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lack of jurisdiction factually, the defendant who litigated the case would have availed himself of that defense.

The result under the present concept of res judicata seems to be that, absent a clear lack of jurisdiction over the subject matter, there must be some special reason for withholding the jurisdiction or else the judgment or decree will stand up on collateral attack. If the judgment or decree is entered because of the default of a party who had notice and an opportunity to be heard, and under circumstances favoring its finality, it too should be immune to collateral attack. To the extent that public policy would favor its application, res judicata affords a convenient rationale for a desirable result.[34]

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THE RIGHT OF PUBLIC EMPLOYEES TO STRIKE

> " 'Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives or their own choosing, and to engage *in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.*' "[1]

This quoted language has been uniformly interpreted to give private employees the right to strike peacefully to enforce their demands with respect to wages, hours and other conditions of employment.[2] Whether these words give the employees of a public corporation the right to strike was presented recently in *Los Angeles Metropolitan Transit Authority v. Brotherhood of R.R. Trainmen.*[3]

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[34]"While the doctrine of res judicata has frequently been enmeshed in technicalities which it is difficult for us fully to understand today; and, while even modern rules are often confusing and illogical; there runs through the huge mass of judicial utterances on this subject a conspicuous desire to obtain a fair, reasonable and just result." Medina, Conclusiveness of Rulings on Jurisdiction, 31 Col. L. Rev. 238, 243 (1931).

[1]Cal. Gen. Laws Ann. act 4480, § 3.6(c) (Deering 1954) (pertains to the Los Angeles Metropolitan Transit Authority Act of 1957 as amended in 1959); 54 Cal. 2d 684, 355 P.2d 905, 907 (1960).

[2]Note 3 infra at 907. Accord, Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 474-75 (1955); Amalgamated Ass'n of State Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383, 389 (1951); International Union of United Auto. Workers v. O'Brien, 339 U.S. 454, 457 (1950); Collins Baking Co. v. NLRB, 193 F.2d 483, 486 (2d Cir. 1942).

It must be emphasized that the right to strike peacefully and engage in other concerted activities does not include illegal strikes or labor violence. See note 3 infra at 907, and International Union of United Auto. Workers v. O'Brien, 334 U.S. 454 (1950); and International Union of United Auto. Workers v. Wisconsin Employment Relations Bd., 336 U.S. 245, 258 (1949).

[3]54 Cal. 2d 684, 355 P.2d 905 (1960).

The plaintiff brought an action against the defendant brotherhood for a declaratory judgment that employees of the Los Angeles Metropolitan Transit Authority were without the legal right to strike because they were employees of a public corporation. The trial court held for the plaintiff, but the Supreme Court of California reversed. Although the defendant union members are employed by a public corporation, the Transit Authority Act[4] establishing the corporation provides that employees should have the right to organize and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and so by implication gives employees the right to strike.[5]

The majority decision points out that the sixteen italicized words of the Transit Authority Act quoted above had been repeatedly used in earlier labor statutes, both Federal[6] and state,[7] and without legislative qualification had been held to give employees the right to strike to enforce labor unions' demands. When courts construe legislation it will be presumed that the legislature intended the language of the later statute to be given the same interpretation as previously given. This is usually the case when a state statute is modeled after a federal statute.[8] The court went on to say that since the same language as contained in the California statute has been interpreted to give private employees the right to strike, the repetition without any legislative qualification manifestly shows an intent to follow in regard to public employees the previous construction applied to private employees.[9]

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[4]See note 1 supra.

[5]See note 3 supra at 915.

[6]The language first appeared in the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 102 (1958). The exact language was repeated in the National Labor Relations Act (Wagner Act) § 7, 49 Stat. 449 (1935), 29 U.S.C. § 101 (1958); and the Labor Management Relations Act (Tart-Hartley Act) § 7, 61 Stat. 136 (1947), 29 U.S.C. § 157 (1958).

[7]Cal. Labor Code § 923. "Negotiations of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

[8]Los Angeles Metropolitan Transit Authority v. Brotherhood of R.R. Trainmen, 54 Cal. 2d 684, 355 P.2d 905, 907 (1960).

[9]Ibid.

Prior to plaintiff's acquisition of the transit company, the employees had the right to strike. The Transit Authority Act in granting the authority to operate transit facilities also provided that no employee " 'shall suffer any worsening of his wages, seniority, pension, vacation or *other benefits* by reason of the acquisition.' "[10] The majority of the court held that since the employees had the right to strike while they were private employees, their rights cannot be denied or diminished by subsequent acquisition of the company by the public.

The majority cites recent cases from two other jurisdictions sustaining the right of public employees to strike. In *Local 266, Int'l Bhd. of Elec. Workers v. Salt River Project Agr. Improvement & Power Dist.*[11] the Supreme Court of Arizona held that an irrigation district was a political subdivision of the state and its employees were entitled to all rights, privileges, benefits and immunities of municipal employees and were therefore allowed to strike to enforce demands, which the irrigation district was empowered to grant.[12] The Minnesota case of *Board of Education v. Public School Employees' Union*[13] concerned the interpretation of the state's statute that prohibited the issuance of injunctions against strikes. School janitors were held not to be "public officials charged with duties relating to public safety"[14] and thus could not be enjoined from striking. The court in the principal case emphasized that these two decisions sustained its position because in both cases the employees were not specifically authorized to bargain collectively and engage in other concerted activities as authorized by the Transit Authority Act.[15]

The case of *United States v. United Mine Workers*[16] was distinguished as not being helpful in determining the proper construction of the sixteen italicized words of the Transit Authority Act. In that case it was held that the Norris-LaGuardia Act did not apply to United States governmental employees. The court followed the rule of construction that "statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect."[17] The court in the principal case said that the Transit Authority Act deals only with the employees of a public

[10]Ibid.
[11]78 Ariz. 30, 275 P.2d 393 (1954).
[12]Id. at 396.
[13]233 Minn. 144, 45 N.W.2d 797 (1951).
[14]Id. at 801.
[15]355 P.2d at 908.
[16]330 U.S. 258 (1947).
[17]Id. at 272.

corporation and not employees generally.[18] The rule of construction "that statutes in derogation of sovereignty are to be strictly construed in favor of the state"[19] would not be applied in the light of the express provisions of the Transit Authority Act providing for liberal construction to carry out the purposes of the act.[20]

The court found that the purpose of the legislature was to create an employment relationship comparable to that existing between privately-owned public utilities and their employees, because otherwise the inability of the Transit Authority employees to strike would place them in a disadvantageous position as compared with similar private employees in regard to collective bargaining.[21] The court thought the legislature had intended to depart from traditional methods of establishing wages and conditions of employment of government employees in favor of a system comparable to that utilized in private industry.[22] This was done by establishing an equal bargaining position by permitting employees the right to strike and engage in other concerted activities as an essential part of the bargaining process,[23] and to deprive the employees of their right to strike would have the effect of nullifying their collective bargaining efforts by taking away their most powerful weapon.

The dissent written by Justice Schauer in the principal case points out that the decision of the majority is contrary to established law and public policy:

> "This is the only case in the judicial history of this state or the United States . . . in which a court of last resort holds that a statute which does not unequivocally and by clear language grant to public employees a right to strike against the government as an employer, nevertheless confers such right by implication."[24]

The holding that the general words of the Transit Authority Act impliedly gave the employees a right to strike against their public employer was challenged by the dissenters. They believe that such a right to strike should not exist unless it is expressly granted, arguing that such rights should have been "specifically granted in unmis-

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[18]355 P.2d at 909.

[19]Ibid.

[20]Ibid. "The act expressly declares that it 'shall be liberally construed to carry out the declared policy of the State of California....'"

[21]Ibid.

[22]Id. at 908.

[23]Id. at 909.

[24]Id. at 911

takable terms."[25] Conceding that those same statutory words have been interpreted by the courts to authorize the right to strike by *private* employees, it does not necessarily follow that these same words by implication authorize strikes by *public* employees.[26]

While the majority summarily handled the *Mine Workers* case, the dissenters considered it authoritative. The United States Supreme Court said in that case: "We think that Congress' failure to refer to the United States or to specify any role which it might commonly be thought to fill is strong indication that it did not intend that the act should apply to situations in which the United States appears as employer."[27] The Court also said, "There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect."[28] This is a rule of construction, but it has been applied in situations similar to the one before the California court.[29] The dissent in the California case noted that Congress later codified the decision in the *Mine Workers* case by including section 305 of Title III in the Taft-Hartley Act,[30] which made it unlawful for government employees to participate in strikes. The penalty for such a strike was immediate discharge, a three year ineligibility for government employment and loss of civil service status.[31] These sanctions were re-

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[25]Ibid.

[26]Id at 912.

[27]United States v. United Mine Workers, 330 U.S. 258, 276 (1947). The concurring opinion by Mr. Justice Black and Mr. Justice Douglas stated that, "Congress had never in its history provided a program for fixing wages, hours, and working conditions of its employees by collective bargaining. Working conditions of Government employees had not been the subject of collective bargaining, nor been settled as a result of labor disputes. It would require specific congressional language to persuade us that Congress intended to embark upon such a novel program as to treat the Government employer-employee relationship as giving rise to a 'labor dispute' in the industrial sense." Id. at 328, 329. The Labor-Management Relations Act (Taft-Hartley Act) § 2, 61 Stat. 136 (1947), 29 U.S.C. § 152 (1958), excludes the United States "or any state or political subdivision thereof" from the term "employer."

[28]Id. at 272.

[29]"If such prohibition is intended to reach the government in the use of known rights and remedies, the language must be clear and specific to that effect." United States v. Stevenson, 215 U.S. 190, 197 (1909).

[30]61 Stat. 136, c. 120 (1947), 29 U.S.C. § 305 (1952). "It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government corporations, to participate in any strike."

[31]"Any individual employed by the United States or by any agency who strikes shall be discharged immediately from his employment, and shall forfeit his civil service status, if any, and shall not be eligible for reemployment for three years by the United States or any such agency." Id. at § 305.

affirmed in 1955 and another one was added making such strikers guilty of a felony and subject to fine and imprisonment.[32]

It is submitted that the holding of the majority is open to criticism on a number of grounds. Few cases involving strikes by public employees have reached the courts and fewer have been reported, "however in every case that has been reported, the right of public employees to strike is emphatically denied."[33] Generally, public employees do not have the right to strike in the absence of explicit legislative authority.[34]

Two recent decisions from Arizona and Minnesota relied upon by the majority are readily distinguishable. The *Salt River* case from Arizona, although holding that the employees of the irrigation district had the right to strike, pointed out that the employees were classified as "public employees," but in reality the district was owned by private landholders and not the public.[35] The court concluded that a strike would not be against the state because the employees were serving the private owners of the district and not the general needs of the community.[36]

The *Public School Employees* case from Minnesota involved a state statute prohibiting the use of injunctions in labor disputes except when used against "policemen, firemen or any other public officials charged with duties relating to public safety."[37] Following a rule of interpretation "that where a statute designates an exception, proviso, saving clause, or a negative, the exclusion of one thing includes all others,"[38] it is clear that school janitors are not public officials charged with public safety duties.

There were many earlier cases from California apparently holding differently from the principal case which were not overruled or clearly

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[32]69 Stat. 624-625, c. 690 (1955), 5 U.S.C. § 118 (1958). "Any person who violates . . . this title shall be guilty of a felony, and shall be fined . . . or imprisoned or both."

[33]Annot., 31 A.L.R.2d 1142, 1159 (1953).

[34]Id. at 1159-61; see also Rhyne, Municipal Law § 163 (1957).

[35]Local 266, Int'l Bhd. of Elec. Workers v. Salt River Project Agr. Improvement & Power Dist., 78 Ariz. 30, 275 P.2d 393, 402 (1954). "To say that the employees of the District herein are actually 'public employees' is not the province of this court but a matter for the legislature." Id. at 401.

[36]Id. at 403. "We find no indication from either the cases or statutes which indicate that the employees of this District may not engage in a peaceful strike. This is not to imply that such social friction is desirable, only that the District, as a business entity, is subject to the hazards of the economy as are its possible competitors."

[37]Board of Educ. v. Public School Employees' Union, 233 Minn. 144, 45 N.W.2d 797, 801 (1951).

[38]Ibid.

distinguished.[39] *Nutter v. City of Santa Monica*[40] previously held that section 923 of the California Labor Code[41] was inapplicable to labor relations of the state or its political subdivisions on the ground that a statute in general terms will not be construed to include government employees unless that interpretation is clear and indisputable from the wording of the act.[42] *Perez v. Board of Police Comm'rs*[43] had granted an injunction preventing policemen from joining a union, stating that all public officials owe their allegiance to the people, and any alienation of this allegiance would be detrimental to the function of government.[44] In *State v. Brotherhood of R.R. Trainmen*[45] the court stated that:

> "Recent authorities hold uniformly that the wages, hours and working conditions of government employees must be fixed by statute or ordinance and that state laws which, in general terms, secure the right of employees to enter into collective bargaining agreements with respect to those matters are not intended to apply to public employment."[46]

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[39]Many cases from other jurisdictions have held there is no right of public employees to strike. See Norwalk Teachers Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951); Miami Water Works Local 654 v. City of Miami, 157 Fla. 445, 26 So. 2d 194 (1946); Mugford v. Mayor and City Council, 185 Md. 266, 44 A.2d 745 (1945); McAuliffe v. Mayor, 155 Mass. 216, 29 N.E. 517 (1892); City of Manchester v. Manchester Teachers Guild, 100 N.H. 507, 131 A.2d 59 (1957); Society of N.Y. Hosp. v. Hanson, 185 Misc. 937, 59 N.Y.S.2d 91 (Sup. Ct. 1945); City of Cleveland v. Division 268 of Amalgamated Ass'n, 30 Ohio Op. 395, 90 N.E.2d 711 (C.P. 1949); International Bhd. of Elec. Workers v. Grand River Dam Authority 292 P.2d 1018 (Okla. 1956); City of Pawtucket v. Pawtucket Teachers' Alliance, 141 A.2d 624 (R.I. 1958); Alcoa v. International Bhd. of Elec. Workers, 203 Tenn. 12, 308 S.W.2d 746 (1957); Weakley County Municipal Elec. Sys. v. Vick, 309 S.W.2d 792 (Tenn. Ct. App. 1957); CIO v. City of Dallas, 198 S.W.2d 143 (Tex. Civ. App. 1946); Port of Seattle v. International Longshoremen's and Warehousemen's Union, 52 Wash. 2d 317, 324 P.2d 1099 (1958).

[40]74 Cal. App. 2d 292, 168 P.2d 741 (1946).

[41]See note 7 supra.

[42]See note 40 supra at 747.

[43]78 Cal. App. 2d 638, 178 P.2d 537 (1947).

[44]Id. at 545. "The controlling principle ... is that employment in the public service frequently entails a necessary surrender of certain civil rights to a limited extent . . . because of the dominant public interest in the unimpeded and uninterrupted performance of the functions of government. Fair treatment for public employees does not require legal protection for concerted labor action generally, for such treatment is, in the public field, compelled to a considerable extent by law." City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council, 94 Cal. App. 2d 36, 201 P.2d 305, 313 (1949).

[45]37 Cal. 2d 412, 232 P.2d 857 (1951).

[46]Id. at 861. "In this state as elsewhere, a strike against a public entity is unlawful." Newmarker v. Regents of the Univ. of Cal., 160 Cal. App. 2d 640, 325 P.2d 558, 562 (1958).

"[T]here is no mention of the grant of a right to strike against the governmental employer *after* the employees become public employees."[47]

The expressed policy of the state of California in creating the Transit Authority was to develop a mass rapid transit system for the benefit of the people, however the holding in the present case could cause the shutting down of the whole transit system to the public detriment because of a strike.[48] The New York case of *Railway Mail Ass'n v. Murphy*[49] expressed this idea by holding that to allow governmental workers to dictate to the government the conditions under which they will carry out the vital services necessary to the welfare, security and safety of the public is to transfer all governmental power to them.[50]

The result in the principal case is also made questionable because of the court's lack of differentiation in classes of employees able to strike. By implication *all* Transit Authority employees are given the right to strike whether they are clerical workers, police, guards, maintenance workers or operators. The police of the Transit Authority who have the duty of protecting the public property may go out on strike and leave the vast properties unprotected.[51] The operation of the Transit Authority is a vital service necessary for the public welfare, so that to allow all employees to strike, regardless of their job classification, is to go against public policy.[52]

The California Legislature was careful to provide in the act for an arbitration board to settle "disputes over wages, salaries, hours or working conditions, which is not resolved by negotiations in good faith

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[47]355 P.2d at 919.

[48]Ibid.

[49]180 Misc. 868, 44 N.Y.S.2d 601 (Sup. Ct. 1943).

[50]Id. at 607. "To admit as true that Government employees have power to halt or check the function of government; unless their demands are satisfied, is to transfer to them all legislative, executive and judicial power. Nothing would be more ridiculous.... The formidable and familiar weapon in industrial strife and warfare—the strike—is without justification when used against the Government. When so used, it is rebellion against constituted authority."

[51]See note 47 supra at 922.

[52]New York City Transit Authority v. Loos, 2 Misc. 2d 733, 154 N.Y.S.2d 209, 215 (Sup. Ct. 1956). "[T]he operation of the rapid transit facilities is a basic governmental service indispensable to the conduct of all other governmental as well as private activities necessary for the public welfare." See also statement by President Franklin D. Roosevelt in a letter to Luther C. Steward, President of National Federation of Federal Employees, dated August 16, 1937; City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539, 542 (1944).