

Opinion No. 45-4647

February 2, 1945

BY: C. C. McCULLOH, Attorney General

TO: Mr. Troy Caviness Secretary-Treasurer New Mexico Board of Pharmacy Loving, New Mexico

{*12} Replying to your recent letter in which you ask for an opinion on "Vitamins, are they Drugs or Foods." We understand that you refer to commercial preparations usually sold in capsule form.

We appreciate your thoughtfulness in sending the pamphlet "WHEN VITAMINS ARE DRUGS" by Leslie D. Harrop and B. W. Wise, members of the legal department of the Upjohn Company. The pamphlet is well edited and the citations include many reported cases and opinions of the Attorney General in several states, and we will refer to each citation in arriving at our opinion. The Attorney General opinions, with the exception of Utah, have not been released to our Supreme Court Library and therefore we will not have an opportunity to read the other opinions mentioned in the pamphlet.

New Mexico Statutes Annotated, 1941 Compilation, Section 71-613. "FOOD" and "DRUG" DEFINED -- The term "food" as used in Sections 71-603, 71-614 inclusive, shall include every article used for food or drink by man other than drugs or water. The term "drug" as used therein shall include all medicines for internal or external use. 17 American Law Reports, Annotated -- "The word food is a very general term, and applies to all that is eaten for the nourishment of the body * * * it is so understood generally, and the authorities whose accuracy is relied upon in all departments of investigation concur in that definition."

"Medicine as defined by Webster is 'any substance administered in treatment of disease; a remedial agent; a remedy'."

We do not believe the following cases, which were cited by Messrs. Harrop and Wise will be given serious consideration by the courts in deciding this question. The decisions being made prior to 1925 and the concentrated form of vitamin preparations not appearing on the market until after 1930.

1. State vs. Breses, 137 Iowa p. 673, 114 N. E. p. 45 (1907);
2. Bradley vs. United States, C. C. A. 5th Circuit (1920) 264 Federal p. 79;
3. Goodwin v. United States, C. C. A. 6th Circuit (1924), 2 F. (2d) p. 200.

In Department of State v. Kroger Grocery & Baking Co. Indiana Appellate Court (1942) 40 N. E. (2nd) p. 375; appealed to Indiana Supreme Court 46 N. E. (2nd) p. 237 (1943). There was a dissenting opinion in this case but the majority of the Court held as follows:

"In determining whether regulations prohibiting sale of vitamin preparations in stores other {*13} than drug stores was arbitrary and unlawful as applied to grocery and baking company by reason of its sale of vitamin capsules court was bound to give due consideration to expert testimony that capsules were not drugs but were either food or accessory food factors, and that the capsules did not fall within the meaning of the word 'drug'."

The Indiana Supreme Court in its final decision, 46 N. E. (2nd) p. 237 decided it was without jurisdiction to render a decision under "the Declaratory Judgment Act", and therefore, the decision rendered would be mere dictum and lack authority of adjudication.

Referring to the opinion of the Attorney General of the State of Utah, December 13, 1943, as quoted by Messrs. Harrop and Wise, we think the gist of the opinion was left out. We quote the entire paragraph and **italicize** the portion left out:

"It is, therefore, my opinion that if the vitamin or vitamin compound is to be used for any therapeutic or curative purpose and if healing claims are made for the **vitamin or its compound and especially if these claims are advertised and openly represented so as definitely to come within the category of being sold and used for those curative purposes**, such vitamins or compounds should be classed as medicines and drugs **and can and should be sold only through drug stores or pharmacies.**"

Board of Pharmacy v. Quackenbush & Co. 39 Atlantic (2nd) p. 28 New Jersey. Court of Common Pleas.

"Defendant, corporate operator of a department store, is charged by the State Board of Pharmacy with violation of Section 45:14 -- 6 of the Revised Statutes, N. J. S. A., in that it permitted the retailing and dispensing of a drug or medicine known as "Vitamins Plus" by a person neither a registered pharmacist or registered assistant nor under the immediate supervision of a registered pharmacist. * * *

"While the witnesses produced at the trial were qualified experts with imposing records of individual achievement, there was little divergence in the factual testimony. The statute does not specifically define either "drug" or "medicine," and the definition cited by the witnesses substantially appears to be that contained in the Federal Food Act, 21 U. S. C. A. Section 321, namely, the term "drug" means "articles recognized in the official United States Pharmacopoeia, and the term "medicine" means "articles intended for use in the diagnosis, cure, medication, treatment, or prevention of disease in man or other animals." These definitions apply to the Federal Act, which was adopted for different and other purposes than those moving the New Jersey Statute, and cannot, in my opinion, govern the construction of the State legislation. It is common knowledge

that certain foods are prescribed in the dietary treatment of disease, and while the article thus falls within the broad limit of the definition, I cannot conceive that it thus is transformed into a medicine ipso facto. Nor can I agree that a substance becomes a medicine as a fact merely because of the form, in this case, capsules, in which it is marketed.

"Vitamins, as such, are not listed in the Pharmacopoeia; they are elements contained in ordinary foods and are constituents of food products -- apparently the fact that they are concentrated does not change their essential character, and the theory of the defendant -- it may well be nothing more than a theory -- is that the concentrated product marketed by them supplies whatever deficiency may be occasioned by improper or insufficient {*14} diet, particularly as to certain food elements. * * *

"The only recent case dealing with the problem here presented appears to be that of Kroger Grocery & Baking Co. v. Board of Pharmacy of State of Indiana, decided November 6, 1939, wherein it was held that vitamin capsules are necessary food factors and as such exempted from the operation of the Indiana State Drug Act.

"My conclusion is that Vitamins Plus," whether called an accessory food factor or a dietary supplement, is still essentially a food product, and the complaint, therefore, should be dismissed."

We have made a very thorough search of authorities and find the law pertaining to vitamins is in the early stage of development. No doubt, most of the Supreme Courts of the States will be called upon to adjudicate this question in the near future.

It is our opinion that the weight of legal authorities today is that concentrated vitamin products, recommended and prepared for the purpose of dietary supplement, are foods.

Any time you desire a report on any new decisions which may be reported from the various states please advise.

By THOS. C. McCARTY,

Asst. Atty. General