Statement of the case.

Applying this rule to the present case it is decisive. The relator's claim for payment had not been brought to judgment in the Circuit Court, nor had it been put in suit. His application for a mandamus was, therefore, an original proceeding, neither necessary nor ancillary to any jurisdiction which the court then had. For this reason it should have been denied, and the judgment that a peremptory mandamus should issue was erroneous.

JUDGMENT REVERSED, and the cause remanded with instructions to

DISMISS THE PETITION FOR A MANDAMUS.

UNITED STATES *v.* AVERY.

1. The court cannot take cognizance of a division of opinion under the Judiciary Act of 1802, between the judges of the Circuit Court on a motion to quash an indictment, even when the motion presents the question of the jurisdiction of the Circuit Court to try the offence charged.
2. *United States* v. *Rosenburgh* (7 Wallace, 580), recognized and followed.

ON certificate of division in opinion between the judges of the Circuit Court for the District of South Carolina:

Avery and others were indicted under the act of May 31st, 1870,* known as the Enforcement Act, for conspiracy, with intent to violate the first section of that act, by unlawfully hindering, preventing, and restraining divers males, citizens of the United States, of African descent, from exercising the right of voting; and the second count of the indictment after charging this offence further charged, under the 7th section of that act, that in the act of committing the offence aforesaid, they murdered one Jim Williams, "contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of South Carolina." The first count charged the conspiracy without the

* 16 Stat. at Large, 140.

murder. The fourth count charged murder in the same manner as the second count.

The defendant's counsel moved to quash so much of the second and fourth counts as charged the murder, on the ground that the Circuit Court had no jurisdiction to try an offence against the State of South Carolina; and, thereupon the following question arose upon which the opinions of the judges were opposed:

"Whether the court has jurisdiction to inquire and find whether the crime of murder has been committed, as set forth and charged, in the latter portions of the second and fourth counts of said indictment, in order to ascertain the measure of punishment to be affixed to the offences against the United States, charged in the former portions of the said second and fourth counts."

The question was accordingly certified to this court under the act of April 29th, 1802, which enacts that when a question shall occur before a Circuit Court upon which the opinions of the judges shall be opposed, the point may be certified to this court, and by it be finally decided.

Mr. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, for the United States, on the case being called for argument, suggested that as the question certified arose on a motion to quash the indictment, the court could not, under the Judiciary Act of 1802, take cognizance of it, such motion being determinable by the court below as a matter of pure discretion; and cited *United States* v. *Rosenburgh*,* where it was held, according to the syllabus, that "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."

Messrs. Reverdy Johnson and H. Stanbery, contra:

When objection to the jurisdiction of the court to try the offence charged in an indictment is raised, it must then and

* 7 Wallace, 580.

there be passed upon, because it involves the authority of the court to proceed at all, and this principle applies as well to a motion to quash as to any other form of objection. A motion to quash is the proper mode of raising a question of jurisdiction, because if the objection be well taken, all proceedings in the case are *coram non judice*, and the objection should, therefore, be made at the earliest possible moment. And when the judges are divided in opinion upon the motion, the case cannot proceed until the question is decided, because it involves the right to proceed at all. This fact distinguishes the present case from *United States* v. *Rosenburgh*. The question there certified was whether the indictment charged an offence. The cases of *United States* v. *Wilson*,* *United States* v. *Chicago*,† and *United States* v. *Reid & Clements*,‡ all show that questions directly affecting the merits of a case may be cognizable here, although arising on motions discretionary in their character.

Reply: Unless the court overrules *United States* v. *Rosenburgh*, it must refuse to take cognizance of this question. The ground for that decision was that "the denial of the motion would not decide finally any right of the defendant." That applies equally to a question of jurisdiction. In this case there is no division of opinion except as to parts of the second and fourth counts of the indictment. The court did not doubt its jurisdiction to try the defendants for conspiracy, and the trial might have proceeded if their motion had been denied (as it would have been as matter of course, had the judges been divided in opinion upon it), and the same question been again raised upon the offer of evidence to prove the fact of murder.

The CHIEF JUSTICE, on the following day, announced that a majority of the court were of opinion that the case must be ruled by *United States* v. *Rosenburgh*, and the case be

DISMISSED FOR WANT OF JURISDICTION.

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

UNITED STATES *v.* WILDER.

1. When a debtor admits a certain sum to be due by him and denies that a larger sum claimed is due, a payment of the exact amount admitted cannot be converted by the creditor into a payment, on account of the larger sum denied, so as to take the claim for such larger sum out of the statute.
2. The statute of limitations is to be enforced, not explained away.

APPEAL from the Court of Claims.

On the 23d of May, 1861, Burbank & Co. contracted with Major McKinstry, a quartermaster of the United States, to furnish transportation for all public stores from St. Paul to Fort Abercrombie, at the rate of $2.90 per 100 lbs. The contract specified no period of duration, but the parties acted under and in pursuance of its terms, until the 19th of July, 1863. On that day, Captain Carling, an assistant quartermaster in charge of the department at St. Paul, being obliged, in a military exigency, to send forward quartermaster and commissary stores to Fort Abercrombie, called upon Burbank & Co. to receive and transport them under the contract referred to. But Burbank & Co. declined to receive and transport the goods under that contract, and refused to acknowledge its force and validity. Carling, being unable to obtain transportation from other parties, thereupon entered into a verbal agreement with them that if they would transport the stores they should receive for their services whatever price the transport might be reasonably worth. They carried the stores accordingly. Carling fixed the value of the carriage at $4.50 per 100 lbs. But the quartermaster's department refused to allow or pay to Burbank & Co. any greater price than $2.90 per 100 lbs.; alleging as a reason for their refusal that the obligation of the original contract had not been terminated by reasonable notice, and that the services justly and legally ought to be deemed to have been rendered under *it*, and at the rate of compensation therein agreed on.

The services were performed and completed on the 31st of July, 1863.

On the 1st of October, 1863, Burbank & Co. were paid by the quartermaster $6393.72, being a payment at the rate of $2.90 per 100 lbs., and leaving unpaid $3516.21; which "the defendants then and there refused to pay. And it still remains unpaid."

The petition was filed in the Court of Claims on the 26th of August, 1869, being more than six years from the time the services were performed, and less than six years from the time of payment.

Upon these facts the Court of Claims decided:

1st. That the claimants had a good cause of action upon the parol agreement.

2d. That they were not barred from maintaining this suit upon the facts set forth and within the meaning of the act of March 3d, 1863, reorganizing the Court of Claims, "and which declares that every claim against the United States shall be forever barred, unless the petition setting forth a statement of the claim be filed in the court . . . . *within six years after the claim first accrued.*"*

The United States appealed and alleged as error that the cause was barred by the statute of limitations, and that the Court of Claims should have so held.

Mr. C. H. Hill, for the United States; Mr. J. B. Sanborn, contra.

Mr. Justice DAVIS delivered the opinion of the court.

We think the Court of Claims erred in deciding that the claimant was not barred by the provision in the act reorganizing that court. The claim accrued on the 31st of July, 1863, because the services were rendered at that time. The petition was not filed until six years afterwards. The claim was, therefore, barred by the statute, unless, in some way, taken out of it. It is insisted that this has been done by a payment of a portion of the demand within the six years, and this presents the only question for consideration.

This court has not adopted the rule of decision made at

* 12 Stat. at Large, 765.

one time in England,* and to some extent in this country, under which, by a constructive equity, judicial refinements came near to abolish the statute altogether. On the contrary, following the decisions of the English courts,† made more immediately after the passage of the statute of James I, we have sought to give to it full effect. In 1814, Marshall, C. J., delivering the judgment of this court, declared‡ that the statute of limitations was entitled to the same respect as other statutes, and should not be explained away. The same doctrine has been asserted in subsequent decisions.§

It results from these cases that a promise to pay cannot be inferred from the mere fact of payment of part of a debt, there being nothing to raise a presumption that it was a payment on account of this debt. The principle on which part payment takes a case out of the statute is, that the party paying intended by it to acknowledge and admit the greater debt to be due. If it was not in the mind of the debtor to do this, then the statute, having begun to run, will not be stopped by reason of such payment. It is too plain for controversy that the payment in question was not intended as an acknowledgment of the demand sued for. Instead of being applicable to an admitted debt, it was in denial of the right to further payment. The sum paid was the exact amount due under the written agreement, and was in discharge of the obligation imposed by it. That agreement was acknowledged, while the verbal arrangement made by the assistant quartermaster was repudiated. It is difficult to see how a payment in full of an admitted contract can be converted into an acknowledgment of one which was denied.

* See Trueman *v.* Fenton, Cowper, 548; Quantock *v.* England, 5 Burrow, 2628; Yea *v.* Fouraker, 2 Id. 1099.

† Dickson *v.* Thomson, 2 Shower, 126; Andrews *v.* Brown, Precedents in Chancery, 385; Williams *v.* Gun, Fortesque, 177; Bland *v.* Haselrig, 2 Ventris, 152; and Benyon *v.* Evelyn, A. D. 1664, Sir Orlando Bridgman's Judgments, 324; all referred to in Angell on Limitations, pp. 18, 212, fifth edition, 1869.

‡ Clementson *v.* Williams, 8 Cranch, 72.

§ Bell *v.* Morrison, 1 Peters, 351; McCluny *v.* Silliman, 3 Id. 270.

Statement of the case.

The case of the claimant is in some of its aspects worthy of consideration, but as it was not filed in the Court of Claims until barred by the statute, we are not at liberty to discuss its merits.

JUDGMENT REVERSED, and the cause remanded to the Court of Claims, with directions to

DISMISS THE PETITION.

KLINGER *v.* STATE OF MISSOURI.

Where the judgment of a State court might have been based either upon a State law repugnant to the Constitution or laws of the United States, or upon some other independent ground, and it appears that the court did, in fact, base it upon the latter ground, this court will not take jurisdiction of the case, even though it should think the decision of the State court erroneous; and so, also, where it does not appear on which of the two grounds the judgment was, in fact, based, if the independent ground was a good and valid one of itself to support the judgment, this court will not take jurisdiction; but if not, it will presume that the judgment was based on the State law in question, and will take jurisdiction.

By the constitution of Missouri, adopted in 1865, a test oath was prescribed to be taken by public officers, jurors, &c., which this court, in *Cummings* v. *Missouri* (4 Wallace, 277), decided to be unconstitutional. A juror, on a trial for murder in a State court, refused to take it; but on being examined as to the reason of his refusal, he alleged, not only that he had sympathized with the late rebellion, and, therefore, could not take it truthfully, but that those were his feelings still, and stronger than ever; whereupon the court discharged him. *Held*, that his avowed present disloyalty to the government was a sufficient cause in itself for his discharge, irrespective of his refusal to take the oath; and as it did not appear that he was discharged for the latter cause, the Supreme Court of the United States refused to take jurisdiction of the case.

ERROR to the Supreme Court of Missouri; the case being thus:

By the third section of the second article of the constitution of Missouri, adopted in April, 1865, it was declared in substance that no person who had ever engaged in the rebellion, or had manifested any sympathy therefor, in any