antiseptic; it could not be safely eaten and drunk and it would not be efficacious for the purposes represented.

DISPOSITION: January 12, 1949. A plea of nolo contrendere having been entered, the court suspended the imposition of sentence and placed the defendant on probation for 5 years, conditioned that he discontinue all misbranding of the article, seek the review and advice of the Food and Drug Administration, and refrain from any label, labeling, or claims regarding the article which would be contrary to the law, regulations, and opinions of the Food and Drug Administration.

2573. Alleged violation of injunction. U. S. v. Dean Rubber Co., et al. Defendant judged not guilty. (Inj. No. 3.)

INFORMATION FILED: On June 7, 1946, Western District of Missouri, against the Dean Rubber Co., a corporation, North Kansas City, Mo., and against Wilbur J. Dean, Charles H. Fry, Beulah V. Dean, Ralph A. Briant, Carl Wormington, Morris J. Pollock, Justine Woodard, Ruth Marie Symons, W. R. Adelsperger, Claiborne Dean, Alpha Dean, Archie Dean, Viola Bausin, and Harry Custer, copartners, doing business as the Dean Rubber Co.; amended informations filed August 6 and October 28, 1946, and March 11, 1947.

ALLEGED VIOLATION: The first information alleged that on September 11, 1940, a permanent injunction, as reported in notices of judgment on drugs and devices, No. 409, had been entered enjoining the Dean Rubber Co., its officers, agents, and all persons then or thereafter acting by or through them, from distributing in interstate commerce any *prophylactics* containing holes or which might subsequently acquire holes; that at that time, one Wilbur J. Dean, was and continued to be president and acting manager of the Dean Rubber Co., a corporation; that on or about October 21, 1944, the assets and business of the corporation were transferred to Wilbur J. Dean, Beulah V. Dean, Charles H. Fry, Ralph A. Briant, Carl Wormington, Morris J. Pollock, Justine Woodard, Ruth Marie Symons, W. R. Adelsperger, Claiborne Dean, Alpha Dean, Archie Dean, Viola Bausin, and Harry Custer, who since that time had operated as copartners under the name of Dean Rubber Co.; that the corporation, Wilbur J. Dean, and each of the other defendants had actual knowledge of the contents of the decree for permanent injunction; that in willful violation of the injunction and in contempt of the court, the defendants had on or about September 30, October 25, and December 14, 1944, and on or about January 9 and 30, February 2, 6, 14, and 17, June 4 and 9, and July 6 and 29, 1945, willfully, unlawfully, contumaciously, and contemptuously caused to be shipped in interstate commerce various quantities of *prophylactics* which were adulterated under Section 501 (c) and misbranded under Section 502 (a), by the reason of containing holes.

DISPOSITION: Upon the filing of the original information on June 7, 1946, an order to show cause why defendants should not be held in contempt of court was issued. Thereafter, the first amended information was filed to include additional violative shipments which were caused to be made by the defendant on or about April 14 and 18 and July 13, 1944, October 17 and December 6 and 7, 1945, and January 22 and 23, February 6, and March 15, 1946. A motion for dismissal of this amended information was then filed on behalf or the defendants, and on October 7, 1946, the court handed down the following opinion in regard to such motion:

RIDGE, *District Judge:* "The amended information filed herein alleges that on September 11, 1940, a permanent injunction was entered against the Dean

Rubber Company, a Corporation, by which said defendant, its officers and agents and all persons then or thereafter acting by, through or under it or them, were perpetually enjoined and restrained from distributing, in interstate commerce, 'any of the stock of defective rubber prophylactics which it had on hand at Kansas City, Missouri, or at any other point, or any other quantity of defective rubber prophylactics it might subsequently acquire.'

"In Paragraph 2 of the information it is alleged that W. J. Dean was the President and Acting Manager of said Dean Rubber Company, a Corporation; that on or about the 21st day of October, 1944, the assets and business of said Corporation were transferred to certain individuals who, since that time, have been and are now operating as co-partners under the style and trade name of Dean Rubber Company; that at the time of such transfer 'each of the within-named individual defendants had actual knowledge of the contents of said injunction order.'

"Rule 65 (d) F. R. C. P. provides that an order granting an injunction 'is binding only upon the parties to the action, and officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.' Under said rule mere knowledge, in and of itself, of the issuance of an injunction would not make a person, not a party to an injunction suit, liable to contempt proceedings for committing an independent act not done in 'active concert or participation with' a party bound by the injunction. *Alemite Mfg. Co.* v. *Staff*, 42 F. (2d) 832; *Harvey* v. *Bettis*, 35 F. (2d) 349. The amended information does not allege how or in what manner the alleged individual contemnors, named therein, acted in concert or participation with the corporate defendant in violating the injunctive decree. All that is alleged in the 3rd and subsequent paragraphs of the information is that 'said defendants did wilfully, unlawfully, contumaciously and contemptuously ship and cause to be shipped in interstate commerce' certain defective rubber prophylactics. There was only one defendant in the original action, namely, the Dean Rubber Manufacturing Company, a Corporation. If the individuals named in the amended information are guilty of violating the injunction decree of this Court, then they are 'contemnors' and not defendants, and the information must allege a 'privity' between defendant and said individuals.

"In its suggestions in opposition to the motion to dismiss the Government states 'the corporation, for some reason, did transfer its assets but, at the same time retained its legal entity and continued in active operation of its business.' If such be a fact, then the amended information should be amended and the facts set out concerning such matters. As the information now stands no such issue is presented. All that is alleged, in the instant information, is a succession to the assets of the business of the corporation by the individuals named as alleged contemnors therein. It is doubtful whether an assignment alone is sufficient to make the assignee bound by an injunction decree. The facts showing the privity between the original parties to the suit and the assignee, or stranger to the action should be alleged so that the information, upon its face, shows a mutual or successive relationship of such parties to the subject matter of the injunction decree.

"It is noted that the injunction decree in part is in personam and in part in rem, i. e., the injunction decree enjoins the corporation from distributing, in interstate commerce, 'any of the stock of defective rubber prophylactics which it now has on hand.' That portion of said decree is in rem. The prohibition of the decree which enjoins distributing in interstate commerce,

'any other quantity of defective rubber prophylactics which it may subsequently acquire,' is in personam. It is only injunctions, acting in rem, that bind successive ownerships of the rem. *Rivera* v. *Lawton*, 42 F. (2d) 832. 28 Am. Jur. p. 505, etc. Only persons who are parties to an injunction decree, or in privity with those whose rights have been adjudicated thereby, are bound by a personam decree. *Chase Nat'l. Bank* v. *Norwalk*, 291 U. S. 431.

"In view of the statement contained in plaintiff's suggestions that 'the evidence on behalf of the plaintiff will disclose that the individual defendants were employees or officers of the corporation at the time judgment was entered against it' and it appears that plaintiff contends that the individual contemnors are 'acting by, through or under' Dean Rubber Manufacturing Company, or that perhaps said individuals were the sole owners of the stock of said corporation at the time the injunction was granted, plaintiff will be given leave to amend its amended information so as to state the facts concerning the privity existing between said corporation and the individual contemnors. If plaintiff does not file an amended information within ten days, defendant's motion to dismiss will be sustained.

"IT IS SO ORDERED."

As a result of the foregoing opinion, the second amended information was filed, following which a motion for a bill of particulars was filed on behalf of the defendants. The motion requested information as to (1, a) whether the *prophylactics* so shipped were those which the defendant, the Dean Rubber Co., a corporation, had on hand on September 11, 1940; or had subsequently acquired; (1, b) whether the *prophylactics* at the time of the shipment were owned and shipped by the individual defendants as partners; (2) what part of the assets of the defendant, the Dean Rubber Co., a corporation, were transferred to the individual defendants, what was the date of transfer, and whether or not the corporation had since the transfer continued to ship *prophylactics* in interstate commerce and operated the business; (3) whether or not the individual defendants or any of them at the time of the shipments were "acting by, through or under" the corporation, as set forth in the last paragraph of the court opinion of October 7, 1946; (4, a) whether or not the individual defendants or any of them were at the times of the shipments in "active concert or participation with" the corporation as set forth in the court's opinion of October 7, 1946; and (4, b) how and in what manner the individual defendants or any of them were in "active concert of participation with" the corporation, as set forth in the court's opinion of October 7, 1946. On January 30, 1947, the court handed down the following opinion on the motion for a bill of particulars:

RIDGE, *District Judge:* "From a perusal of the Government's Second Amended Information, it appears that this criminal contempt proceeding against defendant and the individual contemnors is premised upon the proposition that said parties are acting in concert or participation with each other to violate the injunctive decree of this Court. Such being the predicate of this proceeding, it is not necessary that the information set forth whether the prophylactics shipped were those which defendant Dean Rubber *Manufacturing* Company had on hand on September 11, 1940, as requested in specification 1 (a) of defendants' 'Motion for Bill of Particulars.' Such facts would only be material if the information was premised upon a 'successive' relationship between said parties concerning the 'rem' of the injunctive decree. If the latter is a premise of the contempt proceeding, then the information sought in the above specification should be alleged in the information.

"The 'ownership' of the prophylactics shipped is immaterial in determining

the guilt or innocence of the individual contemnors. If said parties acted in concert with defendant Dean Rubber *Manufacturing* Company, in violation of the injunctive decree, then regardless of the ownership of such goods, or how such parties became possessed thereof, is not pertinent, except perhaps from a defensive standpoint. Defendants' specification 1 (b) of Motion for Bill of Particulars is overruled.

"The information sought in specification 2 of said motion is evidentiary and need not be stated in the information. The present allegations of the information allege that *Dean Rubber Company* shipped or caused to be shipped in interstate commerce the prophylactics in question. Specification 2, of said motion is overruled.

"Specifications 3, 4 (a) and (b) of said motion are sustained. The information, or other formal statement, by which the prosecution of a contempt proceeding is initiated, should state completely the necessary facts constituting the offense so that the parties charged may be clearly apprised of the nature of the charge against them and the acts complained of. Technical accuracy, however, is not required. In the original injunction proceeding the defendant was the Dean Rubber Manufacturing Company, a corporation, not Dean Rubber Company, a corporation. The original defendant in the injunction case has not been made a party in this contempt proceeding. Perhaps this is an oversight but it should be clarified now before any other action is taken herein.

"As above stated, it appears that this contempt proceeding is based on 'concert of action' between the parties named in the information as defendants. I do not believe 'concert of action' alleged to be the cause of the violation of an injunction, can be premised on an assignment of assets alone, unless the injunction decree is directly concerned with the assets transferred, or the assignment is made for the purpose of evading the terms of the injunction decree. *Le Tourneau Co. etc.* v. *N. L. R. B., 150 Fed. (2d) 1012; Holcomb & Co.* v. *U. S. 180 Fed. 794; Hoover Co.* v. *Exchange Vacuum Cleaner Co., 1 F. Supp. 997.* However, where a successor in interest takes over the entire business of one bound by an injunction decree and the conduct of that business is the basis for the injunction, he would probably be liable for a violation of the injunction if the successor in interest conducted such business in the same manner as his assignor had conducted it. *Schumacher* v. *Shawhan Dis. Co. (Mo. App.) 165 S. W. 1142; Riviera* v. *Lawton, 35 Fed. (2d) 823.* I make the above observations because I do not believe that the Second Amended Information alleges sufficient facts to establish 'active concert or participation' by the individual contemnors in a violation of the decree in question. The Government must allege facts in its information, so showing, before a cause for action by this Court can be taken in the premises. *Edwards* v. *U. S., 123 Fed. (2d) 465.* If the individuals are the 'alter egos' of the Dean Rubber Manufacturing Company, facts establishing that relation should be stated in the information. If they are 'successors in interest' under such circumstances as to make them bound by an injunction issued against their assignor, then the facts creating such environment should be alleged. From the allegations of the present information the Court cannot determine which relationship the individuals are sought to be charged. Under such circumstance, the instant Information does not comport with the requirements of proper pleading in a Criminal Contempt Proceeding.

"This is such a contempt proceeding. *Bullock Elec. & Mfg. Co.* v. *Westinghouse, etc., 129 Fed. 105; Nye* v. *U. S. 313 U. S. 33; Gompers* v. *Bucks Stove, etc. 221 U. S. 418.* The action is brought in the name of the United States and

the punishment, if assessed, would be punitive. *Phillips, etc.* v. *Amalgamated, etc., 208 Fed. 335.*

"The Government is given twenty (20) days in which to file an Amended Information in conformance to this order.

"IT IS SO ORDERED."

In accordance with the foregoing opinion, the third amended information was filed to name correctly the corporate defendant and to recite more precisely the privity between the corporation and the individuals. A motion to dismiss this information was filed on April 4, 1947, and on August 1, 1947, the following opinion was handed down by the court, denying the motion:

RIDGE, *District Judge:* "Contemnors herein have moved to dismiss the 'Third Amended Information' on the ground that the several alleged criminal violations of the injunctive decree charged therein, having occurred more than one year before the filing of said information, are barred by limitations provided in *28 U. S. C. A. 390 (Section 25 of the Clayton Act)*.

"The final injunction decree upon which said information is premised was entered on September 11, 1940, in an action instituted by the United States for that purpose, perpetually enjoining and restraining the Dean Rubber Manufacturing Company, a corporation, its officers and agents, and persons then or thereafter acting by, through or under it, or them, from distributing in interstate commerce any of the stock of defective rubber prophylactics which it then had on hand at North Kansas City, Missouri, or at any other point, or any other quantity of defective rubber prophylactics which it might subsequently acquire, 'defective,' within the meaning of the order; except in compliance with *Section 381 (d), U. S. C. A., Title 21 (The Federal Food, Drug and Cosmetic Act) (52 Stat. 1041, etc.)*.

"*Section 302 (b) of the Federal Food, Drug and Cosmetic Act (52 Stat. 1043; Title 21, Section 332 (b), U. S. C. A.)*, provides that 'in case of violation of an injunction * * * issued under (the act), which also constitutes a violation of (the act) * * *' the trial for such violation may be before the Court, or a jury if requested, and 'shall be conducted in accordance with the practice and procedure applicable in the case of proceedings subject to the provisions of *Section 387 of Title 28*, as amended.'

"*Section 387 of Title 28*, in *Section 22 of the Clayton Act.* The Clayton Act governs the procedure in criminal contempts which consist of 'criminal offenses' under any statute of the United States or of any State, except insofar as certain contempts are expressly excluded from its terms. The Clayton Act is neither a grant nor a limitation on the powers of the Federal Courts to punish for contempts, but only prescribes and limits the procedure as to punishment for contempts within the purview thereof. After enumerating the contempts as to which the procedure of the Clayton Act is to be followed, *Section 24* of said Act (*Title 28, Section 391, U. S. C. A.*) expressly excludes from its operations, (1) contempts committed in, or near to, the presence of the Court as to obstruct the administration of justice, and (2) 'contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States.' As to the latter excluded criminal contempts from the provisions of the Clayton Act, it is held that they fall under the general three-year statute of limitation (*Title 18, Section 582, U. S. C. A.*) *U. S.* v. *Goldman, 277 U. S. 229; Hill* v. *U. S. ex rel. Weiner, 300 U. S. 105;* and that as provided in *Section 24* of said Act (*Title 28, Section 389, U. S. C. A.*), punishment therefor may be assessed 'in conformity to the usages at law and in equity prevailing on October

15, 1914'. If the instant action was prosecuted by the United States under the Anti-Trust Act, or similar Act of Congress, there could be no doubt but that the alleged criminal contempts here sought to be prosecuted would not be barred by the one-year period of limitation provided in *Section 25 of the Clayton Act (Title 28, U. S. C. A., 390)*, *U. S.* v. *Goldman and Hill* v. *U. S., supra.*

"Contemnors maintain, however, that *Section 302 (b)* of the *Federal Food, Drug, and Cosmetic Act, supra.*, by expressly subjecting proceedings for violations of injunctions under that Act to the same rules as proceedings under *Section 22* of the *Clayton Act, supra.*, made an 'exception to the exception' contained in the Clayton Act as to criminal contempts prosecuted by the United States, because all proceedings instituted for the enforcement, or to restrain violations of the Federal Food, Drug and Cosmetic Act, are brought in the name of the United States. (*21 U. S. C. A. 537*). They say, 'what a futile thing would Congress have done if * * * all injunction violations under the Food and Drug Act are governed the same as proceedings under *Section 387*, but since *Section 389* (*Title 28 U. S. C. A., Sections 387, 389*) exempts all such proceedings, Congress merely put such proceedings within the Clayton Act and by the same words took them out from under the Clayton Act.'

"Section 302 (b) of the *Federal Food, Drug, and Cosmetic Act* (*Title 21, U. S. C. A. 332 (b)*) did not place criminal contempt proceedings for violations of injunctions procured by the United States, under the Food and Drug Act within the purview of all the provisions of the Clayton Act. All that is accomplished by the provisions of *Section 302 (b) supra.*, is to incorporate into the Federal Food, Drug, and Cosmetic Act one section of the Clayton Act (Section 22) which section sets up a procedure to be followed in the trial and punishment of contempts for violations of an injunction procured under the Federal Food, Drug and Cosmetic Act. Notice the language used in *Section 302 (b), supra.*, is that 'trials' for contempt in case of violation of an injunction procured under the Federal Food, Drug and Cosmetic Act are to 'be conducted in accordance with the practice and procedure applicable in the case of *proceedings subject to the provisions of* Section 387 of Title 28, as amended.' The only 'proceedings' that are 'subject to the provisions of Section 387,' supra.; are criminal contempt proceedings arising in litigations where the 'order * * * decree or command entered is not in a suit or action brought or prosecuted in the name of, or on behalf of, the United States.' In other words, in litigation of a private nature, and such criminal contempts as are committed and prosecuted under miscellaneous Federal statutes authorizing punishment for contempt without designating the particular contempt as civil or criminal and generally containing no provisions as to procedure, as in the Federal Rules of Civil Procedure. (See *Rules 37 (b) (1); 45 (f); 56 (g) and 70.*) In providing that *Section 22* of the Clayton Act shall be the procedure to be followed in prosecution of alleged contempts for violation of injunctions procured under the Federal Food, Drug and Cosmetic Act, Congress established a limited special procedure to be followed in such cases and took such contempt actions out of the procedure generally followed 'at law and in equity' in cases wherein the United States was the party procuring an injunction decree or order. Without such limitation contained in *Section 302 (b)* of the *Federal Food, Drug and Cosmetic Act*, the alleged contumacious conduct here charged against contemnors would be prosecuted under *Section 268* of the *Judicial Code* (*Title 28, U. S. C. A. 385*). In changing the procedure previously established as to criminal contempts prosecuted in the name of the United States so far as such contempts may arise under the Federal Food, Drug, and Cosmetic Act, Congress did not provide that other sections of

the Clayton Act (other than *Section 22* thereof), be made applicable to contempt proceedings arising under the Federal Food, Drug and Cosmetic Act, as asserted by contemnors. To sustain such contention would work the anomalous situation which contemnors state, namely, that Congress 'put such proceedings within the Clayton Act and by the same words took them out from the Clayton Act.' *Section 24* of the Clayton Act (*Title 28 U. S. C. A. 389*) would produce such a paradoxical result. Under contemnors' position, all the sections of the Clayton Act relating to contempt proceedings must be presumed to have been intended by Congress to apply to criminal contempt proceedings instituted under the Federal Food, Drug and Cosmetic Act, and not only *Sections 22 and 25* thereof (*Title 28, U. S. C. A. 390*). To make such assumption is to charge Congress with being a paradoxer. Congress cannot be so charged with such self-annulling action as asserted by contemnors.

"*Section 24* of the Clayton Act, supra, is not specifically made to apply to contempt proceedings instituted under the Federal Food, Drug and Cosmetic Act as is *Section 22* of said Act. *Section 24* of the Clayton Act establishes a limitation of action. A statute creating a limitation against the bringing of an action is never assumed to be effective as against actions instituted by the Federal Government and is only effective against such actions when specifically made so. Exemption from statutes of limitation ordinarily is implied in favor of the State and Federal Governments (*34 Am. Jur. 303, etc.*).

"From what has been heretofore said, it is not necessary to discuss other points raised by contemnors in their briefs.

ORDER

"Contemnors' motion to dismiss this action is by the Court overruled."

On October 26, 1948, after further consideration of the entire matter, the court found the corporation and the individuals not guilty of contempt.

2574. Adulteration and misbranding of prophylactics. U. S. v. 246 Gross * * *. (F. D. C. No. 25394. Sample No. 19531-K.)

LIBEL FILED: August 17, 1948, Middle District of Tennessee.

ALLEGED SHIPMENT: On or about July 12, 1948, by World Merchandise Exchange & Trading Co., Inc., from New York, N. Y.

PRODUCT: 246 gross of *prophylactics* at Nashville, Tenn. Examination of samples showed that 6.3 percent were defective in that they contained holes.

LABEL, IN PART: "Silver-Tex Prophylactics Manufactured by The Killian Mfg. Company, Akron, Ohio."

NATURE OF CHARGE: Adulteration, Section 501 (c), the quality of the article fell below that which it purported and was represented to possess.

Misbranding, Section 502 (a), the label statement "Prophylactics" was false and misleading as applied to an article containing holes.

DISPOSITION: December 16, 1948. Default decree of destruction.

2575. Adulteration and misbranding of prophylactics. U. S. v. 94 Gross * * *. (F. D. C. No. 25501. Sample No. 485-K.)

LIBEL FILED: August 25, 1948, Western District of North Carolina.

ALLEGED SHIPMENT: On or about July 9, 1948, by World Merchandise Exchange & Trading Co., Inc., from New York, N. Y.