



3-1-1960

# Credit -- Credit Cards -- Civil and Criminal Liability for Unauthorized or Fraudulent Use

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## Recommended Citation

John R. Martzell, *Credit -- Credit Cards -- Civil and Criminal Liability for Unauthorized or Fraudulent Use*, 35 Notre Dame L. Rev. 225 (1960).

Available at: <http://scholarship.law.nd.edu/ndlr/vol35/iss2/5>

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## NOTES

### CREDIT — CREDIT CARDS — CIVIL AND CRIMINAL LIABILITY FOR UNAUTHORIZED OR FRAUDULENT USE.

The major problem presented by any consideration of the legal consequences of the various credit card systems flourishing throughout the country is one of definition. The factual patterns of credit card systems readily suggest several areas of law which might be determinative of the legal relationships created by the use or misuse of such cards. Initial efforts in the solution of this problem must be directed toward a comparison of the structure of present day credit card systems with traditional areas of law to the end of providing rules for the direction and control of the extension of such widespread credit. Failing this, new rules must be developed.

Little aid may be enlisted from an examination of the cases directly dealing with credit cards. The number of cases is small and the early analyses have broken down while later ones evidence uncertainty as to adequate definition.

It is the purpose, then, of this Note to examine the structure of the various systems which dominate the field of credit cards and define these relationships with an eye to the aspirations of the businessmen who invented them and the natural equities between the parties. In addition, an attempt will be made to predict the civil and criminal liabilities growing out of the use and misuse of credit cards. Several contracts currently in use by credit card systems will be used from time to time to analogize to various fields of law.<sup>1</sup>

#### DEFINITIONS

For the purposes of this Note certain terms will be used to describe the parties in the systems. The credit card company, such as Diner's Club Inc. or the Hilton Credit Corporation, will be referred to as the "issuer." The holder of the card rightfully acquired from an issuer will be referred to as the "user." The retail establishment, such as a restaurant, service station or hotel which honors the card and extends credit to the user, will be designated "creditor."

Basically, the credit card industry may be divided into two, three and four-party systems. Under the two-party system the issuer grants a credit card (commonly called "charge-a-plate") to its credit customers. This card may only be used at the issuer's establishment and the issuer bills the user directly. Thus, issuer and creditor are the same party. Three and four-party systems will be discussed at length in subsequent sections.

The sizeable economic and commercial problems produced by these systems are beyond the scope of this Note. It suffices to observe that the issuer derives profit from user service charges<sup>2</sup> and by discounting creditor charge slips. The user benefits by having ready credit at numerous outlets throughout the world and an itemized record of his purchases. The creditor benefits through the inclusion of the name of his establishment in a brochure carried by the millions<sup>3</sup> of card holders and the increased purchases by the users.<sup>4</sup>

1 Various information used in this Note was gathered through interviews with owners and attendants at service stations of major oil companies in northern Indiana. The indications are that their policies with regard to credit cards are uniform in all similar service stations throughout the country. Information used in this Note which was obtained through interviews of this type will be footnoted: INTERVIEW.

2 Letter from Diner's Club Inc. to NOTRE DAME LAWYER, Oct. 22, 1959; Application form: Hilton Credit Corp. on file Notre Dame Law Library; N. Y. Times, May 10, 1959, III, p. 1, col. 8.

3 Letter from Diner's Club Inc. to NOTRE DAME LAWYER, Oct. 22, 1959; Fact Sheet—Hilton Credit Card on file Notre Dame Law Library.

4 N.Y. Times, May 10, 1959, III, p. 1, col. 8; Advertising Brochure: Diner's Club Inc. on file Notre Dame Law Library.

### WHAT IS A CREDIT CARD?

The earliest definition of a credit card is found in *Wanamaker v. Megary*.<sup>5</sup> In holding a user liable for debts contracted by a third party through the use of a charge-a-plate lost by the user, the court concluded that a charge-a-plate was a negotiable instrument. The court conceived of it as an order by the user to the creditor to deliver goods to the bearer of the coin.

This theory was rejected eight years later by the New Jersey court in *Lit Bros. v. Haines*,<sup>6</sup> a case involving similar facts. The court noted that the coin had none of the markings of a negotiable instrument and was non-transferable. The court concluded that the coin was merely an identification card.

Some of the uncertainty of the courts as to the nature of a credit card is evidenced in *Gulf Refining Co. v. Plotnik*.<sup>7</sup> The court said:<sup>8</sup>

A credit coin or charge-a-plate is not in the nature of a negotiable instrument. In the instant case it is described not merely as a means of identification, but rather as a token of credit arrangement or contract. Of itself it is neither useful nor valuable, but it represents something of value.

In *Magnolia Petroleum Co. v. McMillan*<sup>9</sup> the court simply decided that the card was a written contract signed and accepted by one party.

In terms of the major credit card systems currently in use, these definitions are either unsatisfactory or incomplete. The following is an analysis of a modern definition of credit cards.

### Letter of Credit

It is the thesis of this Note that credit cards are special, clean, revocable letters of credit. This conclusion is based on two premises: 1) The structure and factual situations inhering in the credit card systems are closely analogous to the structure and factual situations of letters of credit. 2) The legal rights and duties imposed by the law upon letters of credit are both advantageous and equitable taken in the context of a credit card system.

A letter of credit may be defined as "a letter containing a general or special request to pay the bearer or person named money, or to sell him some commodity on credit, or give him something of value, and to look to the writer of the letter for recompense, and which partakes of the nature of a negotiable instrument. . . ."<sup>10</sup> A party, generally called the beneficiary, approaches a bank,<sup>11</sup> business,<sup>12</sup> or individual<sup>13</sup> and requests a letter of credit. If granted, the writer of the letter gives the letter to the beneficiary or sends it directly to the party (usually a bank, but by no means necessarily) to whom the letter is addressed. The letter is a specific authorization by the writer of the letter to the addressee (labeled "creditor") to extend credit to the beneficiary on the strength of the writer's credit. The credit must be extended only on carefully defined terms. The creditor, after having extended the credit, looks to the writer for recompense and the writer in turn is reimbursed by the beneficiary.<sup>14</sup>

The beneficiary draws drafts or purchases goods from the creditor against the letter of credit which generally is granted for a specific amount. The drafts are negotiable instruments,<sup>15</sup> with the beneficiary as drawer, the writer as drawee, and the

5 24 Pa. Dist. 778 (Phila. Munic. Ct. 1915).

6 98 N.J.L. 658, 121 Atl. 131 (1923).

7 24 Pa. D. & C. 147 (C. P. 1934).

8 *Id.* at 150.

9 184 Mo. App. 308, 168 S.W.2d 881 (1943).

10 6 MICHIE, BANKS AND BANKING, ch. 12, § 28 (1952).

11 *E.g.*, Federal Coal Co. v. Royal Bank of Canada, 10 F.2d 78 (2d Cir. 1926).

12 *E.g.*, Lafargue v. Harrison, 70 Cal. 380, 9 Pac. 259 (1885).

13 *E.g.*, Powerline v. Russell's Inc., 103 Utah 441, 135 P.2d 906 (1943).

14 6 MICHIE, BANKS AND BANKING, ch. 12, § 28 (1952).

15 *Camp v. Corn Exchange Nat'l Bank*, 285 Pa. 337, 132 Atl. 189 (1926).

creditor as payee. The commercial letter of credit commonly used between banks and merchants is a documentary letter of credit; that is, bills of lading and other shipping documents must accompany the letter of credit before it may be accepted by the creditor.<sup>16</sup> A "clean" letter of credit is one which may be accepted by the creditor without shipping documents.<sup>17</sup> This letter of credit may be revocable at the will of the writer if so provided in the contract and at the very least it is of limited duration.<sup>18</sup>

Letters of credit are popularly thought of as involving banks and merchants but they are as easily adaptable to transactions between individuals.<sup>19</sup> Where the contract so provides, a letter of credit is non-assignable and it binds the writer only to the party to whom it is addressed. This makes a letter of credit a "special" letter of credit.<sup>20</sup> The creditor is under no obligation to accept the letter of credit.<sup>21</sup>

A detailed analysis of the workings of a credit card system must be made. It should be noted that this structure is typical of all three-party systems including oil company courtesy cards and the well-known restaurant and hotel credit card systems.

In the three-party system the user sends an application to the issuer. The application includes a request for a card and several credit references.<sup>22</sup> If the issuer considers the applicant a good credit risk it sends the user a credit card.

At the same time the issuer is contracting with creditor establishments to join the system. These creditors also submit applications which describe physical plant, menus, type of merchandise, etc.<sup>23</sup> Under the oil company systems there are no creditor applications since the credit card system is part of the service station's franchise.<sup>24</sup> If the issuer wishes to add the applicant creditor to its system it makes a contract with that establishment which sets out the terms whereby the issuer will be bound to purchase the charge slips signed by the user. On the face of some credit cards<sup>25</sup> reference is made to other rules and regulations not set out on the card. This undoubtedly has reference to the contract between issuer and creditor. The issuer-creditor contract makes reference to the terms set out on the credit card which is readily available to the creditor.<sup>26</sup>

The user then presents his card at the creditor establishment. A list of such establishments is attached to the card.<sup>27</sup> All systems analyzed required the presentation of the card before credit could be given. The user then signs the check or charge slip and the number of his card is placed upon it.

16 The term "accepted" is used because the letter is conceived of as an offer by the writer which is accepted by the creditor and forms a binding contract. *American Nat'l. Bank & Trust Co. v. Banco Nacional de Nicaragua*, 231 Ala. 614, 166 So. 8 (1936).

17 6 MICHIE, BANKS AND BANKING, ch. 12, § 28 (1952).

18 *Federal Coal Co. v. Royal Bank of Canada*, 10 F.2d 697 (2d Cir. 1926).

19 *Moore v. Holt*, 51 Va. 284 (1853).

20 *Banco Nacional Ultramarino v. First Nat'l Bank*, 289 Fed. 169 (D. Mass. 1923).

21 *Moss v. Old Colony Trust Co.*, 246 Mass. 139, 140 N.E. 803 (1923).

22 Of ten application forms analyzed, all required a statement concerning the applicant's present business and location of his bank. Nine required additional references; seven required statement of the applicant's age. One required an estimate of the amount of credit desired. The applications analyzed were: Diner's Club Inc., Hilton Credit Corp., American Express Credit Card, Phillips Petroleum Credit Card, Cities Service Credit Card, Mobil Credit Card, Standard Oil Credit Card, Gulf Oil Credit Card, Shell Oil Credit Card, Texas Co. Credit Card. Applications on file Notre Dame Law Library. The Indiana Bell Telephone Co. system does not require an application if the user is already a subscriber or if user is an employee of a business requesting a card. Indications are that this is typical of the entire Bell system. Letter from Indiana Bell Telephone Co. to NOTRE DAME LAWYER, Dec. 7, 1959, on file Notre Dame Law Library.

23 Membership Application for Retail Stores: Diner's Club Inc., on file Notre Dame Law Library.

24 INTERVIEW.

25 E.g., The Diner's Club Credit Card, on file Notre Dame Law Library.

26 E.g., Contract With Associate: Hilton Credit Corp., on file Notre Dame Law Library.

27 Diner's Club Credit Card on file Notre Dame Law Library.

Once a week the creditor compiles the checks charged during the past week and sends them to the issuer.<sup>28</sup> The issuer discounts them at a rate of from 5% to 10% depending upon the particular system and the type of creditor establishment.<sup>29</sup> The balance is remitted to the creditor once a month. The issuer then bills the user for the face amount of the check. If the user does not pay within a certain length of time the check is sometimes turned over to a collection agency<sup>30</sup> and the card is revoked. All creditors are notified not to honor the card. In case of loss or theft of the card, the user is required to notify the issuer immediately whereupon the issuer will give creditors notice not to honor the card if it appears.

The factual similarity between credit cards and letters of credit may be seen from the following chart:

LETTER OF CREDIT	CREDIT CARD
1) Request made by party for a letter of credit.	1) Application sent to issuer along with credit references.
2) If granted, a letter is sent to the creditor bank or business which sets out the terms of extending the credit.	2) If granted, the credit card is given to the user. There is already a written contract between issuer and creditor setting out the terms of credit extension.
3) Beneficiary presents letter of credit at creditor establishment and draws drafts or receives merchandise on the strength of the letter of credit.	3) User presents card to creditor and buys goods or services on credit.
4) Creditor looks to the writer of letter for payment for credit given to beneficiary.	4) Creditor discounts the check or charge slip with the issuer.
5) Writer looks to beneficiary for reimbursement.	5) Issuer bills the user for the face amount of the check or charge slip.
6) By the terms of the letter, it may be revocable.	6) Credit cards may be revoked at any time at the discretion of the issuer.

The real importance of the proposition that a credit card is a letter of credit is not the legal nicety of putting the system in a "pigeon-hole." The importance lies in the legal rights and duties inhering in the letter of credit which are both similar to the contractual rights and duties of credit card systems and useful in placing burdens where, in good conscience, it seems they should lie. The pertinent legal rules are discussed under the section on civil liability.

### *Assignment*

The structure of the credit card systems lend themselves to yet another interpretation, *i.e.*, assignment. The issuer might represent nothing more than a factor who purchases the accounts receivable of the creditor. This would explain the purchase and sale of the checks or charge slips. It is submitted that this should be rejected for two reasons:

1) The payment made for the charge slips is nothing more than either the discharge of a negotiable instrument<sup>32</sup> or a convenient way, through discounting,

28 This procedure is altered slightly under the Hilton credit card system. Within three days of the charge the creditor must present the checks attached to a "Hilton Bank Draft" to a bank designated by the Hilton Credit Corp. for payment.

29 Contract With Associate: Hilton Credit Corp.; Creditor-Issuer Contract: Diner's Club Inc. on file Notre Dame Law Library.

30 Letter from Phillips Petroleum Co. to Notre Dame Lawyer, Nov. 25, 1959, on file Notre Dame Law Library.

31 The structure and law of accounts receivable purchase (factoring) is discussed in 4 U. ILL. L.F. 601 (1956).

32 Under the Hilton system, the draft is drawn on the Hilton Credit Corp.

to fulfill the obligations imposed on the issuer through the acceptance of a letter of credit or credit card and also exact the issuer's fee for belonging to the system. Since in fact the obligation to pay on the part of the issuer grows out of the honoring of the credit card by the creditor, it is incorrect to say that the payment is a bargained-for sale or assignment.

2) The principle behind the rights acquired by the assignee against the obligor rests in subrogation.<sup>33</sup> The assignee is subrogated to the rights of the assignor against the obligor. There is no prior legal connection between the assignee and the obligor.<sup>34</sup> This is the basis upon which the assignee takes subject to all the defenses and equities between the assignor and obligor existing at the time of the assignment. This situation does not obtain, however, in the typical credit card transaction. The user is directly bound to pay the issuer by contract without need for subrogation and the issuer is not subject to the defenses and equities between user and creditor.<sup>35</sup>

In *Gulf Refining Co. v. Williams Roofing Co.*<sup>36</sup> the Supreme Court of Arkansas ruled that the transfer of charge slips of a gas station to the credit-card-issuing oil company was an assignment. User's employee accidentally left his credit card at a creditor service station. One of the attendants at the station appropriated the card and went on a credit card spree through Mississippi. The user gave issuer-plaintiff notice of the loss of the card. There was strong evidence of collusion between the creditor service stations in Mississippi and the third party misuser. On the basis of the rule that the assignee takes subject to all defenses between assignor and obligor the court held plaintiff could not recover from user on the accounts created by the misuser. In the opinions, the court noted that the user was under contract to pay the issuer for all charges made with the card.

Unquestionably the procedure resembles an assignment. To treat it as such, it is submitted, is unrealistic. The user owed a duty to pay issuer for the charges independently of the sales contract between user and creditor. As was demonstrated above, the essence of assignment is subrogation, a "stepping into the shoes of the assignor." Yet the duty transferred to issuer by the supposed assignment is owed him already by the user through collateral contract. Why must the issuer purchase the debt of user when that debt is already owed to issuer through the issuer-user contract? The result reached by the Arkansas court would have been the same under the letter of credit theory. The honoring of the cards by the creditors was wrongful and the issuer had notice from the user of the theft. Issuer was under no obligation to reimburse a wrong-doing creditor for the charges of the misuser. If issuer chose to do so, then it is left with fraudulent bills with only the creditor open to suit. This would suggest that the wrong-doing or negligence of the creditor would free the issuer of its duty to give notice of lost or stolen cards to the creditor.

### *Third-Party Beneficiary*

Due to the fact that the various contracts extant in credit card systems are consistently shaped with a beneficial third party in mind, it might be asserted that a third party beneficiary theory and the rules attendant thereto would better meet the problems of definition.

This position appears untenable on the grounds that the usual beneficial interest

33 *Peoples Trust Co. v. School Dist. No. 6*, 169 Misc. 961, 9 N.Y.S.2d 34 (Franklin County Ct. 1939).

34 *Adler v. Thomas Distrib. Co.*, 148 Cal. App. 2d 584, 307 P.2d 14 (1957).

35 *Moss v. Old Colony Trust Co.*, 246 Mass. 139, 140 N.E. 803 (1923); *Consolidated Sales Co. v. Bank of Hampton Roads*, 193 Va. 307, 68 S.E.2d 652 (1952); *Contract With Associate: Hilton Credit Corp.; Creditor-Issuer Contract: Diner's Club Inc.*, on file Notre Dame Law Library.

36 208 Ark. 362, 186 So.2d 790 (1945).

implied by third-party-beneficiary law<sup>37</sup> is covered by actual formal contracts. For example, the issuer and creditor contract is indirectly for the benefit of the user through giving him credit. However, the original right to the credit is obtained by the user through a contract with the issuer. This contract is essential to the user's right to get credit. The user may not, however, hold the issuer liable if the creditor refuses to honor the card.<sup>38</sup> For the most part, the system is based on mutual business respect and faith until the card is used, which event causes the co-extensive operation of a number of contracts. This area is too embroiled with formal contract to admit the subtleties of the third-party-beneficiary rules.

In summary, the letter of credit is closely analogous to a credit card. Under an assignment theory the various formal contracts generally abrogate the usual assignment law and similarities of fact are more apparent than real. Third-party-beneficiary rules may be discarded simply because there is no need for the implications inherent therein since beneficial rights and duties are spelled out in formal contracts.

#### CIVIL LIABILITY FOR USE AND MISUSE OF CREDIT CARDS

The civil liability of the parties to a credit card system is difficult to ascertain due to the dearth of case law on the subject. The lack of cases may be attributed to the low percentage of defaults or misuses as well as the reluctance of the issuers to sue for reasons of good will and avoidance of bad publicity.

#### *Two-Party System*

In *Wanamaker v. Megary*<sup>39</sup> defendant user was given a charge-a-plate by plaintiff department store. User was held liable for debts contracted by a third party who found the card lost by user. The court proceeded on a negotiable instrument theory, *i.e.*, the coin was a note payable to bearer. The court held that since defendant kept the coin in an insecure place so as to allow a third party to appropriate it, defendant was liable on the principle that between two innocent parties, he who makes the loss possible shall bear it. The user in *Wanamaker* had notified the plaintiff of the loss, but the purchases were made before such notification.

The inadequacies of the negotiable instrument theory were explained in *Lit Bros. v. Haines*.<sup>40</sup> The plaintiff store had issued a charge-a-plate to defendant who at that time was ignorant of the fact that any person presenting the coin could purchase items with it and have them sent to an address other than the defendant's. The coin was stolen, items purchased in defendant's name and sent to the thief's address on his order. Plaintiff sued for the amount of the bill. In denying recovery the court held that the coin was a mere identification coin and no inference could be drawn from it that defendant contracted to pay for goods not purchased by her. Without a contract there could be no recovery.

On facts similar to *Wanamaker* and *Lit Bros.*, the Kansas City Court of Appeals in *Jones Store v. Kelly*<sup>41</sup> reversed a trial court decision for the plaintiff issuer. The court concluded that it was a jury question whether defendant user had intended that the third party use his credit card or whether defendant was ignorant of its use. If the former the defendant was liable; if the latter defendant was not liable. The credit had been extended to the bearer of the coin who represented herself as wife

37 "In nearly all cases, therefore, if the third party is given an enforceable right against the promisor, this right comes to him at no cost to himself. This is true even though he is a creditor beneficiary and the promised performance comes to him in satisfaction of his claim and not as a gift." 4 CORBIN CONTRACTS § 774 p. 7 (1950).

38 *E.g.*, 9. Diner's Club has contracted with member establishments for the honoring of the Diner's Club Credit Card, but will not be responsible if a card is not honored for any reason. Diner's Club Credit Card on file Notre Dame Law Library.

39 24 Pa. Dist. 778 (Phila. Munic. Ct. 1915).

40 98 N.J.L. 658, 121 Atl. 131 (1923).

41 225 Mo. App. 833, 36 S.W.2d 681 (1931).

of the defendant although plaintiff knew defendant was not married. Plaintiff extended credit in the amount of \$185.25 when the limit on the coin was \$50.00. Moreover, defendant had agreed to notify plaintiff if the coin was lost or stolen. This he did not do. The court remanded the case indicating that the above facts should be given consideration in reaching a verdict.

The preceding cases dealt with two-party systems. For present purposes it would seem that the charge-a-plate is an identification coin which merely identifies the person to whom credit is to be given. The New Jersey court held this in *Lit Bros. v. Haines*<sup>42</sup> and the holding in *Jones Store v. Kelly*<sup>43</sup> suggests that the only real problem is whether the user authorized the use of the identification coin and whether the creditor had complied with the rules upon which it had been issued.

The formulation of contract rules presents the most difficult practical problem in the field. From a business standpoint, speed is the most desirable quality of the two-party system. The clerk, when he is presented with a charge-a-plate, is saved the trouble of calling a central department to determine whether the customer has a charge account. If on the other hand the user wishes to allow someone to purchase goods and charge them to his account he should be able to do so through the instrumentality of the credit card. The difficulty arises when the card is lost or stolen and subsequently misused by a third party. How can the interests of convenience of use and security of credit transactions be reconciled? If the clerk must call a central agency the advantage of the credit card is lost. If credit on the card is granted *carte blanche* with no regard for the rightful use of the card the purpose behind the credit card is susceptible to considerable misuse. It is submitted that the liability must rest on the user much the same as it was applied in *Wanamaker v. Megary*<sup>44</sup> without reference to the negotiable instrument theory. It is, in essence, a factual application of the maxim that of two innocent parties, the one whose negligence allows the loss must bear it.

In remanding the case in *Jones Store v. Kelly*<sup>45</sup> the court gave serious consideration to the fact that the defendant was unaware of the practice that the card could be used for the benefit of a third party without user's permission. Yet the user was obligated to notify issuer if the card was lost or stolen. The court was not willing to absolve the consumer of his duty of notice even though he was unaware of the uses to which the card might be put and for which he would be held liable.

In summation, it is submitted that the primary liability for misuse of a two-party card should rest on the user, but the rules and practices surrounding the card should be clearly enunciated as follows:

- a) Credit will be issued to the bearer of the card.
- b) On discovery of loss or theft, the user must immediately notify the issuer.
- c) User will be liable for all purchases made by a defrauding third party between the time of the loss and notice to the issuer.

### Three-Party System

#### (a) User

The user of a three-party card appears to have a two-fold liability through the use of the card: a) at the time of a purchase he becomes indebted to the creditor who has given him goods and services,<sup>46</sup> and, b) he has a continuing contractual duty with issuer to pay all valid bills presented to him by issuer.<sup>47</sup>

The issuer is bound to pay the creditor for the debt in (a) above. This is based

42 98 N.J.L. 658, 121 Atl. 131 (1923).

43 225 Mo. App. 833, 36 S.W.2d 681 (1931).

44 24 Pa. Dist. 778 (Phila. Munic. Ct. 1915).

45 225 Mo. App. 833, 36 S.W.2d 681 (1931).

46 This is a simple contract of sale independent of any credit transactions involving credit cards.

47 Diner's Club Credit Card; Application for American Express Credit Card on file Notre Dame Library.



on the letter of credit theory<sup>48</sup> and the contract<sup>49</sup> between issuer and creditor providing for issuer's purchase of all charge slips. In effect there is one debt with two obligors. Under the customs of the credit card systems the creditor looks first to the issuer for payment of the debt. However, in the event of default by the issuer, creditor may still go against the user. There is no legal primacy among the obligors but rather a business policy to go against issuer first. However, once the debt is paid the user's obligation to creditor is discharged since there was only one debt. Now the only user debt remaining is that one between user and issuer created by contract.

In *Franklin National Bank v. Kass*<sup>50</sup> the court placed civil liability on the user through a negotiable instrument theory. User belonged to the Esquire Club which was later absorbed by Diner's Club. Esquire's system is no longer in use. The regulations of the Club gave the creditor the right to draw drafts on the user to the amount of the charges made by user. The "draft" consisted merely of the information on his checks with an order to user to pay plaintiff bank the amount of the draft in two installments. The creditor sent the draft to issuer who discounted it with plaintiff. Plaintiff delivered the draft to the address given by user in his application. Defendant claimed he never received the draft and refused to pay. The court reasoned that his use of the card was in fact an acceptance of the terms printed thereon, one of which was that the user would accept all drafts drawn on him for charges made by him.

The case is not too significant from a definitive standpoint since the system is no longer used. However, it amounts to a judicial determination that use of the card is acceptance of the terms contained therein, and to this extent, at least, is important.

The problems presented by the misuse of the card are somewhat different. Assume the user loses his card or it is stolen and user does not notify the issuer. If the card is used by a third party, it cannot be said that a debt is created between the bona fide user and the creditor. Undoubtedly a debt is created between creditor and the third party misuser. More than likely, however, the misuse of the card will not be discovered until after the issuer has paid the creditor for the charge slips and then tries to collect from user. User will defend on the grounds that he incurred no debts and his contract with issuer does not imply that he will pay for every debt fraudulently created in his name.

This problem was faced by the Pennsylvania court in *Gulf Refining Co. v. Plotnik*.<sup>51</sup> Defendant user had a gasoline credit card issued by plaintiff. The card was stolen and used by the thief to purchase gas and oil at creditor stations. Issuer sued for the balance of these accounts and was granted recovery. The court noted that normally the bona fide holder of a credit card was not liable for debts created by a thief or one not authorized to use the card. It also noted that the user had neglected to give notice of the theft to the issuer so that it might notify its creditor stations not to honor the card. The court discussed the implied contract of due care in the use of the card resting on the user. This duty is a corollary of the rule in *Wanamaker v. Megary*<sup>52</sup> as to placing liability on the one of two innocent parties whose negligence allows the injury.

Some credit cards specifically state that the user will be liable for all such debts incurred from the time of loss until notice is given to the issuer.<sup>53</sup>

If the user should employ the card after its expiration date, he has, in effect,

48 See *American Nat'l Bank & Trust Co. v. Banco Nacional de Nicaragua*, 231 Ala. 614, 166 So. 8 (1936); *Lamborn v. Nat'l Park Bank*, 240 N.Y. 520, 148 N.E. 664 (1925).

49 Contract With Associate: Hilton Credit Corp.; Creditor-Issuer Contract: Diner's Club Inc. on file Notre Dame Law Library. Oil companies obligate themselves to sell gasoline to the service stations in exchange for the charge slips. INTERVIEW.

50 19 Misc. 2d 280, 184 N.Y.S.2d 783 (Sup. Ct. 1959).

51 24 Pa. D. & C. 147 (C.P. 1934).

52 24 Pa. Dist. 778 (Phil. Munic. Ct. 1915).

53 E.g., Diner's Club Credit Card on file Notre Dame Law Library.

misused the card. Since the expiration date is printed on the card, the creditor will not have complied with all the terms of the card and thus the issuer is not bound to purchase the check or charge slip.<sup>54</sup> The creditor must then go against the user as the sole obligor on the debt.

The user in *Magnolia Petroleum Co. v. McMillan*<sup>55</sup> lent his credit card to a third party and authorized him to make certain purchases with it. No notice of this was given to plaintiff issuer. User's card held him liable for all debts contracted with the card. The third party appropriated the card and made numerous unauthorized purchases. User refused to pay these bills when presented by issuer. On trial, plaintiff was refused relief. On appeal the case was remanded on the grounds that the card was a contract and the user had neither notified issuer of the withdrawal of authorization nor offered to surrender the card to issuer. This case was in line with the "notice" rules expressed in *Wanamaker v. Megary*<sup>56</sup> and *Gulf Refining Co. v. Plotnik*.<sup>57</sup> Since the rule is expressly embodied in some credit card contracts and supported by the few reported cases, it seems fairly certain that the three-party user will be liable for debts incurred by third-party misusers before he gives notice to the issuer.

### Creditor

The position of the creditor is one of enviable security. Since credit cards have not yet generally expanded into the consumer field the users are normally restricted to responsible businessmen and parties with an acceptable credit rating. The risk of loss is minimized. In addition, by honoring the credit card the creditor binds the issuer to purchase the check or charge slip. The issuer is not disposed to challenge these slips because of the small number of defaults<sup>58</sup> and the desire to maintain good will. Considering the beneficial position enjoyed by the creditor, it is submitted that the responsibilities of care in the operation of the system should be correspondingly high. The only case discovered on the misuse of a letter of credit exemplifies and supports this position. In *Orr & Barber v. Union Bank*<sup>59</sup> a letter of credit was written which came into the hands of a third person who fraudulently drew a draft on it. The writer refused to honor the draft. The House of Lords refused plaintiff's petition for payment of the draft on the ground that the plaintiff creditor should have taken greater care in insuring the validity of the signature on the draft.

*Gulf Refining Co. v. Williams Roofing Co.*<sup>60</sup> is a hornbook example of the types of misfeasance and non-feasance in which a creditor may engage. The credit card in this case had "For Trucks Only" printed on its face; yet creditors sold products to misuser for his automobile. The license number on the card was different than the one of misuser's car. The misuser misspelled the name appearing on the credit card when he signed the charge slips. Gasoline was sold in quantities greater than the capacity of misuser's tank. In several instances, cash was delivered instead of goods on the strength of false invoices. One creditor sold the misuser two radios, one for his home and one for his car when the card was restricted to automotive goods and services. With reference to the duty owed by the creditor the court said: "It is necessarily implied from the broad guarantee that the person extending credit must do so in good faith, in accordance with the provisions of the card and subject to any limitations appearing on the card."<sup>61</sup>

54 This is under the letter of credit theory. See *Jaris Co. v. Banque D'Athens*, 246 Mass. 546, 141 N.E. 576 (1923). Compare: *Creditor-Issuer Contract: Diner's Club Inc.*, on file Notre Dame Law Library.

55 208 Ark. 362, 168 S.W.2d 881 (1943).

56 24 Pa. Dist. 778 (Phila. Munic. Ct. 1915).

57 24 Pa. D. & C. 147 (C. P. 1934).

58 Diner's Club places the annual amount of bad debts at from 1 to 1½%. Letter from Diner's Club Inc. to NOTRE DAME LAWYER, Oct. 22, 1959.

59 1 Macq. 513 (H. L. 1854).

60 208 Ark. 362, 186 S.W.2d 790 (1945).

61 *Id.* at 794.

This rule of strict compliance with the terms of credit cards would mean that the creditor would have to make an effort to follow every regulation in his contract and printed on the card; foremost among them being to extend credit only to a bona fide holder of the card. This would prevent such travesties as granting credit when the user does not even have the card in his possession<sup>62</sup> and minimize the unlawful use of the cards by third persons. It is arguable that this will destroy the usefulness of the card by making the creditor determine the user's credit collaterally. This position does not seem valid because the creditor might only require confirming identification from the holder. If the creditor was unwilling to take the time necessary for such strict compliance, it might simply accept the risk. Then if the issuer could prove that the creditor did not make a good faith attempt to materially comply with the terms of the card, the creditor would have recourse only against the third party misuser.

Such a conclusion is reached under a letter of credit theory<sup>63</sup> since the creditor is required to strictly comply with all terms of the letter in order to hold the writer to the payment of debts created by the beneficiary. These propositions have the merit of placing a duty of due care on that party who is in the most secure legal position and also in the best practical position to deter many forms of misuse.

#### *Four-Party System*

A different sort of creditor liability grows out of the four-party system. Under the four-party system, the checks and charge slips signed by the user are discounted at an issuer-designated bank within three days of the purchase. This is done by means of a draft composed of an envelope containing the checks signed by the user.<sup>64</sup> After discounting, the draft is presented to the issuer for discharge. The bank becomes a holder in due course<sup>65</sup> and the issuer is bound to discharge the draft discounted at the bank.<sup>66</sup>

Under the three-party system, if the creditor has not strictly complied with the terms of the card and has extended credit without taking due care to determine whether the holder of the card is a bona fide user, the issuer may simply refuse to pay creditor for the charge slips.<sup>67</sup> Under the four-party system, if the creditor does not comply with the terms of the card, the issuer will not have notice of the non-compliance until the checks have passed through a holder in due course and the issuer is unable to refuse payment.<sup>68</sup> How can an issuer proceed against a willful or negligent creditor under a four-party system? It is submitted that he may proceed on breach of contract. Under the law of letter of credit, the letter is an offer made by the writer to the creditor which is accepted when the creditor extends credit to the user.<sup>69</sup> Implicit in this contract is the duty of the creditor to comply strictly with the terms of the letter.<sup>70</sup> So it is with the four-party credit card. If the creditor breaches his duty by honoring an expired card or honoring the card in the hands of a misuser without taking due care to determine the holder's identity, issuer has been damaged in the amount of the draft and should be able to recover against creditor for breach of contract duty.

This alteration does not take the four-party system out of the letter of credit definition. Rather, it adds the element of negotiability which is even more closely analogous to the modern day notion of the letter of credit. The letter of credit theory is merely implemented by the requirements of the Negotiable Instruments Law.

62 See Life, Oct. 26, 1959, p. 53.

63 See Moss v. Old Colony Trust Co., 246 Mass. 139, 140 N.E. 803 (1923).

64 Advertising Brochure: Hilton Credit Corp., on file Notre Dame Law Library.

65 BEUTEL'S BRANNON, NEGOTIABLE INSTRUMENTS LAW § 52, p. 674 (1948).

66 Advertising Brochure: Hilton Credit Corp., on file Notre Dame Law Library.

67 See Gulf Refining Co. v. Williams Roofing Co., 208 Ark. 362, 186 S.W.2d 790 (1945).

68 BEUTEL'S BRANNON, NEGOTIABLE INSTRUMENTS LAW, § 57, p. 823 (1948).

69 Lafargue v. Harrison, 70 Cal. 380, 9 Pac. 259 (1885).

70 Jaris & Co. v. Banque D'Athens, 246 Mass. 546, 141 N.E. 576 (1923).

*Issuer*

The problems of the issuer's rights and duties under all types of systems seem primarily grounded in two areas: a) the issuer's duty to reimburse the creditor for charges made without recourse to the equities and defenses existing between the parties<sup>71</sup> and, b) giving notice to the creditors when a card has expired, been revoked, or is lost or stolen.<sup>72</sup> Under letter of credit theory, the various contracts involved are separate, independent, and distinct.<sup>73</sup> Expediency seems to demand this. If the creditor knows that disputes between himself and the user may be interposed as a defense for the issuer's refusal to reimburse him when in fact the issuer is already protected by contract obligations with user, the effect of the guarantee is severely hampered. The creditor is willing to extend such easy credit because generally he feels that he will be paid regardless of circumstances, fair or foul. If however, the issuer can join a dispute between user and creditor, the creditor is merely doing business with two common debtors instead of surety and beneficiary. The latter situation is far more desirable from a business point of view. The issuer takes a genuine business risk in contracting to reimburse for all charge slips regardless of dispute between user and creditor. It is submitted that the risk is offset by the increased number of establishments which will be encouraged to join the creditor ranks.

Secondly, let it be assumed that a user loses his credit card or it is stolen. User immediately notifies issuer. The next step for issuer is to notify the creditors so that they will not honor the card. The usual procedure is for the issuer to send a list of such cards to the creditor once a month. This is no small task considering some systems have as many as ten thousand creditors. If after notice the creditor honors the card, issuer is not bound to reimburse him. Suppose further that the card is lost or stolen on January 1. User notifies the issuer in writing on January 5. The card number will appear on the "void card" list at the end of January or on January 15 if the list is sent bi-monthly. What if charges are made by a third party misuser between the notice to the issuer and notice to the creditor? The user has fulfilled his obligation and the creditor may honor any card not voided. It would seem that the issuer must absorb any fraudulently made charges during the "notice lag." The user and creditor are free of duty and the issuer has notice of the card's loss.

## CRIMINAL LIABILITY FOR THEFT AND MISUSE OF CREDIT CARDS

Criminal acts within the credit card sphere center around either a third person who steals the card from a legitimate user or a user who fraudulently uses the card.

The user who gets a credit card from an issuer by means of fraudulent credit references has in fact stolen a piece of paper from the issuer. The card, when signed by the user, becomes a contract.<sup>74</sup> Thus the card, although subject matter for theft when gotten from the issuer, loses this quality by becoming a contract which cannot be stolen.<sup>75</sup> Thus one who unlawfully takes a signed credit card from a user has stolen nothing.

On the other hand, one who uses a credit card which is stolen has committed the crime of taking property by false pretenses. As will be shown later, a user who uses a credit card after its expiration date has not committed a crime. In *Littlejohn v. Hiatt*<sup>76</sup> defendant stole a credit card from a mailbox. Defendant pleaded guilty and was convicted of mail theft of property valued in excess of \$100.00. He was sentenced to five years in prison. After one year of his term, defendant petitioned for a writ of habeas corpus on the grounds that the credit card was worth less than

71 *Grouf v. State Nat'l Bank*, 40 F.2d 2 (8th Cir. 1930).

72 INTERVIEW; Letter from Diner's Club Inc. to NOTRE DAME LAWYER, Oct. 22, 1959, on file Notre Dame Law Library.

73 *Grouf v. State Nat'l Bank*, 40 F.2d 2 (8th Cir. 1930).

74 See *Magnolia Petroleum Co. v. McMillan*, 168 S.W.2d 881 (Tex. Civ. App. 1943).

75 CLARK AND MARSHALL, CRIMES, § 12.01, p. 717 (6th ed. 1958).

76 197 F.2d 334 (5th Cir. 1952).

\$100.00 and he could not be imprisoned for more than one year.<sup>77</sup> The court denied the petition on the grounds that a plea of guilty was an admission of all material facts in the indictment.

Aside from the lurking constitutional issues involved in this case there is some doubt whether there is other factual basis for the indictment. The defendant had surely stolen something but, it is submitted, it was only a piece of paper. It is difficult to agree with a five-year prison term for stealing a piece of paper. The only true consideration as to the value of this piece of paper is that a \$5.00 or \$6.00 service charge was required to obtain it.<sup>78</sup> The card is non-transferable<sup>79</sup> by its terms and presumably the thief could not have used it. Thus it would have been incorrect to say that the value of the piece of paper was reflected in the amount of purchases that could have been made with it.

Of greater importance is the use of the card by a thief to obtain goods and services. Recently Florida<sup>80</sup> and Texas<sup>81</sup> have enacted statutes making it a crime to knowingly purchase goods by means of a card which has been stolen or expired.

77 The statute has subsequently been amended to make any mail theft a felony regardless of the monetary value of the thing stolen. See 18 U.S.C. § 1708 (1958).

78 N. Y. Times, May 10, 1959, III, p. 1, col. 8; Credit Card Application: American Express Co., on file Notre Dame Law Library.

79 Diner's Club Credit Card on file Notre Dame Law Library; Refiner's Export Co. v. Eriksson, 264 App. Div. 525, 35 N.Y.S.2d 829 (1942) (Letter of Credit is non-assignable if so provided by its terms.).

80 Fla. Laws 1959, ch. 59-337, §§ 1-3, at 544.

Sec. 1 The term "credit card" as used herein means an identification card issued to a person by a business organization which permits such person to purchase or obtain such goods, property, or services on the credit of such organization.

Sec. 2 Any person who knowingly for the purpose of obtaining credit, or for the purchase of goods, property, or services, uses a credit card which has not been issued to such person and which is not used with the consent of the person to whom issued or a credit card which has been revoked or cancelled by the issuer of such card and notice thereof has been given to such person, or a credit card which has expired is guilty of a misdemeanor and punishable by fine of not more than one hundred dollars (\$100.00) or imprisonment for not more than thirty (30) days if the amount of the credit or purchase obtained by such use does not exceed fifty dollars (\$50.00) or by both such fine or imprisonment, or by a fine of not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00) or imprisonment for not more than one year if the amount of the credit or purchase obtained by such use exceeds fifty dollars (\$50.00), or by both such fine and imprisonment.

81 TEX. PEN CODE Art. 1555b (1959).

Use of expired or revoked credit cards for purchase of motor vehicle supplies, equipment and services.

Sec. 1 It shall be unlawful for any person to knowingly make use of any expired or revoked credit card or "courtesy card" is obtaining credit for the purchase of gasoline, motor oil, or other motor vehicle supplies, equipment, or services.

Sec. 2 The presentation of an expired or revoked credit card for the purpose of obtaining credit or the privilege of making a deferred payment for the article or service purchased shall be prima facie evidence of knowledge that the credit card had expired or had been revoked, if the purchaser shall not have paid to the seller the total amount of the credit purchase within ten (10) days after receiving notice from the seller that such credit card had expired or had been revoked at the time the purchase was made, which notice shall also state the amount due on such purchase.

Sec. 3 The word "notice" as used herein shall be construed to include either notice given to the purchaser in person or notice given to him in writing. Such notice in writing shall be conclusively presumed to have been given when deposited, as registered or certified matter, in the United States mail, addressed to such person at his address, or the address of the person to whom the card was issued, as it appears on the credit card.

Sec. 4 For the first conviction for a violation of the Act, in the event the amount of the credit purchase is Five Dollars (\$5) or less, the punish-

In *People v. Von Hecht*<sup>82</sup> the defendant attempted to get credit with a gasoline credit card issued to one Ronan who claimed that he had not authorized the card's use. Defendant was convicted of attempted grand theft in that he willfully, unlawfully, and feloniously attempted to take the property of the creditor. Defendant had shown the card to an attendant at the store and planned to return later and get the merchandise purchased. Defendant signed nothing. On his return, he claimed he wanted to pay cash. He did not have the card in his possession. He was apprehended and later he showed the police where he had hidden the card. The court held that he had proceeded so far that his abandonment was not sufficient to avoid the charge of attempted grand theft. Evidently the mere presentation of the card is sufficient to create criminal liability even though no more representations are made. It remains to determine the nature of the criminal act.

The third party misuser represents that he has a contractual relationship with the issuer and that the card has been issued to him pursuant to prescribed formalities peculiar to each system. Since the assurance to the creditor that this issuer stands behind the user is the primary thrust of the credit card, the third party misuser is misrepresenting a present existing fact upon which another relies to his detriment. It is a well-established rule that misrepresentation of a present existing fact with intent to defraud is obtaining property by false pretenses.<sup>83</sup> It must be carefully noted that the third party misuser is not misrepresenting a present intention to pay, thus possibly coming under the exclusion of criminal liability for misrepresentation of a present intent to pay.<sup>84</sup> The criminal liability grows out of his misrepresenting his relationship with the issuer. Analogy may be made to *People v. Von Hecht*<sup>85</sup> wherein defendant misrepresented that he was authorized to use the card. By the same token, if Von Hecht had represented himself to be the party named on the card, he would have been guilty of the same offense.

The third party misuser must sign for the goods and services acquired. No system investigated allows the use of a card without signing the check or some other form. The creditor gives credit with the condition precedent that the party getting the credit will sign for it. There is a material reliance on this signature. At the moment of the signing the credit transaction is completed and various legal rela-

ment shall be a fine not exceeding Two Hundred Dollars (\$200). For the first conviction for a violation of this Act, in the event the amount of the purchase is in excess of Five Dollars (\$5) but less than Fifty Dollars (\$50), punishment shall be confinement in the county jail for not exceeding two (2) years, or by fine not exceeding One Thousand Dollars (\$1000), or by both such fine and imprisonment.

If it be shown on the trial of a case involving a violation of this Act in which the amount of the credit purchase is less than Fifty Dollars (\$50), that the defendant has been once before convicted of the same offense, regardless of the amount of the credit purchase involved in the first conviction, he shall, on his second conviction, be punished by confinement in the county jail for not less than thirty (30) days nor more than two (2) years, and by a fine not exceeding Two Thousand Dollars (\$2,000).

If it be shown upon the trial of a case involving a violation of this Act where the amount of the credit purchase is less than Fifty Dollars (\$50), that the defendant has two (2) or more times before been convicted of the same offense, regardless of the amount of the credit purchase involved in the first two (2) convictions, upon the third or any subsequent conviction the punishment shall be confinement in the penitentiary for not less than (2) years nor more than ten (10) years, and by a fine not exceeding Five Thousand Dollars (\$5000).

For a violation of this Act, in the event the amount of the credit purchase is Fifty Dollars (\$50) or more, punishment shall be by confinement in the penitentiary for not less than two (2) years nor more than ten (10) years, and by a fine not exceeding Ten Thousand Dollars (\$10,000).

82 133 Cal. App. 2d 25, 283 P.2d 764 (1955).

83 CLARK AND MARSHALL, CRIMES, § 12.23, p. 815.

84 *Chaplain v. United States*, 157 F.2d 697 (D. C. Cir. 1946); See generally: PERKINS, CRIMINAL LAW, ch. 4, § 4, p. 258.

85 133 Cal. App. 2d 25, 283 P.2d 764 (1955).

tionships are created, *i.e.*, the issuer is bound to pay the creditor, a debt is created between a bona fide user and the creditor, and the user is bound to reimburse the issuer. For a third party misuser to get credit and then sign for it is therefore forgery. *Corpus Juris Secundum*, vol. 37, § 1, p. 31 states:

Subject to statutory variations, forgery may generally be defined as the false making or materially altering with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. (Emphasis supplied.)

That a third party misuser is criminally liable for his acts admits of little argument. A different situation obtains in the case of a user. The user may:

- a) Procure a card through false credit information.
- b) Use the card after expiration.
- c) Procure and use a card knowing at all times that he does not intend to pay for the goods and services received.

*People v. Robertson*<sup>86</sup> was a case involving a party who procured a two-party credit card by means of representing himself to be an osteopath of good standing when in fact he was not. The court concluded that purchases made through the use of the card were thefts made by means of false pretenses. The court did not state whether the procurement of the card was larceny itself or whether its use was the basis for obtaining property by false pretenses. It is submitted that either act was sufficient grounds for a larceny charge. The issuer has a right to hold blank cards and not have them taken. If the issuer is induced to part with these pieces of paper on the strength of false representations a crime has been committed. There can be larceny of something so insignificant as a piece of paper.<sup>87</sup> The defendant in *Robertson* induced the issuer to grant him the card on the strength of certain misrepresentations. In the three-party systems the user ordinarily pays a fee for the card. That the issuer has received a quid pro quo for the article he has given on the strength of false pretenses is immaterial.<sup>88</sup> There has been a fraudulent taking.

As regards the use of the credit card so procured, the user is misrepresenting the relationship between himself and the issuer. If the creditor knew that the user had obtained the card by false pretenses, he would not extend credit on the strength of the card. It is necessary to distinguish between credit extended sua sponte by the creditor and credit extended on the strength of the credit card. There must be a reliance on the particular representation for larceny by false pretenses.<sup>89</sup> It is submitted that the signing of the check and the placing of the credit card number on the check would strongly suggest that the credit was extended through an honoring of the card.

A similar situation obtains through the knowing use of a card which has expired. Florida makes this criminal by statute.<sup>90</sup> In the absence of specific statute, imposition of criminal liability is more difficult. The expiration date appears on the card itself. Diner's Club cards provide for an expiration date with an automatic renewal if the account is in good order.<sup>91</sup> Most oil company cards have an expiration date printed on them.<sup>92</sup> Thus a creditor can see the validity or invalidity of the card on its face. Generally the astuteness of the victim of false pretenses is not taken into account as the law protects the fool as well as the wise man.<sup>93</sup> However, it is difficult to understand how a reliance on a false pretense when the victim has the evidence of truth or falsity before him is the sort of reliance conceived of by the law of false pretenses. It is submitted that, in the absence of statute, use of an expired

86 167 Cal. App. 2d 571, 334 P.2d 938 (1959).

87 CLARK AND MARSHALL, CRIMES, § 12.01, p. 715.

88 United States v. Rowe, 56 F.2d 747 (2d Cir. 1932).

89 CLARK AND MARSHALL, CRIMES, § 12.01, p. 815.

90 Fla. Laws 1959, ch. 59-337, §§ 1-3, at 544.

91 Diner's Club Credit Card on file at Notre Dame Law Library.

92 INTERVIEW.

93 CLARK AND MARSHALL, CRIMES, § 12.27, p. 834 (6th ed. 1958).

credit card is not criminal, especially where there is no intent to defraud.<sup>94</sup>

What is the disposition of a user who applies for a credit card with appropriate credit references but has at that time an actual intent never to pay for any goods purchased with the card? This is in effect, when the card is used, purchasing goods intending not to pay for them. The majority rule in this country is that purchasing with a present intent not to pay is not criminal.<sup>95</sup> This is so, it is reasoned, because the representation made to the creditor is of a future fact, *i.e.*, payment on presentation of the bill. This, it is said, is not misrepresentation of a present fact.

It is submitted that the credit card situation is distinguishable from the *Chaplin v. United States*<sup>96</sup> rule and is in fact larceny by false pretenses. In applying for a card and receiving it, user makes a contract with issuer that it will pay all valid charges made by him. This is an independent contract in and of itself. The user's tender amounts to the application, credit references, service charge, and an implied promise to pay bills presented by issuer. If user has a present intent not to pay he has in fact breached the contract. It must be remembered that this argument proceeds to establish criminal liability, not to give a contract cause of action to the issuer for breach of contract. The user here has repudiated his contract although issuer is not aware of it. Although the issuer would not sue or rescind until he became advised of the intent not to pay, those facts grounding a suit for rescission are in existence. The intent not to pay therefore, although not grounds for criminal liability between user and issuer under the *Chaplin* rule, is sufficient, if known, to dissolve contract relations between the parties. Thus the representation made to the creditor by the user is not a non-existent intent to pay, but the existence of a present contractual relationship which the user has already knowingly repudiated. The user indeed does get credit when he does not intend to pay, but he gets that credit on the strength of a card whose contract implications he has repudiated. The creditor views the card and, relying on the fact of the contract between issuer and user along with his contract with issuer which is made operative by the user-issuer contract, extends credit to the user. As was pointed out before, the extending of credit to the user on the creditor's initiative and the extending of credit on the strength of the credit card are two different actions. In the former case the user will be protected by the *Chaplin* rule. In the latter he will not.

In *People v. Keller*,<sup>97</sup> the defendant procured a Diner's Club card with valid credit references. Numerous purchases were made on the strength of this card. Subsequent actions by the user indicated no intent to pay for the purchases. Defendant and her husband were convicted of conspiracy to defraud by criminal means and grand theft. The court does not discuss the reasons for so holding, but the holding is certainly contrary to the *Chaplin* rule. California is one of eight jurisdictions which have repudiated the majority rule.<sup>98</sup>

The California rule appears to be a healthy trend away from the *Chaplin* holding. It is nonetheless submitted that regardless of the trend, misuse of the credit card by a user should be criminally punishable for the reasons stated above.

### Conclusion

Credit cards, for the most part, are special, clean letters of credit. Their business structure suggests an application of assignment or third-party-beneficiary law but closer scrutiny indicates that it is no more than a suggestion.

The user of a credit card must acquire and use the card in good faith and is responsible for all purchases made by a third party who wrongfully uses the card before the rightful user gives the issuing company notice of the card's loss or theft. The creditor establishment is required to make a good faith effort to determine that

94 *Id.* at § 12.24.

95 *Chaplin v. United States*, 157 F.2d 697 (D.C. Cir. 1946).

96 *Ibid.*

97 165 Cal. App. 2d 419, 332 P.2d 174 (1958).

98 *People v. Ashley*, 42 Cal. 2d 246, 267 P.2d 271 (1958).



one who presents the card is the rightful user and otherwise takes the risk of not being reimbursed by the issuer if the user proves to be a thief or misuser. The issuing company is required to give the creditor establishments notice of lost or stolen cards when the issuer receives notice of this from a user. Otherwise the issuer must bear the risk of misuse of the card.

One who steals a blank credit card commits larceny. If the card is signed, however, it becomes a contract and is incapable of being stolen. One who procures a card from an issuing company through false credit references commits the crime of obtaining property by false pretenses. If a rightful user presents the card after expiration, he commits no crime because the expiration date appears on the card and the truth or falsity of the representation is apparent to the creditor. However, if one uses a card which he has fraudulently acquired, he obtains property by false pretenses. The most pressing question is the quality of the crime with regard to the degrees of larceny. At most, theft of a card would be petty larceny and misuse of it would be measured by the amount of goods wrongfully so acquired.

The law of credit cards has yet to take on scope and definition. Though they came into general use in 1920 and national prominence in 1952 with the formation of Diner's Club Inc., few suits have been brought and only two states have dealt with them legislatively. With international credit card companies listing their users in the millions and their creditors in the thousands, the quantity of credit extension becomes astronomical.

The letter of credit theory is propounded only as a guidepost. To inter the vast commercial system of credit cards in a body of law as old as the Law Merchant without regard for the need for fluidity is to create problems where they do not exist. It is submitted, nevertheless, that much aid may be garnered from viewing credit cards in the light of letter of credit law since the cases are numerous, the facts similar, and the courts generous in their explanation of the law. The normal desire for uniformity in the law becomes a mandate when the transitory nature of credit card users is considered. Be that as it may, whatever the eventual structure of credit card law, the problems will be lessened if the courts all start from the same place.

*John R. Martzell*