The criticisms on the use of the words "then and there," and the allegations of time, in the counts charging false entries in reports, and alleging that the accused was president of the bank, seem to require a refinement and strictness not known to the law. In innumerable instances known to every practitioner of experience where there are set out many connected or related facts, though some may cover the whole of a day and others only an instant, or a small part of a day, the words "then and there" are used interchangeably, and without further specification, unless there is some presumption of law or necessity of pleading which does not exist in this case. The existence of the bank, and the tenure of office by the accused, are properly laid in terms to have the effect of a continuando, and stand by themselves. All the other facts might, in contemplation of law, have occurred simultaneously, or have taken only an instant in their occurrence, or have occupied the whole of a day, and there is no presumption which required that they should be described as occurring in consecutive order. Edwards v. Com., 19 Pick. 124, was a special case, and does not touch this general rule; and in U. S. v. Simmonds, 96 U. S. 360, there was an entire failure to allege any time.

On principle, allegations of time in criminal pleadings ought to be made with approximate accuracy; yet, by authority of a practice which has now continued so long that it must be yielded to, time need not be proved as stated, and these allegations touching it are the most useless portions of criminal pleadings. Of course, exceptions are to be noted where the allegations of time are inconsistent, or apparently bring the case within the bar of the statutes of limitations; and perhaps there are other exceptions. Yet, as a general rule, statements of time may be so far varied from by the proofs that Judge Lowell, in U. S. v. Jackson, 2 Fed. Rep. 502, and Bish. Crim. Proc. (3d Ed.) § 386, regard them as so wholly formal that they may be dispensed with under Rev. St. § 1025. U. S. v. Britton, 107 U. S. 655, 2 Sup. Ct. Rep. 512, holds, however, that there must be some allegation of time, as well as of place. But I am not now required to rule on the general proposition, and I refer to the statute only because it clearly renders unnecessary any more particularity than we find in the counts under consideration.

I am somewhat in doubt touching the omissions of the signs for dollars and cents, and of the word "specie," in the recitals of the alleged false entries in the reports; but, on the whole, I think that there is enough left to identify beyond doubt the entries on which the counts are intended to be based, and that the subsequent allegations supply the omissions, and that the omissions are, at the most, mere "matter of form," within the meaning of Rev. St. § 1025. The omission of the signs was not deemed important in U. S. v. Britton, 107 U. S. 655, 656, 2 Sup. Ct. Rep. 512. The same line of reasoning seems to meet the objection based on the apparent variance between the title of the bank as set out in the various counts, and as appearing in the caption of the reports.

If necessary, the alleged misdescriptions of the character of the reports are met in the same way, as the reports are set out by their

tenor, and also by their substance, and show for themselves what they are, and are fully described elsewhere in the body of each count. "Falsa demonstratio non nocet." Heard, Crim. Pl. 212, 213; Queen v. Williams, 2 Denison, Cr. Cas. 61. Moreover, the statute does not give these reports any designation of the character which the counsel for the accused assumes. They are all reports of the condition of the bank within the meaning of the law,—certainly all must admit that a detailed and tabulated statement of resources and liabilities is such; and, in the absence of any statute designation, they may well be so styled by the pleader.

In my opinion, it was not necessary to allege specifically that these reports were transmitted to the comptroller. That expression does not occur in the body of the enactment, but the word there used is "make," the present tense of the precise word used by the pleader. This necessarily includes the fact that the report reached the comptroller; and that the word "transmitted" is used subsequently in working out details does not make it an essential element in describing the offense. Neither is the omission to allege that the reports were published of importance, because the offense, if committed, was complete before the required time of publication.

It seems to the court that the words, "during all the times hereinafter mentioned," cover the 20th day of February. While, without Rev. St. § 1025, a more technical allegation might be required, yet with it this is sufficient

All the objections to the allegations of an intent to deceive or defraud, or other intent, are met, so far as this court is concerned, by the explicit approval by the supreme court in U. S. v. Britton, 107 U. S. 655, 2 Sup. Ct. Rep. 512, of two counts therein referred to. It is claimed by counsel that some of the propositions here presented and argued were not considered by the supreme court; nevertheless this court is holden to accept its express language relating to the particular counts before it, put in such form that it cannot be regarded as a mere dictum. If such rulings of the supreme court are to be reconsidered, it must be done by it, and not by a subordinate tribunal.

There remain, as to these particular counts, but two propositions to be considered,—one touching the fact that they do not set out that the reports were verified and attested, but on this point allege only that they were in the form required by law; and the other touching the claim that, while they allege that the accused was president, they do not allege that he acted in this matter as president, or in the line of his official duty. Of course, setting out an instrument by its tenor does not supply the want of an allegation of its execution.

Ordinarily it is not sufficient in criminal pleadings to allege merely that a matter or thing conforms to law, but the details must be set out, so that the court can apply the law, and determine for itself the validity or invalidity of the transaction or instrument. As to the other proposition. I have already laid down a rule in reference to the indictments against Jonas H. French and Thomas Dana, touching one who is presumably unauthorized, or who has no color

of authority. Can it be that those portions of Rev. St. § 5209, which punish the unauthorized issue of notes or certificates of deposit, and unauthorized assignments or acceptances, include mere forgeries, though made by one within some of the classes designated in the section? Is it not true, that, aside from the clause punishing those who aid and abet, the offense must include—First, that the offender is one of the enumerated classes; and, second, that he must have acted in the line of his authority, or at least under color thereof? In other words, aside from the clause punishing those who aid and abet, does not the suggestion of a breach of trust or agency run through the whole? U. S. v. Northway, 120 U. S. 327, 333, 7 Sup. Ct. Rep. 580. These are fundamental and difficult questions, which I am not willing to pass upon until they have been thoroughly and carefully reargued, in the light of the conclusions I have reached touching the indictments against Jonas H. French and Thomas Dana, and of the doubts herein expressed.

On completion of the reargument, I will dispose of the demurrer to all the counts in the indictment, and for the present, in No. 1,212, (United States v. Asa P. Potter,) I will only pass the following order:

Ordered, that the questions raised by the demurrers in this cause and left open by the opinion filed in No. 1,211, (United States v. Asa P. Potter,) be reargued.

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## UNITED STATES v. POTTER.

(Circuit Court, D. Massachusetts. November 28, 1892.)

No. 1,212.

1. NATIONAL BANK—PRESIDENT—FALSE ENTRIES—INDICTMENT.
An indictment against the president of a national bank under Rev. St. U. S. § 5209, for making false entries in the books of the bank, which charges that it was done "with intent to injure and defraud the said association and certain persons to the grand jurors unknown," is sufficient, so far as concerns the allegations of intent. U. S. v. Britton, 2 Sup. Ct. Rep. 512, 107 U. S. 655, followed.

2. SAME.
When the indictment alleges that the false entries in question indicated that there was then in the paying teller's department of the bank a certain amount in gold, legal tenders, and gold certificates, when such amount was not there in fact, it is not necessary that it should further allege that such amount was not then in other departments of the bank. U. S. v. Britton, 2 Sup. Ct. Rep. 512, 107 U. S. 655, followed.

3. SAME—SHOWING CONTEXT.
In addition to the entries themselves, the indictment need set out the context only when it so modifies the entries as to be, in presumption of law, a part of them.

4. SAME—SPOLIATIONS.
The fact that the note teller's and paying teller's books, in which it is charged the president made the false entries on which the indictments are based, are usually kept by those officers without interference by the president, does not invalidate the indictment; for the presumption that these acts were so far beyond the range of his duty as to be mere spoliations is at best one of fact, and not of law.

5. SAME—FALSE ENTRIES IN REPORTS.
Counts charging false entries by the president in reports of the condition of the bank, which allege that the reports were made in conformity