

public policy that seem to be rather within the province of the legislature than of the court. The legislature can investigate and determine when and to what degree news disseminating is a business affected with a public interest, whether monopoly or competition will better meet that public interest, and what means can best be used to obtain the ends desired. See opinion of Justice Brandeis in *International News Service v. Associated Press*, 248 U.S. 215, 248 (1918); also see Harris, Radio and the Press, *Annals Amer. Acad. of Pol. and Soc. Sci.*, 163 (Jan. 1935); Dill, Radio and the Press; A Contrary View, *Annals Amer. Acad. of Pol. & Soc. Sci.*, 170 (Jan. 1935); Pew, Free as the Air, 3 *Today* 8 (1935).

**Water Rights—Opposite Riparian Owners' Right To Flow of Stream under Oregon Code—[Oregon].**—Acting under authority of the Oregon Water Code (Ore. Code (1930), tit. 47) the state engineer issued a permit to defendant riparian owner, to appropriate the greater portion of the flow of a stream for power purposes. Plaintiff, the opposite riparian owner, claiming a vested property right in a "continuous flow," sought to enjoin the appropriation on the ground it violated the due process clause of the Fourteenth Amendment. *Held*, the appropriation is constitutional even though it limits the riparian right of the plaintiff to water being put to a beneficial use. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 73 F. (2d) 555 (C.C.A. 9th 1934).

The present law of water rights in our western states has evolved from a conflict of two rather antagonistic theories. Shaw, *The Development of the Law of Waters in the West*, 189 *Cal.* 779 (1922); Walton, *Origin and Growth of Western Irrigation Law*, 21 *Ill. L. Rev.* 126 (1926); Harowitz, *Riparian and Appropriation Rights to the Use of Water in Washington*, 7 *Wash. L. Rev.* 197 (1932). The doctrine of *prior appropriation* originated in the usage of "placer" miners. The first person to appropriate the water, regardless of the amount, was entitled to it as against subsequent takers. 1 Nichols, *Eminent Domain* (2d ed. 1917), § 144; 2 Farnham, *Waters and Water Rights* (1904), § 462; *Coffin v. Left Hand Ditch Co.*, 6 *Colo.* 448 (1882). Later, as the various states adopted the English common law, the question arose as to whether the common law doctrine of riparian rights was included. *Jones v. Adams*, 19 *Nev.* 78 (1885) (overruling *Van Sickle v. Haines*, 7 *Nev.* 249 (1872) which had followed the common law rule of riparian rights); *Boquillas Land and Cattle Co. v. St. David Co-operative Commercial and Development Assoc.*, 11 *Ariz.* 128, 89 *Pac.* 504 (1907), *affd.* 213 *U.S.* 339 (1909) (*riparian right* doctrine never became a part of Arizona common law). This riparian right view was inconsistent with the former view, each owner, under the riparian right view, subject to the right of other riparian owners to a reasonable use of the stream, being entitled to an undiminished flow, regardless of prior appropriations. As the need for extensive irrigation developed neither doctrine was found to be satisfactory. That of *prior appropriation* was unfair to lower riparian owners; *Lux v. Haggin*, 69 *Cal.* 255, 4 *Pac.* 919 (1884); and the riparian right view did not satisfy the irrigation needs of lands non-adjacent to streams. *Kan. v. Colo.*, 206 *U.S.* 46, 105 (1907). The incompatibility of the two theories and the inadequacy of each resulted in statutory enactments in all western states placing water rights in the control of state administrative boards in order to distribute the water equitably among those desiring to use it beneficially. Lasky, *From Prior Appropriation to Economic Distribution of Water by the State—Via Irrigation Administration*, 1 *Rocky Mt. L. Rev.* 161, 248 (1928); 2 *Rocky Mt. L. Rev.* 35 (1929).

The various statutes, which exempted vested rights in water then put to a beneficial use, were not subject to constitutional "due process" attacks, other than procedural due process, in jurisdictions not accepting the common law doctrine of riparian rights. *Herminghaus v. S. Cal. Edison Co.*, 200 Cal. 81, 252 Pac. 607 (1926) (California statute invalid because of lack of procedural due process). However, in jurisdictions recognizing a vested right in a riparian owner to a natural flow substantially undiminished, whether put to a beneficial use or not, such statutes were severely attacked as taking property without due process of law. *St. Germain Irrigation Ditch Co. v. Hawthorne Ditch Co.*, 32 S.D. 260, 143 N.W. 124 (1913) (South Dakota statute which provided that non-use by riparian owner would terminate his rights held unconstitutional). Since the doctrine of *riparian rights* had been accepted in Oregon, *Weiss v. Oregon Iron and Steel Co.*, 13 Ore. 496, 11 Pac. 255 (1886); this precise issue was raised by the Code of 1909 which attempted to place in State control all water not then put to a beneficial use. Laws Or. 1909, p. 319. There is some authority to the effect that even under the *riparian rights* doctrine there are no property rights in water not put to a beneficial use. See *Hough v. Porter*, 51 Ore. 318, 379, 95 Pac. 732, 751 (1908); *Eastern Ore. Land Co. v. Willow River Co.*, 187 Fed. 466, 468 (C.C. Ore. 1910); 4 Kinney, *Irrigation and Water Rights* (2d ed. 1912), §§ 1975, 1977, 1997. It is generally held, however, that the *riparian right* to a natural flow is a property right which will be protected whether put to a beneficial use or not. See *McCoy v. Danley*, 20 Pa. 85 (1852) (riparian right to an undiminished flow whether used or not); *St. Germain Irrigation Ditch Co. v. Hawthorne Ditch Co.*, 32 S.D. 260, 143 N.W. 124 (1913) (the right to make a reasonable beneficial use is a vested property right); 2 Farnham, *Waters and Water Rights* (1904), § 4621. But even vested property rights are subject to the control of the state under the police power when necessary to "promote the economic welfare, public convenience, and general prosperity of the community." *Chicago, B. & Q. R. Co. v. Illinois*, 200 U.S. 561 (1906); cf. *Miller v. Schoene*, 276 U.S. 272 (1928). The relation of police power to water rights is described by the California Supreme Court, ". . . the conservation of the waters of the state is of transcendent importance. Its waters are the very life blood of its existence. The police power is an attribute of sovereignty and is founded on the duty of a state to protect its citizens and provide for the safety, good order and well being of society. It is coextensive with the right of self-preservation in the individual." *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 22 P. (2d) 5 (1933). The Supreme Court of Oregon sustained the Oregon Water Code as constitutional. *In re Willow Creek*, 74 Ore. 592, 144 Pac. 505 (1914). See 3 Cal. L. Rev. 347 (1915). The United States Supreme Court took a similar view and held that the act was in "no way offensive to a right conception of due process." *Pacific Live Stock Co. v. Oregon Water Board*, 241 U.S. 440 (1916).

Although the court in the principal case could have upheld the action of the Water Administration Board by accepting the minority view that the *riparian right* doctrine gives no right to water not put to a beneficial use, it seems that it was justified in sustaining the constitutionality of the permits as a valid exercise of the police power of the state. This is in accord with the avowed policy of the statute to put all unused water to a beneficial use. The court by its decree reserved to the plaintiff sufficient flow for immediate needs. Furthermore, it is probable that, when the plaintiff desires to make a beneficial use of the stream for power purposes, a flow readjustment will be made. See *Martha Lake Water Co. v. Nelson*, 152 Wash. 53, 277 Pac. 382 (1929).

It was contended further in the principal case that, since the plaintiff acquired his patent from the government, the clause in the Federal Desert Land Act of 1877 (19 Stat. 377, 43 U.S.C.A. § 321 (1928)), "all surplus water . . . upon the public lands . . . shall remain and be held free for the appropriation and use of the public," limited the plaintiff's riparian rights. *Hough v. Porter*, 51 Ore. 318, 95 Pac. 732 (1908); *contra: Still v. Palouse Irr. & Power Co.*, 64 Wash. 606, 117 Pac. 466 (1911); *Cal., San Joaquin & Kings River Canal & Irr. Co. v. Worswick*, 187 Cal. 674, 203 Pac. 999 (1922). The broad interpretation of the Desert Land Act in *Hough v. Porter* was criticized in the principal case, the court preferring to deny the plaintiff relief on the ground that the statute is a reasonable exercise of police power.

**Workmen's Compensation—Application of Workmen's Compensation Act to Relief Workers—[Ohio].**—Claimant, upon application for relief to the division of charities of the city of Columbus, was given a work card entitling him to do work for the city, for which he was to be paid partly in cash and partly in groceries. While working as a street-cleaner, he was injured. *Held*, the language of the state insurance act (*Ohio Throckmorton's Ann. Code* (1929) §§ 1465-61), which affords protection to every person in the service of any municipality "under any appointment or contract for hire, express or implied" is broad enough to include one whose labor is a condition precedent to relief. *Industrial Comm'n of Ohio v. McWhorter*, 193 N.E. 620 (Ohio 1934).

Relief workers have to a large extent been denied any rights under workmen's compensation acts. Of more than forty states compensating public employees for injuries received in the course of employment, the compensation acts of only eighteen have been interpreted to cover employees on work relief. 49 *American City* 77 (1934). In general relief has been denied on two grounds: first, lack of legislative intent to provide protection for workers such as the claimant; second, absence of a contract of employment. *Hartford Accident & Indemnity Co. v. Department of Industrial Relations*, 139 Cal. App. 632, 34 P. (2d) 826 (1934); *Vaivida v. City of Grand Rapids*, 264 Mich. 204, 249 N.W. 826 (1933); *Village of West Milwaukee v. Indust. Comm'n of Wis.*, 255 N.W. 728 (Wis. 1934.) Thus it has been held that since the underlying theory of workmen's compensation is to charge industry with costs arising out of injuries to laborers, as part of the cost of production, the acts are inapplicable where the purpose in creating the employment is to relieve the hardships of the unemployed. *Hartford Accident & Indemnity Co. v. Department of Industrial Relations*, 139 Cal. App. 632, 34 P. (2d) 826 (1934); see 19 *Ia. L. Rev.* 450, 452 (1934). And it has been held there is no contract for hire because voluntary participation by the municipality is lacking where the municipality is under a statutory duty to extend relief even though the claimant does no work and because the work and relief are not the bargained equivalents for each other, the municipality extending food or money as charity rather than as consideration for work done. *McBurney v. Indust. Acc. Comm'n of Cal.*, 220 Cal. 124, 30 P. (2d) 414 (1934); *In re Moore*, 97 *Ind. App.* 429, 187 N.E. 219 (1933); 19 *Ia. L. Rev.* 450 (1934).

Cases on this problem may be divided into three categories: (1) Cases where work is a condition precedent to relief and where the relief dispensing agency is under no obligation to extend relief. Here the essential elements for a contract of hire are present; there is an exchange of bargained equivalents and voluntary participation on both sides. *McLaughlin v. Antrim County Road Comm'n*, 266 Mich. 73, 253 N.W. 221 (1934);