It has long been the general rule of practice in law cases in the Federal courts that questions decided adversely to the defendant in error (now the appellee), in the course of the trial in the lower court, will not be considered in the Appellate Court, in the absence of a cross-appeal. Cleary v. Ellis Foundry Co., 132 U. S. 612; Bolles v. Outing Co., 175 U. S. 262, 268; Pauly, etc. Co. v. Hemphill Co., 62 F. 698, 703; Guarantee Co. of N. A. v. Phenix Ins. Co., 124 F. 170 (CCA 8); Aetna Ind. Co. v. J. R. Crowe, etc. Co., 154 F. 545, 567 (dissenting opinion) (CCA 8); Midland Valley R. Co. v. Fulgham, 181 F. 91, 95 (CCA 8); Phil. Gas Co. v. Fechheimer, 320 F. 401, 418; see Peoria Ry. Co. v. U. S. 263 U. S. 528, 535, 536; The Maria Martin, 12 Wall. 31, 40; Board of Co. Comm'rs v. Hurley, 169 F. 92 (CCA 8); O'Neil v. Wolcott Min. Co., 174 F. 527, 535 (CCA 8); Swig v. Tremont Tr. Co., 8 F. (2d) 943, 945.

While libel proceedings such as the one in the case at bar are likened in the statute (21 USCA, sec. 14) to proceedings in admiralty, yet this similarity is largely confined to the seizure of the property by process in rem. The method of review follows the practice in law actions. 443 Cans of Egg Product v. United States, 226 U. S. 172, 183; United States v. 779 Cases of Molasses, 174 F. 325 (CCA 8); U. S. v. Hudson Mfg. Co., 200 F. 956; Lexington, etc. Co. v. United States, 202 F. 615 (CCA 8).

In view of these considerations, we think the question of res adjudicata presented by the claimant should not be reviewed by us.

We turn to the questions presented by the appellant.

The purpose of the Food and Drugs Act is well established. In U. S. v. Lexington Mill Co., 232 U. S. 399, the court, in its opinion, used the following language (p. 409): "The statute upon its face shows, that the primary purpose of Congress was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated foods. The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality. As against adulteration, the statute was intended to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances which might render such articles injurious to the health of consumers.

The position of the appellant is thus stated by its counsel in their brief: "In the instant case there is no charge against the name 'Bred Spred' as such, but against the adulteration of the article because it was mixed so as to conceal its inferiority, and the misbranding of the article because it was an imitation of another article, jam."

The statutory provision relied upon as to adulteration reads: "Damage or inferiority concealed.—Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed."

It is apparent that two things were required to be proven in the case at bar, as respects adulteration: First, that Bred Spred was a damaged or an inferior food product, because one or more of its constituents was damaged or inferior; second, that it was mixed in a manner whereby the inferiority was concealed. There was no proof of either of these matters. There was no proof that Bred Spred contained any damaged or any harmful or deleterious substance. The word "inferiority" in the statute raises the question, what is the other member of the comparison; or, in other words, the question, "Inferior to what?" The use of the word "damage" in connection with the word "inferiority" is significant. The word "damage" in this connection means that an ingredient has suffered a loss of strength or quality; the word "inferiority" means that an ingredient is, in the first instance, of low grade or quality. Nothing of this kind is shown by the evidence as to the elements going to make up Bred Spred. The strawberries, the sugar, the pectin, the tartaric acid, the water, were none of them, so far as the evidence shows, either damaged or of low grade; nor was the resulting product either damaged or of low grade quality. The mere fact that the product contained fewer strawberries than some other product, e. g., jam, does not show that Bred Spred was inferior to jam; nor does it show that a comparison with jam was called for by the statute unless Bred Spred was being palmed off on the public as jam. No showing of this kind was made.

As to the matter of misbranding, the evidence clearly shows that the label contained no false or misleading statements; and, therefore, did not come within that definition of misbranding contained in section 10 of the statute. But the Government contends that misbranding, under section 10, includes imitation of some other article, and that, in this case, Bred Spred was an imitation of jam. Conceding, but without deciding, that the construction of the statute contended for by the Government is correct, yet there is no evidence in the case that Bred Spred was an imitation of jam. Such imitation would, naturally, be disclosed by the tests of appearance, of taste, of smell. But, although there were introduced in evidence, in the trial court, physical exhibits consisting of jars of Bred Spred and jars of jam, these physical exhibits have not been brought by the Government to this court. Nor is there other evidence in the case showing imitation. On such a record, we cannot hold that the ruling of the trial court was error.

One other matter is called to our attention by appellant. The Government offered to show by one of its witnesses, a grocer, "that a product consisting of 17 parts of strawberry, 55 parts of sugar, 11½ parts of water, one-fourth part of pectin and a small amount of tartaric acid, is an imitation of strawberry jam." Objection was made to this offer and the objection was sustained. We think there was no error in the ruling. The matter was not one calling for expert testimony, and especially so when the physical articles themselves were present in court.

We find no error in the record, and the judgment is accordingly affirmed.

Filed March 25, 1931.

The Government immediately filed in the Circuit Court of Appeals a petition for a hearing, which petition was denied without an opinion by the court on May 4, 1931.

ARTHUR M. HYDE, *Secretary of Agriculture.*

18427. Adulteration of canned prunes. U. S. v. 498 Cases of Canned Prunes. Judgment of condemnation, forfeiture, and destruction. (F. & D. No. 26012. I. S. No. 23998. S. No. 4257.)

Samples of canned prunes from the shipment herein described having been found to be decomposed, the Secretary of Agriculture reported the matter to the United States attorney for the Western District of Oklahoma.

On March 10, 1931, the United States attorney filed in the District Court of the United States for the district aforesaid a libel praying seizure and condemnation of 498 cases of canned prunes at Enid, Okla., consigned by the Ray-Maling Co., Hillsboro, Oreg., October 7, 1930, alleging that the article had been shipped in interstate commerce from Hillsboro, Oreg., into the State of Oklahoma, and charging adulteration in violation of the food and drugs act. The article was labeled in part: (Can) "Santa Fe Brand Italian Prunes * * * Packed for the Ranney-Davis Mercantile Co. * * * Enid, * * * Oklahoma."

It was alleged in the libel that the article was adulterated in that it consisted in part of a decomposed vegetable substance.

On May 15, 1931, the Ranney-Davis Mercantile Co., Enid, Okla., having withdrawn its motion to quash the motion and having by leave of court filed its answer, the court, after hearing evidence and testimony of witnesses, found that the averments of the libel were true as alleged therein and that the product had been packed and sold to the intervener under a written guarantee that it complied with the Federal food and drugs act. Judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be destroyed and that the costs of the proceedings be assessed against the said Ranney-Davis Mercantile Co.

ARTHUR M. HYDE, *Secretary of Agriculture.*

18428. Adulteration of canned salmon. U. S. v. 28 Cases of Canned Salmon. Default decree of condemnation, forfeiture, and destruction. (F. & D. No. 25337. I. S. No. 17451. S. No. 3615.)

Samples of canned salmon from the shipment herein described having been found to be putrid, tainted, or stale, the Secretary of Agriculture reported the matter to the United States attorney for the Northern District of Mississippi.

On November 19, 1930, the United States attorney filed in the District Court of the United States for the district aforesaid a libel praying seizure and condemnation of 28 cases of canned salmon, remaining in the original unbroken packages at Columbus, Miss., alleging that the article had been shipped by the E. H. Hamlin Co., Seattle, Wash., on or about August 27, 1930, and had been transported from the State of Washington into the State of Mississippi, and charging adulteration in violation of the food and drugs act. The article was labeled in part: "Silver Sea Brand Pink Salmon * * * Packed For West Sales Inc., Seattle."

It was alleged in the libel that the article was adulterated in that it consisted wholly or in part of a filthy, decomposed, and putrid animal substance.

On April 13, 1931, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be destroyed by the United States marshal.

ARTHUR M. HYDE, *Secretary of Agriculture.*

18429. Adulteration and misbranding of meat scraps. U. S. v. Norfolk Tallow Co. Plea of nolo contendere. Fine, $25. (F. & D. No. 21608. I. S. Nos. 13521-x, 13547-x, 13548-x.)

Samples of meat scraps for poultry from the shipments herein described having been found to contain less protein and more phosphoric acid than declared on the labels, the Secretary of Agriculture reported the matter to the United States attorney for the Eastern District of Virginia.

On October 25, 1927, the United States attorney filed in the District Court of the United States for the district aforesaid an information against the Norfolk Tallow Co., a corporation, Norfolk, Va., alleging shipment by said company, in violation of the food and drugs act, on or about October 6, 1926, from the State of Virginia into the State of Georgia; and on or about January 10, 1927, from the State of Virginia into the State of Florida, of quantities of meat scraps which were adulterated and misbranded. The article was labeled in part: (Sacks) "Notalco Extra Quality Meat Scraps [or "AA High Grade Meat Scraps"] For Poultry, Guaranteed Analysis Protein Min. 55% [or "45%"] * * * Phos. Acid Max. 10%, Manufactured by Norfolk Tallow Co. Norfolk, Va."

It was alleged in the information that the article was adulterated in that substances, namely, meat and bone meal containing less than 55 per cent or 45 per cent, as the case might be, of protein, and more than 10 per cent of phosphoric acid, had been mixed and packed therewith so as to reduce and lower and injuriously affect its quality and strength, and had been substituted for the said article.