

Opinion of the Court.

UNITED STATES *v.* BRITTON & Another.

ON CERTIFICATE OF DIVISION IN OPINION, FROM THE EASTERN
DISTRICT OF MISSOURI.

Decided April 2d, 1883.

Indictment—National Bank.

It is no violation of the provisions of § 5440 Rev. Stat., subjecting to penalties persons conspiring to commit an offence against the United States, and persons doing acts to effect the object of the conspiracy ; and no violation of § 5209 Rev. Stat., subjecting to punishment a president or a director of a national banking association who wilfully misapplies the money, funds or credits of the association, if the president and such a director conjointly cause shares in the capital stock of such association to be purchased with the money of the association, and held on trust for its benefit.

Indictment for conspiracy by Britton as president and Bates as director of a national banking association, to injure and defraud the association by wilful misapplication of its money. Rev. Stat. §§ 5209, 5440. The acts which formed the subject of the alleged conspiracy are the same which are set forth in the counts in the indictment from 77 forward in *United States v. Britton*, 107 U. S. 655, and which were there held, when not charged as a conspiracy, not to be violations of the statutes.

Mr. Assistant Attorney-General Maury for the United States.

Mr. Geo. H. Shields and *Mr. Chester A. Krum* for defendants.

MR. JUSTICE WOODS delivered the opinion of the court.

In this case the indictment contained two counts. They charged a conspiracy between James H. Britton and Barton Bates, the first being president and a director and the latter a director of the same banking association, to misapply its funds by the purchase therewith of the shares of the association. The first count described the offence which defendants conspired to commit substantially as it is set forth in count seventy-seven, and the second count described the offence as the same

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is set forth in count ninety-seven in *United States v. Britton*, 107 U. S. 655.

The judges of the circuit court were divided in opinion upon the question whether the counts sufficiently stated an offence under sections 5209 and 5440 of the Revised Statutes, and the same has been duly certified to us for our opinion. What we have said in *United States v. Britton* cited above, disposes of this question.

We answer in the negative.

UNITED STATES v. BRITTON.

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Opinion, April 2d, 1883.

Indictment—National Bank—Revised Statutes.

1. It is not an offence under § 5209, Rev. Stat., which forbids the wilful misapplication of the moneys of a national banking association by a president of the bank, for such officer to procure the discount by the bank of a note which is not well secured, and of which both maker and indorser are, to the knowledge of the president, insolvent when the note is discounted; and to apply the proceeds of the discount to his own use.
2. Assuming that it was the duty of a president of a national banking association to prevent the withdrawal of deposits while the depositor is indebted to the association, he is, nevertheless, not liable for a criminal violation of § 5209 Rev. Stat., forbidding the wilful misappropriation of the funds of the bank, solely by reason of permitting a depositor who was largely indebted to the bank, to withdraw his deposits without first paying his indebtedness to the bank.

Indictment against the president of a national banking association. The indictment contained three counts. It was found by the same grand jury as the indictment in case No. 406, just decided, and was remitted and transferred to the circuit court in like manner.

The first count charged that the defendant, James H. Britton, on March 24th, 1877, within the Eastern District of