information, at most, presents only a case of the unlawful conversion of property to the use of the appellants, and that for redress of such an injury this proceeding by information cannot be sustained; and second, that neither the act of 1861 nor the act of 1862 contemplated any proceeding, as in admiralty, where there existed no specific property or proceeds capable of seizure and capture.

The decree of the District Court must therefore be REVERSED, and the cause remanded, with directions to the District Court to cause restitution to be made to the appellants of whatever sum of money they have been compelled to pay under that decree.

UNITED STATES *v.* ROSENBURGH.

This court cannot take cognizance, under the Judiciary Act of 1802, of a division of opinion between the judges of the Circuit Court, upon a *motion to quash an indictment.*

ON certificate of division in opinion between the judges of the Circuit Court for the Southern District of New York.

The Judiciary Act of 1802 provides that whenever any question shall occur before a Circuit Court, upon which the opinion of the judges shall be opposed, the point upon which the disagreement shall happen, may be certified to this court, and shall by it be finally decided.

With this statute in force, one Rosenburgh was indicted in the court below, for an offence alleged to be within an act of Congress specified. *A motion being made to quash the indictment*, on the ground, among others, that upon the true interpretation of the act under which the indictment was made, no offence had been committed, and that the indictment was insufficient, a division of opinion on these points existed between the judges, involving, of course, a division as to whether the motion to quash ought or ought not to be granted.

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The division upon the meaning of the act, and upon the sufficiency of the indictment, being certified, these points were argued. But it appearing, also, that they arose upon a motion to quash, a preliminary question—one, as the result proved, which rendered the decision of the other questions unnecessary—was suggested here; the question, namely, whether this court could, under the above-quoted Judiciary Act of 1802, take cognizance of a certificate of division upon a motion to quash an indictment.

Mr. Evarts, Attorney-General, for the United States.

Mr. E. W. Stoughton, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The general rule undoubtedly is, that this court cannot, upon a certificate of division of opinion, acquire jurisdiction of questions relating to matters of pure discretion in the Circuit Court. Thus, it has been held that this court will not determine upon a certificate of division of opinion, whether or not a new trial shall be granted,* or whether a plaintiff in ejectment shall be permitted to enlarge the term in the demise,† or any question in any equity cause relating to the practice in the Circuit Court, and depending on the exercise of sound discretion in the application of the rules which regulate the course of equity to the circumstances of the particular cause.‡

The principles by which the limit of jurisdiction, upon certificates of division, is determined, were quite fully considered in the case of *Davis* v. *Braden*,§ and the conclusion of the court was, that a division on a motion, to be granted or refused at the discretion of the court, does not present a point which can be certified under the act of Congress. Upon this principle, the court in that case refused to take cognizance, upon certificate, of the question, whether an action of

* United States *v.* Daniel, 6 Wheaton, 542.

† Smith *v.* Vaughan, 10 Peters, 366.

‡ Packer *v.* Nixon, Ib. 410.

§ Ib. 288.

detinue, founded upon tort, when abated by the death of the defendant, can be revived against his personal representatives.

In the opinion then delivered, the court took notice of the case of *The United States* v. *Wilson*,* supposed to be an authority for taking cognizance of the question made by the motion to revive. In that case the question certified was, whether a prisoner, convicted of a capital crime, could have any advantage from a pardon without bringing it judicially before the court; and it arose upon a motion of the district attorney for sentence. The court regarded this as a question going to the merits, and not determinable in the exercise of mere discretion; and, therefore, held this case not to be an authority for another, in which the merits were not involved in the question certified.

There are other cases in which the court has taken cognizance of questions directly affecting the merits of the cause, even though arising, in form, upon motions determinable at discretion. The case of *The United States* v. *Chicago*,† where the question certified arose on a motion to continue a temporary injunction, granted by the district judge, until final hearing on the merits, must be regarded as one of this character. The continuance of the injunction was clearly matter of discretion with the court; but the question certified involved the right of the United States in the land which was the subject of the suit, and was one proper for consideration upon the motion for continuance. The court held, though not unanimously, that the case was exceptional in its character, and that cognizance of the question certified might be properly taken. It may be doubted whether, in this instance, the exception made to the general rule was quite warranted by the principle established in prior decisions.

In the latter case of *The United States* v. *Reid & Clements*,‡ the point of jurisdiction upon certificate was not noticed. One of the questions certified seems, however, to have been clearly cognizable here. The defendants had been sepa-

* 7 Peters, 150. † 7 Howard, 190. ‡ 12 Id. 361.

rately tried, and one of them, when upon trial, had proposed to call the other as a witness, and the court had rejected the testimony. The question certified was, whether this ruling was correct. It arose upon motion for new trial, but it was plainly a point which must be determined, as of right, before sentence could be pronounced; and the certificate therefore was within the principle of *The United States* v. *Wilson.*

The motion to quash, upon which the question now before us arose, was clearly determinable as a matter of discretion. It was preliminary in its character, and the denial of the motion could not finally decide any right of the defendant. The rule laid down by the elementary writers* is, that "a motion to quash is addressed to the sound discretion of the court, and if refused, is not a proper subject of exception."

When made in behalf of defendants, it is usually refused, unless in the clearest cases, and the grounds of it are left to be availed of, if available, upon demurrer or motion in arrest of judgment.

It is quite clear therefore that we cannot take cognizance of the questions certified to us in the present condition of the case. They may hereafter arise upon demurrer, or on motion in arrest, and if the opposition of opinion shall still exist, can be again presented for consideration here.

At present the case must be

DISMISSED FOR WANT OF JURISDICTION.

AGAWAM COMPANY *v.* JORDAN.

1. In a suit in chancery under a patent, evidence of prior knowledge or use of the thing patented is not admissible, unless the answer contains the names and places of residence of those alleged to have possessed a prior knowledge of the thing, and where the same had been used.
2. The defence, "that the patentee fraudulently and surreptitiously obtained the patent for that which he knew was invented by another," is not a

* 1 Colby's Crim. Stat. 268 and 269; 1 American Crim. Law, 518 and 519.