

[72] See Flores v. Prann, 282 F.2d 153, 157 (1st Cir. 1960), *cert. denied*, 29 U.S.L. WEEK 3284 (U.S. March 27, 1961); Guerrido v. Alcoa S.S. Co., 234 F.2d 349, 355 (1st Cir. 1956).

[73] See note 42 *supra*.

[74] See Munoz v. Porto Rico Ry. Light & Power Co., 83 F.2d 262 (1st Cir. 1936): "It has generally been customary for Congress, in extending legislation to the territories and 'possessions' of the United States, to expressly mention them as included within the purview of the act." *Id.* at 266.

[75] In The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870), the Supreme Court defined the test of navigable waters as follows: "And they constitute navigable waters of the United States . . . when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." *Id.* at 563.

igable waters of the United States, thereby seemingly including Puerto Rican waters.[76]

One further point requires discussion. It has already been indicated that the constitutional extension of the judicial power to all cases of admiralty jurisdiction, imported the adoption of a federal maritime law, which the federal courts in the exercise of the judicial power were bound to apply and which the state courts or legislatures could not substantially alter. However, the federal district court in Puerto Rico is not a "constitutional" court created under Article III, section 2 of the Constitution.[77] It is a "legislative" [78] court created under Article IV, section 3, which grants Congress the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." [79] As such it does not share in the judicial power of the United States, since it is "incapable of receiving it." [80] But the mere fact that the federal district court in Puerto Rico is not exercising the constitutional judicial power does not mean that the constitutional requirement of uniformity ceases to apply to Puerto Rico. The constitutional grant of judicial power imports the adoption of a federal maritime law, and requires the preservation of uniformity in that law. To be effective that requirement extends to all navigable waters of the United States, of which the waters of Puerto Rico are an integral part. The absence of a federal court exercising the judicial power of the Constitution in Puerto Rico, should not therefore free the territorial courts or legislature, or the federal district court, albeit a "legislative" court, from preserving the uniformity of the maritime law as it is interpreted by the constitutional courts of the United States.

It is interesting to note that Congress has provided that the jurisdiction of the federal district court in Puerto Rico shall be

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[76] In 1920, Congress enacted the Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958), as an addition to the general maritime law. By its terms it provides a recovery for "any seaman" injured "in the course of his employment." *Ibid.* As this addition is "legislation" it might be argued that absent express extension it does not necessarily apply to Puerto Rico. However, Congress when legislating concerning the maritime law must do so uniformly through acts of general applicability. Hence, as the constitutional requirement of uniformity seemingly encompasses the waters of Puerto Rico any addition by Congress to the maritime law would necessarily have to apply to that area.

[77] See Balzac v. Porto Rico, 258 U.S. 298, 312 (1922).

[78] In American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828), federally created territorial courts were deemed "legislative" courts in which the judicial power of the Constitution was not vested, in view of the fact that the judges of those courts held office for a term of years, rather than during "good behavior" as provided in the Constitution. *Id.* at 545. The district judge in Puerto Rico has a term of office of eight years, 28 U.S.C. § 134a (Supp. I, 1959).

[79] U.S. CONST. art. IV, § 3.

[80] American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 545 (1828).

defined by the same provisions of the Judicial Code as define the jurisdiction of the "constitutional" district courts of the United States.[81] In other words, the balance of federal-insular maritime jurisdiction in Puerto Rico as in the states is defined by Title 28 of the United States Code, Section 1333, which is in effect the original Judiciary Act of 1789.[82] In *Romero v. International Terminal Operating Co.*[83] the Supreme Court had the following to say concerning the rationale behind the allocation of maritime jurisdiction in the original Judiciary Act:

> Here, as is so often true in our federal system, *allocations of jurisdiction have been carefully wrought to correspond to the realities of power and interest and national policy.*[84]

The constitutional requirement of uniformity should prevail in Puerto Rico, and the congressional allocation of federal-insular maritime jurisdiction is perhaps a congressional acknowledgment of the "power" realities that exist.

Conclusion

The First Circuit might quite reasonably have interpreted the congressional grant of control over local waters as the vesting of a "police" power in the island, comparable to that enjoyed by the states.[85] An interpretation that Congress was granting that "police" power previously reserved to the federal government in the Foraker Act,[86] seems more plausible than a holding which makes the requirement of uniformity inapplicable to Puerto Rico. It has been the consistent policy of Congress to more closely approximate the status and power of Puerto Rico to that of the states.[87] Hence, a del-

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[81] Section 41 of the Organic Act of 1917, 39 Stat. 965, defined the jurisdiction of the federal district court of Puerto Rico. In 1948, these jurisdictional provisions were eliminated from section 41 as unnecessary for the reason that the jurisdiction of that court was considered defined by the same provisions of the Judicial Code as define the jurisdiction of all federal district courts. See Miranda v. United States, 255 F.2d 9, 14-15 & n.7 (1st Cir. 1958).

[82] The Judicial Code provides that: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. . . ." 28 U.S.C. § 1333 (1958).

[83] 358 U.S. 354 (1959).

[84] *Id.* at 374-75. (Emphasis added.)

[85] The states have rather broad power to enact local regulations for rivers, harbors, piers, and docks. See Southern Pac. Co. v. Arizona, 325 U.S. 761, 783 (1945).

[86] 31 Stat. 80 (1900).

[87] See Magruder, *The Commonwealth Status of Puerto Rico,* 15 U. PITT. L. REV. 1 (1953): "[T]he status of the Commonwealth of Puerto Rico is still

egation of "police" power would be perfectly in line with such a policy. The broader interpretation actually given the delegation of control over local waters by the First Circuit would appear to make the grant unconstitutional.

DEFICIENCY COMPENSATION UNDER THE WORKMEN'S COMPENSATION LAW

Ordinarily, when an employee, injured in the course of employment, receives reparation outside of the Workmen's Compensation Law from the party responsible for such injuries, he is entitled to any deficiency between the amount he received and that to which he would be entitled as a compensation award.[1] Exceptions arise, however, where the circumstances surrounding the collateral recovery preclude the employee, or his dependents in case of death, from receiving deficiency compensation. One such instance is when the employee accepts a compromise or settlement of a cause of action against a third party tortfeasor without first receiving the consent of the employer or carrier liable for compensation payments.[2] The theory of a denial of deficiency compensation in such a case is that the actions of the employee have prejudiced the subrogation rights of the employer or the carrier against the third party. Deficiency awards are also denied when an employee successfully terminates an action against the employer while his right to a compensation award is uncertain.[3] Denial in the latter instance is founded on the premise that the employee should not be permitted to maintain inconsistent actions.

It is the purpose of this article to outline the New York statutory provisions and to examine the merits of preventing an injured employee from receiving deficiency compensation in the situations mentioned above. Particular concern will be given to those instances where an injured employee has, by some means outside the compensation law, received a sum less than the injury would have rated as compensation and seeks to recover the difference.

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not the same as that of a State in the Federal Union, though both have in common complete powers of local self-government. . . . On balance, the Puerto Ricans justly feel that the status of the island . . . though different from that of a State of the Union, is one of no less dignity." *Id.* at 19-20.

[1] See note 47 *infra* and accompanying text.

[2] See note 48 *infra* and accompanying text.

[3] See text accompanying note 101 *infra*.