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John Dalzell

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JOHN DALZELL*

America has taken with enthusiasm to the use of the credit card, a plastic card carried usually in a wallet, with the holder's name and a number embossed on it, which is accepted by many merchants, restaurateurs, service-station operators, etc., as establishing the credit of the holder. The merchant accepting such a card simply gets the customer's signature on an invoice, which bears also the number of the card, the customer gets the goods, and the transaction is closed,—except for payment for the goods. The merchant gets his money from the organization which issues the card, and the issuer collects from the card holder customer. When the card is issued by the merchant and authorizes purchases only at his store, these two transactions, collection by the merchant and from the customer, are one. But today probably most cards are issued by a bank, or by an organization in the credit-card business, which makes its profit in the discount arrangement with its merchant customer.

In 1964 it is said that there were about 70 credit card plans in the United States;[1] by 1967 there were 1000.[2] Today there are some 200,000,000 cards in use in the fifty states doing about $50 billion dollars a year in business.[3] They can get the customer anything from a ham sandwich or a pack of cigarettes to a Cadillac car, or a lengthy vacation in Europe or Hawaii. And the customer may pay in installments over several months or years, provided he pays also the charge for the delayed account.

It is not surprising that sometimes a card falls into unauthorized hands, and is used for goods and services which go to the finder or thief. Losses from such use have been estimated at from $20 million to $50 million dollars annually.[4] The question which has troubled the courts, is who carries the liability for these losses,—issuer, card holder, or merchant?

* Professor, School of Law, North Carolina Central University; Professor *Emeritus*, School of Law, University of North Carolina.

[1] WALL STREET JOURNAL (Midwest Edition) Jan. 17, 1967, p. 1, col. 8.

[2] 8 BOSTON COLL. INDUSTRIAL & COMMERCIAL LAW REV., 485, 486 (1967).

[3] Associated Press Story, Jack Lefler, July 28, 1968; cited in Barnes, *The Law, The Credit Card, and the Coming of the Cashless Society*, 6 AMERICAN BUS. LAW JOURNAL 641, 642 (1968).

[4] Louisville, Ky., COURIER JOURNAL, Dec. 29, 1967; Newsweek, Sept. 2, 1968, cited in 6 AMERICAN BUS. LAW JOURNAL 641, 642 (1968).

Implied Obligation of Card Holder: Due Care

Most credit cards issued today include a provision obligating the applicant or card holder to notify the issuer promptly of loss of the card, or promising to assume liability for use of the card prior to notice of its loss or theft. But Central Charge Service, Inc., issued its card to Thomas without any such provision, either on the application or on the card.[5] The card was lost and used by the finder for over $500 in purchases. The question which the court had to decide was whether Thomas made an implied promise to assume liability for unauthorized use of the card, or even assumed a liability to notify the issuer when the card was lost; and the court refused to find any such implication by Thomas. In its decision for Thomas the court included this language:

> At most, it may be said by implication that Thomas agreed to exercise due care in the use of his card. And while he perhaps failed in that agreement, it is plain that such failure is insufficient to support this action.[6]

Just how Thomas "failed" in the agreement to exercise due care in use of his card is not revealed in the facts given, unless it is to be inferred from the fact that he lost his card. Nor does the court explain its last statement above as to the insufficiency of such failure to support the action. The case seems to hold simply that the cardholder is not liable for unauthorized use of his card, in the absence of an express assumption of such liability.

The obligation to use "due care" (whatever that is) is also recognized in other cases which found the card holder responsible for purchases which he had not made. In one case, the card holder had loaned his card to two friends, who used it, not only as authorized by the holder, but for other purposes also, and who failed to return it upon demand; the card holder was, quite rightfully, held for the purchases.[7] In an earlier case, the plaintiff issuer of the card sued the card holder for $173.68 in sales which the defendant denied having received. The purchases were apparently made by an unauthorized use of the credit card. It was alleged that defendant was negligent in leaving his card in his car,

[5] Thomas v. Central Charge Service, 212 A.2d 533 (D.C. Ct. of App. 1965). In fact, there does not appear to have been any signature of a contract by the card holder; but Thomas had used the card for a small purchase at a drug store.

[6] *Id.* at 534.

[7] Magnolia Petroleum Co. v. McMillan, 168 S.W.2d 881 (Tex. Co. App., 1943).

which was stolen. The court eliminated $135.31 from the plaintiff's claim, without giving any reason for it, simply saying that these purchases were made at service stations operated by "authorized dealers" of the plaintiff, while the balance of the claim was for goods sold by the plaintiff company at its other service stations. The court upheld the jury verdict against defendant for this balance, $38.37, saying:

> Ordinarily the bona fide holder of a courtesy coin or plate should not be held liable for the debt created by the use of it by a thief or by one not authorized to obtain credit on it. However, under the particular facts and circumstances of the instant case, the court feels that it properly submitted part of the claim, $38.37, to the jury. . . .[8]

The "particular facts and circumstances of the instant case," apparently, referred to the defendant's negligence in leaving his card in his car.

The New York court also gave the same reason, lack of due care by the holder, for protecting the issuer in *Texaco v. Goldstein.* The card read that the holder

> assumes full responsibility for all purchases made hereunder by anyone through the use of this credit card prior to surrendering it to the company or to giving the company notice in writing that the card has been lost or stolen.

The card was stolen, and Goldstein gave no notice to Texaco, Inc.; it was picked up some time later by a Chicago Texaco dealer, after it had been used to make purchases totalling some $569. Goldstein was held liable to Texaco on this account.[9] The court remarked that the contract was reasonable in dividing the loss, as of the time of notice to the company, between the card holder and Texaco.

> Accordingly the negligence of the card holder became most important. . . . Should he . . . lose his credit card . . . the risk of loss is not only borne by him, but also by the Company, when he actually complies with the conditions of the issuance of the card to him . . . the only requirement by the company is that the card holder exercise a proper degree of care in the handling of his card.[10]

The only apparent "negligence" of the card holder in handling his card, was his failure to report promptly its loss, to the issuer.

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[8] Gulf Refining Co. v. Plotnick, 24 Pa. D. & C. Ct. 147, 151-52 (C.P. 1935).

[9] Texaco, Inc. v. Goldstein, 34 Misc. 2d 251, 229 N.Y.S.2d 51 (New York Mun. Ct. 1962).

[10] *Id.*, 229 N.Y.S.2d at 55.

Another decision against the card holder appears based upon his failure to notify the issuer as lack of care. A Uni-Serv Card was issued to Vitellio upon an application reading, in part,

> If Uni-Card is lost or stolen, card holder will notify Uni-Serv in writing, and until Uni-Serv received (sic) such notification, card holder will be responsible for any use of this card.[11]

The card was in a purse which was stolen on October 15th; police were notified at once, and they suggested notice to the issuer. Vitellio telephoned to Uni-Serv Corporation, and was told to "send in a written communication, which he did on October 18, 1964."[12] But the man who had the card lost no time; he used it twenty-one times in three days, October 15, 16 and 17, for an aggregate of $685. Judgment was against the card holder; the court quoted from *Texaco, Inc. v. Goldstein*, as to the holder's obligation to handle his card as carefully as he did his currency.[13]

Obligation of Due Care by Issuer and Merchant to Card Holder, and Burden of Proof Thereof

Other cases have reached opposite decisions by speaking of the obligation of care owed by the merchant and issuer to the card holder, to give him reasonable protection. The merchants are the only ones in the triangle who had actual contact with the wrongful user of the card. The issuer commonly gets into the picture by assignment from the merchant, and the assignment is, naturally, subject to any defense good against the merchant. Even if there is no assignment, but rather a direct obligation created between the card holder and the issuer, the implication is that it will come into existence only when the merchant shows reasonable care in dealing with the imposter.

In *Gulf Refining Co. v. Williams*,[14] the action was to collect $975 for goods brought by use of a credit card without authorization. Defendant, in business in Little Rock, Arkansas, secured eight credit cards for his trucks; one of them was inadvertently left by his driver at a service station, and stolen from there by an employee of the station. Probably the driver was careless in leaving his card at the station in the first place;

[11] Uni-Serv. Corp. v. Vitellio, 53 Misc. 2d 396, 278 N.Y.S.2d 969, 970 (Civ. Ct. of City of New York, 1967).

[12] The case does not reveal whether Oct. 18 was the date of dispatch of notice, or of receipt of notice, or both. *Id.*, 278 N.Y.S.2d at 970.

[13] *Id.*, 278 N.Y.S.2d at 971.

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

but he called there the next day to retrieve the card, and was told that it would be sent to him. Up to this point, the only negligence was chargeable to the card holder, in leaving his card at the station. The card provided that any loss of the card must be promptly reported; and there was a conflict of evidence as to whether there was any report. But the man who got the card wrongfully went on a ninety-day spending spree in Mississippi. He was driving a Plymouth coach, a passenger car, with a Mississippi license. He used the card often for purchases which were not for the car he was driving,— a radio for his home, and tires which did not fit his car, and for gasoline which was not put in his car. In one or two instances, he secured cash from the dealers, and signed fictitious invoices. Most of the invoices had a false license number—not that of the Plymouth he was driving. The imposter was known in the community, to some of the dealers, and had lived in several of the towns where he had secured credit. It was a rather obvious case of lack of reasonable care, if not of collusion, by the merchants; and the issuer's claim was dismissed.

In the *Diners' Club v. Whited*, the card holder agreed that

> If this credit card is lost or stolen, original holder is liable and responsible for all purchases charged through use of this card until . . . written notice [to the issuer] of its loss or theft.[15]

The card was stolen, and sales of $1622.99 were made by the thief, all before the defendant Whited knew about the theft. In the trial court these facts were held enough to establish liability of the holder; but appellate court found the issuer liable. It was held that the plaintiff's case was based upon due care by the plaintiff, and that this burden of proof was not properly carried by the issuer. Whether the issuer acquired the claim by assignments from the merchants, or by direct obligation of the customer to the issuer, was immaterial, according to the court.

Allied Stores of New York, Inc. issued a credit card to Mary Funderburke, and sought to collect $2460 from her, claiming for 237 purchases, totalling $2460, made in reliance upon the card during a one month period.[16] Her application for the card read that she agreed

[15] Diners' Club v. Whited, Civil No. A 10872, App. Dept. Calif., Aug. 6, 1964. The case is not reported; the statement above is based upon 43 N.C. Law Rev. 416 (1965).

[16] Allied Stores of New York, Inc. v. Funderburke, 52 Misc. 2d 872, 277 N.Y.S.2d 8 (Civil Ct., City of New York, 1967).

> 1. To pay for all purchases made by any person presenting the identification plate which the Seller will lend me, until Seller receives my notice by certified mail that same has been lost or stolen.[17]

She did not know the card was lost, so no notice was given to the issuer During the last two weeks of the month, she was away on vacation.

The New York Statutes contained this section:

> A provision to impose liability on an obligor for . . . use of a credit card after its loss or theft is effective only if it is conspicuously written or printed in a size at least equal to eight point bold type either on a card, or on a writing accompanying the card where issued or on the obligor's application for the card, and then only until written notice of the loss or theft is given to the issuer.[18]

The credit card involved in Allied Stores case met the requirements of this statute.[19] But it was pointed out that neither statute nor contract expressly imposed any liability on the card holder for purchases made when the card holder did not know that the card was lost. During the thirty day period from the middle of June until the middle of July, when her account was building up to the high mark, the plaintiff-issuer alone knew of the increased activity in the account. At the end of June, it was in excess of $470, yet it continued to accept the card, apparently without inquiry, for another $1900 in July. Plainly, the plaintiff-issuer did not act with reasonable care to prevent defendant's card from unauthorized use.[20] Equally obvious to the writer, is the meaning of the agreement "To pay for all purchases made by any person presenting the identification plate . . . until Seller receives my notice that same has been lost or stolen." The court's reading of this undertaking as subject to the implied condition, "provided that I know about the loss of the card, and provided it is possible for me to notify the Seller," changes substantially the obligation of the holder, and seems to require some further explanation. The court points out that the credit card arrangement here involved two parties only, being an authorization to purchase only at the plaintiff's stores, unlike the Lull case (*infra*) and the Goldstein case (*supra*);[21] but it is not clear that this makes any difference.

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[17] *Id.*, 277 N.Y.S.2d at 10.

[18] *Id.*, 277 N.Y.S.2d at 11; 19 McKinneys Consolid. Laws of N.Y., Sec. 512.

[19] *Id.*

[20] The court speaks of this as an application of tort law; *ibid.*, 277 N.Y.S.2d at 15. It seems to the writer rather an application of contract law.

[21] *Id.*, 277 N.Y.S.2d at 14.

Union Oil Company of California v. Lull is a case where a decision below for the defendant card holder was reversed, and the case was remanded for a new trial, with (1) a holding that practically rejects the construction of the card holder's obligation as impliedly limited as set out in the preceding paragraph, but at the same time, (2) a holding that plaintiff owed the defendant an obligation to use reasonable care, and that the jury should make a finding on the point. The decision is a good review of the law on the subject. Defendant's credit card included this sentence:

> The customer to whom this card is issued guarantees payment . . . of price of products delivered or services rendered to anyone presenting this card, guarantee to continue until card is surrendered or written notice is received by the company that it is lost or stolen.[22]

The card was renewed, and another issued; but the old card was lost and got into the hands of another, who used it without authority for purchases amounting to $1454, before it expired. Defendant's home address, in Oregon, was on the card. The wrongdoer, driving an Idaho car, used the card all the way to Chicago. Then the defendant card holder heard about it, and cancelled the card.

The trial court instructed the jury that Lull, the card holder, had fully performed his duties under the contract if he had notified the issuer of the loss of the card "as soon as a reasonably decent person under all the circumstances would have given the notice." The court held this instruction erroneous.

> There is no basis for implying the limitation upon defendant's liability.[23]

The court classified the contract as one of suretyship, guaranty, or indemnity, relying on the defendant's promise to "guarantee payment," and saying it made no difference, for the case before it, which term was applied.[24] Thus it gave defendant the benefit of the favored position of gratuitous guarantors, and decided that the issuer-indemnitee owed the duty of reasonable care to the defendant, citing cases on banks cashing forged checks and paying out money to the unauthorized person who presented a savings bank book.[25] The court then referred to the fact that

[22] Union Oil Co. of California v. Lull, 220 Or. 412, 416, 349 P.2d 243, 245 (1960).
[23] *Id.* at 421, 349 P.2d 243, 247.
[24] *Id.* at 425, 349 P.2d 243, 249.
[25] *Id.* at 428-32, 349 P.2d 250-52.

the impostor was driving a car with an Idaho license, while the card showed Oregon as the state of residency of the defendant, saying that it should be left to the jury to determine whether it was reasonable to conclude that service station attendants should have inquired about the identity of the man with whom they were dealing.[26] The court then placed the burden of proof on this issue upon the plaintiff.[27]

In *Uni-Serv Corporation v. Frede*, there was no proof of proper mailing of the card to the defendant, and therefore no contract liability at all between the parties. But the card, in unauthorized hands, was used 98 times in 24 days, for a total of $2347.08 (though the limit fixed by the issuer was $250). Having held for the defendant, the court went on to say:

> If it were necessary to determine upon assumption (contrary to fact) that there was such contract—whether there was an obligation to reimburse plaintiff for its claimed loss, I would hold there was no such obligation. . . . Plaintiff fixed a $250 limit for defendant. Plaintiff claims it mailed the credit card to defendant on July 31, 1964, or within a day or two thereafter. Concededly the card was not used in August and September of 1964. Beginning with Oct. 9, 1964 and through Oct. 20, 1964—there was an avalanche of purchases by use of the credit card. There were 98 such purchases aggregating $2342.08. This should have aroused plaintiff's suspicion much earlier than seems to have been the case, and mere inquiry of plaintiff (sic) would have revealed the illegitimate use of the credit card. In such circumstances, it was the plaintiff's conduct which was the proximate cause of the loss.[28]

It seems, however, that the facts did raise a question of negligence by the merchant in accepting a card issued to the husband but not signed by him (and possibly also by the wife in not keeping the card where it could not fall into unauthorized hands); and the jury should be required to pass upon these facts.

Sears, Roebuck and Company of Lubbock, Texas, issued a credit card to Waldo N. Duke, which read that the holder would pay for all purchases made by him, or with his card. The card was taken from Duke's suitcase in a New York hotel and used, without authority, to purchase goods to the amount of about $1,200 in the New York area, within

[26] *Id.* at 434-35, 349 P.2d 253-54.
[27] *Id.* at 436, 349 P.2d at 254.
[28] Uni-Serv Corporation v. Friede, 50 Misc. 2d 283, 271 N.Y.S.2d 478, 428-3 (Civil Ct., City of N.Y., 1966).

two weeks, all before any notice to Duke or to the issuer. The jury found Duke was not negligent in his loss of the card or failure to report to Sears. Duke claimed that he was not liable for purchases made by another without his authority; that Sears was liable for failure to check the identity of the purchaser. He argued that the card could not be accepted as proof of identification by Sears, upon whom the burden of proof rested. The Supreme Court held that the burden of proof on this issue rested on Duke and that, under normal circumstances, the credit card could be taken as sufficient identification. But it also held that it was for the jury to decide whether Sears' stores in New York used proper care, remarking upon those facts as apparently relevant:

> Many purchases were made in the same stores, and one New York area store inquired of the Lubbock store as to Duke's credit standing in connection with one large purchase without any question being raised about the irregularity.[29]

This decision does not indicate any disposition to allow the merchants to do what they appear inclined to do—simply take the card number and the purchaser's signature as sufficient.

There is one case in which the decision does not place it within either of the above categories; but the facts stated would indicate lack of care on the part of the merchant. Denver Charge-Plate Associates issued a credit card, without a statement that the holder would be responsible for all purchasers made with the card before notice to it of loss of the card. One of its cards was issued to H. A. Rayor, and was apparently used, without authorization, to secure about $100 worth of goods, for which suit was brought against Rayor. It was the custom for the issuer to issue the cards in series designated A, to the wife, and in series designated B, to the husband. The card here involved was a B card, issued to H. A. Rayor; but the signature line was filled in with the signature of his wife, Connie P. Rayor. Mrs. Rayor used the plate in April, 1964, and then returned it to its place in her purse. She made no further use of the plate and upon receiving the bill for the unauthorized purchases she found the place where she had left it, in her purse. The sales slips were signed "H. A. Rayor," but the lower court expressed the opinion that the signature was not in the handwriting of either defendant, husband or wife, and that the purchases were not made by them. It was in evidence that

[29] Sears, Roebuck and Company v. Waldo Duke, — Tex. —, 441 S.W.2d 521, 524 (1969).

clerks often do not compare the signature on the slip with that on the card. But the lower court, in the haste of deciding many cases, excluded all evidence of any contractual obligations at the time of issue, remarked that the loss of the credit card was the same as the loss of a five-dollar bill, and held Rayor liable. The appellate court reversed, remanding the case for a new trial, holding that:

> In the absence of other factors (such as negligence, bad faith, or estoppel) which are not involved here, such a liability must be predicated upon a contractual obligation.[30]

Card Holder Plainly not Liable

These are a couple of cases not cited above because there is not much doubt about the liability of the issuer. In one case the evidence indicated that Esso, the issuer, was induced by the wrongdoer to mail a duplicate card, which was taken from the mail and used without authority. The loss must be carried, not by the person named on the card, but by Esso, and its successor.[31] In the other case, the purchases were made after notice of loss of the card was received by the company which issued the card, and it was held liable for the resulting losses.[32]

Conclusion

The credit card is still a comparatively recent factor in American courts, and some disagreement as to its treatment is to be expected. In these cases, two innocent parties, neither one profiting from the transaction, face the judge. Defendant has simply lost his card; he may not have known anything about it at the time of its loss. Plaintiff has, either by assignment from the merchant or by direct obligation from one who has every indication of apparently speaking for the defendant card holder, a claim against the defendant. Which one is liable?

When the card speaks in the language of guarantee, it has been suggested that the card holder is a gratuitous guarantor, indemnitor, or surety.[33] But this is not entirely satisfactory, for, even where the card says the holder "guarantees payment," this term, although the only promise of payment on the card, certainly does not apply to the transactions

[30] Rayor v. Affiliated Credit Bureau, Inc. — Colo. —, 455 P.2d 859, 860 (1969).
[31] Humble Oil & Refining Co. v. Waters, 159 So. 2d 408 (La. App., 1963).
[32] Read v. Gulf Oil Corporation, 114 Ga. App. 21, 150 S.E.2d 319 (1966).
[33] Union Oil Co. v. Lull, 220 Or. 412, 425, 349 P.2d 243, 254.

by the card holder himself, for in those transactions he is the primary debtor. And the card is issued with those transactions in mind.

Of course, the language of guarantee is intended to cover unauthorized and authorized use of the card; but literally interpreted, it does not express very accurately the intentions of the parties as to either. As to both uses, the issuer relies upon the unconditional promise of the holder to pay; he expects payment from the holder for sale to him because he got the goods, and payment from the holder for sale to another because the holder is responsible for the other party having possession of the card, and the other party has disappeared. He does not normally expect payment by the wrongdoer; a sale to the wrongdoer in reliance upon the card is thought of as imposing an unconditional liability upon the card holder, not a liability if the wrong doer does not pay.

The credit card holder is in a class by himself; he does not belong with any group heretofore recognized in the common law. He has secured his card by an implied promise to handle it with due care. Certainly if he loaned the card to another for a particular use, and it was used for other purposes, he would expect to be held liable.[34] But the issuer, also, has made a promise, likewise implied, to use reasonable care in recognizing a card, and to impose the same obligation on the merchants who are members of its organization. It would not be reasonable for the merchant to recognize the card for one whom he knows is not the person named as card holder, even though he signs the card holder's name.

One question, possibly the central question for the jury, concerns the standard of care to be exercised by the parties. Is mere failure or unreasonable delay in notifying the issuer of the loss lack of care in handling the card? It may be argued that such failure or delay is not concerned at all with handling the credit card, which is involved with care in physical possession of the card. As to care by the plaintiff-issuer, what circumstances are sufficient to put the merchant on notice that he is not serving the original card holder? It is customary not to display the credit card until the tank has been filled, or the dinner consumed; and, at that time, pressure on the merchant to accept is considerable. On rejecting the card, many filling stations probably have siphons that will drain gasoline out of the tank; but the dinner that has been served to the customer and his guests—? Should the jury be given these facts and allowed to take them into consideration, in determining whether the merchant has acted with ordinary prudence?

[34] *Supra*, note 7 and accompanying text.

The locus of the burden of proof on these two issues may well prove to be decisive. As to the care of the card holder, he alone would be in possession of the facts on that, and he should, probably, carry the burden of proof. As to the prudence shown by the merchants and the issuer, the plaintiff issuer appears closer to that problem, and the burden should probably be left with him as a part of his case. This may be determinative in many cases; it will be extraordinary for the issuer to be able to produce witnesses who will remember the individual transactions on which his recovery depends.

More careful contract drafting would reduce the problem.[35] The two promises that are implied should be spelled out on the card. More identifying data on the card, including even a photo of the card holder, would be of much assistance.[36] Some such identification seems essential, if the loss based upon abuse of credit cards is to be eliminated.

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[35] There is one problem that has not yet gotten into the reports, but will probably come up soon: Who is liable for transaction secured by the credit card after the death of the holder? Clearly there is no agency relation involved, which would be terminated by death. The card is a definite contract to pay for all goods supplied and services rendered in reliance upon it. It would be comparatively easy to find a constructive condition, *if* the other contracting party, the issuer, knew about the death, as does the employer in employment contract cases.

[36] According to an item in COMMERCIAL LAW JOURNAL for September, 1968, a computer system has been devised which will take care of all credit-card losses.

> Both I.B.M. and Honeywell, Inc., have developed simple and workable systems linking a computer to an inlock telephone network employing telephones with the touch tone pad. The computer can give oral answers to simple pertinent questions by means of spoken words stored in its memory.
>
> This is the way both systems work. The credit card holder presents the card to pay for an expensive dinner. The cashier calls the computer by inserting two plastic cards in the touch pad of the special telephone. The first card makes the call, the second identifies the restaurant. The cashier then dials the credit card number and amount of the charge. Within four seconds the computer voice announces either that the charge is accepted or rejected.
>
> Richard Howland, American Express credit card manager, is convinced that the system is a real break-through and will eliminate most credit card abuses."

73 COMMERCIAL LAW JOURNAL 290 (1968).

The writer does not see how the proposed system would prevent any abuses of the credit card by a finder or thief. The system depends upon the presentation of a genuine credit card, for use in the computer; and the finder or thief presents to the merchant just such a credit card.