cian; and that, instead of fixing the penalty for this act by directly setting it out in the section carrying the prohibition, it has declared the act of so refilling to be the same as misbranding and subject to the same penalty.

"It did this by setting out in 353(b)(1) the only way in which drugs of the kind dealt with can be dispensed, and then in the same section going on to say that the act of dispensing such a drug, contrary to the provisions of the paragraph, shall be deemed to be an act which results in the drug being misbranded. This established, by law in this section, there is required only resort to 21 U.S.C. 331(k), which denounces the offense of misbranding, and to Sec. 333, which fixes the penalty for that offense. When this resort is had, the conclusion is inescapable, we think, that the sections taken together have provided as clearly as though it had all been written out in the same section, that one dispensing drugs of the kind dealt with here, contrary to the provisions of Sec. 353(b)(1) shall be guilty of, and subject to the punishment provided by law for, an act of misbranding.[5] This necessarily results from the use in Sec. 353(b)(1) of the language, 'the act shall be deemed to be an act which results in the drug being misbranded while held for sale.'

"In *Bowers* v. *United States*, 226 F.(2) 424, this court dealt with a statute using substantially the same language. We there pointed out, one judge dissenting, that a statute using the words 'deemed to have been marketed in excess of the quota' was intended to operate not as a presumption of fact but as a statement of a substantive rule of law, the meaning, purpose and effect of which was that the same penalty should be imposed for the failure of the producer to account for the disposition of any peanuts as was provided for, and imposed upon, excess marketing. As we held there, we hold here, that the use of the word 'deemed' in the act creates an irrebuttable presumption, a rule of substantive law, and that the doing of the prohibited act, dispensing the drugs contrary to the provision of Sec. 353(b)(1) and without the authorization of the prescriber, makes refilling misbranding and subjects the dispenser to the penalties provided for misbranding.

"It was error to dismiss the three counts. The order is REVERSED and the cause is REMANDED for further and not inconsistent proceedings.

"CAMERON, *Circuit Judge:* 'I concur in the result.' "

The defendant petitioned for rehearing, which was denied on 6–30–56. A petition for a writ of certiorari was filed with the United States Supreme Court by the defendant; the court denied the petition (352 U.S. 841).

On 4–15–57, the defendant entered a plea of guilty to counts 4, 5, and 6 of the information, and the charges on counts 1, 2, and 3 were dismissed by the Government. On 4–26–57, the court fined the defendant $100.

5429. (F.D.C. No. 39191. S. Nos. 58–810/12 M.)

INFORMATION FILED: 6–15–56, Dist. Colo., against **Edith Lillian Every, also known as Mrs. H. R. Marshall, Denver, Colo.**

CHARGE: Between 5–18–56 and 5–31–56, *dextro-amphetamine sulfate tablets* were dispensed twice (counts 1 and 3) and *pentobarbital sodium capsules* were dispensed once (count 2) without a prescription.

PLEA: Not guilty.

DISPOSITION: The case came on for trial on 10–15–56. On 10–16–56, the court dismissed counts 1 and 3 on the basis that the evidence presented by the Government was insufficient to establish that dextro-amphetamine sulfate is a drug within the meaning of Section 503(b)(1)(B). On 10–17–56, the jury found the defendant guilty as to count 2.

The defendant, on 11–2–56, made a motion for acquittal and a motion for a new trial, based upon the contention that a photostatic copy of a letter that had been introduced into evidence at the trial was (a) not the best evidence

[5] United States v. Debrow, 346 U.S., 374; United States v. Sullivan, 332 U.S. 689; United States v. Arnold's Pharmacy, 116 Fed. Supp. 370; Jordan v. DeGeorge, 341 U.S. 223; Boyce Motor Lines v. United States, 342 U.S. 337.

as it was a photostatic copy and (b) obtained by unlawful search and seizure, and thus violated the defendant's constitutional rights. The court denied the motion for acquittal, stating that the other evidence produced by the Government was sufficient to refer the case to the jury. The court granted the motion for a new trial on the basis that the letter had been obtained by unlawful search and seizure and that the court had made an error in admitting the letter into evidence.

On 11–28–56, a new trial was held as to count 2, and the jury returned a verdict of guilty. On 11–30–56, the defendant was sentenced to 60 days in jail.

5430. (F.D.C. No. 40439. S. Nos. 36–320 M, 48–485/91 M.)

INFORMATION FILED: 11–27–57, N. Dist. Ill., against **Harold S. Goodman, t/a Janz Drugs, Chicago, Ill., and Frank S. LaCoy (apprentice pharmacist).**

CHARGE: Between 12–4–56 and 1–24–57, *dextro-amphetamine sulfate capsules* were dispensed 3 times, *secobarbital sodium capsules* were dispensed twice, and *Metandren Linguets*, *Candicillin* (brand of penicillin and bacitracin) *troches*, and *Pentids* (brand of penicillin G potassium) *tablets* were each dispensed once, without a prescription.

PLEA: Guilty by Goodman to all 8 counts of information and by LaCoy to counts 1, 2, 7, and 8 relating to dispensing of *dextro-amphetamine sulfate capsules*, *Metandren Linguets*, and *secobarbital sodium capsules*.

DISPOSITION: 12–16–57. Goodman fined $400, plus costs, and LaCoy fined $200.

5431. (F.D.C. No. 40432. S. Nos. 60–145 M, 72–350/2 M.)

INFORMATION FILED: 8–23–57, E. Dist. Mich., against **Ralph B. Carpenter, t/a Carpenter's Pharmacy, Royal Oak, Mich.**

CHARGE: Between 1–16–57 and 4–8–57, *dextro-amphetamine sulfate capsules* were dispensed three times and *amphetamine sulfate tablets* were dispensed once without a prescription.

PLEA: Guilty.

DISPOSITION: 11–27–57. Defendant placed on probation for 2 years.

5432. (F.D.C. No. 39971. S. Nos. 40–902 M, 40–906 M.)

INFORMATION FILED: 2–28–57, Dist. Minn., against **Harry M. Zipperman, t/a Zipp's Pharmacy, Minneapolis, Minn., and Ashley H. Morse (pharmacist).**

CHARGE: Between 7–6–56 and 7–19–56, *dextro-amphetamine sulfate tablets* and *amphetamine sulfate tablets* were each dispensed once without a prescription.

PLEA: Guilty.

DISPOSITION: 2–25–58. Zipperman fined $750 and Morse $250. Each defendant placed on probation for 3 years.

5433. (F.D.C. No. 40451. S. Nos. 72–358 M.)

INFORMATION FILED: 11–4–57, E. Dist. Mich., against **Richard T. Furtney, t/a Furtney's Drug Store, Pontiac, Mich.**

CHARGE: On 4–9–57, *dextro-amphetamine sulfate tablets* were dispensed once without a prescription.

PLEA: Guilty.

DISPOSITION: 1–7–58. $500 fine.