

the summons.⁵⁶ It is submitted that this Court has accepted and expanded this holding. Under *Powell*, a proceeding to enforce the Commissioner's summons must be instituted pursuant to the Federal Rules of Civil Procedure by filing a complaint followed by answer and hearing.⁵⁷ At this time, if the taxpayer raises a substantial question that an enforcement of the summons would be an abusive use of the court's process, then according to the Court's holding, the government will have to make a showing of probable cause.⁵⁸ The taxpayer can meet the burden by showing that the summons had been issued to "harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation."⁵⁹

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Antitrust—Sherman Act—Inducing State Officer To Enforce a Law—*Harman v. Valley Nat'l Bank*.¹—Appellant, trustee of the Coffeyville Loan and Investment Co., brought an action under Section 4 of the Clayton Act,² alleging violation of Sections 1 and 2 of the Sherman Act.³ Appellant averred that the defendants had conspired, together with the Attorney General of Arizona, fraudulently to place the Arizona Savings and Loan Association in receivership under Arizona law,⁴ as part of a scheme to restrain and monopolize financial transactions in the area. The state receiver refused to honor the appellant's contracts with Arizona Savings, thus limiting its refinancing resources. The district court held that appellant failed to state a cause of action upon which relief could be granted and dismissed the action. Reversing, the Ninth Circuit HELD: Merely inducing a state officer to enforce a law, regardless of the substantive merits of the enforcement, is not prohibited by the antitrust laws; allegations of this enforcement, however, either as part of a larger anti-competitive scheme or one in which the state officer was a conspirator are sufficient to state a cause of action.

Although the Sherman Act prohibits "every" agreement designed to monopolize trade, the Supreme Court has held that it applies only to "unreasonable" restraints on trade.⁵ In determining unreasonableness the Court

⁵⁶ *Id.* at 445-46.

⁵⁷ *United States v. Powell*, *supra* note 1, at 58 n.18.

⁵⁸ *Id.* at 51: "We reverse, and hold that the Government need make no showing of probable cause to suspect fraud *unless* the taxpayer raises a substantial question" (Emphasis added.)

⁵⁹ *Id.* at 58.

¹ 339 F.2d 564 (9th Cir. 1964).

² "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue. . . ." 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

³ "Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal. . . . Every person who shall monopolize, or attempt to monopolize . . . any part of [interstate or foreign] trade . . . shall be deemed guilty of a misdemeanor. . . ." 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1958).

⁴ *Ariz. Rev. Stat. Ann.* §§ 6-422, 423 (1956), as amended, *Ariz. Rev. Stat. Ann.* §§ 6-480, 481 (Supp. 1964).

⁵ *Standard Oil Co. v. United States*, 221 U.S. 1 (1910).

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has used two standards: the "rule of reason"⁶ and the "per se" violation.⁷ Looking chiefly to the result of the activity to determine a violation, the Court stated in *American Tobacco Co. v. United States*:⁸ "It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns."⁹

The Court has recognized, nonetheless, that certain actions, even if resulting in a monopoly or restraint on trade, are not within the scope and purpose of the antitrust laws, as, for example, restraints in industries regulated by governmental agencies.¹⁰ Some forms of labor activity, such as a strike or boycott, have also been held exempt from the antitrust prohibitions.¹¹ This exemption, however, may not preclude violation if the labor activities are in conjunction with businessmen and produce a restraint of trade.¹² The case of *Pennington v. United Mine Workers*,¹³ alleging a union conspiracy with large coal producers to monopolize trade in that industry, offers a current example.

Another important area excluded from the purpose and scope of the antitrust laws is state governmental action. In *Parker v. Brown*,¹⁴ the Supreme Court stated "We find nothing in the language of the Sherman Act . . . which suggests that its purpose was to restrain a state or its

⁶ The "rule of reason" was first enunciated in *Standard Oil*, supra note 5, and given its classic definition by Mr. Justice Brandeis in *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918):

To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

⁷ The "per se" doctrine was explained in *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958):

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

See Handler, Recent Developments in Antitrust Law: 1958-1959, 59 Colum. L. Rev. 843 (1959), and von Kalinowski, The Per Se Doctrine—An Emerging Philosophy of Antitrust Law, 11 U.C.L.A. L. Rev. 569 (1964).

⁸ 328 U.S. 781 (1946). This case spelled out the implication of *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945), where Georgia was allowed to file an antitrust suit even though the railroad rates were set up under the War Production Board. Subsequent decisions in *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F. Supp. 199 (D.N.J. 1952) and *United States v. Association of American Railroads*, 4 F.R.D. 510 (D. Neb. 1945) have followed the Court's reasoning.

⁹ *American Tobacco Co. v. United States*, supra note 8, at 809.

¹⁰ For example, the Interstate Commerce Act provides that "any carriers . . . participating in a transaction approved or authorized . . . are relieved from the operation of the antitrust laws. . . ." 24 Stat. 380 (1887), as amended, 49 U.S.C. § 5(11) (1958). See also, Shipping Act, 39 Stat. 733 (1916), as amended, 46 U.S.C. § 814 (Supp. V, 1964); Civil Aeronautics Act, 72 Stat. 770, 49 U.S.C. § 1384 (1958).

¹¹ *Apex Hosiery v. Leader*, 310 U.S. 469 (1940).

¹² *Allen Bradley Co. v. International Bhd. of Elec. Workers*, 325 U.S. 797 (1945).

¹³ 325 F.2d 804 (6th Cir. 1963), cert. granted, 377 U.S. 929 (1964).

¹⁴ *Parker v. Brown*, 317 U.S. 341 (1943).

officers or agents from activities directed by its legislature."¹⁵ In *Parker*, state officers under the California Agricultural Producers Marketing Law,¹⁶ established and managed programs for marketing agricultural commodities so as to restrain competition among the growers and maintain prices. Although these activities were concededly monopolistic under the Sherman Act if performed by individual agreement, the Court held that such activities performed under a state legislative mandate were beyond the scope of the Sherman Act, stating, "In a dual system of government . . . an unexpressed purpose to nullify a state's control over its officers . . . is not lightly to be attributed to Congress."¹⁷

A question left unanswered by *Parker* was the liability of individuals who conspired to induce state action for their own anti-competitive purpose. This question arose in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*¹⁸ There, the plaintiffs alleged that the railroads, by inducing enforcement of existing laws and pressing for new legislation against the trucking industry, were conspiring to restrain trade in violation of the Sherman Act. The Court held that such activities were chiefly political and unaffected by the restrictions of the Sherman Act, despite any anti-competitive purpose or effect they may have had.¹⁹ The "end result" test of *American Tobacco*²⁰ did not control because the activities were part of valid governmental processes.

A question still remained, however, of the applicability of the Sherman Act where there were allegations of participation by a state or its officers in a private conspiracy to restrain trade. As the court in the instant case pointed out, *Parker* explicitly reserved judgment on this point, stating, "we have no question of the state . . . becoming a participant"²¹ The court in the instant case also pointed out that *Noerr* did not preclude relief, since in that case there were no allegations of participation by the state or its officers in the conspiracy.

Viewing the question as one of first impression, the court in the instant case held that a Sherman Act cause of action would exist where there was alleged active participation in a conspiracy by a state or its officers. The exemptions granted state action under *Parker*, as well as the protection afforded individuals to petition for government action under *Noerr*, do not extend to the situation where there is the added factor of active participation by a state or its officers.

The court in the instant case also held that liability would be found if the plaintiff could show that the enforcement of the law was but one element in a larger plot to restrain trade. Although the court does not cite authority, support for this position appears in *Noerr* where the Court pointed out that not all activity under the guise of political action is to be protected, stating:

¹⁵ Id. at 350-51.

¹⁶ Cal. Agri. Code, §§ 2000-2400 (1954).

¹⁷ *Parker v. Brown*, supra note 14, at 351.

¹⁸ 365 U.S. 127 (1961).

¹⁹ Id. at 140.

²⁰ *American Tobacco Co. v. United States*, supra note 8.

²¹ *Parker v. Brown*, supra note 14, at 351.

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"There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham . . . and the application of the Sherman Act would be justified."²²

Another important aspect of the present case is that the court felt that without the Attorney General's alleged participation the *Noerr* rule protecting rights of citizens to petition their government would apply regardless of the substantive merits of their petition. This would seem to conflict with the Sixth Circuit which, in the *Pennington* case,²³ held that only activities conducted in good faith would be excluded from the ambit of the antitrust laws. The allegation in *Pennington* was that the union and larger coal producers had attempted to induce the Secretary of Labor to extend the minimum wage provided in the Walsh-Healey Act²⁴ to all coal producers dealing with governmental agencies, thus forcing the plaintiff to pay higher wages and thereby driving him out of business. The court there revived an intent criterion while the instant court held such activity exempted regardless of intent or result.

Not only did the instant court avoid any intent criterion but it also felt that the legitimacy of the methods used to induce the enforcement of the law does not affect their liability under the Sherman Act. Whether the Supreme Court in *Noerr* meant to protect fraudulent acts which induced state action, such as those alleged in the instant case, is questionable. In *Noerr*, no one alleged that the enforcement of laws against the truckers was attempted by fraud. The Court said: "[T]he Sherman Act does not apply to those activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action. . . ."²⁵ (Emphasis added.) The Court took care not to call the activities illegal in themselves but viewed them as accepted political procedures.

One case which has held that *Noerr* does not protect fraudulent petitions for government action is *Woods Exploration & Producing Co. v. Aluminum Co. of America*.²⁶ There, the court held that a fraudulent attempt to influence state action, by filing false statements of oil production, stated a cause of action under the Sherman Act. The defendants claimed that *Noerr* controlled but the court felt that the activities in *Noerr* were "political," while the fraudulent acts in its case were not, and that to deny them protection was not to deny any of the freedoms guaranteed by *Noerr*.

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²² Eastern R.R. Presidents v. Noerr Motor Freight, Inc., supra note 18, at 144.

²³ Pennington v. United Mine Workers, supra note 13, at 817.

²⁴ 66 Stat. 308 (1936), 41 U.S.C. §§ 43A-45 (1958).

²⁵ Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., supra note 18, at 138.

²⁶ 36 F.R.D. 107 (S.D. Tex. 1963).