

Research on the Legislative Intent and Case Law of 18 USC 486*

Version 1.4, 11/06/02

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* Originally known as the "Act of June 8, 1864"

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Disclaimer

This research paper has been compiled to show the history and legislative intent of the Act of June 8, 1864, which eventually became 18 USC Chapter 25 Section 486. The authors believe that the historical record shows that 18 USC 486 is a counterfeiting law, and not, as is believed in some numismatic circles, a law that bans all private coinage of money in the United States. However, the authors are not lawyers and this document is a work of historical analysis, not a legal opinion. While this research might inform legal advice from competent professionals, this study is not itself a presentation of legal advice

and should not be construed as such.

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Revision History

1.0 10/06/02 Original version.

1.1 10/20/02 Added disclaimer, copyright notice.

1.2 10/21/02 Fixed small grammar errors, clarified language in "Did the Act of June 8, 1864 Really Ban Private Currency?" and increased font. Added section "Indications In Current (2002) Code".

1.3 11/04/02 Added "Discussion of Case Law" and all case law sections. Added picture of

Civil War token.

1.4 02/10/04 Minor updates to author's email and phone.

Introduction

NORFED, the National Organization for the Repeal of the Federal Reserve and the Internal Revenue Code, has re-introduced a privately issued, voluntary silver-backed currency called the "Liberty Dollar". The Liberty Dollar is a circulating currency issued as part of a political education program to educate the public about the virtues of value-based currency as opposed to unbacked "fiat" currencies such as the Federal Reserve Note. The currency system consists of a silver certificate warehouse receipt, the Liberty Dollar, backed by and redeemable in a custom-minted one-ounce Silver Liberty. A network of Redemption Centers exchanges Federal Reserve Notes for Liberty Dollars at a 1-to-1 face value exchange rate. Merchants called "Liberty Merchants" voluntarily solicit payment in Liberty Dollars, sometimes offering special incentives to customers who pay with them.

Unlike most "bullion currencies" issued by governments and private groups, the Liberty Dollar carries a face value comparable to the Silver Liberty's intrinsic value, and higher than the spot price of un-minted silver metal. Typically governments stamp their bullion coinage with an artificially low value, to prevent the use of gold or silver coins ordinary commerce. For example, the United States Silver Eagle carries a face value of only one dollar - one fifth of the current melt value of the coin.

NORFED intends the warehouse receipt to be the circulating currency, but in practice the Silver Liberty for which the receipt can be exchanged also circulates, since both are of equal value. As part of the ongoing research project to document the historical basis for lawful commerce in gold and silver (referred to by the Founding Fathers as "lawful money"), we have undertaken an examination of the Act of June 8, 1864, later recorded as the current 18 USC 486. This law is often said by numismatic researchers to have banned the private coinage of money in the United States. Its presence raises issues of whether producing Silver Libertys, or circulating Silver Libertys in commerce, would make parties liable for charges under 18 USC 486.

We believe that this interpretation has become muddled in history. Our research indicates that the Act of June 8, 1864 was simply a straightforward exercise of Congress's Constitutional power to punish counterfeiting and was not intended to ban any issuance of, or circulation of, "lawful money" per se. Different types of private coinage occurred for different reasons in the United States of America at various times, usually driven by a scarcity of the preferred government coinage. Correspondingly, private currency waned for various other reasons. Much private currency did resemble existing United States coinage and thus fall under the 1864 law, but the legislative intent established in the law's genesis and movement through Congress reflect a clear desire to simply curb counterfeiting of existing United States currency.

This report presents a historical overview of the events leading to the Act of June 8, 1864, an analysis of the Constitutional authority the Act derived its power from, and legislative testimony. We illustrate that the Act was intended simply to prevent counterfeiting and not simply the private issuance of metallic currency.

Historical Background of Private Coinage

Throughout American history, private coinage appeared, waned, and re-appeared. During the Revolutionary and pre-Revolutionary years, both States and the Federal government experimented with fiat currency, as had the Bank of England, causing currency inflation and economic turmoil. To combat this problem, the United States Constitution mandated the use of gold or silver money and prohibited the states from coining money or emitting "bills of credit". It gave to the Federal government the power to coin money and to regulate the standards of weights and measures, a power specifically intended to produce uniform coinage. All these powers were new to the Constitution and were not present under the Articles of Confederation. During the Constitutional debates, the founders expressed with great clarity their hatred of paper money and their desire to insure the new Constitution prohibited its issuance. The Federal government, then, was responsible for minting coinage whose quality the people could trust. The new system proved a great success, and whenever Federal coinage was available, the public generally preferred it to any alternative.

However, privately minted coins did circulate at several points in American history when Federal specie was scarce. For example, blacksmith John Higley in Granby, Connecticut, minted copper coins in 1737 and 1739, which saw general use until the United States opened its first mint in 1792. His coins bore the inscription "'I am good copper/Value me as you please."

From 1831 to 1847 Christopher Bechtler of Rutherfordton, North Carolina coined gold despite competition from the nearby Federal mint established in 1837 in Charlotte. From Brian Summer's "Private Coinage in America"³:

Clarence Griffin reports on the public's acceptance of the Bechtler coins which, like all privately minted coins, were not legal tender: "Bechtler coins were accepted and passed at face value in all of western North Carolina, South Carolina, western Tennessee, Kentucky and portions of Virginia. One of the country's oldest citizens once told the

writer that he was 16 years old before he ever saw any other coin than the Bechtlers. The coins filled a long-felt need for specie and continued to circulate long after the discontinuance of the mint in 1847. At the outbreak of the War between the States the new Confederacy began issuing currency, but did not put out any specie. Bechtler coins, especially in this locality, were carefully hoarded, and many contracts and agreements of the sixties specified Bechtler gold coins as a consideration rather than the Confederate States currency or the scant supply of Federal specie.

"Despite the fact that these coins bore no device emblematic of a national character, or any official guaranty of their purity, they were unhesitatingly accepted by all. In the proper sense of the word they were only 'tokens' and when offered at the government mints were worth less than the face value, as the government deducted the seigniorage and assay fees for reminting. Yet these coins were passed over the counters of the stores, where they received the same consideration as if they were made by the United States Government. They were carried by traders into Kentucky and South Carolina, and many homeseekers going westward during the great immigration period of 1850-1870 carried their Bechtler coins with them. Many circulated more freely than did government specie, and it has not been so many years since the local banks accepted them at face value².
Private Coinage in effect 1848-1864

Two significant types of private coinage arose in the early to mid 1800's - the private issuance of gold coins in California and the issuance of Civil War "store tokens" by Northern merchants, which often closely resembled cents. While both types of coins were established due to the government's inability to supply sufficient specie, they both closely resembled existing Federal currency but did not always assay at an honest value. It is this resemblance to existing Federal currency that led the Secretary of the Treasury to petition Congress to establish penalties discouraging counterfeiting in the Act of June 8, 1864.

Throughout the California gold rush, the United States proved unable to establish a mint in the frontier territory to support its inhabitants, partly due to the difficulty of importing the chemicals needed for refining. The United States did open an Assay Office which issued a large unrefined \$50 "slug" of native California gold naturally alloyed with silver, but it was insufficient to meet commercial demand. A score of private mints sprung up to meet the demand. Most of these companies produced inferior grade coins that did not assay at their stated value and soon disappeared from circulation.

However, three companies produced coins which assayed properly and were accepted by the market: Moffat & Co., Kellogg & Co., and Wass, Molitor & Co. John Moffat, who ran Moffat & Co. enjoyed an excellent reputation; R.J. Walker, then Secretary of the United States Treasury, wrote him a letter of reference. From 1850-1853 Moffat & Co., under contract to the United States, ran the United States Assay Office in San Francisco⁵. Eventually the Federal Government when it asked the two surviving members of the firm to initiate the United States Branch Mint in 1853 and bought out the equipment of Moffat & Co. with which to equip the new Federal mint. The new mint had difficulties obtaining refining acids and sometimes suspended operation, leading to occasional coinage by private mints, but as California began to provide its own refining acids, the Federal mint

supplanted private mints. While the Secretary of the Treasury's 1864 letter, presented in the legislative testimony, refers to private coinage in California, all such minting had ended by 1855. Any private coins in circulation in California in 1864 had been minted over a decade before^{5, 6}. However in Denver private minting by Clark, Gruber & Co. continued until 1862, after which they were bought out in 1863 by the United States to establish a new mint^{3,7}. Note that many of these privately minted coins copied the United States' eagle designs, causing commercial confusion.

A more pressing problem in 1864 was the usage of civil war "store tokens". Due to the scarcity of small change, Northern merchants began minting their own pennies, called "store tokens" using less copper than the scarce Federal coins and often bearing similar designs. The store tokens rapidly led to problems when merchants would refuse to redeem them. New York City's Third Avenue Railroad collected a large quantity of cents issued by New York barkeep Gustavus Lindenmueller, who had placed approximately 1 million of his own cents in circulation in early 1863. When the Third Avenue Railroad of New York collected a large quantity of Lindenmueller cents and approached Lindenmueller to exchange them, he laughingly refused to redeem them. In their 1924 book "Civil War Tokens and Tradesmen's Store Cards", George Hetrick and Julius Guttag wrote "The railroad had no redress, and it is not improbable that incidents of this character forced the government to put a stop to their issue."^{8,9}

Constitutional Basis for Enactment of the Act of June 8, 1864

The United States Constitution is structured as a set of enumerated powers and restrictions, specifying exactly what areas the Federal government exercised power over and which areas the States were prohibited from exercising power in. For example, Article I Section 10 reads:

"No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

As an important principle of the Constitution's construction, power originated with the People, and both States and the Federal government had only the specific powers expressly delegated to them in their Constitutions, and no more. To insure the clarity of this principle, the people of the United States, through their state legislatures, insisted that a Bill of Rights be added to the Constitution as a condition of its ratification. The Tenth Amendment, the final amendment in the Bill of Rights, reminds us that:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States implicitly, or to the people."

While this principle has been considerably abused in recent years, it was well understood during the period of the Act of 1864's consideration.

Finally, the new Constitution specifically gave the Federal government the new power to protect the public systems of commerce by coining money and by fixing the standards of weights and measures used in to denominate currency to create, literally, a "gold standard". In Article I, Section 8, the Constitution enumerates a set of powers given to the Federal government, including the powers:

"To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;"

That the wording of the Constitution, as always, is specific and reflects the very specific intent to protect the money system from debasement, either by printing fiat currency which could be overprinted to cause inflation, or by debasing the gold and silver currency through counterfeiting. The Constitution's framers had extensively studied the history of nations, and both of these situations had caused the downfall of prior empires. They sought to protect the system of lawful money in current use. Note, for example, that the Constitution gives the power to punish counterfeiting of "current Coin". Counterfeiting ancient coins that are not usable in current commerce could not imperil the national system of money, and was not an area of concern for the Federal government. In a similar manner, Congress was given the power to regulate the value of foreign coin - not to set the exchange rate, but to literally set its value. This is no grammatical accident - recall that the first United States mint opened in 1792, while the Constitution was ratified on June 21, 1788. During the years in between - and for years after - United States merchants used foreign coins, particularly Spanish gold pieces, at a value set by Congress. An article by the Numismatic Guarantee Association notes:

"The failure of the United State Mint to produce an adequate coinage of its own perpetuated the circulation of Spanish coins for decades. Contributing to this problem was that the Spanish coins, which were frequently clipped and worn, were readily spent, while the federal coins, with their higher intrinsic value, were either hoarded or shipped overseas for recoinage in Europe.

From the very outset, Congress established legal tender values for each of the various foreign pieces familiar to 18th Century Americans. It was hoped that this step would be a temporary one, but practical necessity mandated that their legal tender status be renewed time and again. It was not until the 1850s that the USA had enough domestic coinage in circulation to permit withdrawal of the Spanish issues, the only foreign pieces that still maintained a large presence.

Despite the loss it would incur on the underweight Spanish coins, the Treasury began redeeming these pieces in 1857 at a modest discount from their nominal face value. Given in exchange were the new small cents first coined that year as a replacement for the large copper cents and half cents, which were also being retired with the Spanish pieces. This program was renewed through 1860, and it brought to an end the circulation

of these historic coins in most of the nation, though rural areas continued to utilize the old bits as late as the 1870s."

"Spanish American Colonial Coinage", 2001, the Numismatic Guarantee Association, available at <http://www.coinsite.com/content/articles/Spanish.asp>

Note that the Constitution did not confer any power to ban private coinage of money, whether in gold or silver or in any other form, although it did confer a power to punish counterfeiting, and to set the value of foreign coin. When Congress sought to extinguish the use of Spanish currency, it did so by producing better and more desirable currency in its mints, and by paying a slight premium for Spanish currency, so people brought it to be re-coined. In doing so, Congress pursued its legitimate mission to guarantee to the citizens of the United States a reputable standard of lawful money. Congress did not simply declare the use of Spanish coins illegal - it had no power to do so.

The Act of June 8, 1864 constitutes a direct exercise of the Federal power to ban counterfeiting to protect the standard of weights and measures underlying national commerce. In subsequent section, we present evidence showing that this Act did no more than ban counterfeiting using the Constitutional powers described above.
Did the Act of June 8, 1864 Really Ban Private Currency?

Numismatic collectors commonly believe that the Act of June 8, 1864's purpose and effect was to ban all privately issued currency. We think that this belief is an overstatement of the Act's true legislative intent and power. To have this effect, the Act would have had to create new Constitutional power (a thing that cannot be done in an act).

Americans create and circulate currency in various metallic and non-metallic forms all the time. One example is the tokens issued by Las Vegas casino tokens, which are often metallic, and with which one can purchase goods and services freely in Las Vegas - making them a circulating currency. Other examples include gift certificates, American Airlines AAdvantage miles, and the electronic ones and zeros associated with a Visa card. If the Act of June 8, 1864 really did criminalize the issuance or passing of any coin or tokens of "gold, silver, other metal, or alloy of metal," anyone buying breakfast in Las Vegas with a metallic casino token would be committing a Federal felony. But Las Vegas has used casino tokens as de facto local currency for decades without incident, providing a clear modern example of how the Act of June 8, 1864 did not simply criminalize all private currency.

The Act of June 8 refers specifically to metal tokens of "gold, silver, any other metal, or alloy of metal", deliberately excluding tokens of other materials such as wood, paper, glass, or plastic. If the Act of June 8 really were to have banned private currency, it would only have banned private currency made of metal. Were this (incorrect) interpretation true, Americans would still be able to create a circulating private currency based on any item, regardless of lack of intrinsic value, as long as it were not metal. That is to say, Americans could create a currency based on anything, regardless of how

worthless it was, except gold and silver - which have intrinsic worth. Under such an interpretation, a currency whose coins were made of wood, with almost no intrinsic value, would be legal for use in commerce, but one whose coins were made of silver (which is valuable) would not be, to protect the public interest. Clearly, this is ridiculous proposition, and the underlying assumption about the Act of June 8's purpose and effect is suspect.

Closer examination of the Act and its legislative history show clearly that the Act's purpose was simply to punish counterfeiting. As such, the Act derives its legitimate Constitutional authority directly from Article I, Section 8 of the Constitution, cited above. Conversely, simply minting and circulating coins of gold or silver does not constitute counterfeiting, provided that the coins do not closely resemble existing currency (whether issued by the United States or by some other source).

At the time of the passage of the Act of June 8, 1864, private coinage actually used the devices of the United States and closely resembled existing circulating United States currency. For example the gold coins privately minted by Moffat & Co. bore the United States Federal eagle as insignia:

Moffat & Co. \$5 Gold Eagle

Civil War Token from Connecticut (cent size, enlarged for clarity)
Bears inscription "E. W. Atwood, Dealer in Books"
Picture of Congressional Building, "United States, 1863" on obverse

In contrast, prior private coinage, such as that issued by Christopher Bechtler and John Higley, bore no national insignia of the United States.

Statute as enacted:

The "Act of June 8, 1864", Chapter 114, was enacted by the 38th Congress, 1st Session. It appears in the United States Statutes at Large on this date and chapter with the original title "An Act to punish and prevent the Counterfeiting of Coin of the United States" (p. 120). The margin note on the next page (p.121) reads "Penalty for counterfeiting coin of the United States." The scanned images appear in the Library of Congress "A Century of Lawmaking" online archive, starting here:

<http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=013/llsl013.db&recNum=149>

In its current form as 18 USC 486, the law reads almost identically:

"Whoever, except as authorized by law, makes or utters or passes, or attempts to utter or pass, any coins of gold or silver or other metal, or alloys of metals, intended for use as current money, whether in the resemblance of coins of the United States or of foreign countries, or of original design, shall be fined under this title or imprisoned not more than

five years, or both."

House Debate on H.R. 455 (later the Act of June 8, 1864)

The debates on H.R. 455 prove it is clearly intended to prevent only counterfeiting, meaning coining designs very similar to existing U.S. coinage but from different alloy. This transcript is taken from The Congressional Globe of 1864, page 2265, and its scanned image is archived here:

[http://memory.loc.gov/cgi-](http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=066/llcg066.db&recNum=314)

[bin/ampage?collId=llcg&fileName=066/llcg066.db&recNum=314](http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=066/llcg066.db&recNum=314)

PUNISHMENT OF COUNTERFEITING

Mr. KASSON: I am instructed by the Committee on a Uniform System of Coinage, Weights, and Measures, to report a bill to prevent and punish the counterfeiting of the coin of the United States. I am aware that it is not a private bill, but it is considered on important to be passed, and I now ask the consent of the House to report it now and put it on its passage.

There being no objection, the bill was reported and read a first and second time.

The Bill provides a penalty of a fine not exceeding \$3,000, and imprisonment not exceeding five years, or both, in the discretion of the court, for counterfeiting any of the gold or silver or other coins of the country, or for uttering or passing any token or original device resembling the coins of the United States or of any foreign Government.

[brief interjection of unrelated Army field reports as more Confederate armies were captured, deleted]

PUNISHMENT OF COUNTERFEITING - AGAIN

MR. KASSON: I ask that the following letter may be read from the Treasury Department.

The clerk read, as follows:

"Treasury Department, May 2, 1864

"SIR, it has been the practice during the last few years for parties in the gold producing regions of our country to issue coins of gold largely alloyed with the silver naturally present. The devices on these pieces, in most instances, are in close imitation of those on the legal coins, and they pass currently in considerable extent in the far West, although much below the professed value.

"In the Atlantic cities, a large amount of ersatz tokens have been issued by private parties and are now in circulation.

"This issue by private parties of coins bearing a close resemblance to coins of the United States, is a reprehensible practice, and is injurious to the public interests. It therefore seems proper that some provision should be made by law to prohibit it. To this end I submit the accompanying draft of a bill for the consideration of your committee and such action as they may think proper.

"I am, very respectfully,

"S.P.CHASE,
Secretary of the Treasury"

Hon John A. Kasson, Chairman Committee on Coinage, House of Representatives.

Mr. BROOKS: Is this a regular report from the committee?

Mr. KASSON: It is.

Mr. BROOKS: In the first place, I desire to call the attention of the members from California and Oregon to this bill, for it concerns them more than it does my section of the country. If it is satisfactory to them I will not oppose it; but it strikes me that \$3000 fine and five years imprisonment is a pretty severe penalty for the circulation of gold tokens, which at one time, if not now in California and the Pacific coast, were used for business purposes.

Mr. SHANNON: I say to the gentleman from New York that that time has passed.

Mr. BROOKS: If the bill is satisfactory to the gentleman from the Pacific coast I will not object to it.

Mr. SHANNON: I think this is a very proper bill, and hope the House will pass it. We have a mint at San Francisco, the capacities of which, it is true, are not sufficient for the wants of our commerce, but with the additional machinery which I have no doubt Congress will give us an appropriation to purchase, it will be quite sufficient so far as California is concerned. It is also asked that a mint be established in Oregon and another in Nevada. If that be done, the facilities for furnishing all the United States coin required for commercial purposes on the Pacific coast will be ample.

It is true that in the earlier history of that country it became necessary for private parties to engage in stamping coin for circulation, but that day has passed. There may still be some little difficulty in Nevada. I think Congress should establish a mint there; but if not, they will have to supply themselves from California. I think the bill is a proper one.

Mr. ELIOTT: I wish to ask whether, if this bill passed in its current shape, it will not prevent the coinage of money altogether? This provides a penalty for coinage without discriminating by whose authority it is done.

Mr. KASSON: It was not, of course, the intent of this bill, nor do I think it is its effect. Government does its own coinage still, while this bill prevents fictitious coinage. I have no objection, however, to an amendment which shall make it clearer.

Mr. ELIOTT: I am afraid it is just that thing.

The SPEAKER: Does the gentleman move an amendment?

Mr. ELIOTT: I would rather that the gentleman who reported this bill should suggest an amendment. I will, however, move to insert after the word "persons," in the first line, the words "except as authorized by law."

The amendment was agreed to.

The bill, as amended, was ordered to be engrossed and read a third time; and being engrossed, it was accordingly read the third time and passed.

Indications of Legislative Intent in Original Testimony

This section enumerates previously presented points of evidence showing that the Act of June 8, 1864 was a counterfeiting bill, deriving its authority from the Constitutional power to prevent counterfeiting, and specifically targeted at private coinage that resembled existing Federal coinage but was of different alloy, (and thus different value).

" The bill was titled "An Act to punish and prevent the counterfeiting of coin of the United States."

" The margin note in the United States Statutes at Large for the Act reads "Penalty for counterfeiting coin of the United States"

" The bill emerged from the Committee on a Uniform System of Coinage, Weights, and Measures, indicating that it derives its Constitutional authority from the Federal authority to regulate Coinage, Weights, and Measures.

" The letter from the Secretary of the Treasury explaining the bill's intent clearly refers to the private coinage's close resemblance to the United States coins as the underlying issue requiring regulation: "This issue by private parties of coins bearing a close resemblance to coins of the United States, is a reprehensible practice, and is injurious to the public interests."

" Secretary Chase's letter further establishes that the problem is not simply the close resemblance of the private coins to United States coins, but also that they do not have the professed face value: "they pass currently in considerable extent in the far West, although much below the professed value. In the Atlantic cities, a large amount of ersatz tokens have been issued by private parties and are now in circulation."

" Rep. Kasson's description of the bill notes that it provides a penalty for "counterfeiting any of the gold or silver or other coins of the country, or for uttering or passing any token or original device resembling the coins of the United States or of any foreign Government."

" In the legislative debate, Rep. Elliot asks whether the bill, in its current shape, would prevent the coinage of money altogether. Rep. Kasson answers "It was not, of course, the intent of this bill, nor do I think it is its effect." and continues to note that the bill addresses only fictitious coinage.

" Rep. Elliot requests an amendment to further clarify that the statute criminalizes only fraudulent coinage, which is added to the bill, and is its only amendment.

Indications In Current (2002) Code:

" The modern recoding of the Act of June 8, 1864 appears in the United States Code at Title 18, Chapter 25, Section 486 (18 USC 486). Chapter 25 is titled "Counterfeiting".

" The current federal sentencing guidelines for 18 USC 486 are associated with sentencing guidelines 2B1.1 and 2B5.1 in the Federal Sentencing Guide¹⁰.

" Section 2B1.1 is titled "Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States".

" The background section for 2B1.1 reads "This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States)."

" Section 2B5.1 is titled "Offenses Involving Counterfeit Bearer Obligations of the United States".

" Application notes 2 and 3 of 2B5.1 reads "Applicability to Counterfeit Bearer Obligations of the United States.-This guideline applies to counterfeiting of United States currency and coins, food stamps, postage stamps, treasury bills, bearer bonds and other items that generally could be described as bearer obligations of the United States, i.e., that are not made out to a specific payee."

" Application note 3 of 2B5.1 reads: "Inapplicability to Genuine but Fraudulently Altered Instruments.-"Counterfeit," as used in this section, means an instrument that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety. Offenses involving genuine instruments that have been altered are covered under §2B1.1 (Theft, Property Destruction and Fraud)."

" No sentencing guidelines cover cases involving the simple issuance of private currency in a manner that is not fraudulent.

Track through Congress

H.R. 455 Act To punish and prevent the counterfeiting of coin of the United States.

http://memory.loc.gov/cgi-bin/ampage?collId=llhj&fileName=061/llhj061.db&recNum=653&itemLink=D?hlaw:31:/temp/~ammem_aNoq::%230610654&linkText=1

House of Representatives' Journal

May 13, 1864: Mr. Kasson, by unanimous consent, from the Committee on a Uniform System of Coinage, Weights, and Measures, reported a bill (H. R. 455) to punish and prevent the counterfeiting of coin of the United States; which was read a first and second time.

Pending the question on its engrossment, Mr. Eliot submitted an amendment thereto; which was agreed to.

After debate, Ordered, That the bill be engrossed and read a third time.

Being engrossed, it was accordingly read the third time and passed.

Mr. Kasson moved that the vote last taken be reconsidered, and also moved that the motion to reconsider be laid on the table; which latter motion was agreed to.

Ordered, That the Clerk request the concurrence of the Senate in the said bill.

img:<http://memory.loc.gov/cgi-bin/ampage?collId=llhb&fileName=038/llhb038.db&recNum=3045>

Journal of the Senate:

May 16, 1864: read twice in the house and referred to the Committee on Finance

img: http://memory.loc.gov/cgi-bin/query/D?hlaw:10:/temp/~ammem_aNoq::

Journal of the Senate:

May 24, 1864: Mr. Van Winkle, from the Committee on Finance, to whom was referred the bill (H. R. 455) to punish and prevent the counterfeiting of coin of the United States, reported it without amendment

House of Representatives' Journal

Saturday, June 5, 1864: received notice from the Senate that Senate had passed H.R. 455 w/o amendment.

Later on that day, Mr. Cobb from the Committee on Enrolled Bills, reported that the Committee had examined and found truly enrolled H.R. 455 and the speaker signed it without further discussion.

Journal of the Senate:

June 7, 1874:

http://memory.loc.gov/cgi-bin/query/D?hlaw:14:/temp/~ammem_aNoq::

Mr. Howe reported from the committee that they yesterday presented to the President of the United States the following enrolled bills (includes 455)

References in Case Law

To explore the history of court interpretations of 18 USC 486, we researched applicable case law.

Case Summaries - Overview

While Federal counterfeiting cases occur regularly, very few cases reference the Act of June 8, 1864 or its subsequent recodings. A search using the Westlaw online legal research database for cases referencing 18 USC 486 uncovered only four cases:

" U.S. v. Bogart, 24 F.Cas. 1185, 9 Ben. 314, 24 Int.Rev.Rec. 46, No. 14,617 (D.C.N.Y. 1878)

" U.S. v. Gellman, 44 F.Supp. 360 (D.C.Minn., 1942)

" U.S. v. Yeatts, 639 F.2d 1186 (C.A.Ga., 1981)

" U.S. v. Falvey, 676 F.2d 871 (C.A.Me., 1982)

All cases involved alleged counterfeiting. In all cases except Yeatts, the defendants were found innocent.

The only case in which an individual who issued his own private currency was ever directly charged under 18 USC 486 was U.S. v. Bogart. In Bogart, the court made examination of the legislative intent of the Act of June 8, 1864. The Bogart court determined that the Act was simply a counterfeiting law that prohibited private coins that closely resembled circulating United States currency and could mislead the public (even if such designs were original, but still misleading). Further, the Bogart court specifically determined that a person who simply issued a private precious metal currency could not be charged with counterfeiting under the Act of June 8, 1864, and that the Act did not establish the new, previously unknown crime of issuing private currency.

The Gellman court mentions 18 USC 486, noting that it bans the issuance of private currency "as current money". Falvey later cites Gellman on this point. However, the Gellman observation is really only dicta, as the court noted that the statute was not applicable to Gellman's alleged crime (selling slugs that could operate vending machines). The Gellman court's discussion of 18 USC 486 involved no investigation of the statute's legislative intent, and appears to be a simple quick reading by the court. Gellman does not reference the prior U.S. v. Bogart, which directly contradicts Gellman on this matter, on this matter (although, ironically, the Gellman court cites Bogart on an unrelated matter).

U.S. v. Yeatts involved a 1981 case where a counterfeiter, charged with attempting to pass fraudulent historic United States gold coins, maintained that the coins were not current money, and thus no longer fell within the purview of 18 USC 485, the sister law to 18 USC 486. Using somewhat dubious Constitutional reasoning, the appeals court held that, even though the coins were not current money, the law was still applicable under the

Constitution's "necessary and proper clause". Yeatts references 18 USC 486 only to note that it defines a parallel offense to that defined in 18 USC 485 and one law did not repeal the other.

U.S. v. Falvey looked extensively at 18 USC 486's sister law 18 USC 485. The Falvey ruling established the important and frequently cited doctrine that a court may use evidence of legislative history to govern a statute's reading - even if the statute's current literal reading would be different without the legislative evidence absence. Even in the absence of the Bogart ruling, the Falvey decision would provide direct support for using the legislative testimony from the Act of June 8, 1964's passage to show its intent as a simple counterfeiting law.

In summary, the case law referencing 18 USC 486 does contain (unsupported) dicta claiming the law prohibited private coinage. However, U.S. v. Bogart case provides a more direct and better-researched ruling, contemporaneous with the law's enactment, affirming 18 USC 486 to be only a prohibition of counterfeiting and declaring simple private coinage to be outside the purview of 18 USC 486. Further, the doctrine established in Falvey of allowing the use of the historical legislative record to show legislative intent would allow persons charged under 18 USC 486 to submit evidence, such as that compiled here, to show the law was not intended to apply to simple private coinage.

Case Discussion - U.S. v. Bogart

In a short but well-reasoned decision, the District Court of New York considered directly the question of whether a defendant accused of circulating an octagonal gold piece that did not closely resemble current money could be charged under the Act of June 8, 1864. The case, 14 years after the Act's passage, appears to be the first Federal prosecution under the Act. The court observes that a plain reading of the statute would seem to ban privately circulated coinage. However, when the court reviews the statute under strict construction, it determines that the law's legislative intent was simply to ban counterfeiting by creating new designs in close resemblance to existing coins, so as to confuse an ordinary observer. The Bogart court observes that the pieces are technically privately issued tokens and not counterfeit coins:

(1) The pieces of metal passed by the defendant do not purport to be coins, in the legal definition of the word, but are tokens.

The court further realizes that, were the Act of June 8 to have actually banned private currency, it would require extraordinary new power not delegated to Congress in the power to prevent counterfeiting:

(2) If it should be held that the section makes it a crime to make or utter any pieces of metal, with the intent that the pieces shall serve as a substitute for money, an offence is created which is new and foreign to the law of counterfeiting.

A coin is a piece of metal stamped and made legally current as money. A counterfeit coin is one in imitation of the genuine. The coins known to the law are those authorized to be

issued from the mints of the United States, and those of foreign countries current here. The pieces in question are not in imitation of our own coin or of any foreign coin.

The Bogart court invokes the well-established historical standard, later cited in Gellman, that a counterfeit coin must be one that would deceive an ordinary observer using ordinary caution:

One of the rules applicable to the offence of counterfeiting is, that the resemblance of the spurious to the genuine coin must be such as that it might deceive a person using ordinary caution, and a conviction cannot be had for uttering pieces of metal which are not in the likeness or similitude of genuine coins.

Turning to the historical record for evidence of legislative intent, the court finds that the Act was originally titled 'An act to punish and prevent the counterfeiting of coin of the United States', showing Congressional intent to augment the existing counterfeiting laws, not to ban all private coinage. Since the Act of June 8 was one of several anti-counterfeiting laws passed in the same session, the court also examined the other acts. In particular, examining an act passed shortly after the Act of June 8 to restrict ban private issuance of certain cents (the Civil War Tokens or store cards) that could easily be confused with circulating cents, the Bogart court points out that:

- 1) that act specifically applied only to denominations in circulation, covering a three and five cent piece but not the (nonexistent) four cent piece, and
- 2) there would be no reason for the legislature to pass such an act if the act it had just recently passed on June 8 really applied to all private coinage

Bogart therefore concluded "In view of this, the latest, exposition of legislative intent, it would be unreasonable to hold that congress intended, by the former act, to make it a crime to utter a token which does not purport to be in imitation or in substitution of any coin known to the law."

The reader is urged to read the full Bogart decision, included as an appendix, as it bears most directly on the question of 18 USC 486's applicability to the Liberty Dollar.

Case Discussion - U.S. v. Gellman

In U.S. v. Gellman, the United States attempted to prosecute the brothers Gellman, who ran a business selling concession merchandise, with selling slugs that could be used to operate vending machines. In the early 1940's, vending machines were becoming popular and existing counterfeiting law did not directly address the legality of producing or selling slugs. Further, the Gellmans claimed that slugs, or "tokens", had legitimate business uses and presented evidence to show this. In an attempt to attach a charge that would pass judicial review, prosecutors charged the Gellmans with violations of 18 U.S.C. § 277, 278, 281, and 282.

The slugs bore the inscriptions 'Good for Amusement Only,' and on the other side, 'This Token has no Cash or Trade Value,' and some bore number values. The court found that the several of the slugs were of similar size and weight to current circulating United

States coins and were of lesser alloys than the comparable coins. However, the court noted that no ordinary observer would be misled into believing the coins were legitimate U.S. "current money" - an old and well-established standard judicial test for applicability of charges of counterfeiting [U.S. v. Weber, D.C.W.D. Wash. N.D., 210 F. 973, 976]. Examining the "ordinary observer" standard in case law, the court found it to be uniform in many different citations. Therefore, 18 USC 277 "Counterfeiting gold or silver coins or bars" and 278, "Counterfeiting minor coins", both of which specified in their language a "resemblance or similitude" to current United States money, did not apply. Finding no grounds to apply the government's desired "mechanical test", the court considered the applicability of sections 281 or 282. 18 USC 281, that era's current coding of the Act of June 8, 1864, had been titled "Making or uttering coins resembling money." Note that this title had been changed in recoding from the original title "An Act to punish and prevent the counterfeiting of coin of the United States." This change, probably a simple draftsman's update, induced exactly the sort of inadvertent alteration of the statute's plain meaning through recoding that Falvey would later examine and overturn based on legislative history [Note, the present title has been again changed to "Uttering coins of gold, silver or other metal"]. The Gellman court, proceeding no further, noted the following:

"A reading of these sections induces the view that they were primarily adopted to prevent the coining of money in competition with the United States; resemblance or similitude is not necessarily an element. The United States has the sole power to coin money under the Constitution, and if anyone, individual or State, assumes to supplant the medium of exchange adopted by our Government, or assumes to compete with the United States Government in this regard, a violation of these statutes would follow. Undoubtedly, no one can interfere with the monopoly which this Government has obtained by reason of the Constitutional provisions without running afoul of these statutes. If one manufactures a coin, a five cent piece, for instance, in an oblong shape, and although much larger than a genuine five cent piece, for the purpose of circulation as money within any area of the United States, a violation would occur."

The Gellman court correctly identified that Section 281 differed from its other sister counterfeiting laws in relaxing the requirement for "resemblance or similitude". However, apparently swayed by the title, the court read Section 281 to carry no requirement for any resemblance whatsoever, a reading directly at odds with Bogart, which held that the law carried the implicit context of a counterfeiting law and not the criminalization of simple coinage. Ironically, the Gellman decision earlier cites Bogart as part of a long set of citations establishing the standard requiring that counterfeiting be such that would deceive an "ordinary observer." However, the fact that the Gellman decision directly contradicts the against the core conclusion in Bogart (that simple issuance of currency is not within the purview of the Act of June 8) without referencing Bogart indicates that Judge Nordbye likely read only the case citation headnote relevant to the "ordinary observer" standard and did not actually read the full Bogart decision.

The reading's cursory nature shows in discussion of Constitutional authority - the Constitution places restrictions only on States and on the Federal government, not on

individuals, so any "monopoly" given to the Federal government would be simply a prohibition on the powers of States, not of individuals. Since Article I, Section VIII of the Constitution also grants the Federal government the power to establish post offices and roads, in the same section that grants the power to coin money, such an interpretation would prohibit Federal Express from competing with the United States Post Office. In reality, Article I, Section VIII, which granted the Federal government the power of coinage, confers no monopoly. Article I, Section X (powers denied to States), specifically prohibits States from coining money, and nothing prevents individuals from coining money. Congress has the power to "provide for the punishment of counterfeiting the Securities and current Coin of the United States" - a power of prosecution from which counterfeiting cannot be separated.

The Gellman court did not visit Section 281 deeply, because they knew it to be inapplicable even if it had completely relaxed the "resemblance or similitude" requirement:

"But the intendment must be that the coin shall be 'for the use and purpose of current money' under Section 281, and 'to be used as money' under Section 282. Now, money is a medium of exchange. It is something which has general exchange-ability as such. Obviously, these tokens or slugs were never intended for circulation as money. The very inscriptions-- 'No Cash Value'-- 'For Amusement Purposes Only'-- dispel any doubt in that regard. There is no promise to pay money or anything of value, either impliedly or by reason of any express inscription on the coin."

The court referred to *U.S. v. Roussopulous*, 95 F. 977, 978 (D.C. Minn.), which had examined "intent to circulate as money" with respect to "trade checks". Trade checks, despite the name, are metal tokens stamped with inscriptions, and resemble coins, but are redeemable in store goods. In *Roussopulous*, Judge Lochren noted:

"It does not purport to be a piece of money, or an obligation to pay money, and the obligation expressed is in terms solvable in merchandise. It cannot, therefore, have been intended to circulate as money, or to be received and used in lieu of lawful money, and does not come within the prohibition of section 3583, Rev. St. U.S.' 18 U.S.C.A. § 293."

The Gellman court cited *U.S. v. Van Auken*, 96 U.S. 366, 367, 24 L.Ed. 852, a Supreme Court decision on the Act of July 17, 1862, another sister to the Act of June 8, 1984, with a similar finding. In *Van Auken*, the Supreme Court found 18 USC 293 "certainly inapplicable to any thing not measurable by the pecuniary standard. It could not be applied where the measurement was to be, ex gratia, by the pound, the gallon, the yard, or any other standard than money."

Examining dictionary definitions of money, the Gellman court noted that it is a commodity with its own value, is a common measure of values, and is generally usable as a medium of exchange. The government's contention that vending machine items were money was not supported. The Gellman court concluded that even the loosest interpretation of 18 USC 486 it could construct would not extend to the Gellmans, and

found them innocent. The court further recommended that the legislature enact appropriate legislation to extend to the case, which Congress later passed as the current prohibition on vending machine slugs currently codified in 18 USC 491.

Case Discussion - U.S. v. Yeatts

Coleman Yeatts, a shady coin dealer, attempted to pass counterfeit historic United States gold coins to another coin dealer, who turned him in to the authorities. On appeal, his attorney posed the (legitimate) issue that the coins, having been removed from legal tender status, no longer fell within the purview of "current money" and thus were outside the realm of the Constitutional authority to prosecute counterfeiting of "current Coin".

While denied certiorari by the Fifth Circuit, the Yeatts decision is terribly constructed and is suspect on many points of currency law. First, the Yeatts court's decision to apply 18 USC 485 hinges on the law's second paragraph lacking the clause requiring the coin to be "current money." However, the Falvey court, which examines the legislative history of 18 USC 485, shows that the clause was originally intended to restrict both paragraphs of the law and Congress did not intend to change the intent in the law's redrafting, so 18 USC 485 should be read as if the "current money" requirement applied to the whole law. Falvey further held that the "current money" requirement is implicit in the definition of counterfeiting and would be implied even if absent.

The "current money" requirement arises directly from the Constitutional source of the Federal power to prohibit counterfeiting of "current Coin." As noted in Falvey and Bogart, counterfeiting is generally understood from its common law definition to refer specifically to creating false versions of circulating money. As the Falvey court notes, one can create a fake ancient coin, but that coin is not counterfeit - although its sale could be considered fraud. Congress has no Constitutional power to prohibit creation of any non-circulating coin, and none of the counterfeiting statutes raised in Yeatts ever showed legislative intent to do so.

Undeterred, the Yeatts court invents a source of Constitutional power, declaring that the law applies even to ancient coins by virtue of the ever-ready "necessary and proper" clause, despite the fact that 18 USC 485 was clearly enacted as a straightforward counterfeiting law.

Fortunately, the Yeatts court refers to 18 USC 486 only to note that it was passed as a companion law to 18 USC 485, and that neither law's enactment repealed the other. The Falvey decision, following Yeatts, quickly revisited the shakier parts of Yeatts with stronger reasoning.

Case Discussion - U.S. v. Falvey

In Falvey, affirmed by the First Circuit, defendants were charged under 18 U.S.C. 485, 486, with uttering and possession with intent to defraud of counterfeit gold South African Krugerrands. The District Court had previously considered the question of the term "current money". It found that current money is money that is in actual use and

circulation, and that neither 485 nor 486 criminalized the possession or use of counterfeit foreign coin unless such coin was in current use in the United States. The government appealed, and the First Circuit affirmed that 18 USC 485 and 486 do not reach the counterfeiting of foreign coins that are not current money in actual use and circulation in the United States.

At the time of the Falvey decision, the current coding of 18 USC 485 appeared on a plain reading to apply to Falvey:

Whoever falsely makes, forges, or counterfeits any coin or bar in resemblance or similitude of any coin of a denomination higher than 5 cents or any gold or silver bar coined or stamped at any mint or assay office of the United States, or in resemblance or similitude of any foreign gold or silver coin current in the United States or in actual use and circulation as money within the United States; or
Whoever passes, utters, publishes, sells, possesses, or brings into the United States any false, forged, or counterfeit coin or bar, knowing the same to be false, forged, or counterfeit, with intent to defraud any body politic or corporate, or any person, or attempts the commission of any offense described in this paragraph-
Shall be fined not more than \$5,000 or imprisoned not more than fifteen years, or both.

Falvey was charged under the second paragraph, which did not contain the requirement for actual use and circulation as money. However, the District Court had carefully considered the legislative history of 18 USC 485, finding that in earlier codings of the statute the restriction of "actual use and circulation" had applied to both paragraphs. Examining the legislative intent of subsequent amendments documented in their House and Senate reports, the court found no evidence of intent to change the restriction and concluded that the change had been a simple and inadvertent result of the statute's redrafting. Therefore, the District Court concluded (and the Circuit Court affirmed) that the statute must be read as if the restriction applied to both paragraphs. In doing so, the Falvey court noted that it followed the same path that the Fifth Circuit had earlier taken in *U.S. v. Yeatts*, which it implicitly read the "use and circulation" clause to restrict the entire statute per the evidence of legislative intent derived from the law's prior codings. [Note: this appears to be mistaken on the part of the Falvey court; the *Yeatts* court appears to have incorrectly worked off the statute's plain meaning as if the restrictive claim did not apply to the second paragraph].

The Falvey court noted that "Cases construing changes in statutory language tend to rely in part on evidence of congressional intent or at least attention to the change in deciding whether to give the change its literal effect. . . . In the absence of these factors, courts are not bound to read a statute literally in a manner entirely at odds with its history and apparent intent." Falvey is frequently cited in cases where evidence of legislative intent is introduced to influence the reading of statutory language where the plain reading might, absent the evidence of intent, be construed differently. Note that, while Falvey referred specifically to cases where statutory language was changed through later amendment, it has come to also be cited in cases where the simple reading of a statute, whether changed or unchanged, is influenced by evidence of legislative intent. The authors of this

document feel that, were 18 USC 486 to be held on plain reading to ban all simple issuance of private coinage outright per Gellman, in contradiction to the findings of Bogart, the Falvey decision could provide an avenue to introduce further evidence of legislative intent to correct Gellman's interpretation.

The Falvey court also recognized that all counterfeiting statutes have implicit in their nature certain restrictions arising from the common law understanding of counterfeiting, whether or not those restrictions appear explicitly in the statute's plain language. Referring to 18 USC 485, the court notes:

While the statute now literally punishes possession of "any" counterfeit coin, certainly some limitation must be read into it: we have found no evidence throughout the history of the statute of an intention to punish counterfeit ancient Greek or Roman coins, for example. Cf. *United States v. Gertz*, 249 F.2d 662, 664-65 (9th Cir. 1957).

Addressing the applicability of 18 USC 486, the Falvey court attempted to review evidence of legislative intent, but did not reach as far as this document has or the Bogart court did. The court went so far as to reference the bill's stated purpose "to punish and prevent the counterfeiting of coin of the United States," both in the Statutes at Large and in the Congressional Globe. Unfortunately, while the Falvey court referenced the Congressional Globe, it appears not to have reached, or at least not to have referenced, the debate on the Act and the letter from Secretary of the Treasury Chase explaining the need for the Act. Rather, Falvey cites Gellman's (unsupported and overly simplistic) description of 18 USC 486's purpose, noting it "seems to have been with the prohibition of private systems of coinage created for use in competition with the official United States coinage." Had the court proceeded farther into the Congressional Globe, it would have found a firsthand, and more accurate, description of what legitimate counterfeiting problem would necessitate a law referring to coins "of original design" and without a clause for "intent to defraud." The absence of both clauses was noted by the court in its discussion of the applicability of 18 USC 486 to Falvey's case, and Falvey makes no reference to Bogart.

For purposes of the matter at hand, the distinction was irrelevant to the Falvey court, which was concerned with establishing whether 18 USC 486 made any reference to foreign coins intended for circulation outside the United States. The court correctly concluded that 18 USC 486 was not intended to reach that case and dismissed the charge against Falvey.

UNITED STATES v. BOGART
24 F.Cas. 1185, 9 Ben. 314, 24 Int.Rev.Rec. 46, No. 14,617 (D.C.N.Y. 1878)

This was an indictment against James B. Bogart.

WALLACE, District Judge.

This case presents the question, whether a conviction can be sustained, under section

5461 of the Revised Statutes of the United States, where the defendant passed certain pieces of metal, apparently gold, octagon in form, on one side of which was the device of an Indian, and on the other the inscription '1/4 dollar, Cal.'

The section under which the indictment is found was originally in an act passed June 8th, 1864, and entitled 'An act to punish and prevent the counterfeiting of coin of the United States,' and read as follows: 'Every person who, except as authorized by law, makes or causes to be made, or utters or passes, or attempts to utter or pass, any coins of gold or silver or other metal, or alloys of metals, intended for the use and purpose of current money, whether in the resemblance of coins of the United States or of foreign countries, or of original design, shall be punished by a fine of not more than three thousand dollars, or by imprisonment not more than five years, or both.' On first impression, this language seems sufficiently comprehensive to cover the present case; but, giving it that strict construction which is always to be applied to penal statutes, my conclusion is, that the language is satisfied by a much narrower application.

(1) The pieces of metal passed by the defendant do not purport to be coins, in the legal definition of the word, but are tokens.

(2) If it should be held that the section makes it a crime to make or utter any pieces of metal, with the intent that the pieces shall serve as a substitute for money, an offence is created which is new and foreign to the law of counterfeiting.

A coin is a piece of metal stamped and made legally current as money. A counterfeit coin is one in imitation of the genuine. The coins known to the law are those authorized to be issued from the mints of the United States, and those of foreign countries current here. The pieces in question are not in imitation of our own coin or of any foreign coin. They are calculated to impose upon the ignorant or unwary, and, if this purpose is effected, the utterer may be guilty of false pretences. If they were passed upon the sole representation that they were issued by the state of California, it is doubtful if a conviction for false pretences could be had, because every person is bound to know that the state of California cannot issue coins. If, instead of the pieces in question, the defendant had passed pieces purporting to bear the stamp of Plato's Republic, he would have been equally as guilty of a criminal offence as he now is.

One of the rules applicable to the offence of counterfeiting is, that the resemblance of the spurious to the genuine coin must be such as that it might deceive a person using ordinary caution, and a conviction cannot be had for uttering pieces of metal which are not in the likeness or similitude of genuine coins. It is not to be presumed that congress overlooked these familiar rules, when legislating 'to punish and prevent the counterfeiting of coin;' and the title of the act is inconsistent with the idea that an offence radically differing from that of counterfeiting was the subject of legislative consideration. Full effect can be given to the language used, without indulging in such a conclusion; and that is, by limiting it to meet cases which frequently occurred, where persons making or uttering coins which purported to be in imitation or similitude of current money of the country could not be convicted because the designs or devices were not those which the law prescribes as the

devices or legends which shall be stamped upon the coin issued from the mints of the United States. These devices or legends are made by statute the authentic evidence of the genuineness of the coins. Where different ones were substituted, the utterer often escaped because the spurious coin was such that it ought not to have deceived, and, theoretically, could not have deceived, a person using ordinary prudence. The act in question remedies this difficulty, and, if the spurious piece purports to be coin of the United States, or of foreign countries, it is one within the statute, although the devices with which it is impressed are so far from a similitude to the genuine as to be of original design.

This conclusion is in harmony with the language employed, and is consistent with the nature of the offence which was the subject of legislation. It is also sustained by the several other acts of congress in *pari materia*. These all relate to the forging of coin in resemblance or similitude of the gold or silver coins coined or stamped at the mints of the United States, or of any foreign gold or silver coin which by law is current in the United States; and the last act of congress upon the subject, and one which was passed subsequent to the act now under consideration, is one which makes it a crime 'to make, issue, or pass any coin, token, or device, in metal or its compounds, which may be intended to be used as money, for any one-cent, two-cent, three-cent, or five-cent piece now or hereafter authorized by law, or for coin of equal value'--an act which was entirely unnecessary if the one in question is to be construed as is now insisted by the counsel for the government. Under the last act a conviction could not be had for uttering a token intended to be used as money, for a four-cent piece or for a coin of equal value. No such coin is known to the coinage of the United States, and, because of this, congress did not attempt to make it an offence to utter such a token. In view of this, the latest, exposition of legislative intent, it would be unreasonable to hold that congress intended, by the former act, to make it a crime to utter a token which does not purport to be in imitation or in substitution of any coin known to the law. For these reasons the defendant must be discharged.

UNITED STATES v. GELLMAN
44 F.Supp. 360 (D.C.MINN. 1942)

Victor E. Anderson, U.S. Atty., and John W. Graff, Asst. U.S. Atty., both of St. Paul, Minn., for plaintiff.

T. W. McMeekin, of St. Paul, Minn., and Maurice Weinstein, of Milwaukee, Wis., for defendants.

NORDBYE, District Judge.

There are fourteen counts in the indictment. The two Gellmans are charged with being principals and the defendants Wilcox Co. and Voorhees with aiding and abetting. The first four counts charge violation of Section 278-- possession and sale of counterfeit five cent coins. Counts 5 to 8 charge violation of Section 277-- possession and sale of ten cent and twenty-five cent counterfeit coins. Counts 9, 10 and 11 charge violation of Section 281-- passing five cent, ten cent and twenty-five cent coins intended for the use and purpose of current money. Counts 12 to 14 charge violation of Section 282-- passing devices in metal intended to be used as money for five, ten and twenty-five cent pieces. It

may be observed that Count 13 refers to ten cent pieces and Count 14 to twenty-five cent pieces. This statute, Section 282, refers only to one cent, two cent, three cent, and five cent pieces. However, in view of the disposition of the charges, the applicability of this statute to coins of the denominations referred to need not be discussed.

The defendants Gellman conduct a wholesale and retail business in Minneapolis, selling amusement and concession merchandise, and among the merchandise handled and sold are tokens and trade checks which were largely purchased from Wilcox Manufacturing Co., of Chicago, Illinois whose business is the manufacture and sale of hospital and hotel supplies and stampings of various types and descriptions. The defendant Voorhees is an officer of the Wilcox Co. These trade checks, or slugs, as they are sometimes called, which form the basis for the charges herein, are in the size and shape of genuine United States five cent, ten cent and twenty-five cent coins. While there is some variance in the metallic contents, and in the weight and diameter of the five cent slugs, the type bearing the closest resemblance to a genuine United States coin was identified as Government's Exhibit A, and this coin may be compared with a genuine five cent coin as follows:

Description Genuine 5 5 cent
and Contents cent coin slug-A

Weight (grains) 77.16 76.30
Diameter (inches) 00.835 00.835
Thickness (inches) 00.078 00.075
Copper (%) 75.00 64.88
Nickel (%) 25.00 17.56
Zinc (%) 00.00 15.21
Cadmium (%) 00.00 02.05
Iron (%) 00.00 00.16

The ten cent slug, in comparison with a genuine ten cent coin, is as follows:

Description Genuine 10 10 cent
and Contents cent coin slug

Weight (grains) 38.58 35.2
Diameter (inches) 00.705 .709
Thickness (inches) 00.051 .051
Copper (%) 10.00 63.65
Silver (%) 90.00 00.00
Nickel (%) 00.00 16.91
Zinc (%) 00.00 19.05

The twenty-five cent slug may be compared with a genuine twenty-five cent coin as follows:

Description Genuine 25 25 cent

and Contents cent coin slug

Weight (grains) 96.45 78.70
Diameter (inches) 00.955 00.951
Thickness (inches) .065 00.065
Copper (%) 10.00 66.95
Silver (%) 90.00 00.00
Nickel (%) 00.00 Trace
Zinc (%) 00.00 32.78

The inscriptions on the three types of slugs vary. On some of the five and ten cent slugs there is inscribed 'Good for Amusement Only,' and on the other side, 'This Token has no Cash or Trade Value.' On either side of the five cent slug of this type is inscribed the numeral 5, which is placed within a diamond-shaped enclosure. The ten cent coin is inscribed with the same inscription, but has the numeral 10 instead of the numeral 5. The other specimens of five cent and twenty-five cent slugs are inscribed 'No Cash Value' and on the reverse side, 'Good for Amusement Only.' No numbers or numerals appear on these slugs. All of these tokens and slugs are made of German silver and are blanked out of regular commercial German silver metal sheets. The Wilcox Co. obtains these metal sheets in the market and manufactures the tokens or slugs as above stated.

There is no contention on the part of the Government that any of these tokens were ever palmed off on any person as genuine United States coins. The resemblance or similitude required by the statute is sought to be established on the theory that these tokens will operate certain vending machines, music boxes, cigarette machines, telephone pay-station boxes, parking meters, and other types of machines which are adapted for use or service by the insertion of certain genuine United States coins.

Sections 277 and 278, T 18 U.S.C.A., read as follows:

'Sec. 277. Counterfeiting gold or silver coins or bars. Whoever shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or shall willingly aid or assist in falsely making, forging, or counterfeiting any coin or bars in resemblance or similitude of the gold or silver coins or bars which have been, or hereafter may be, coined or stamped at the mints and assay offices of the United States, or in resemblance or similitude of any foreign gold or silver coin which by law is, or hereafter may be, current in the United States, or are in actual use and circulation as money within the United States; or whoever shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, knowing the same to be false, forged, or counterfeit, with intent to defraud any body politic or corporate, or any person or persons whomsoever, or shall have in his possession any such false, forged, or counterfeited coin or bars, knowing the same to be false, forged, or counterfeited, with intent to defraud any body politic or corporate, or any person or persons whomsoever, shall be fined not more than \$5,000 and imprisoned not more than ten years.'

'Sec. 278. Counterfeiting minor coins. Whoever shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or shall willingly aid or assist in falsely making, forging, or counterfeiting any coin in the resemblance or similitude of any of the minor coins which have been, or hereafter may be, coined at the mints of the United States; or whoever shall pass, utter, publish, or sell, or bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, or have in his possession any such false, forged, or counterfeited coin, with intent to defraud any person whomsoever, shall be fined not more than \$1,000 and imprisoned not more than three years.'

[1] It will be observed that both of these statutes require that the coin, to be counterfeit, must be in the resemblance or similitude of a genuine United States coin. The slugs or tokens in question are all similar as to weight, diameter and thickness. The five cent coin, Exhibit A, is similar in metallic composition, but manifestly the resemblance of any of the alleged counterfeit coins is not such that these tokens would deceive any person exercising ordinary caution, nor would they deceive 'an honest, sensible, and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest.' *United States v. Weber*, D.C.W.D. Wash. N.D., 210 F. 973, 976. In fact, any school child, or the most illiterate person, would not be duped into accepting any of these slugs or tokens as genuine coins. There are no inscriptions or markings on the face of the coins which even remotely resemble or simulate that which appears on the genuine coins of the denominations referred to. While courts have differed in some degree as to the test which should be applied in determining resemblance or similitude, no court has departed from the test which seeks to determine the possibility or probability of some person being deceived by the passing of the spurious coin. Here, the Government seeks to establish similitude or resemblance because certain vending machines will respond to these metal tokens.

A completely blank slug, composed entirely of iron, or even a certain wire device, might deceive some vending machines, but no one would have the temerity to suggest that such a metal device would be a counterfeit coin within the purview of the statutes referred to. True, there is some resemblance between a blank metal disk the size of a five cent piece and a genuine five cent coin. They are both made of metal. The weight and diameter may be approximately the same, but if we are to apply the test which has been universally applied by the courts for almost a century, it follows that the position of the Government in this regard is not tenable. Reference to the cases will indicate that throughout the courts have determined that, while a counterfeit coin need not be an exact copy, it must be one 'as might deceive an ordinary observer.' *United States v. Aylward*, D.C. Conn. 1853, 24 Fed.Cas. 907, No. 14,482.

'One of the rules applicable to the offence of counterfeiting is, that the resemblance of the spurious to the genuine coin must be such as that it might deceive a person using ordinary caution.' *United States v. Bogart*, D.C.N.Y. 1878, 24 Fed.Cas. 1185, No. 14,617.

' * * * The jury was charged that no conviction could be had unless the coins put in evidence were found to bear such a resemblance to the genuine trade dollar as to render

them capable of being used to deceive a person of ordinary intelligence * * * . The charge was correct.' United States v. Abrams, C.C.S.D.N.Y., 18 F. 823, 824.

' * * * It is not necessary that the resemblance should be exact in all respects. The resemblance is sufficient if the coins are so far alike that the counterfeit coin is calculated to deceive a person exercising ordinary caution and observation in the usual transactions of business.' United States v. Hopkins, D.C.N.C. 1885, 26 F. 443.

'If the imitation or resemblance is such as is capable of imposing on persons of ordinary observation, this would be sufficient; and it is further sufficient if the alleged counterfeit coin bears such resemblance or likeness to the genuine as to be calculated to deceive an honest, sensible and unsuspecting man of ordinary observation and care, dealing with men supposed to be honest. ' Glass v. State, 45 Tex.Cr.R. 605, 78 S.W. 1068, 1069, 108 Am.St.Rep. 980.

[2] No substantial departure will be found in any reported decision from the interpretations above enumerated. It would seem that the mere fact that these tokens are, by reason of this modern mechanical vending age, capable of use for purposes designed primarily for genuine coins, should not justify the substitution of the 'mechanical test' for the discrimination in accepting proffered coins commonly and usually employed by average, prudent persons. There would be no justification for such a strained and unwarranted interpretation of a criminal statute which clearly was not designed to prohibit the manufacture and sale of any metal pieces in the size of a genuine United States coin, unless they bore such resemblance or similitude to genuine coins that they would be likely to deceive some person into accepting them as genuine. The machine test suggested by the Government is not encompassed within the plain purview of the statutes referred to and it follows that these defendants are not guilty of the possession and sale of coins bearing any similitude or resemblance to genuine United States coins. In view of this finding, it does not become necessary to discuss the other element of the statutes, to wit, an intention to defraud.

[3] [4] It is urged, however, that these coins do come within the purview of the prohibition found in Sections 281 and 282, 18 U.S.C.A. These statutes read as follows: 'Sec. 281. Making or uttering coins resembling money. Whoever, except as authorized by law, shall make or cause to be made, or shall utter or pass, or attempt to utter or pass, any coins of gold or silver or other metal, or alloys of metals, intended for the use and purpose of current money, whether in the resemblance of coins of the United States or of foreign countries, or of original design, shall be fined not more than \$3,000, or imprisoned not more than five years, or both.'

'Sec. 282. Making or uttering devices of minor coins. Whoever, not lawfully authorized, shall make, issue, or pass, or cause to be made, issued, or passed, any coin, card, token, or device in metal, or its compounds, which may be intended to be used as money for any 1-cent, 2-cent, 3-cent, or 5-cent piece, now or hereafter authorized by law, or for coins of equal value, shall be fined not more than \$1,000 and imprisoned not more than five years.'

A reading of these sections induces the view that they were primarily adopted to prevent the coining of money in competition with the United States; resemblance or similitude is not necessarily an element. The United States has the sole power to coin money under the Constitution, and if anyone, individual or State, assumes to supplant the medium of exchange adopted by our Government, or assumes to compete with the United States Government in this regard, a violation of these statutes would follow. Undoubtedly, no one can interfere with the monopoly which this Government has obtained by reason of the Constitutional provisions without running afoul of these statutes. If one manufactures a coin, a five cent piece, for instance, in an oblong shape, and although much larger than a genuine five cent piece, for the purpose of circulation as money within any area of the United States, a violation would occur. But the intentment must be that the coin shall be 'for the use and purpose of current money' under Section 281, and 'to be used as money' under Section 282.

Now, money is a medium of exchange. It is something which has general exchangeability as such. Obviously, these tokens or slugs were never intended for circulation as money. The very inscriptions-- 'No Cash Value'-- 'For Amusement Purposes Only'-- dispel any doubt in that regard. There is no promise to pay money or anything of value, either impliedly or by reason of any express inscription on the coin.

In *United States v. Roussopolous*, D.C. Minn., 95 F. 977, 978, where the court considered certain trade checks with the name 'Clark & Boice Lumber Co., 1898, Jefferson Texas,' and on the other side, 'Good for 50c in Merchandise,' Judge Lochren used language as follows:

' * * * It does not purport to be a piece of money, or an obligation to pay money, and the obligation expressed is in terms solvable in merchandise. It cannot, therefore, have been intended to circulate as money, or to be received and used in lieu of lawful money, and does not come within the prohibition of section 3583, Rev. St. U.S.' 18 U.S.C.A. § 293.

The Government contends, however, that, because these tokens are used in place of money in various types of vending machines, and because the defendants knew that they could be used for such purpose, the tokens or slugs were actually used in place of money, and that therefore a violation of the statute occurs. In this regard, it may be stated that the defendants contend that they assumed that the tokens were primarily used by amusement and vending machine operators to stimulate business. The evidence fairly supports the contention that many concerns purchase these tokens for such purposes.

On the other hand, however, there cannot be much doubt that all of the defendants knew of the probability of the use of such tokens by persons who defraud the owners of such machines. Gellman Bros. sold these tokens in quantities of one hundred to anyone who might desire to make the purchase, and no attempt was made by them to determine the purposes for which the tokens were obtained. That owners of vending machines, telephone pay stations and parking meters in this area are defrauded of thousands of dollars every year by the use of tokens or slugs similar to these here involved has been clearly established by the evidence. Furthermore, that these tokens could be used in place

of money in operating vending machines is conceded. The menace and the monetary loss to legitimate enterprises by reason of the manufacture and sale of such tokens is apparent. However, notwithstanding the fraud that has arisen by reason of the manufacture, sale and circulation of slugs similar to those which form the basis of this indictment, it must be recognized that many tokens or slugs have a so-called legitimate connection with certain types of amusement machines.

For instance, the ordinances of the City of Minneapolis, passed October 25, 1935, and the City of St. Paul, passed September 11, 1941, assume to permit the licensing of mechanical amusement devices operated by coins or slugs which return to the player slugs or tokens similar to those herein identified, when such slugs or tokens are used in the machines so licensed. That is, the ordinances were apparently enacted to permit machine operators to enable the users of such machines to obtain as prizes the right to replay the same by receiving and using slugs or tokens in the event certain scores or results were obtained by such users. Furthermore, it does appear that certain operators of amusement machines have purchased tokens from time to time from these defendants for the purpose of demonstrating their machines and to stimulate business. Then, again, there are instances where these slugs are purchased for legitimate purposes by concerns or individuals who, by courtesy, permit their employees or others to operate certain amusement or vending machines and who do not, therefore, desire to distribute genuine coins for such purposes.

While this Court is not unmindful of the menace and nuisance which has arisen by reason of the indiscriminate manufacture and sale of such tokens or slugs, it would seem that the mere adaptability of such tokens for use in the place of genuine coins in the operation of these machines, whether with or absent consent of the owner, does not justify a finding that these tokens are manufactured or sold by these defendants for the use or purpose of current money, or as a medium of exchange.

In *United States v. Van Auken*, 96 U.S. 366, 367, 24 L.Ed. 852, the Supreme Court considered the Act of Congress of July 17, 1862, Sec. 2, 12 Stat. 592; Rev. Stat. p. 711, Sec. 3583, 18 U.S.C.A. § 293, which declares that 'no private corporation, banking association, firm, or individual shall make, issue, circulate, or pay out any note, check, memorandum, token, or other obligation, for a less sum than one dollar, intended to circulate as money, or to be received or used in lieu of lawful money of the United States.' The defendant was indicted under this Act for circulating an obligation which read as follows: 'Bangor, Mich., Aug. 15, 1874. The Bangor Furnace Company will pay the bearer, on demand, fifty cents, in goods, at their store, in Bangor, Mich.' This obligation was signed by the president and the treasurer. A demurrer was interposed to the indictment and was sustained, the court stating with reference to the statute under which the indictment was brought (96 U.S. page 368, 24 L.Ed. 852):

'It is certainly inapplicable to any thing not measurable by the pecuniary standard. It could not be applied where the measurement was to be, *ex gratia*, by the pound, the gallon, the yard, or any other standard than money.'

And, further: ' * * * It is not payable in money, but in goods, and in goods only. No money could be demanded upon it. It is not solvable in that medium.'

[5] Funk & Wagnall's Dictionary defines 'money' in part as follows: 'Any material that by agreement serves as a common medium of exchange and measure of value in trade.' It quotes from J. M. Gregory's Political Economy, p. 253, wherein the author states that the 'essential, natural functions of money may be stated as including these three: 1. It is a commodity-- having a value of its own. 2. It is a common measure of values. 3. It has general exchangeability, and is, hence, a general medium of exchange.' While historically speaking, and in a comprehensive sense, many commodities have been used as a medium of exchange, one cannot reconcile the adaptability of certain metal devices in operating mechanical machines in place of money as fulfilling the requirements of a medium of exchange, as that term is commonly and generally understood. The difficulty is that this indictment seeks to charge the defendants with an offense under statutes which were enacted over one hundred years ago when vending machines probably did not exist. They were never framed to embrace the use of metal tokens as a substitution for money in the limited sense referred to.

While the Court is not unmindful that there should be some curb on the fraud that is being perpetrated by the use of these slugs or tokens, relief must be sought from Congress and not from the courts. The State of Minnesota has recently passed an act, Chapter 132, House File No. 270, approved April 9, 1941, which prohibits the manufacture, sale, offering for sale, advertising for sale, or distribution of tokens, checks or slugs for use in lieu of lawful coin in vending machines, parking meters, service meters, coin boxes, telephones or other coin receptacles. No doubt Congress would have authority to extend the statutory prohibitions regarding the use of coins or tokens in the manner referred to herein. A criminal statute must be strictly construed, and to apply these statutes to the factual situation disclosed by this evidence would be entirely unwarranted.

Therefore, in harmony with the views herein indicated, it follows that the defendants and each of them are not guilty of any of the counts set forth in the indictment. It is so ordered.

UNITED STATES. v. YEATTS
639 F.2d 1186 (C.A.Ga., 1981)

Defendant was convicted in the United States District Court for the Northern District of Georgia, Robert L. Vining, Jr., J., of possession of counterfeit gold coins with intent to defraud and he appealed. The Court of Appeals, Frank M. Johnson, Jr., Circuit Judge, held that: (1) fact that gold coins were no longer current does not remove them from coverage of statute prohibiting possession of counterfeit coins with intent to defraud; (2) Congress has the power under the necessary and proper clause to prohibit possession of gold coins with intent to defraud even though they are no longer current; and (3) evidence sustained finding that defendant possessed the coins with intent to defraud. Affirmed.

Edward T. M. Garland, Atlanta, Ga., for defendant-appellant.
William L. Harper, U. S. Atty., William R. Toliver, Asst. U. S. Atty., Atlanta, Ga., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Georgia.

FRANK M. JOHNSON, Jr., Circuit Judge:

Appellant H. Coleman Yeatts was convicted, after trial by jury, for possession of counterfeit United States gold coins with intent to defraud in violation of 18 U.S.C.A. s 485.[FN1] He appeals, urging four grounds of error. First, he claims that the trial court erred in denying his motion for judgment of acquittal notwithstanding the verdict. Second, he contends that possession of counterfeit United States gold coins with intent to defraud is not a criminal offense within the meaning of Section 485. Third, he argues that the evidence was insufficient to show that he had the requisite intent to defraud. Last, he contends that the jury instructions constituted plain error by permitting the jury to consider evidence outside the record. We find no reversible error and accordingly affirm.

FN1. Title 18 U.S.C.A. s 485 provides:

Whoever falsely makes, forges, or counterfeits any coin or bar in resemblance or similitude of any coin of a denomination higher than 5 cents or any gold or silver bar coined or stamped at any mint or assay office of the United States, or in resemblance or similitude of any foreign gold or silver coin current in the United States or in actual use and circulation as money within the United States; or

Whoever passes, utters, publishes, sells, possesses, or brings into the United States any false, forged, or counterfeit coin or bar, knowing the same to be false, forged, or counterfeit, with intent to defraud any body politic or corporate, or any person, or attempts the commission of any offense described in this paragraph

Shall be fined not more than \$5,000 or imprisoned not more than fifteen years, or both.

Yeatts is a professional coin and stamp dealer. He was a booth holder at a stamp trade show in Atlanta on February 24, 1978, when he offered to sell what appeared to be 10 to 15 United States gold coins to another booth holder, Harold Miller. Miller, also a professional coin and stamp dealer, was suspicious of the authenticity of the coins and questioned Yeatts about them. Yeatts admitted to Miller that he knew that those coins were counterfeit. Yeatts also indicated that he sold those types of coins to the "jewelry trade" and to other people who were not aware of the true nature of such coins. Yeatts then told Miller that he had given Miller the wrong group of coins and showed Miller another group of coins. Miller, again suspicious, questioned Yeatts about the authenticity of the second group of coins. Yeatts admitted that those coins were also probably counterfeit but stated that he felt that the coins were "good enough to pass." Miller then contacted his office in Atlanta.

Two government agents arrived at the stamp show and went to Yeatts' booth and asked him to step into the hallway. When they told Yeatts that they were investigating information that he possessed counterfeit coins, Yeatts told the agents that he was not

aware that he possessed any counterfeit coins. The agents then asked Yeatts to show them the coins that he had and Yeatts went to his booth and returned to the hallway carrying 8 to 10 coins. When asked if he had any more coins, Yeatts admitted that he did and also admitted that he had been told by another dealer that the other coins might be counterfeit.

Yeatts then returned to his booth, accompanied by one of the agents. That agent observed Yeatts attempt to hide some of the coins, which were in two stacks in a box on the floor of the booth. Yeatts pushed one stack to a corner of the box and removed only one stack, and then started to leave the booth. Yeatts took the second stack out of the box only after the agent pointed out that he had forgotten one stack. Yeatts took the coins, about 35 in all, into the hallway where Miller examined them and stated that 27 of them appeared to be counterfeit. Yeatts surrendered the 27 coins to the agents.

Subsequent testing of the coins by the United States Bureau of Mint disclosed that the coins were indeed counterfeit.[FN2]

FN2. The coins in question were all in resemblance and similitude of genuine United States gold coins in the following denominations: \$1.00 gold pieces; \$2.50 Liberties; \$5.00 Indians; and \$10.00 Indians.

Appellant filed a motion for judgment of acquittal notwithstanding the verdict on February 20, 1980. However, he failed to accompany his motion with a memorandum of law citing supporting authorities and allegations of fact relied upon and required by the local rules of the district court.[FN3] On March 27, 1980, the date of sentencing, appellant's counsel inquired about the status of the motion and the district court instructed him to supply the required memorandum by the following Friday, April 4, 1980. The court stated that it would reserve its ruling until it had reviewed appellant's supporting memorandum. There is no indication in the record that appellant ever filed such a memorandum. As a result of appellant's omission, no final order with respect to this motion was entered on the docket.

FN3. United States District Court for the Northern District of Georgia Local Rule 9.1.

(1) Because appellant declined to pursue at the trial court level his motion for judgment of acquittal notwithstanding the verdict by failing to comply with the local rules of the district court, appellant effectively abandoned his motion. See *United States v. Mireles*, 570 F.2d 1287, 1290 (5th Cir. 1978) (where defense counsel failed to request ruling on motion to suppress evidence or move for directed verdict of acquittal and no ruling was ever made, defendant effectively abandoned suppression motion). Failure to reach this issue, which is not properly before the Court, will not foster a manifest miscarriage of justice since, after carefully reviewing the record for plain error, we conclude that no plain error was committed. See Fed.R.Crim.P. 52(b). Even if we review the evidence under a less stringent standard of review, as we will demonstrate in our discussion of appellant's contentions regarding the sufficiency of the evidence, we conclude that appellant's conviction is fully supported by the evidence.

Appellant contends that because, under United States law, gold coins may no longer be

minted, circulated, or recoined, nor may they be used to pay any obligation, gold coins are no longer coins of the United States within the meaning of 18 U.S.C.A. s 485.

(2) (3) We are aided in the interpretation of Section 485 by several principles of statutory construction. A federal criminal statute should be construed narrowly in order to encompass only that conduct that Congress so intended to criminalize. *Dunn v. United States*, 442 U.S. 100, 112, 99 S.Ct. 2190, 2191, 60 L.Ed.2d 743 (1979). A basic canon of statutory construction is that words should be interpreted as taking their ordinary and plain meaning. *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1980). We must assume that Congress used the words of the statute as they are commonly and ordinarily understood. *United States v. Porter*, 591 F.2d 1048, 1053 (5th Cir. 1979). A statute should ordinarily be interpreted according to its plain language, unless a clear contrary legislative intention is shown. *United States v. Apfelbaum*, 445 U.S. 115, 121, 100 S.Ct. 948, 952, 63 L.Ed.2d 250 (1980).

(4) After carefully considering the language of Section 485, we conclude that counterfeit United States gold coins are within the scope of that section.

The word "coin" in Section 485, with respect to the counterfeiting of any coins in resemblance and similitude of any gold or silver United States coin, is not expressly qualified or restricted in such a manner as to require that the counterfeit coin be in resemblance or similitude of a coin which is a current United States coin or which is legal tender. However, paragraph one of that section specifically limits the scope of the statute, with respect to counterfeit foreign gold and silver coins, to coins "in resemblance or similitude of any foreign gold or silver coin current in the United States or in actual use and circulation as money within the United States."

We believe that Congress' failure to expressly restrict the scope of Section 485 with respect to counterfeit gold or silver United States coins to current coins or legal tender is significant. The language of the section indicates that Congress intended to cover the counterfeiting of any gold coin which was stamped or coined by a United States mint.[FN4] The coins at issue in this case clearly fall within the language of Section 485: "any coin ... in resemblance or similitude of any coin of a denomination higher than 5 cents ... coined at any mint or assay office of the United States." 18 U.S.C.A. s 485. The second paragraph of Section 485 does not require that United States coins be composed of a particular metal, nor are gold coins specifically excluded.

FN4. Former Section 277, 18 U.S.C. s 277 (1940), from which the present Section 485 is derived, prohibited the counterfeiting of "any coin or bars in resemblance or similitude of the gold or silver coins or bars which have been, or hereafter may be, coined or stamped at the mints and assay offices of the United States."

Yeatts argues that gold coins, which were formerly minted in the United States and then withdrawn from circulation by the Gold Reserve Act of 1934 [FN5] are no longer legal tender and, therefore, no longer coins of the United States. Section 485, however, does not require that gold coins be current legal tender.

FN5. Gold Reserve Act of 1934, ch. 6, 48 Stat. 337 (codified in scattered sections of 12, 31 U.S.C.A.). See 31 U.S.C.A. s 440.

Title 18 U.S.C.A. s 486 prohibits the making, uttering or passing of any coins made of gold, silver, or any other metal or alloy of metals "intended for use as current money." This Circuit held that former Section 281 of Title 18, upon which the present Section 486 is based, did not repeal former Section 277 of Title 18, upon which the present Section 485 is based. *Curran v. Sanford*, 145 F.2d 229, 230 (5th Cir. 1944). This Court stated that former Sections 281 and 277 define similar but not identical offenses. Had Congress intended to restrict present Section 485 to "current money" of the United States, or to coins in actual use and circulation as money within the United States, or to legal tender, we believe that it would have so stated in the statute.[FN6]

FN6. See *United States v. Mock*, 143 F.Supp. 661, 663-64 (N.D.Cal.1956).

Section 485 was revised by Congress on June 25, 1948, ch. 645, 62 Stat. 708, and again on July 23, 1965, Pub.L. 89-91, 79 Stat. 257. On neither occasion did Congress choose to indicate that this section was restricted to current coins or legal tender. Pub.L. 89-91, the 1965 amendments, deleted "Gold or silver" preceding "Coins or bars" in the section catch line, changed the description of the United States coins covered in the first paragraph from gold or silver coins to any coin of a denomination higher than five cents, and made minor structural changes in the second paragraph. The 1965 amendments were made in order to cover coins of any denomination in excess of five cents, thus including "clad" coins which are made of a copper core between layers of cupro-nickel. The purpose of those amendments was to expand the scope of Section 485 to include clad coins. H.R.Rep.No.509, 89th Cong., 1st Sess. 2, reprinted in (1965) U.S.Code Cong. & Ad.News 2299, 2310.

(5) Appellant also argues that the application of the prohibitions of Section 485 to gold coins is unconstitutional. He contends that because gold coins are not current they are not subject to regulations under U.S.Const. Art. I, s 8, cl. 6, which empowers Congress to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States." Appellant's argument is without merit. Article I, s 8, cl. 18, grants Congress the power to "make all laws which shall be necessary and proper for carrying into Execution" the specific legislative powers granted to Congress by Article I, s 8 itself. We hold that Congress had the constitutional power, under Art. I, s 8, cl. 6, and the necessary and proper clause, Art. I, s 8, cl. 18, to enact 18 U.S.C.A. s 485, thus prohibiting the counterfeiting of gold coins which are no longer in circulation as current coins. Congress had a rational basis for protecting the integrity of non-current gold United States coins. Such coins have value in that the owner may redeem gold coins for current money. These coins also have historic and numismatic value.

To determine whether the evidence is sufficient to support a guilty verdict, we must view the evidence in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), and all credibility choices must be considered

in support of the jury verdict. *United States v. Conway*, 632 F.2d 641, 643 (5th Cir. 1980). The standard of review for the sufficiency of the evidence supporting a guilty verdict is whether a reasonably minded jury must necessarily entertain a reasonable doubt of the defendant's guilt. *United States v. Kelley*, 630 F.2d 302, 303 (5th Cir. 1980).

(6) Appellant contends that no intent to defraud on the part of appellant was proved. However, the record in this case reveals clear evidence of Yeatts' intent to defraud. Yeatts initially offered the counterfeit coins to Miller without admitting to Miller that they were counterfeit; it was only after Miller asked about the authenticity of the coins that Yeatts admitted that the coins were counterfeit. Additionally, Yeatts was evasive in response to questions posed by the government agents and attempted to conceal some of the counterfeit coins from them. These circumstances, particularly Yeatts' admission to Miller, offer sufficient evidence of appellant's intent to defraud.

(7) (8) Appellant argues that the trial judge erred by giving a jury instruction that permitted the jury to consider evidence *1191 outside the record.[FN7] Appellant's argument is based on one portion of the instruction, taken out of context. The district court merely instructed the jurors that they could draw from the facts in evidence such reasonable inferences as they found justified in the light of experience. It is well settled that a jury may draw reasonable inferences from the evidence presented in the case. See *United States v. Gainey*, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1964). The district court specifically charged the jury to consider only the evidence admitted in the case, and further charged them not to consider any evidence to which an objection was sustained, which was ordered stricken from the record, or which may have been seen or heard outside the courtroom.

FN7. The trial judge gave the following jury instruction:

The evidence in the case consists of the sworn testimony of the witnesses, regardless of who may have called them, and it consists also of the exhibits received in evidence, regardless of who may have produced them.

Any evidence as to which an objection was sustained by the court, and any evidence ordered stricken by the court, must be entirely disregarded. Anything you may have seen or heard outside the courtroom is not evidence, and must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw from the facts which you find have been proved, such reasonable inferences as you feel are justified in the light of experience.

(9) In reviewing the adequacy of a challenged jury instruction, this Court must view the charge in its entirety and determine whether, taken as a whole, the issues and the law presented to the jury were adequate. *United States v. Abravaya*, 616 F.2d 250, 251 (5th Cir. 1980); *United States v. Brooks*, 611 F.2d 614 (5th Cir. 1980). However, where, as

here, no objection to the instruction was made at trial as required by Fed.R.Crim.P. 52(b), this Court may reverse only if plain error was present. *United States v. Abravaya*, supra, 616 F.2d at 251. The jury instructions were not in error and, taken as a whole, were clearly adequate.

UNITED STATES. v. FALVEY
676 F.2d 871 (C.A.Me., 1982)

Margaret D. McGaughey, Asst. U. S. Atty., Portland, Maine, with whom Richard S. Cohen, U. S. Atty., Portland, Maine, was on brief, for appellant.
Willie J. Davis, Boston, Mass., for defendant, appellee.

LEVIN H. CAMPBELL, Circuit Judge.

This case presents questions of first impression concerning the applicability of certain federal counterfeiting statutes to foreign coins. Richard Falvey, Anthony Webster, and Rudy Zoffoli were charged with violations of 18 U.S.C. ss 485, 486, and with conspiracy. The indictment alleged that they had possessed with intent to defraud and had uttered counterfeit Krugerrands, which are gold coins current in South Africa but not in the United States. Falvey pleaded guilty to the possession charge, and Webster and Zoffoli went to trial in the United States District Court for the District of Maine. At the close of the government's case, the court granted the defendants' motions for judgments of acquittal on the ground that sections 485 and 486 did not reach counterfeiting conduct with respect to foreign coins not current or in actual use and circulation as money in the United States.

Falvey then brought motions to withdraw his guilty plea and to dismiss the indictment, based on the court's ruling with respect to his co-defendants. The government and Falvey stipulated that Krugerrands are neither current nor in actual use and circulation as money within the United States.[FN1] The district court granted the motions, incorporating its earlier ruling from the trial. The government then brought this appeal.

FN1. While the government asserted in its brief and at oral argument before this court that it stipulated only that the coins are not current here, the record is quite clear that it also stipulated to the "use and circulation as money" provision.

I.

(1) 18 U.S.C. s 485 currently reads as follows:

Whoever falsely makes, forges, or counterfeits any coin or bar in resemblance or similitude of any coin of a denomination higher than 5 cents or any gold or silver bar coined or stamped at any mint or assay office of the United States, or in resemblance or similitude of any foreign gold or silver coin current in the United States or in actual use and circulation as money within the United States; or

Whoever passes, utters, publishes, sells, possesses, or brings into the United States any false, forged, or counterfeit coin or bar, knowing the same to be false, forged, or counterfeit, with intent to defraud any body politic or corporate, or any person, or

attempts the commission of any offense described in this paragraph-
Shall be fined not more than \$5,000 or imprisoned not more than fifteen years, or both.

Falvey was charged with possession under the second paragraph. At first blush, this would seem to reach Krugerrands, as it refers to "any false, forged, or counterfeit coin or bar." As Chief Judge Gignoux recognized in his careful bench ruling, however, the earlier versions and legislative history of this statute make it clear that the scope of the second paragraph must be read identically with that of the first. We therefore *873 affirm the decision below that the only foreign coins covered by the second paragraph are those "current ... or in actual use and circulation as money within the United States." [FN2]

FN2. As the parties stipulated that Krugerrands did not meet either of these requirements, we are not presented with the question of what might be needed to satisfy them.

Section 485 was last amended in 1965. Its various predecessor versions may be traced back to Act of April 21, 1806, ch. 49, s 1, 2 Stat. 404. The 1806 version clearly restricted the scope of the second part of the statute to that of the first:

(I)f any person shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly aid or assist, in falsely making, forging or counterfeiting, any gold or silver coins, which have been or which hereafter shall be coined at the mint of the United States, or who shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting any foreign gold or silver coins, which, by law now are or hereafter shall be made current, or be in actual use and circulation as money within the United States; or who shall utter, as true, any false, forged, or counterfeited coins of gold or silver, as aforesaid, for the payment of money, with intention to defraud any person or persons, knowing the same to be falsely made, forged or counterfeited; any such person, so offending, shall be deemed and adjudged guilty of felony, and being thereof convicted according to the due course of law, shall be sentenced to imprisonment, and kept at hard labour for a period not less than three years, nor more than ten years; or shall be imprisoned not exceeding five years, and fined not exceeding five thousand dollars.

Throughout its long history and many changes, the statute had up until 1965 explicitly referred back to the first part in describing the coins covered by the second. See Act of March 3, 1825, ch. 65, s 20, 4 Stat. 121; Act of February 12, 1873, ch. 131, s 61, 17 Stat. 434; Act of January 16, 1877, ch. 24, 19 Stat. 223; Rev.Stat.U.S. s 5457 (2d ed. 1878); Criminal Code, Act of March 4, 1909, Pub.L.No. 350, ch. 321, s 163, 35 Stat. 1119; Criminal Code, Act of June 25, 1948, Pub.L.No. 772, ch. 645, s 485, 62 Stat. 708. It was recognized as early as 1832 that this statute did not reach the counterfeiting of foreign coins without limitation. See H.R.Doc.No. 214, 22d Cong., 1st Sess. (1832); H.R.Doc.No. 258, 23d Cong., 1st Sess. (1834).

Perhaps the most clearly worded version of the statute is from 1873:

(I)f any person or persons shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting, any coin or bars in resemblance or similitude of the gold or silver coins or bars, which have been, or hereafter may be, coined or stamped at the mints and assay-offices of the United States, or in resemblance or similitude of any foreign gold or silver coin which by law is, or hereafter may be made, current in the United States, or are in actual use and circulation as money within the United States, or shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the United States from any foreign place, or have in his possession, any such false, forged, or counterfeited coin or bars, knowing the same to be false, forged, or counterfeited, every person so offending shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine not exceeding five thousand dollars, and by imprisonment and confinement at hard labor not exceeding ten years, according to the aggravation of the offense.

The "such," of course, limits the second part of the statute to those coins covered in the first part. It remained in the statute up to and including the 1948 version. While the wording changed slightly from 1873 through 1948, there was never any indication of an intention to change this function of the word "such." In 1877, for example, the statute was changed to read as follows:

Every person who falsely makes, forges, or counterfeits, or causes or procures to be falsely made, forged, or counterfeited, or willingly aids or assists in falsely making, forging, or counterfeiting any coin or bars in resemblance or similitude of the gold or silver coins or bars which have been, or hereafter may be, coined or stamped at the mints and assay-offices of the United States, or in resemblance or similitude of any foreign gold or silver coin which by law is, or hereafter may be, current in the United States, or are in actual use and circulation as money within the United States, or who passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or bring into the United States from any foreign place, knowing the same to be false, forged, or counterfeit, with intent to defraud any body politic or corporate, or any other person or persons whatsoever, or has in his possession any such false, forged or counterfeited coin or bars, knowing the same to be false, forged or counterfeited, with intent to defraud any body politic or corporate, or any other person or persons whatsoever, shall be punished by a fine of not more than five thousand dollars, and by imprisonment at hard labor not more than ten years.

This change was intended solely to add the intent to defraud requirement. See 4 Cong.Rec. 4232 (1876); 5 Cong.Rec. 521 (1877). While the wording was thereby made considerably more awkward, we read the word "such" as still performing the same limitation function as it did prior to 1877. Only very minor changes were made in 1909 as part of the general revision and codification of the criminal laws. See S.Rep.No. 10, 60th Cong., 1st Sess. (1908); H.R.Rep.No. 2, 60th Cong., 1st Sess. (1908). Again, only minor changes were made (including division into paragraphs) in 1948, as part of the enactment of title 18 of the United States Code into positive law. See H.R.Rep.No. 304, 80th Cong., 1st Sess. (1947); S.Rep.No. 1620, 80th Cong., 2d Sess. (1948). As of 1948, then, the statute read as follows:

Whoever falsely makes, forges, or counterfeits any coin or bars in resemblance or similitude of the gold or silver coins or bars coined or stamped at the mints and assay offices of the United States, or in resemblance or similitude of any foreign gold or silver coin current in the United States, or are in actual use and circulation as money within the United States; or

Whoever passes, utters, publishes or sells, or attempts to pass, utter, publish, or sell, or bring into the United States, from any foreign place, knowing the same to be false, forged, or counterfeit, with intent to defraud any body politic or corporate, or any person, or possesses any such false, forged, or counterfeited coin or bars, knowing the same to be false, forged, or counterfeited, with intent to defraud any body politic or corporate, or any person-

Shall be fined not more than \$5,000 or imprisoned not more than fifteen years, or both.

Thus, up until the 1965 amendment, this statute had for over 150 years expressly limited its scope with respect to foreign coins to those current or in actual use and circulation as money within the United States.[FN3] In 1965, section 485 was amended by the Coinage Act, July 23, 1965, Pub.L.No. 89-81, s 211(a), 79 Stat. 257. The purpose of this act was to authorize the minting and use of non-silver coins in order to conserve the nation's silver supply. See S.Rep.No. 317, 89th Cong., 1st Sess. 1 (1965); H.R.Rep.No. 509, 89th Cong., 1st Sess. 1 (1965), U.S.Code Cong. & Admin.News 1965, p. 2299. Section 485 was changed because it had theretofore applied only to gold and silver coins; the change made it applicable to the new United States coins authorized by the Coinage Act. Thus, the House report states,

FN3. In fact, the 1825 version was even stricter, referring only to foreign coins current here. See *United States v. Gardner*, 35 U.S. (10 Pet.) 618, 9 L.Ed. 556 (1836). The 1873 version reinserted the use and circulation provision.

Section 485 of title 18 of the United States Code makes it a felony to counterfeit silver coins. Section 211 of the bill amends it to cover coins of any denomination in excess of 5 cents, thus covering coins of the same denomination as existing law, but describing them in terms which make their composition irrelevant.

The Senate report also makes this clear:

Section 211(a) would make necessary changes in the counterfeiting laws to assure they will be applicable to the new coins in the same terms as they were applicable to the present subsidiary coins. As in the case of current coins, the counterfeiting of the new coins will carry penalties of a fine of \$5,000 or 15 years' imprisonment, or both.

These are the only references to section 485 in the legislative history. [FN4] From this slender reed, the government constructs its argument that in 1965, Congress intended, in a minor provision of an act with an entirely different purpose, to make a major change in a statute dating back to 1806. We cannot accept such an argument.

FN4. While the government might conceivably have access to sources of legislative history not publicly available, it has not presented any such evidence in support of its argument concerning the intent of Congress in its 1965 amendment of section 485, and we therefore assume that none is extant.

(2) Section 485 was, to be sure, rather extensively rephrased in 1965. But in the complete absence of any evidence that the rewording was aimed at bringing about substantive changes other than the one expressly reflected in the legislative history, the most plausible explanation of the revised phraseology is that it was simply intended to eliminate the awkwardness of expression that was introduced in 1877 and carried through the 1948 version. The draftsman, we surmise, merely sought to "clean up the language"- falling into the trap, as can easily occur where statutory language is rephrased, of unintentionally suggesting a substantive change. In light of the history of this statute and the absence of any indication of an intention in 1965 to change its scope, it would be anomalous to read the amended statute as broader in coverage than its predecessors (except, of course, with respect to non- silver U.S. coins, the change intended in the Coinage Act). Cases construing changes in statutory language tend to rely in part on evidence of congressional intent or at least attention to the change in deciding whether to give the change its literal effect. See generally *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979); *Bush v. Oceans International*, 621 F.2d 207 (5th Cir. 1980); *Pena-Cabonillas v. United States*, 394 F.2d 785 (9th Cir. 1968). In the absence of these factors, courts are not bound to read a statute literally in a manner entirely at odds with its history and apparent intent.

Indeed, even the present language of section 485 taken alone does not compel the conclusion pressed by the government. While the statute now literally punishes possession of "any" counterfeit coin, certainly some limitation must be read into it: we have found no evidence throughout the history of the statute of an intention to punish counterfeit ancient Greek or Roman coins, for example. Cf. *United States v. Gertz*, 249 F.2d 662, 664-65 (9th Cir. 1957). Given the necessity of reading some limitation into the second paragraph, it is most reasonable, especially in light of the history of the statute, to find that limitation in the first paragraph of the same statute.[FN5]

FN5. In a recent case, the Fifth Circuit implicitly assumed that the scope of the second paragraph of section 485 was identical to that of the first. See *United States v. Yeatts*, 639 F.2d 1186, cert. denied, 452 U.S. 964, 101 S.Ct. 3115, 69 L.Ed.2d 976 (1981). The court noted that the 1965 amendment made "minor structural changes" in the second paragraph. *Id.*, at 1190 n.6.

II.

(3) Section 486 presents a different, although related, problem of construction. It currently reads as follows:

Whoever, except as authorized by law, makes or utters or passes, or attempts to utter or pass, any coins of gold or silver or other metal, or alloys of metals, intended for use as current money, whether in the resemblance of coins of the United States or of foreign

countries, or of original design, shall be fined not more than \$3,000 or imprisoned not more than five years, or both.

18 U.S.C. s 486 (enacted, Criminal Code, Act of June 25, 1948, Pub.L.No. 772, ch. 645, s 486, 62 Stat. 709).

The issue presented is whether the coins covered by section 486 must be "intended for use as current money" in the United States, or whether their currency anywhere is sufficient. Again, we agree with the district court that the former construction is correct, and that on the facts stipulated below, the statute does not reach Falvey's conduct. Section 486 may be traced back substantially unchanged through a 1909 codification, Criminal Code, Act of March 4, 1909, Pub.L.No. 350, ch. 321, s 167, 35 Stat. 1120, and an 1873 codification, Rev.Stat.U.S. s 5461, to its enactment in 1864, Act of June 8, 1864, ch. 114, 13 Stat. 120. We have been unable to find any version prior to this, nor is there any indication in the legislative history that the 1864 version was an amendment of a previous statute. We therefore assume that this is indeed its earliest appearance. The 1864 statute reads as follows:

(I)f any person or persons, except as now authorized by law, shall hereafter make, or cause to be made, or shall utter or pass, or attempt to utter or pass, any coins of gold or silver, or other metals or alloys of metals, intended for the use and purpose of current money, whether in the resemblance of coins of the United States or of foreign countries, or of original design, every person so offending shall, on conviction thereof, be punished by fine not exceeding three thousand dollars, or by imprisonment for a term not exceeding five years, or both, at the discretion of the court, according to the aggravation of the offense.

As in the present version, there is no explicit qualifier of the phrase "current money." No substantive changes were made with respect to the statute's scope in any subsequent versions. See S.Rep.No.10, 60th Cong., 1st Sess. (1908); H.R.Rep.No.2, 60th Cong., 1st Sess. (1908); H.R.Rep.No.304, 80th Cong., 1st Sess. (1947); S.Rep.No.1620, 80th Cong., 2d Sess. (1948). We may, therefore, look to the intention of Congress in the original 1864 enactment in order to understand the scope of the present section 486.

For several reasons, we believe that Congress intended the statute only to reach coins intended for use as current money in the United States. While the legislative history is sparse, what little we have been able to uncover evinces only a concern with coins used in the United States. The bill was referred to in Congress as one "to punish and prevent the counterfeiting of coin of the United States," 136 Cong.Globe, 38th Cong., 1st Sess. 2707 (1864) (emphasis added), and it was captioned as such in Statutes at Large, 13 Stat. 120. There is no reference to applicability to foreign money as such. Rather, the primary concern of Congress seems to have been with the prohibition of private systems of coinage created for use in competition with the official United States coinage. See *United States v. Gellman*, 44 F.Supp. 360, 364 (D.Minn.1942); cf. *Curran v. Sanford*, 145 F.2d 229 (5th Cir. 1944) (sections 485 and 486 define separate offenses).

This conclusion is buttressed by the "except as authorized by law" proviso, which in context seems to refer to the possibility that some entity other than the federal

government might be permitted by law to issue and use unofficial coinage. It is also supported by the complete absence of an intent to defraud requirement. It is unlikely that Congress would punish the use of unofficial coins of another country here in the United States in the absence of any intent to defraud, unless those coins were being used as a medium of exchange here. A comparison with other statutes, where Congress specifically made criminal the making and uttering of foreign monetary instruments not necessarily in circulation here, is also instructive, for they do contain express intent to defraud requirements. See 18 U.S.C. ss 478, 479, 482, 483. They were also motivated in part by congressional concern that this country was being used as a sort of safe harbor in which counterfeit foreign paper was being printed; this was especially troublesome because some official foreign monetary instruments were actually printed here in the United States. See H.R.Rep.No.1329, 48th Cong., 1st Sess. (1884). There is no evidence of such international concerns behind section 486.

(4) The very broad implications of the government's suggested reading of section 486 also support our conclusion. We think it unlikely, for example, that Congress intended to proscribe the making of coins "of original design" that were not intended for use as money in the United States. Otherwise, we would be placed in the position of protecting the integrity of foreign currency from unofficial coinage that did not even resemble it, and without any direct relationship to our own monetary system. While Congress could do this if it wished, we are loath to adopt such an expansive reading of this statute in the absence of even a glimmer of supporting legislative history. The government's reading would also imply that the "except as authorized by law" proviso referred to foreign, as well as domestic, law. Again, this result seems unlikely, and there is no indication of congressional intent in its favor. Finally, we are not unmindful that criminal statutes are normally to be construed narrowly, at least when such a construction comports with the intent of Congress as we can divine it. See, e.g., *Perrin v. United States*, 444 U.S. 37, 49 n.12, 100 S.Ct. 311, 317 n.12, 62 L.Ed.2d 199 (1979). We therefore believe that section 486 was construed correctly by the district court.

Affirmed.

Citations

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2. Clarence Griffin, "The Story of the Bechtler Gold Coinage," *The Numismatist*, September 1929.
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5. Donald H. Kagin's, "Private Gold Coins and Patterns of the United States", copyright 1981, Arco Publishing, Inc. of New York, pages 85-92, reprinted with permission at http://www.coinfacts.com/historical_notes/history_of_moffat_and_company.htm. Also see pp 163-167.

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