WILBUR, *Circuit Judge:* This action was begun by a libel in rem against 200 Cases of Tuna which were alleged to be adulterated, as that term is defined in §8 par. 6, T. 21 USCA, being §7, par. 6, of the Food and Drug Act of June 30, 1906. The French Sardine Company appeared as owners thereof and denied the truth of the allegation contained in the libel. The issue of fact was submitted to a jury which returned a verdict in favor of the claimant. The court, in entering judgment denying condemnation, included costs amounting to $141.38. The Government appeals from this judgment.

It is conceded on this appeal that judgment for costs does not lie against the United States unless specially authorized by statute. This well known and long established rule has been recently stated by the Supreme Court in *U. S.* v. *Worley*, 281 U. S. 339, 344, and by this court in *U. S.* v. *Knowles Est.*, 58 F. (2d) 718. The appellee, however, contends that §10 of the Food and Drug Act (34 Stat. 768, 771, 21 USCA §14), does contain such statutory authority in the last sentence thereof, which is as follows:

> The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

The appellee claims that as in an admiralty proceeding costs may be awarded against the United States (Suits in Admiralty Act, 41 Stat. 525–528; 46 USCA §§741–752; *John Shewan & Sons, Inc.*, v. *U. S.*, 267 U. S. 86, 45 Sup. Ct. 238). it follows that the allowance of costs is proper in the case at bar because the allowance of costs is a part of "the proceeding in admiralty" which is to be conformed to in the proceedings upon a libel under the Food and Drug Act (§10), supra. The Supreme Court has not spoken on this exact question, but in the case of *443 Cans of Frozen Egg Product* v. *U. S.*, 226 U. S. 172, that court said: "We do not think it was intended to liken the proceedings to those in admiralty beyond the seizure of the property by process in rem, then giving the case the character of a law action, with trial by jury if demanded and with the review already obtaining in actions at law."

While the right to costs is ancillary to the judgment, it is a substantive right and not a mere matter of procedure. As stated in *Erwin* v. *U. S.*, 34 Fed. 470, "In its general acceptation 'proceeding' means the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, the mode of deciding them, of opposing judgments and of executing. Ordinary proceedings intend the regular and usual mode of carrying on a suit by the due course of common law." *People* v. *White*, 14 How. Practice (N. Y.) 498.

The distinction between a right to costs and the procedure for the enforcement of that and other rights, is pointed out in *Fargo* v. *Helmer* (N. Y.), 43 Hun. 17, 19 (50 Sup. Ct. Rep. 17) where the court, quoting Judge Duer in *Rich* v. *Husson*, 1 Duer 617: "The rules by which proceedings are governed are rules of procedure; those by which rights are established and defined, rules of law. It is the law which gives the right to costs and fixes their amount. It is procedure which declares when and by whom the costs to which a party has a previous title shall be adjusted or taxed and when and by whose direction a judgment in his favor shall be entered." The right to costs is not a question of procedure but is a substantive right.

If the proper interpretation of §10 of the Food and Drug Act, supra, were a matter of doubt that doubt must be resolved in favor of the government. As stated by the Supreme Court in *Davis* v. *Corona Coal Co.*, 265 U. S. 222: "* * * The United States should not be held to have waived any sovereign right or privilege, unless it was plainly so provided."

The decree is modified by striking therefrom the judgment for costs and as so modified is

Affirmed.

W. R. GREGG, *Acting Secretary of Agriculture.*

**24808. Adulteration of tomato puree. U. S. v. 8 Cases of Tomato Puree. Default decree of condemnation and destruction.** (F. & D. no. 32851. Sample no. 71634–A.)

This case involved a shipment of tomato puree that contained excessive mold.

On June 25, 1934, the United States attorney for the District of Vermont, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of eight cases of tomato

puree at Rutland, Vt., consigned by Oswego Preserving Co., from Oswego, N. Y., on or about March 2, 1934, alleging that the article had been shipped in interstate commerce from the State of New York into the State of Vermont, and charging adulteration in violation of the Food and Drugs Act. The article was labeled in part: "Oswego Brand Tomato Puree * * * Oswego Preserving Co., Oswego, N. Y., Distributors."

The article was alleged to be adulterated in that it was in a partially decomposed condition.

On June 10, 1935, no claimant having appeared, judgment of condemnation was entered and it was ordered that the product be destroyed.

W. R. GREGG, *Acting Secretary of Agriculture.*

**24809. Adulteration and misbranding of butter. U. S. v. Sheridan Creamery Co. Plea of guilty. Fine, $50.** (F. & D. no. 32886. Sample no. 66772–A.)

This case was based on an interstate shipment of butter that was deficient in milk fat.

On August 2, 1934, the United States attorney for the District of Wyoming, acting upon a report by the Secretary of Agriculture, filed in the district court an information against the Sheridan Creamery Co., a corporation, Sheridan, Wyo., alleging shipment by said company in violation of the Food and Drugs Act on or about February 14, 1934, from the State of Wyoming into the State of Montana, of a quantity of butter which was adulterated and misbranded. The article was labeled in part: "San-I-Dairy Butter * * * Distributed by the 'San-I-Dairy' Creameries of Wyoming and Montana Sheridan Creamery Company, Sheridan, Wyo., Owners."

The article was alleged to be adulterated in that a product containing less than 80 percent by weight of milk fat had been substituted for butter, a product which must contain not less than 80 percent by weight of milk fat as defined by the act of Congress of March 4, 1923, which the article purported to be.

Misbranding was alleged for the reason that the statement "Butter", borne on the carton, was false and misleading, and for the further reason that it was labeled so as to deceive and mislead the purchaser, since the said statement represented that the article was butter as defined by law; whereas it contained less than 80 percent by weight of milk fat, the standard for butter defined by law.

On July 22, 1935, a plea of guilty was entered on behalf of the defendant company and the court imposed a fine of $50.

W. R. GREGG, *Acting Secretary of Agriculture.*

**24810. Adulteration of apples. U. S. v. Reginald A. Watson (R. A. Watson, Agent.) Tried to the court without a jury. Judgment of guilty. Fine, $25.** (F. & D. no. 32889. Sample no. 42526–A.)

Examination of the apples involved in this case showed the presence of arsenic and lead in amounts that might have rendered them injurious to health.

On September 28, 1934, the United States attorney for the Southern District of Illinois, acting upon a report by the Secretary of Agriculture, filed in the district court an information against Reginald A. Watson, trading as R. A. Watson, Agent, Valley City, Ill., alleging shipment by said defendant in violation of the Food and Drugs Act on or about September 21, 1933, from the State of Illinois into the State of Indiana, of a quantity of apples which were adulterated. The article was labeled in part: "Fancy Grimes Golden Packed by R. A. Watson-Morrison or Valley City, Ill."

The article was alleged to be adulterated in that it contained added poisonous and deleterious ingredients, namely, arsenic and lead, in amounts that might have rendered it injurious to health.

On June 28, 1935, the defendant having entered a plea of not guilty, the case came on for trial before the court without a jury. Judgment was entered finding the defendant guilty and imposing a fine of $25.

W. R. GREGG, *Acting Secretary of Agriculture.*

**24811. Adulteration and misbranding of coffee. U. S. v. 9¼ Cases of Coffee. Consent decree of condemnation. Product released under bond to be relabeled.** (F. & D. no. 33087. Sample no. 76614–A.)

This case involved a product which was adulterated and misbranded, since it was represented to be a superior high-grade coffee, whereas it contained approximately 10 percent of chicory.