

items of printed matter involved in that count. There was no error committed by the court in instructing the jury.

"Fourth: Appellant Charles F. Kaadt contends that the court erred in refusing to invoke the doctrine of *res judicata*.

"To be sure, the doctrine of *res judicata* is applicable to criminal as well as civil proceedings, and operates to conclude those matters in issue which have been determined by a previous verdict, even though the offenses be different. *Scalfon v. United States*, 332 U. S. 575. In our case it appears that during the trial Kaadt offered in evidence the verdict of a jury and the opinion of the District Court in 1940 in the case of the *United States v. Charles F. Kaadt*, 31 F. Supp. 546. The indictment in that case charged him with a scheme to defraud and the use of the mails to further such a scheme. He asserts that the question and issue passed upon in the prior action dealt with the therapeutic value of his medicine, and argues that that issue can not again be litigated in this case. He should not be vexed more than once for the same cause. In support of his argument he cites, among other cases, *United States v. Oppenheimer*, 242 U. S. 85; *Oklahoma v. Texas*, 256 U. S. 70; and *Tait v. Western Maryland Railway Co.*, 289 U. S. 620.

"Counsel for appellee concedes, as he must, the propriety of invoking *res judicata* when the issues have previously been tried and determined, but to avoid the application of the doctrine, he points to the fact that in a scheme to defraud the significant fact is the intent and purpose, and that the two essential elements of the offense of using the mails to defraud (18 U. S. C. A. § 338) are the existence of a scheme to defraud and the placing or causing to be placed in the post office a letter, post card, package, writing, circular, pamphlet, or advertisement, for the purpose of executing the scheme. *Fournier v. United States*, 58 F. 2d 3; *United States v. Lowe*, 115 F. 2d 596; and *United States v. Cohen*, 145 F. 2d 82.

"We agree with appellee that it is impossible from this record to ascertain on what ground the jury acquitted Kaadt of the offense of using the mails to defraud. But the instant prosecution does not involve any question of fraud. The misbranding charged is based on § 352 (a) of the Act which provides that a drug or device shall be deemed to be misbranded if its labeling is false or misleading in any particular. And *Scalfon v. United States*, *supra*, is of no aid to appellant for the reason that in the unique circumstances of that case, the jury's verdict in the conspiracy trial was a determination favorable to Scalfon of the facts essential to a conviction of the substantive offense. Appellee in the present case was not required to prove intent to defraud. Thus the offense of using the mails to defraud and the offense of introducing or delivering for introduction into interstate commerce misbranded drugs are not the same, and hence there is no *res judicata*. Compare *United States v. Five cases*, 156 F. 2d 493.

"The judgment of the District Court is affirmed."

2579. Misbranding of Adolphus vitamin and mineral products. U. S. v. Adolphus Hohensee. Plea of not guilty. Tried to the jury. Verdict of not guilty on count 1; verdict of guilty on remaining counts. Fine \$1,800. (F. D. C. No. 20125. Sample Nos. 31973-H to 31983-H, incl.)

INFORMATION FILED: September 25, 1946, District of Arizona, against Adolphus Hohensee, of Scranton, Pa., and Phoenix, Ariz.

ALLEGED SHIPMENT: On or about April 2, 1945, from the State of Arizona into the State of California.

LABEL, IN PART: "Malt-O-Soy (Soy Milk) Ingredients Soya Beans, Vegetable Oils, Raw Sugar, Dextrose, Sodium Chloride, Calcium Phosphate, Diabasic Salt"; "Improved 'B' Complex A Food Supplement * * * Each Tablet Contains Not Less Than Vitamin B₁—750 USP Units (2.27 mg.); Vitamin B₂ (G)—2,000 Micrograms (2.0 mg.); Vitamin B₆—250 Micrograms (.25 mg.); Niacinimide—20,000 Micrograms (20.0 mg.); Calcium Pantothenate—1,000 Micrograms (1.0 mg.); "High Potency Vitamin C 250 Mgs. A Food Supplement Each Tablet Contains: 5,000 USP Units (250 Mgs.) of Vitamin C (Ascorbic Acid)"; "Dicalcium Phosphate and Vitamin D A Food Supplement Each Tablet Contains Dicalcium Phosphate and Vitamin D (Irradiated Ergosterol) and Represents 210 Mgs. Calcium, 150 Mgs. Phosphorus and 400 USP Units Vitamin D"; "Garlic Parsley Each Capsule Contains Approximately 2500 Mgs. of Clean Fresh Parsley and Peeled Garlic"; "Food Supplement Mineral Capsules The Following Weights Apply to the Mineral Salts (Iron) from Ferrous Sulphate Dried 56.1 Mg. (Calcium) from DiCalcium Phosphate Anhyd. 187.0 Mg. (Phosphorous) from No. 2 42.6 Mg. (Iodine) from Potassium Iodide .15 Mg. (Magnesium) from Magnesium Sulphate Dried 7.2 Mg. (Zinc) from Zinc Sulphate C. P. Dried 3.0 Mg. (Copper) from Copper Sulphate Anhyd. 5.0 Mg. (Sodium) from Sodium Chloride C. P. Dried 2.5 Mg. (Cobalt) from Cobalt Sulphate .2 Mg. (Potassium) from Potassium Chloride C. P. 1.3 Mg. (Manganese) from Manganous Sulphate (2H²O) 3.4 Mg. (Sulphur) traces from Nos. 1, 6, 7, 9 and 11 Liver Concentrate, from Fresh Livers 30.0 Mg. Soybean Lecithin 15.0 Mg. C. P. Wheat Germ Oil 214.0 Mg."; "Vitamin C 30 Mg. A Food Supplement Each Tablet Contains 600 U.S.P. Units (30 Mg.) Vitamin C (Ascorbic Acid)"; "Pure Soy Bean Lecithin and Vitamin D A Food Supplement Each Capsule Contains 4 Gr. Soybean Lecithin in 3 Minim Soybean Oil with 150 USP Units Vitamin D from Irradiated Ergosterol"; "3 Minim Capsules * * * Containing Pure, Virgin Cold Pressed Wheat Germ Oil A Rich Natural Source of Vitamin E."

NATURE OF CHARGE: Misbranding, Section 502 (a), certain statements in the labeling were false and misleading since the articles would not be effective to accomplish the purposes represented and suggested. These statements were set forth on the labels of the articles, in accompanying display cards entitled "The Wheel O'Life," and in accompanying booklets entitled "Lecture Series on Health and Progress Better Eyes Without Glasses," "Lecture Series on Health and Progress How to Think and Attain Success," "The Health, Success and Happiness Lectures," "* * * 'High Blood Pressure' * * * Degenerative Diseases," "What About the Vegetables and Fruits We Eat Today?" "Lecture Series on Health and Progress * * * What is Brain Food," and "Lecture Series on Health and Progress Your Personality Glands."

The false and misleading statements in the labeling represented and suggested:

That the *Malt-O-Soy* would be of value in treating arthritis and in correcting acid or ulcer states; that it would serve as an ideal nonresidue diet of high nutritional value in dysentery, sprue, and colitis; that it would supply every purpose of animal milk for the growing child, for the adult, and for the pregnant or nursing mother; and that it was hypoallergic.

That the *Improved "B" Complex Tablets* would be an adequate treatment for colds and sinus conditions; that it would be efficacious in the prevention of colds, sinus conditions, allergy, and marked acidosis; that it would enable one to attain good eyesight without glasses; that it would correct farsightedness, nearsightedness, middle-age sight, and inflamed eyes; that it would be an

adequate treatment for asthma and hay fever; that it would aid heart action, nerves, and blood formation; and that when taken alone or in combination with all the vitamins and minerals and an 80 percent alkaline diet, it would insure good eyesight, healthy sinuses, and vigorous lungs.

That the *High Potency Vitamin C Tablets*, when taken alone or in conjunction with the other measures indicated in the labeling, would be adequate treatment for colds and sinus conditions; that it would prevent colds, sinus conditions, and allergy; that it would correct marked acidosis, constipation, and digestive disturbances; that it would build up resistance; that it would make the eyes beautiful; that it would minerally balance the blood stream; that it would enable one to attain good eyesight without glasses; that it would prevent many children's diseases; that it would correct farsightedness, middle-age sight, nearsightedness, astigmatism, and inflamed eyes; and that it would insure healthy sinuses and vigorous lungs.

That the *Dicalcium Phosphate and Vitamin D Tablets* would be effective in correcting disease of the brain cells; that it would prevent and correct brain destruction; that it would develop brain cells; that it would supply mental power; that it would promote will-power and mentality; and that it would steady the nerves.

That the *Garlic Parsley Capsules* would be efficacious in the treatment of high blood pressure, headache, ear noises, rushing of the blood to the head, heart palpitation, general weakness, and debility; that it would open arteries which have become smaller and would supply flexibility to stiff and hardened arteries; that it would loosen and dissolve incrustation on the walls of the arteries; that it would be efficacious in the cure and prevention of high blood pressure; that it would bring about a profound cleansing effect upon the intestines and blood stream; that it was an internal antiseptic and blood purifier; that it would be of benefit in the treatment and prevention of influenza, rheumatism, and chronic catarrh; that it would inhibit the growth of the tubercle bacillus; that it would be efficacious in the cure, mitigation, treatment, and prevention of tuberculosis of the skin, bones, glands, lungs, and special parts of the body; and that it would strengthen the circulatory system.

That the *Food Supplement Mineral Capsules* would be an adequate treatment for rickets, bony deformities, bad teeth, nervous disorders, reduced resistance to other diseases, fatigability, behavior disturbances such as incorrigibility, assaultiveness, and nonadaptability, infections of the nose and throat, swollen glands, enlarged and diseased tonsils, defective vision, round shoulders, bow legs, and anemia; that it would build up resistance and, when used alone or in combination with vitamins A, B, and C, and an 80 percent alkaline diet, would prevent colds and sinus conditions; that it would correct acidosis, digestive disturbance, sour stomach, and constipation; that it would make the eyes beautiful; that it would enable one to attain good eyesight without glasses; that it would prevent and correct children's diseases, farsightedness, middle-age sight, nearsightedness, astigmatism, inflamed eyes, asthma, and hay fever; that it would insure good nerves; that it would maintain the intestinal tract free of toxemia; and that it would provide good eyesight, healthy sinuses, and vigorous lungs.

That the *Vitamin C Tablets*, when taken alone or in conjunction with the other measures indicated in the labeling, would be an adequate treatment for colds and sinus conditions; that it would prevent colds, sinus conditions, and allergy; that it would correct marked acidosis, constipation, and digestive disturbances; that it would build up resistance; that it would make the eyes

beautiful; that it would minerally balance the blood stream; that it would enable one to attain good eyesight without glasses; that it would prevent children's diseases; that it would correct farsightedness, middle-age sight, nearsightedness, astigmatism, and inflamed eyes; and that it would insure healthy sinuses and vigorous lungs.

That the *Pure Soy Bean Lecithin and Vitamin D Capsules* would be of value as a brain food; that it possessed special virtues for the treatment of rickets, dyspepsia, diabetes, anemia, and tuberculosis; that it was especially required by the stomach, kidneys, liver, lungs, and pancreas; that it would be efficacious in the correction in an undernourished person of despondency, early discouragement, and lack of will-power and enthusiasm; that it would provide proper reasoning power; that it would restore loss of memory; that it would correct lack of power to concentrate and lack of coordination between the brain and muscles; that it would be efficacious in the correction of an inferiority complex; that it would increase mental efficiency; and that it would produce healthy physical and mental developments and glandular functioning in children.

That the *Wheat Germ Oil Capsules* would be of benefit to women during the menopause; that it would supply proper nourishment to all important glands including the sex glands; that it would be efficacious in the correction of nervous irritability, flashes before the eyes, fever, chills, and heat spells; that it would be efficacious in the correction in men of difficult urination, pelvic pains, cramps, prostate gland trouble, and loss of the sexual fluid; that it would supply pep and life; that it would benefit every fiber of the muscles in his body as well as the valves that control the various fluids; that it would be efficacious in the prevention of gland atrophy; that it would lengthen life; that it would permit living a life free from suffering and disease; that it would promote general well-being, vigor of personality, glands, and mental and physical vigor; and that it was essential to nerve and muscle tissue, for maximum growth and nutrition, and for pregnant women.

The information charged further that, with the exception of the *Garlic Parsley Capsules*, the above products and a shipment of *Concentrated Broth* were misbranded under the provisions of the law applicable to foods, as reported in notices of judgment on foods.

DISPOSITION: A plea of not guilty having been entered, the case came on for trial before a jury on February 17, 1948. The trial ended on February 20, 1948, with the return by the jury of a verdict of not guilty on the count which related to the *Concentrated Broth* and a verdict of guilty on all other counts of the information. The court imposed a fine of \$1,800 on March 8, 1948. On the same day, the court denied the defendant's motion for a new trial and arrest of judgment.

2580. Misbranding of Gotu Kola tablets, Minerals Plus tablets, sarsaparilla root, Cetabs tablets, Fenugreek tea, Fero-B-Plex tablets, Bolax tablets, Ormotabs tablets, Ribotabs tablets, Kordel tablets, Everm wheat germ oil capsules, Kordel-A capsules, Garlic Plus tablets, Niamin tablets, and sarsaparilla tea. Three Informations: U. S. v. Laura Kordel (Gotu Kola Distributors) and Lelord Kordel, U. S. v. Lelord Kordel (Lelord Kordel Products), and U. S. v. Lelord Kordel (Lelord Kordel Products and Nutrition Enterprises). Pleas of not guilty. Tried to the court. Verdict of guilty against Lelord Kordel; verdict of not guilty