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The Omnibus Clause of U.C.C. Section 4-303(1)(d): A Holder's Sword or a Payor's Shield?

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THE OMNIBUS CLAUSE OF U.C.C.
SECTION 4-303(1)(d): A HOLDER'S SWORD OR A PAYOR'S SHIELD?

CHARLES C. LEWIS*

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I. INTRODUCTION

The 1952 Official Text of the Uniform Commercial Code\(^1\) contained in section 4-303(1)(d) what was then called the "omnibus" language.\(^2\) The language of this omnibus clause in that text and all subsequent texts\(^3\) has remained unchanged as follows: "or otherwise has evidenced by examination of such indicated account and

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1. The American Law Institute and the National Conference of Commissioners on Uniform State Laws promulgated this text in September of 1951 with the endorsement of the American Bar Association.

2. U.C.C. § 4-303, comment 3.

3. There have been five official texts since the first one of 1952: the 1957 Official Text, the 1958 Official Text, the 1962 Official Text, the 1972 Official Text, and the 1977 Official Text.
by action its decision to pay the item . . . .”

According to the official comments to section 4-303, this omnibus clause describes one of the seven events listed in section 4-303 which confer priority to an item over any knowledge, notice or stop order received by, legal process served upon, or set-off exercised by a payor bank. Comment 3 to section 4-303 says simply that the omnibus clause was necessary to pick up other possible types of action, impossible to specify particularly, when the bank has examined the account to see if there are sufficient funds and has taken some action indicating an intention to pay. “Sight posting” is given as an illustration of this type of action.

In the years after the promulgation of the 1952 official text, particularly as the New York Law Revision Commission studied it, and as more and more states either studied the Code for enactment or actually enacted it during the late 1950’s and early 1960’s, law professors, practicing attorneys and bank attorneys commented on each provision of it. Section 4-303(1)(d) and its omnibus clause did not escape this scrutiny. Many of the commentators, however, did no more than describe the purpose of section 4-303’s priority rules, point out that section 4-213(1)(c), a remarkably similar section in the Code, did not contain the omnibus clause, and then note the purpose of the omnibus clause as explained in official comment 3. Other commentators noted that the interplay between section 4-213(1)(c)’s completion of the process of posting and the omnibus clause of section 4-303(1)(d) left a period of time or “gap” during which the responsibility of the payor bank was not clearly defined. This period of questionable responsibility was

5. The omnibus clause is the sixth event. U.C.C. § 4-303, comment 3. Section 4-303(1)(e) is the seventh and last event. U.C.C. § 4-303, comment 4.
6. Item is defined as any instrument for the payment of money even though not negotiable, but does not include money. U.C.C. § 4-104(1)(g).
7. The New York Law Revision Commission studied the official 1952 text during the years 1953 through 1955.
8. As will be explained later, the 1952 Official Text and earlier drafts stated the events of section 4-303 in terms of priority, but the 1957 official text and later texts, as a result of the work of the New York Law Revision Commission, removed the terminology of “priority” from the language of section 4-303. The priority terminology was left untouched, however, in the official code comments.
9. The similarities and dissimilarities of sections 4-213 and 4-303 will be noted later on pages 287-88 infra.
10. Rapson, Article 4-Bank Deposits and Collections, 17 Rutgers L. Rev. 79 (1962); Bunn, When is a Check Paid? Check Handling Under Article 4 of the
noted as early as January 15, 1954, by Robert H. Brome. In a memorandum which he filed with the New York Law Revision Commission, Brome posed the problem:

If before posting but after . . . evidencing its decision to pay short of posting, the bank receives a stop order, what is the basis of the bank's liability if it recognized the stop order and returns the item as unpaid within the time permitted by sections 4-301 and 4-302? It would appear that there is none.

Walter D. Malcolm, the final recorder for U.C.C. Article 4, in a February 17, 1954, reply letter to Brome's memorandum, acknowledged that the case Brome posed had "theoretical difficulty." But he added without further comment, "Query—how frequently will they arise in contested cases?" Brome's reply to Malcolm was prophetic:

... I think banks will be faced fairly frequently with the problems—do we give effect to the customer's stop order, and return the item to the holder and risk a possible test suit under the statute, or do we give priority to the item and argue with the customer as to how far we had gone in the posting process?

Despite the questions about the omnibus clause raised by Brome, the New York Law Revision Commission suggested no change in the omnibus language. The language has, as set out above, remained unchanged since the 1952 official text. Time, however, has answered Malcolm's query by confirming Brome's feeling that the problem would indeed surface frequently.

Uniform Commercial Code., 43 MINN. L. REV. 289 (1958); Russell, Article 4: Bank Deposits and Collections, 29 Mo. L. Rev. 411 (1964); note that all of these law review articles are pre-1968—before the West Side case brought this "gap" to light.

11. Chairman of the Subcommittee on Bank Deposits and Collections of the New York State Bar Association's Special Committee to consider the Uniform Commercial Code and also member of the Special Committee of Federal Reserve Counsel to consider the Uniform Commercial Code.
12. 1 NEW YORK LAW REVISION COMMISSION REPORT 297 (1954) [hereinafter cited as COMMISSION REPORT].
13. Id. at 342.
14. Id. at 362.
15. 1 COMMISSION REPORT 429 (1956). As discussed later in this article, the analysis of section 4-303 by John D. Killian, III, Esq., may have softened Mr. Brome's fears by reporting that New York's law was in accord with the acts by which section 4-303 gives the item priority. See 2 COMMISSION REPORT 252 (1955).
A. THE PROBLEM FIRST ARISES, BUT IN DISGUISE

The facts in the now famous case of *West Side Bank v. Marine National Exchange Bank* raised the issue posed by Brome in his January 15, 1964, memorandum: is a payor bank accountable to the holder of a check if it has, under section 4-303(1)(d)'s omnibus clause, evidenced by examination of its customer's account and by action its decision to pay the check but has not yet committed any of the final payment steps (particularly that of completing the posting process) under section 4-213(1)? The Wisconsin Supreme Court however, did not see that issue as the controlling one and decided the case without mentioning section 4-303 or its omnibus clause.

In the *West Side* case, the stock brokerage firm of Paine, Webber had issued a check in the amount of $262,600.00, drawn on Marine National Bank, to the order of Byron Swidler. That same day, Bryon Swidler deposited the check in his account at West Side Bank. On Friday morning, West Side Bank, through the local clearinghouse, presented the check to Marine National for payment. On Friday evening, Marine National sent the check, along with others, through its sorting and encoding machines and its electronic computer. Since the electronic computer did not reveal that Paine, Webber's account was deficient in any respect the account was charged with the item and a "Paid" stamp was affixed to the check. On Monday morning, the report of the computer was submitted to the bookkeeper, and since the computer had revealed no deficiencies, the item was photographed, cancelled and filed in Paine, Webber's account.

16. 37 Wis. 2d 661, 155 N.W.2d 587 (1968). The trial court's written opinion in the same case quoted section 4-303(1)(d) and recognized the period of questionable responsibility suggested by Brome: "The possibility has been suggested that a payor bank may make a discretionary determination of payment in the period occurring between charging an account and reversing an entry when one of the 'four legals' intervenes." *West Side Bank v. Marine National Exchange Bank*, 4 U.C.C. Rep. Ser. 264, 273 (Cir. Ct. Milwaukee Co., 1967). Nevertheless, the trial court did not decide the question under section 4-303 because it felt the issue under section 4-303 was not presented; the Wisconsin Supreme Court later affirmed the holding of the trial court in its famous opinion.

17. "Payor bank" means a bank by which an item is payable as drawn or accepted. U.C.C. § 4-105(b).

18. "Holder" means a person who is in possession of a document of title or an instrument or a certificated investment security drawn, issued or indorsed to him or his order or to bearer or in blank. U.C.C. § 1-201(20).
If the story had ended with the actions of the bookkeeper, no one, not even law students and bank attorneys, would have heard anything more about the West Side case. Unfortunately, at 4:00 p.m., on that same Monday, Marine National discovered that a check drawn by Swidler on another bank in the amount of $270,000.00 payable to Paine, Webber and deposited by it in its account at Marine National, had been dishonored as a nonsufficient fund check. Upon learning of these facts from Marine National, Paine, Webber immediately entered a stop payment order with Marine National on its check for $262,600.00 payable to Bryon Swidler. Marine National withdrew the check from Paine, Webber’s file and notified West Side Bank that the check for $262,600.00, which it had presented to Marine National in the clearinghouse on Friday, was being returned because of the stop payment order. Marine National reversed the entries for the check in the computer that same Monday night by crediting Paine, Webber and stamping the check, “Payment Stopped” and “Cancelled in Error.” Marine National then returned the check to West Side Bank in the morning exchange at the clearinghouse on Tuesday. West Side sued Marine National Bank for the face amount of the dishonored check.

The Supreme Court of Wisconsin’s opinion based on these facts, either set out in full or discussed in most commercial law case books, is now history. In short, it held that Marine National Bank was not accountable for the amount of the check to West Side Bank because the process of posting, which would have brought about accountability under section 4-213(1)(c), had never been completed. The court never mentioned section 4-303 even though the facts included a contest between a customer’s stop payment order and a check holder’s demand for payment and West Side Bank’s brief advanced the argument that the stop payment order came too late under the omnibus clause of section 4-303 for Marine National to honor it instead of the check.

19. Marine National Bank convinced the court that its process of posting included section 4-109(e)’s correcting or reversing an entry or erroneous action until it was too late to return the check, thus effectively postponing the completion of its posting process until cut off by section 4-213(1)(d)’s midnight deadline or later time provided by statute, clearinghouse rule or agreement.

B. THE BATTLE LINES ARE DRAWN

Although the Wisconsin Supreme Court did not address the issue of whether section 4-303’s omnibus clause could impose accountability in the *West Side* case, legal commentators did not miss an opportunity to discuss it. Walter D. Malcolm, the final reporter for Article 4, suggested outright that section 4-303, rather than section 4-213, should have been the section used to determine the outcome of the *West Side* case; therefore West Side Bank should have prevailed as a result because the stop order came too late for Marine National to obey it.21 James J. White and Robert S. Summers, authors of the popular treatise, *HANDBOOK ON THE UNIFORM COMMERCIAL CODE*, agree with Malcolm that the Wisconsin court was in error in analyzing the case under section 4-213 and not under section 4-303(1)(d) as a priority dispute.22 On the other hand, Fairfax Leary, Jr., the initial reporter of Article 4, maintained that section 4-303 could not have been used by a holder such as West Side Bank to impose accountability on a payor bank such as Marine National.23 In a frequently cited article, Ralph J. Rohner conceded that a payor bank which had otherwise evidenced its decision to pay but had not yet completed the posting process was not yet liable to the holder.24 Two law review notes also agreed.25


22. J. WHITE AND R. SUMMERS, *THE HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 559 (2d ed. 1980). The authors’ views have been the same since it was first taken in their earlier edition of the same book. J. WHITE AND R. SUMMERS, *THE HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 599 (1972). In their casebook, which they co-authored with Richard E. Speidel, their discussion of section 4-303 priority dispute asserts that the “importance of analyzing a priority dispute under U.C.C. section 4-303 and not merely with U.C.C. section 4-213 can make the difference between winning and losing a $262,000 law suit,” an obvious reference to their opinion that the *West Side* case should have been analyzed under section 4-303 and not U.C.C. § 4-213. R. SPEIDEL, R. SUMMERS, AND J. WHITE, *COMMERCIAL AND CONSUMER LAW* 1418 (3rd ed. 1981).


What is the true place and purpose of section 4-303's omnibus language? The answer is not yet clear; the law in this area, in the words of the authors of one textbook, has not yet crystalized. Commentators have expressed their opinions, given brief reasons, and then have gone on to other issues, perhaps more important and timely. The omnibus clause has never been dealt with in depth; a glancing blow at best has been given—a lick and a promise.

The purpose of this article is to give the omnibus clause more than a lick and a promise—a solid treatment. It will examine not only the present day language of the omnibus clause and section 4-303 in which it appears, but also its pre-Code existence, its pre-legislative history, its legislative history, the views of legal commentators, and possible future treatment by the courts.

II. THE STARTING POINT

The starting point for discussion of whether the omnibus clause of section 4-303 may be used by a holder to impose accountability on a payor is to look at those provisions which, without question, do impose accountability in favor of a holder against a payor bank. The possibility of section 4-303's omnibus clause also imposing accountability will then come more sharply into focus.

The most obvious section by which a holder may impose liability on a payor bank is section 3-413(1) under which an acceptor engages that he will pay the instrument according to its tenor at the time of his engagement. If a payor banks thus becomes an acceptor of a check by certifying it, the holder may sue the payor bank on the check if it does not honor its acceptor's contract.

A holder of a check may impose accountability on a payor bank if that bank makes any of the final payment steps under section 4-213(1). For example, if the payor bank settles for the item


27. The term “liability” is used here with section 3-413(1) because the holder's suit against the payor bank will be based on the check itself. “Accountability” is used with the acts under section 4-213 because those acts, once they have taken place, impose a duty to account since payment has presumably already been made. See U.C.C. § 4-213, comment 7.

28. Id. §§ 3-410(1), 3-411(1).

29. Of course, if the payor bank does not accept the check by certification, it will not be liable on it to the holder since the payor “is not liable on the instrument until he accepts it.” Id. § 3-409(1).
without reversing the right to revoke, if it completes the process of posting, or if it gives provisional credit and fails to revoke the settlement in the time and manner permitted, then the payor bank "shall be accountable for the amount of the item."

Although section 4-213(1) lists payment in cash as one of the final payment steps, it does not provide that the payor bank is accountable after the payment of cash. Comment 7 to section 4-213, however, explains that the payor bank is not made accountable if it has paid the item in cash because such payment is itself a sufficient accounting. The payor bank, thus, has accounted for the check by paying for it in cash.

Section 4-302, entitled "Payor Bank's Responsibility for Late Returns" is yet another provision by which accountability may be imposed by a holder upon a payor bank. If a payor bank, which is not also a depositary bank, retains a check beyond midnight of the banking day of receipt without settling for it, that payor bank will become accountable for the amount of the check to the holder. Regardless of whether the payor bank is also the depositary bank, if it does not pay or return the check or send notice of dishonor until after the midnight deadline, it is also accountable for the amount of the check to the holder.

The only other section that clearly imposes liability in favor of a holder upon a payor bank is section 3-419(1) which makes a payor liable in conversion. If, for example, the payor bank refuses to return a check delivered to it for acceptance or refuses on demand either to pay or return the check delivered for payment, or

30. Id. § 4-213(1)(b).
31. Id. § 4-213(1)(c).
32. Id. § 4-213(1)(d).
33. Id. § 4-213(1).
34. Id. § 4-213(1)(a).
35. A depositary bank is the first bank to which an item is transferred for collection even though it is also the payor bank; in this case, however, the depositary bank is not the payor bank. U.C.C. § 4-302(a) (emphasis added).
36. U.C.C. § 4-302(a). In other words, the payor bank must make the "authorized settlement" required under section 4-301(1) before midnight of the banking day of receipt if it is to avoid accountability to the holder. Section 4-301(2) does not require the "authorized settlement" of section 4-301(1) if the payor bank is also the depositary bank. See section 4-301, comment 2. Section 4-105(a) provides that a depositary bank may also be a payor bank.
37. U.C.C. § 4-302(a).
38. Id. § 3-419(1)(a).
39. Id. § 3-419(1)(b).
pays over a forged indorsement, the payor bank may be liable on the face amount of the instrument.

Should section 4-303 be added to the above list of provisions which certainly act as swords in the hands of the holder in the sense that they impose either liability or accountability upon the payor bank? If section 4-303 were added to the list, it would, for the most part, make no difference because the elements that trigger either liability or accountability under sections 3-413(1), 4-213, and 4-302, also appear in section 4-303. For example, acceptance or certification which triggers liability under the acceptor’s contract of section 3-413(1) is also present in section 4-303(1)(a). In addition, section 4-213(1)’s final payment steps of paying the item in cash, settling for the item without reserving the right to revoke and completing the posting process appear verbatim in section 4-303(1)(b),(c), and (d). Section 4-213(1)(d)’s making a provisional settlement for the item and then failing to revoke it in the time and manner permitted, and section 4-302’s late returns which bring about accountability on the part of the payor bank, are both incorporated in section 4-303(1)(e). Therefore, arguing that section 4-303 is a sword in the hands of the holder to impose accountability on the payor bank would appear on the surface to make little difference, except for the inclusion of the omnibus clause, the language of which appears nowhere else in the Code.

A. First Analysis

By comparing the language of section 4-303(1)(d), with comparable language of section 4-213(1)(c) and the official comments of both sections, it is easy to see that the omnibus clause of section 4-303(1)(d) must be something different from the completion of the posting process mentioned at the beginning of section 4-303(1)(d) and section 4-213(1)(c). If the omnibus clause were not somehow different, surely the drafters would have included the additional language. The difficult questions are how exactly is it dif-

40. Id. § 3-419(1)(c).
41. Id. § 3-419(2).
42. U.C.C. § 4-303(1)(d): “completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith or otherwise has evidenced by examination of such indicated account and by action its decision to pay to the item.”
43. U.C.C. § 4-213(1)(c): “completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith.”
44. Unless, of course, the drafters succumbed to the temptation to do what
different and what significance does it have?

The omnibus clause apparently describes an event that is completely separate from the completion of the posting process mentioned in section 4-213(1)(c) and in the first part of section 4-303(1)(d). Comments 2 and 3 to section 4-303 support this proposition. Comment 3, for example, calls the event described by the omnibus clause as the "sixth event" conferring priority under section 4-303. The first five events are listed in comment 2 and include acceptance, certification, payment in cash under section 4-213(1)(a), final payment of the item under section 4-213(1)(b), and completion of the process of posting under section 4-213(1)(c). The omnibus clause, therefore, is recognized as an event that is separate and different from completion of the posting process described either under section 4-213(1)(c) or section 4-303(1)(d).

This different and separate event also apparently takes place at a different point in time from that of completion of the posting process. Surely it does not take place at the same time or after completion of the posting process because, in that event, the drafters would have had no reason to put in an additional event since final payment and priority would have already been conferred by the completion of the posting process. The event described by the omnibus clause must therefore come at a point in time prior to that of completion of the posting process. Legal commentators agree on this point. For example, in his January 15, 1954, analysis of section 4-303, Robert H. Brome stated in the beginning: "This section provides, in effect, that there may be a period of time before an item is finally paid during which the item nevertheless has 'priority of payment' over the indicated items." Legal commentators have accepted this early proposition without question. What makes up the action described by the omnibus clause?

many lawyers do when they use such phrases as "null and void." H. WEIHOHEN, LEGAL WRITING STYLE 50 (2d ed. 1980).

45. Comment 2 describes the third, fourth, and fifth events by referring to section 4-213 because it says that certain of the tests determining priority status are the same tests for determining final payment under section 4-213, an obvious reference to the verbatim language of section 4-213(1)(a), (b) and (c) and section 4-303(1)(b), (c) and (d), except, of course, for the omnibus clause in section 4-303(1)(d). Comment 4 of section 4-303 states that the seventh and last event is the accountability resulting from section 4-213(1)(a) and 4-302 on late returns. 1 COMMISSION REPORT 305 (1954).

46. 1 COMMISSION REPORT 305 (1954).

47. Bunn, supra note 10, calls the event of the omnibus clause an "act short" of final posting.
Two elements seem to do it: (1) examination of the indicated account and (2) some additional action, both of which must evidence a decision or an intention\textsuperscript{48} to pay. Comment 3 to section 4-303 states that the types of action making up the sixth event are impossible to specify particularly but occur "where the bank has (1) examined the account to see if there are sufficient funds and (2) has taken some action indicating an intention to pay." The example given in comment 3, and included in most writings of the commentators, is the action of sight posting in which the bookkeeper (1) examines the account and (2) makes the decision to pay by sight posting rather than actual posting. Both elements required under the omnibus clause are certainly present in the bookkeeper's action: (1) the examination of the account and (2) the additional action, which, in this instance, is the posting by hand on the customer's ledger sheet.

Could these two acts, examination and some additional action, in the omnibus clause in any way be equated to the actions under the process of posting? According to section 4-109,\textsuperscript{49} the process of posting, like the omnibus clause, also contains two elements: (1) determining to pay an item and (2) recording the payment.\textsuperscript{50} The major similarity between the process of posting and the omnibus clause seems to be in their first elements. Although section 4-109 does not define what it means by its first element, "determining to pay an item," comment 5 of section 4-213, which discusses the process of posting,\textsuperscript{51} does describe what it calls the key point at which the decision of the bank to pay is made.\textsuperscript{52} This key point (determination to pay, if you use the language of section 4-109) is when the bookkeeper for the drawer's account determines or verifies that the check is in good form and that there are sufficient funds in the

\textsuperscript{48} Although section 4-303(1)(d)'s omnibus clause speaks of "evidenced . . . [a] decision" to pay, comment 3 to section 4-303(1)(d) uses the phrase "indicating an intention to pay."

\textsuperscript{49} Section 4-109 which defines the process of posting did not appear in the earlier texts of the Code; it was added in 1962.

\textsuperscript{50} "The 'process of posting' means the usual procedure followed by a payor bank in determining to pay an item and in recording the payment. . . ." U.C.C. § 4-109.

\textsuperscript{51} When the comments of section 4-213 were drafted, section 4-109 was not in existence. See supra note 48. Therefore, it is not surprising to find that the official comments of section 4-213 are a fertile area for ideas on the posting process.

\textsuperscript{52} This "decision to pay" language of comment 5 seems similar enough to equal it to section 4-109's "determining to pay" language.
drawer's account to cover it.\textsuperscript{53} Since the first element of the omnibus clause is described as when the bank examines the account to see if there are sufficient funds,\textsuperscript{54} it seems that the first element of the process of posting\textsuperscript{55} and the first element of the omnibus clause are substantially the same.

The difference then, if there is one, must be in the second element of the process of posting and the omnibus clause. The omnibus clause describes its second element as "some further action;"\textsuperscript{56} the description of the second element of the process of posting is "recording the payment." On the surface, these two elements might be the same. Official comment \textsuperscript{5} to section 4-213, in continuing its discussion of the posting process, speaks of its second element as some action beyond "a mere examination of the account of the person to be charged," which is certainly only a part of the first element of the posting process. Comment 5 terms that action the "mechanical step" and says that it is "the posting of the item to the account." Comment 3 to section 4-303 does not define what "other further actions" might be in the omnibus clause, but it does give as an example sight posting in which the bookkeeper "postpones posting," suggesting that "other further actions" is something short of the mechanical step of actual posting, and thus something different from "recording the payment."

Section 4-303's comment 3 offers another example of "other further action" when it says that the clause should be interpreted in the light of \textit{Nineteenth Ward Bank v. First National Bank of South Weymouth.}\textsuperscript{57} In that case,\textsuperscript{58} a maker made a note payable to a payee at the First National Bank of South Weymouth. Several days prior to the note's maturity date, the holder of the note sent it to the First National Bank after indorsing it, "for collection and remittance," in order to have the note paid and the funds sent to him.\textsuperscript{59} When the cashier of the bank received the note, he drew a

\begin{itemize}
\item \textsuperscript{53} U.C.C. § 4-213, comment 5.
\item \textsuperscript{54} U.C.C. § 4-303, comment 3.
\item \textsuperscript{55} Id. §§ 4-213, 4-109.
\item \textsuperscript{56} Section 4-303(1)(d) actually states "action." This writer has taken the liberty of adding the word "further" in order to differentiate the "action" of the second element from the action taken in the first element when the bookkeeper examines the account to see if there are sufficient funds.
\item \textsuperscript{57} 184 Mass. 49, 67 N.E. 670 (1903).
\item \textsuperscript{58} Although the \textit{Nineteenth Ward} case is frequently cited in legal literature on this point, few writers have ever examined its facts.
\item \textsuperscript{59} It might seem that this case would not be applicable to a check, but the
\end{itemize}
check made payable to the holder on the bank’s account with another bank in Boston. He made a memo of the check and then stamped the note paid and perforated it three times. He put the note along with the check in a file “so that the proper record of the transaction might be entered at the end of the day upon the permanent books.”60 The clerk, however, never made an entry on the permanent books because he received a telephone call from the maker’s creditors who requested that the note not be paid because an assignment had been made for their benefit. The clerk obeyed the directions from the creditors and did not pay the note; the holder of the note later sued the bank.

The Massachusetts Supreme Court decided that the First National Bank of South Seymouth should not have obeyed the telephone call, but rather should have paid the note by transferring the proceeds on to the holder. It held that prior to the telephone call the note had been paid and the only remaining duty of the bank was to remit the proceeds. It added, “[i]t is true the proper records were to be made upon the books, but the payment is affected by the act, and not by the record, and was valid even without records.”61 Since the court held that payment was “affected by the act” (stamping the note paid, perforating it and putting it in a file), and not “by the record,” the facts of the case would seem to confirm that the second act in the completion of the posting process, the mechanical act of posting to the account, need not occur under the omnibus clause, but some action short of mechanical action must occur, such as in this case the marking of the note “paid” and the perforating of the note.62

court opinion notes that in Massachusetts a note payable at a bank is equivalent to a check drawn upon that bank. 184 Mass. 49, 67 N.E. 670. This rule is reflected today in Alternative A of section 3-122. The official comment to section 3-122 says that Alternative A is common in the Northeastern states but not common in the Southern and Western states.

60. 184 Mass. at 50, 67 N.E. at 671.

61. Id.

62. The judge writing the opinion in the Nineteenth Ward case speaks in terms of “payment” of the note. As will be discussed later, pre-code cases determined priority by whether payment had been made. Since the note here had been “paid,” the stop payment order made by the maker’s creditors did not have priority. Legal commentators have speculated about what acts short of the mechanical step of posting would constitute the “other further actions” of the omnibus clause. Some of the acts suggested are stamping the item paid after examination even though the posting to the drawer’s account has not occurred. Bunn, supra note 10, at 301; Note, Bank Collections Under the Uniform Commercial Code, 38
Comment 3 to Section 4-303 also states that the omnibus clause was intended to include more than various preliminary acts which are in "no way close to a true decision of the bank to pay the item." It then lists, as examples, such preliminary acts as receiving the item over the counter for deposit, entry of a provisional credit in the passbook, or the making of a provisional settlement for the item through the clearinghouse, by entries in accounts, remittance or otherwise. Since the two elements of section 4-303's omnibus clause appear to be modified by the phrase "evidenced . . . its decision to pay," then certainly none of these preliminary acts which are in no way close to a true decision to pay would constitute the action described by the omnibus clause. Naturally, these same preliminary acts would also not constitute completion of the posting process since the decision to pay is also a part of that process.

Thus, this first analysis of the omnibus clause indicates that it does indeed represent a prior separate event short of the posting process under section 4-213(1)(c). If section 4-303 were then added to the list of the Code provisions by which holders clearly impose liability or accountability on a payor bank, it would make a great deal of difference. As a prior separate event it would bring about accountability for a payor bank when no other provision of the Code would do so, thus making the omnibus clause, in effect, an independent basis for accountability of the payor bank under the Code.

The argument used by West Side Bank in its brief depended on the omnibus clause's being a prior separate event short of the posting process. West Side argued that even if the posting process had not been completed, as the Wisconsin court eventually held, Marine National had nevertheless under the omnibus clause "otherwise [that is, not by the completion of the posting process] evidenced by examination . . . and by action its decision to pay . . . ." Paine, Webber's check when it charged Paine, Webber's account, and then stamped the check paid, checked for sufficient funds, photographed and cancelled the check and finally filed it in the

IND. L. REV. 710, 728 (1963); assurance that a check is good to a teller who telephones the bookkeeping department; Rapson, supra note 10, at 85; and the sending of a remittance draft; Clark, Bank Deposits and Collections: Article IV, 16 ARK. L. REV. 45, 52 (1961), can be used by those who support Malcolm's view that the omnibus clause can be used as a sword by a holder to impose liability on a payor bank.
drawer's file. Certainly West Side's argument that Marine National's actions at least constituted the actions described by the omnibus clause is a plausible one, but West Side's argument needed an additional step: that Marine National was therefore accountable for the amount of the check since the stop order came too late for Marine National to honor it instead of paying the check.

Unfortunately for West Side bank, section 4-303's language does not include any words of "accountability" as does section 4-213. It is difficult to argue that section 4-303(1)(d) imposes liability by inference through section 4-213(1)(c) because of their similarity in the light of section 4-303's omnibus clause being a prior separate event which falls short of section 4-213(1)(c)'s posting process. The actions constituting the omnibus clause of section 4-303 simply do not occur under section 4-213, and thus accountability would not seem to arise. The only other sections by which either accountability or liability arise do not include the actions constituting the omnibus clause. The omnibus clause under the first analysis would not then impose liability or accountability in favor of a holder of a check against a payor bank.

B. SECOND ANALYSIS

In 1956, the American Law Institute and the National Commissioners on Uniform State Laws accepted the recommendation made by the New York Law Revision Commission and changed the preamble of section 4-303 as it appeared in the 1952 official text. The new preamble, which has remained unchanged to

63. West Side Brief at 24-32.
64. U.C.C. §§ 4-213(1), 4-302, 4-213, and 4-319. See supra pp. 285-87.
65. "It was recommended that the language of the preamble to section 4-303 be revised to delete the phrase 'entitled to priority' and substitute language making it clear that the section is concerned only with the question whether notice, etc. 'comes too late.'" 1 COMMISSION REPORTS 429 (1951).
66. The preamble as it appeared in the 1952 official text was as follows: "Any notice, stop-order or legal process received and any valid set-off exercised by a payor bank is entitled to priority over any item drawn on or payable by and received by the bank until but not after the bank has done any of the following. . . ." The remainder of section 4-303 in the 1952 text listed (a) through (e) with a few changes not relevant to this discussion.
67. Any knowledge, notice or stop-order received by, legal process served upon or set-off exercised by a payor bank, whether or not effective under other rules of law to terminate, suspend or modify the bank's right or duty to pay an item or to charge its customer's account for the item,
date, provides, in language simpler than that actually used, that the four legals come too late to terminate, suspend or modify the payor bank's right or duty to pay an item or to charge its customer's account if they come after the payor bank has made any of the steps discussed in (a) through (e) of section 4-303.68

Like the absence of accountability language in section 4-303, the language of the preamble to section 4-303 may also have an effect on whether section 4-303's omnibus clause may be used by a holder to impose accountability on a payor bank. For example, without even attempting to infer accountability from section 4-213, West Side's counsel argued that Marine National Bank should not have obeyed the stop payment order simply because under the preamble's language it "came too late" when Marine National had taken all the actions contemplated by the Code under the omnibus clause. According to the argument, if a stop payment order or any of the four legals come too late under section 4-303, then a check simply has "priority" and the payor bank has no discretion under section 4-303(1) to do anything other than pay the check to the holder.70

The counter argument is "But too late for what?" The preamble provides that the legal comes too late to terminate, suspend or modify the payor bank's "right or duty to pay the item." Assuming that the stop payment order in the West Side case did indeed

comes too late to so terminate suspend or modify such right or duty if the knowledge, notice, stop-order or legal process is received or served and a reasonable time for the bank to act thereon expires or the set-off is exercised after the bank has done any of the following... U.C.C. § 4-303(1).

68. The four legals are, of course, knowledge or notice, stop orders, legal process and set off to which a check may be subject under section 4-303.

69. (a) accepted or certified the item;
   (b) paid the item in cash;
   (c) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearing house rule or agreement;
   (d) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith or otherwise has evidenced by examination of such indicated account and by action its decision to pay the item; or
   (e) become accountable for amount of the item under sub-section (1)(d) of section 4-213 and section 4-302 dealing with the payor bank's responsibility for late returns of items.

Id.

70. West Side Brief at 32, 38.
come too late under the omnibus clause, then it follows under section 4-303's preamble that it came too late to terminate or suspend Marine National's "right or duty" to pay the amount of the check to West Side.

Consider first Marine National's "right" to pay the check to West Side, a "right" which West Side would argue was preserved for Marine National since the stop payment order came in too late to suspend that right. Exactly what the term "right" means in relation to what a payor bank, like Marine National, may or may not do in paying the check is not suggested in the Code. One can only reason that if a person has a right to do a certain act, that person has the discretion whether to do the act or not. It seems illogical to require a bank such as Marine National to exercise its right to pay West Side if Marine National for any reason did not want to exercise that right.

Next, consider Marine National's "duty" to pay the check to West Side, a "duty" which West Side would argue was preserved for Marine National since the stop payment order came in too late to suspend that duty. As with the term "right," the Code is equally silent about the meaning of "duty." Surely, it is something more than a "right," and probably means the "requirement" or the "obligation" which "right" did not include. The stop payment order's coming too late under the omnibus clause in the West Side case then must mean that Marine National's duty or obligation or requirement to pay the check to West Side was not terminated or

71. No help can be found in the official comments to 4-303 because no further comments were added upon adoption of the "comes too late... to terminate, suspend or modify... the right or duty to pay..." language in 1956. The comments of the New York Law Revision Commission in its 1956 report suggesting the change in section 4-303's preamble are equally unhelpful. It was suggested that the intention of this section is not to establish rules of priority, or determine questions as to the validity or effectiveness of a notice, stop-order, legal process or service, except to the extent that "priority" and effectiveness are determined by the timeliness of receipt of the notice or stop-order, legal process or service, except to the extent that "priority" and effectiveness are determined by the timeliness of receipt of the notice or stop-order, service of process, or exercise of a set-off—i.e. that the meaning of the section is that a notice, stop-order or legal process which, under other rules of law, would be effective to terminate or suspend or otherwise modify the bank's privilege to charge the customer's account for an item it pays, and set-off which would, by other rules of law, be effective to terminate or suspend the bank's duty to its customer to pay an item, "comes too late" if the notice or order is received, or the process is served, or the set-off is exercised, after the bank has done one of the things specified in section 4-303.

72. See supra note 71.
suspended.

The non-termination or non-suspension of Marine National Bank's duty to pay would seem to be the strongest argument for West Side Bank in seeking to require Marine National to pay it the amount of the check. The weakness of that argument, however, appears when one asks the question "to whom does the duty run?" Certainly, a payor bank, like Marine National, has a duty to its customer, Paine, Webber, to pay a properly payable check; but in this case, its duty to its customer has surely been waived because Paine, Webber issued a stop payment order.

Does the same duty to pay a check run also to its holder; in this case, West Side Bank? No duty apparently exists under the Code. If final payment, and thus accountability, had occurred under section 4-213(1) or section 4-302, Marine National would certainly have a duty to pay the check; but the Wisconsin Supreme Court held that no final payment occurred under those sections. If Marine National Bank had accepted or certified the check, it would have had an obligation to pay the check under section 3-413 (1); but no such acceptance or certification took place. Finally, if Marine National Bank had refused to return the check delivered either for acceptance or payment, or if it had paid over a forged indorsement, then it would be liable for the amount of the check; but Marine National properly (according to the court) returned the check through the Milwaukee clearinghouse. Thus, at least under the Code, no duty to pay the check would seem to run from Marine National, the payor bank, to West Side, the holder of the check.

If, however, the legal in the West Side case had been one other than a stop payment order, such as legal process in a garnishment action, notice of bankruptcy, or a bank setoff, and that legal had come after the payor bank had taken the required actions under the omnibus clause, the argument does not necessarily fol-

73. Section 4-402 on wrongful dishonor of a customer's check insures that a payor bank will not lightly disregard its duty to its customer to pay a properly payable check.

74. See supra note 71.

75. U.C.C. § 3-419(1).

76. One commentator has suggested that a payor bank might be held liable under the Code's general obligation of good faith of section 1-203 or under a tort theory using sections 4-103(5) and 1-103 to establish a standard of ordinary care on the part of the payor bank in handling a check. Rohner, supra note 24, at 1087. Such theories have been criticized. See Leary, supra note 23, at 931.
low that the payor bank in that case would have no duty to its customer to pay the amount of the check to the holder. A waiver of the payor bank's duty to pay for the customer may be easily inferred from the customer's stop payment order, but not so from any of the other legals. 77 If a payor bank did in fact breach its duty to a customer to pay a check by returning the check and honoring one of the legals other than a stop payment order without approval of its customer, and after it had taken the actions under the omnibus clause, to what liability or accountability would the payor bank be subject? The customer could bring a cause of action against the payor bank for wrongful dishonor of its check if sufficient funds were in the account to pay the check. 78 But the holder of the check, a person or bank such as West Side, could not impose liability or accountability against the payor bank unless the accountability provision 79 or the liability provisions 80 of the Code had come into play.

Under this second analysis, the omnibus clause again would not impose liability or accountability in favor of the holder against a payor bank as a result of the "right or duty" language of section 4-303's present preamble. If a payor bank has made a timely return of the check under section 4-301 and has not certified the check, the payor bank would not be accountable to the holder even if it obeyed a legal which came too late under the omnibus clause because the payor's right or duty to pay the check do not seem to run to the holder.

III. PRE-1952 HISTORY

Article 4 of the Uniform Commercial Code was not drafted in a vacuum. The recorder had before him the Negotiable Instruments Law, adopted by every state then in the Union, and much commercial case law construing both the Negotiable Instruments Law and areas of commercial law not codified by the Negotiable Instruments Law. 81 In addition, the recorder had the benefit of ex-

78. U.C.C. § 4-402. Supra note 10, at 365. See supra note 71.
79. U.C.C. § 4-213(1) or 4-302.
80. U.C.C. § 3-413(1) or 3-419(1).
81. Actually, the sources before the records were a good deal more complex than stated in this introduction to the pre-1952 history of section 4-303. See Malcolm, Article 4- A Battle with Complexity, 1952 Wis. L. Rev. 265.
tensive consultation with others as the early drafts of the Code were circulated among the experts. A look at this mixture of sources from which the omnibus clause was born to take its final form in the 1952 official text version will help to explain its place and purpose today. The source of its pre-1952 history lies in two places: first, pre-Code law and, secondly, what this writer terms "pre-legislative" history.

A. PRE-CODE LAW IN DETERMINING PRIORITY

Whether a legal came too late to interfere with payment of a check to a holder was determined under pre-Code law by the concept of "payment". If "payment" occurred prior to the legal, then the legal was ineffective to prevent payment; if, however, the legal was received prior to "payment" then the legal prevented the payment. Unfortunately, exactly what brought about "payment" prior to the Code's adoption was somewhat diverse; indeed, one of the major contributions of Article 4 to the law of bank collections was to resolve exactly when an item was paid.

Despite the diversity in its concept, payment did come about fairly quickly prior to World War II and the advent of deferred posting. As Fairfax Leary, Jr., noted, two common law rules and a third statutory rule emphasized speedy action in payment of a check in the absence of deferred posting legislation. First, one common law rule provided that the mere entry of credit in the depositor's passbook constituted final payment. A second common law rule, known as the "next day" rule, considered a person negli-

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82. Leary, Deferred Posting and Delayed Returns-The Current Check Collections Problems, 62 Harv. L. Rev. 905, 946 (1946); Leary supra note 10, at 361.
83. The Nineteenth Ward case is a good example of pre-Code law. Once the court in that case determined that payment had occurred before the stop payment order was received by telephone, it held that the stop payment order came too late to prevent payment of the note.
84. The diversity in the "payment" concept is well documented and may be conveniently summed up in Walter E. Malcolm's famous phrase, "yo pays yo money, and yo takes yo choice." Malcolm, supra note 81, at 287. See also Malcolm, How Bank Collection Works, Article 4 of the Uniform Commercial Code, 11 How. L. J. 71, 81 (1965); Andrews, The City Clearing House: Payment, Returns, and Reimbursement, 27 Ind. L. J. 155, 158 (1952); Note supra note 25, at 959.
85. Malcolm, supra note 81, at 287.
86. Leary, supra note 10, at 334.
87. Unless, of course, there was an agreement to the contrary. See Andrews, supra note 84, at 163-6. Note, 50 Colum. L. Rev. 802, 818 (1950).
gent if he received a check drawn and payable in the same town and did not present it for payment on the next banking day. If the check were payable in a different town, he was considered negligent if he did not start it on its way through the collection channels by the next banking day. The third rule, a statutory one as interpreted by the courts, provided that a payor bank’s retention of a check payable by it beyond twenty-four hours rendered the bank liable on it. The combination of these three rules worked together to bring about payment on a check at a very early stage under pre-Code law. Since the cut-off time for any of the four legals came at the very same time as payment on the check, a determination of whether a legal was too late to prevent payment also came at a very early stage. Once the check was paid, the holder of the check did not need to worry about one of the four legals interfering with its payment.

Deferred posting legislation, which came about after World War II, delayed the time of final payment on the check. These statutes extended the time within which a bank might return a not good item, presumably giving the bank sufficient time in which to provide for the orderly processing of checks. Most of the statutes allowed a payor bank until midnight of the next business day after receipt of the check in order to return it.

88. N.I.L. sections 136 and 137 were used by some courts to impose liability on the payor banks for retention of a check beyond twenty-four hours. Leary, supra note 82, at 918; Andrews, supra note 84, at 180.

89. In the ordinary clearinghouse arrangement prior to deferred posting statutes, a payor bank which received checks at the morning exchange would return the “not good” items in an afternoon exchange at two or three o’clock, so that in practice a payor bank held checks about five hours. Leary, supra note 82, at 911.

90. Deferred posting was born of wartime shortage in personnel and the increased volume of checks in the collection system. See Leary, supra note 82, at 906, 908. It has been defined as “a practice whereby all checks received by a payor bank on one business day are accumulated and ‘posted’ to the ledger accounts of the drawers at one time during the next day, as contrasted with the practice of ‘dribble posting’ whereby checks are posted from time to time during the day of receipt.” Brome, Bank Deposits and Collections, 16 Law. & Contemp. Prob., 308, 321 (1951).

91. The reason for permitting deferred posting was to cut down the number of clerks necessary to handle the checks; with deferred posting, a bank could organize its work flow on a more even keel. See Leary, supra note 82, at 931. For a practical view of the problems prevented by the adoption of deferred posting, see Leary supra note 82, at 916. See also, Andrews, supra note 84, at 161, 180.

92. The American Banker's Association also drafted in 1948 a model deferred posting statute which gave the drawee bank this same period to return a check.
The deferred posting statutes thus extended the time period during which a drawee bank could make a decision to pay or return the check. Since a drawee bank under a deferred posting statute would ordinarily post its checks on the day after receipt, its decision to pay could be postponed until after the twenty-four hour period formerly permitted.83

The deferred posting statutes, however, did not change the rule that the time of payment determined the effectiveness of the four legals. Therefore, by postponing the time of payment and thus extending the much needed time to the payor bank for its decision to pay or return the check, the deferred posting statutes effectively extended the time during which one of the four legals could interfere with payment of a check and also increased the risk to the holder of a check that a legal might prevent him from getting payment.84

Such was the state of pre-Code law on priority when the recorder began work on the Code. The official comment to section 4-303 notes bleakly that the recorder had no prior uniform statutory provision to use as a model for section 4-303.

B. PRE-LEGISLATIVE HISTORY

The drafting history of the Uniform Commercial Code ordinarily begins with the 1952 official text of the Code because prior drafts were not approved by the American Law Institute or the National Conference of Commissioners on Uniform State Laws.85 An examination of the prior drafts beginning in 1949, however, provides a background for the birth of section 4-303’s omnibus clause and suggests something about its significance.86

Andrews, supra note 84, at 181. Regulation J of the Board of Governors of the Federal Reserve System and the circulars of its Federal Reserve Banks were amended, effective January 1, 1949, to recognize the practice of deferred posting. Brome, supra note 90, at 321.

93. See supra note 7.

94. Leary, supra note 82, at 947; Leary, supra note 10, at 337, 362. Note, supra note 25, at 958.


96. Pre-legislative history of the Uniform Commercial Code may not be a valid tool to interpret its provisions. Section 1-102(3)(g) of the 1952 edition of the Code provided that “[p]rior drafts of text and comments may not be used to ascertain legislative intent.” The explanation given for this provision was that “[f]requently matters have been omitted as being implicit without statement and language has been changed or added solely for clarity. The only safe guide to
The first integrated draft of the Code was published and promulgated in May of 1949. The forerunner of the present section 4-303 was found in section 3-629(1) and provided as follows:

Subject to the payor bank’s right to charge the items received in a single day in any order convenient to it, an item properly payable when received takes priority for payment over all subsequently received stop-orders, notices, or legal process, except that items payable through the bank may, upon direction of the drawee, be returned dishonored before expiration of the time allowed for return of such an item and recovery of its payment.

This first draft of the Code thus ended the drawer’s power to enter an effective stop order against a check at the time when the check was received by the payor bank. Similarly, a creditor’s power to give a notice or have legal process served in order to interfere with payment of a check also ended when the check was received by the payor bank.

Section 3-629, unlike present section 4-303, omits any reference to a bank’s set-off. The 1949 draft, however, provides for the contest between a check and a set-off in section 3-414(4):

A payor bank may charge against the indicated account of its customer the items received in a single day and in any order convenient to the bank, but must charge all properly payable items received on any one day before charging items on a subsequent day. A demand on unmatured claim against its customer which the bank calls or accelerates for set-off against his account has the intent lies in the final text and comments.” U.C.C. § 1-103(3)(g), comment (1952 version). Section 1-102(3)(g) however, was deleted in the 1957 edition of the Code after the New York Law Revision Commission suggested that it should be deleted. The actual reason given for the deletion was that the changes from the 1952 edition were clearly legitimate history which may or may not suggest that pre-1952 changes are still not legitimate history. White and Summers list prior drafts as an aid to interpretation and construction of the Code, but warn that “lawyers cannot base reliable inferences as to intended meaning of enacted text on changes made from prior versions of that text.” U.C.C. § 4 (2d ed. 1980). J. WHITE AND R. SUMMER, THE HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 4 (2d ed. 1980).


98. A separate Article 4 on Bank Deposits and Collections did not yet exist. Part 6 of the Article in the 1949 draft was entitled, “Bank Collections.”

effect of an item received on the day of the call or acceleration. The cut-off time for a bank's set-off is extended past the cut-off time for a stop order, notice or legal service under section 3-629. The cut-off time for the set-off is, apparently, the end of the banking day; the cut-off time for the stop order, notice or legal service is the arrival of the check at the payor bank.

A comparison of the cut-off times for the four legals under the 1949 draft and under present-day section 4-303 reveals that the cut-off times under the 1949 draft will generally come before the cut-off time for the same four legals under section 4-303. Section 4-303, of course, provides for a cut-off for all four legals as early as acceptance, certification, or payment in cash but the cut-off can come as late as the completion of the posting process under section 4-303(1)(d) or the midnight deadline under section 4-303(1)(e). The cut-off time for the stop order, notice or legal service under section 3-629 of the 1949 draft can come no later than the time when the check is received by the payor bank; the cut-off time for the bank's set-off will come no later than the end of the banking day on which the check is received. Thus, the cut-off time for the stop order, notice or legal process under the 1949 draft may come as much as thirty-nine hours prior to the cut-off time for the same legals under the present section 4-303, and the cut-off time for the set-off under the 1949 draft as early as twenty-four hours prior to the cut-off time of the set-off under section 4-303.

The comments to section 3-629 suggest that the purpose of the earlier cut-off times of the 1949 draft was to narrow the risk of loss to the holder of the check by giving the check priority over those legals. Fairfax Leary, Jr., the initial drafter of Article 4, has confirmed this purpose. Although he was writing about an even earlier draft of the Code than the 1949 draft, his comments are still apropos to its provisions.

100. Id. § 3-414(4).
101. If the check arrives at the payor bank at 9:00 A.M. on Monday morning, thirty-nine hours will pass before the midnight deadline on Tuesday.
102. Comment 1 to § 3-629. U.C.C. § 3-629, comment 1 (1949 version).
103. Leary, supra note 82.
104. Leary was writing about Proposed Final Draft No. 2. See id., at 928 n. 48. Section 736(3) of that proposed draft was similar to section 3-629(1) of the 1949 draft: "For the purposes of determining whether an item is properly payable, an item has priority for payment over any notice or stop order received by or legal process served upon the payor bank after its receipt of the item." See Leary, supra note 82, at 928 n. 52.
Leary's comments begin with the proposition that the common law touchstone for determining priority between a check and a legal like the stop order, notice or legal process was whether the check was paid. He noted that the deferred posting operations, so prevalent after World War II and incorporated into the 1949 draft of the Uniform Commercial Code, postponed the time when the check was finally paid. Since final payment of the check was postponed, the cut-off time on the legal was also postponed, thereby extending the time during which the holder of the check bore the risk that one of the legals would interfere with the check's payment. Leary thought that the deferred posting operations by the payor banks should not operate in this manner to the detriment of the holder because the purpose of deferred posting was to decrease the cost of operation to the payor bank and not to increase the period during which a holder's rights to payment on a check would be in jeopardy. Thus, Leary suggested that the touchstone for determining priority between a check and a legal should be separated from the concept of final payment and pushed forward to the time of the receipt of the check by the payor bank for a stop order, notice, or legal service and to the end of the banking day for the set-off. Sections 3-629(1) and 3-414(4) of the 1949 draft accomplished this change. By separating the touchstone for priority of the legals from the concept of final payment, the period during which the holder of a check was in jeopardy by one of the four legals was reduced to a period very similar to what it had been prior to the initiation of deferred posting operations.

In the spring of 1950, another draft of the Uniform Commercial Code appeared. In this draft, section 4-303's forerunner, section 4-402(3), differs somewhat from the way it appeared in the earlier 1949 draft:

An item properly payable when received is subject to notices, stop orders or legal process received by the bank at any time up to midnight of the day of receipt of the item unless prior to receipt of such notices, stop orders or legal process payment of the item has been made in cash or by remittance or the item has been posted to the account of the customer.

This new section pushes back the cut-off time for the stop order, notice or legal service to the later cut-off time provided for a

105. Leary, supra note 82.
106. See supra pp. 287-88.
bank's set-off under the prior 1949 draft. The payor bank's cut-off time for set-off in the 1950 draft did not change from that of the 1949 draft, so the final cut-off time for all four legals was finally the same.\(^{108}\)

Although the 1950 draft deferred the cut-off time for the stop order, notice, or legal process from the time the check was received to midnight of the day of its receipt, the cut-off time for all four legals would still come as much as twenty-four hours earlier under the 1950 draft than it would under present-day §4-303.\(^{109}\) The comment to section 4-402 of the 1950 Code indicates that the purpose of the section remains the same as the similar section of the May 1949 draft: "While deferred posting is permitted under this Article, it may not be practiced in such a way that items presented on a Tuesday, for example, will prevail over items presented on Monday. Similarly, a bank may not by a Tuesday's call or acceleration defeat an item presented on Monday."

A significant change from section 4-303's earlier drafts appeared in the proposed final draft #2 in the spring of 1951. Section 4-404 provides:

> Any notice, stop order or legal process received and any valid set-off exercised by a payor bank is entitled to priority over any item drawn on or payable by and received by the bank until but not after the item is accepted, certified, paid in cash, paid by separate remittance for the particular item, posted to the indicated account of its customer or reaches that point of time in the processing of an item when the bank evidences by action its decision to pay the item, whichever happens first.\(^{110}\)

Several observations may be made about this change. First, the germ of the omnibus clause is present: "or reaches that point of time in the processing of an item when the bank evidences by action its decision to pay the item. . . ."\(^{111}\) Second, the general form of the present section 4-303 may be seen. No longer is the cut-off time for the four legals set at the early stage found in the 1949 or 1950 drafts. The cut-off time may, of course, come as early as ac-

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108. Of course, the cut-off time of the stop order, notice or legal process would come earlier under section 4-402(3) than the set-off if the check were paid in cash or by remittance or had been posted to the customer's account.

109. Section 4-303(1)(e) could push the time as far back as midnight of the next bank day after receipt.

110. U.C.C. § 4-404 (1951 version).

111. Id.
ceptance, certification, payment in cash or payment by separate remittance for the particular item; but it may also come as late as a deferred posting to the customer's account, although perhaps not as late as the midnight deadline of the present section 4-303(1)e.

Third, Leary's attempt to separate priority questions from the concept of final payment has been abandoned.

The reasons for the significant change in this proposed 1951 draft were expressed by Leary. Writing is 1965, he said that initially he and some of his banker friends felt that it would be possible to have a "day blockage" of items; in other words, have Monday's items take precedence over Tuesday's stop order, attachments and the like. That view was reflected in the earlier drafts of 1949 and 1950. Unfortunately, he found that practical difficulties stood in the way of the "day blockage" rule. One of those difficulties was the continuous processing of items on a 24-hour basis by the large banks. Another difficulty was the expectation of customers to be paid immediately over the counter, for example, on Tuesday without having to wait until the state of the customer's account after the posting of Monday's items could be ascertained. A third difficulty was that a bank's determination to exercise the right of set-off sometimes depended upon the nature and amount of the items presented for payment, but the items presented for payment during one day could not be ascertained until the next day when the set-off would be too late under the day blockage rule. In the end, the determination was made that the day blockage rule had to go. In the light of the small percentage of bad items, the added cost to all depositors to install procedures at a bank to follow the day blockage rule was not worth the trouble. Accordingly, the rule of payment was again chosen to determine priority.

A few more changes were made in the final text edition of November 1951. The appropriate section was finally designated section 4-303 and provided:

Any notice, stop order or legal process received and any valid set-off exercised by payor bank is entitled to priority over any item drawn on or payable by and received by the bank until but not after the item is accepted, certified, paid in cash, settled for by separate remittance for the particular item, or the bank has com-

112. Leary, supra note 10, at 337.
113. With two additional elements: acceptance or certification and omnibus clause, both of which are mentioned later in this article.
pleted the process of posting the item to the indicated account of the drawer, maker or the person to be charged therewith or otherwise has evidenced by action its decision to pay the item, whichever happens first.

The omnibus clause finally appeared as it remains today in present-day section 4-303, and the day blockage rule, which was eliminated in the spring 1951 draft, is permanently gone. This language of section 4-303 is that finally accepted by the American Law Institute and Commissioners on Uniform State Laws for the final text edition of the 1952 Code.114

Leary again commented on these changes.115 He noted that the rule of payment was indeed chosen to determine priority in the 1952 edition but with two additional elements not considered in determining final payment: acceptance or certification and the omnibus clause. Referring to the omnibus clause, he suggested that it has two functions. The first is to cover the practice of “sight posting,” a function already noted in the comments.116 The second,117 which he termed the more important, is to “eliminate, with respect to the four legals, the extension of time given, in final payment cases, by the inclusion in the definition of the ‘process of posting’ of the concept of reversal of entries.”118 His reference to the “concept of reversal of entries” obviously refers to section 4-109(e)119 by which in the same article he had argued that it would be difficult for a court to say that “the process of posting” had been completed so long as time remained in which entries could be reversed.120 Hence, Leary suggested that the omnibus clause could bring about the cut-off time for the four legals prior to the completion of a posting process which remains incomplete until the time for reversal of entries expires. This second function is proper, he maintained, because additional time allowed a payor bank for reversal of entries should not result in any of the legals compelling a reversal of entries if no such reversal should otherwise occur.

114. More changes, however, were to come after the New York Law Revision Commission’s study in 1954-56.
115. Leary, supra note 10, at 363.
116. U.C.C. § 4-303, comment 3.
117. Not mentioned in the comments to section 4-303.
118. Leary, supra note 10, at 364.
119. U.C.C. § 4-109(e): “correcting or reversing an entry or erroneous action with respect to the item.”
120. Leary, supra note 10, at 360. The Wisconsin Supreme Court cited this argument with approval in the West Side case. 37 Wis. at 665, 155 N.W.2d at 593.
When the 1952 official text of section 4-303 was promulgated, section 4-109 did not exist, perhaps explaining why the official comments made no reference to Leary's second function of the omnibus clause. Could the second function have existed in 1952 prior to the addition of section 4-109? Certainly not as Leary specifically stated that second function in 1965; but even without section 4-109, the omnibus clause still eliminates the extension of time given in final payment cases under the process of posting as it was prior to the addition of section 4-109. This proposition is shown by the official comment's illustration of the omnibus clause in conjunction with sight posting which brings about the cut-off time for the four legals prior to the completion of the regular process of posting. Leary's two functions for the omnibus clause may then be combined into just one function: eliminating the extension of time given in final payment cases under the process of posting. This single function, which will allow the omnibus clause to cut off a legal prior to completion of the posting process and final payment, still reflects Leary's earlier attempts to separate the touchstone for priority from that of final payment.

C. SUMMARY OF PRE-1952 HISTORY

The pre-Code history of section 4-303 shows that the advent of deferred posting statutes quite dramatically increased the time during which a holder's right to payment of a check was in jeopardy from a legal. These deferred posting statutes postponed payment and thereby postponed the cut-off time for the effectiveness of the legals which was also determined by when payment occurred. Attempts to lessen the holder's risk in the early drafts of the Code apparently failed when provisions favoring an early cut-off time for the legals proved impractical, and the Code's final text version in 1952 again adopted the payment concept in deciding the cut-off time for the legals.

If, however, the omnibus clause's function is to eliminate the extension of time given in final payment cases under the process of posting, section 4-303(1)(d) still retains something of the early recorder's idea that a payor bank's extra time to reverse under deferred posting should not, at least in this small circumstance, come at the expense of the holder. Based on this interpretation of section 4-302's pre-Code history, a holder in a position similar to

121. Section 4-109 was added in 1962.
122. U.C.C. § 4-303, comment 3.
West Side's could forcefully argue that its right to payment on the check was jeopardized by a legal in exactly the situation that the recorder unsuccessfully attempted to remedy in the holder's favor in the early draft of the Code and, more specifically, in the exact situation described by the omnibus clause which the drafters successfully remedied in the holder's favor in the final official text version of 1952. Thus, it may be asserted that the check should be paid to the holder because the intent of the omnibus clause was to prevent the holder from bearing the risk of loss during the extension of time given under the process of posting.

IV. LEGISLATIVE HISTORY

After the 1952 official text of the Uniform Commercial Code was promulgated in September of 1951, Pennsylvania became the first state to enact the Code; its approval of the Code came in 1953 with an effective date of July 1, 1954. The important commercial state of New York, however, did not jump at the Code as did Pennsylvania; the New York Legislature and Governor Dewey, instead, referred the Code to the New York State Law Revision Commission for study and recommendations. The Commission spent the years 1953 through 1955 studying the Code and recommended in a 1956 report that the Code as drafted should not be enacted in New York without revision.

As a result of the Commission's report, the Code's Editorial Board recommended numerous changes in the 1952 official text. In 1957, the American Law Institute and the National Conference of Commissioners on Uniform State Laws promulgated a 1957 official text which embraced many of the changes suggested by the Commission.

No one denies that the reports of the New York Law Revision Commission are an invaluable source of legislative history for the Code. Section 4-303, as it appeared in the 1952 official text,

123. One commentator surmised the drafter's purpose for the omnibus clause in a manner supporting this conclusion: "The apparent thought of the draftsmen was that a check-owner has equities superior to a Johnny-come-lately 'legal' claimant, if the bank has taken steps toward paying it before the legal arised." Rohner, supra note 24, at 1079.

124. The Commission's study and recommendations can be found in 1-2 COMMISSION REPORT (1954), 1-3 COMMISSION REPORT (1955) and 1 COMMISSION REPORT (1956).

125. The reports have been termed the "richest single source of 'legislative history' on the Code." R. BRAUCHER and R. RIEGERT, supra note 26, at 28. White
was studied and analyzed in the New York Law Revision Commission reports and thus has had a legislative history which throws some light on that section's omnibus clause and its effect on a payor bank's liability to a holder. Although the importance of this legislative history has been mentioned by some writers, only Walter E. Malcolm, the final reporter for Article 4, has attempted to set out the legislative history as shown in the New York Law Revision Commission reports. The New York Law Revision Commission's analysis is quite applicable to the issue of whether the omnibus clause of section 4-303 can impose liability on a payor bank. It therefore deserves a more detailed examination than the cursory one given it by Malcolm.

The first mention of section 4-303 in the New York Law Revision Commission Reports is little more than a passing swipe. It appears in the memorandum filed in February of 1954 by Milbank, Tweed, Hope and Hanley and merely mentions that a notice, stop order or legal process is entitled to priority; that there is no limitation on the type of notice or legal process referred to in section 4-303; and finally that section 4-303 apparently does not conform with the requirements of a particular section of the New York Banking Law.

and Summers suggest that the reports are of greater value to lawyers than prior drafts and prior official texts with comments because the hearing and studies that the Commission published cast light on what the Code draftsmen were trying to do in the first place. J. WHITE AND R. SUMMERS, supra note 96, at 11.

126. For section 4-303 as it appeared in the 1952 official text see page 59, supra.

127. Note, 43 Mo. L. Rev. 734 (1978); J. WHITE AND R. SUMMERS, supra note 96, at 702 n. 163.


129. Malcolm says that the legislative history of section 4-303 is "of interest." Id. at 26. He sets out some of the legislative history in full in his articles, but merely refers to some portions of it by reference to the Commission's Reports and entirely omits reference to other portions. Subsequent footnotes will indicate Malcolm's treatment of each part of the legislative history as to inclusion in full, mere reference, or omission.

130. Malcolm quotes in full this portion of the legislative history. Id. at 27. It is as follows:

14. Section 4-303 introduces a number of questions. It provides that "any notice, stop order, or legal process . . . is entitled to priority." No limitations are stated as to type of notice or legal process. Moreover, this section would not appear to conform with the requirements of section 134(5) of the New York Banking Law.

1 COMMISSION REPORT 305 (1954). Mr. Malcolm makes no comments on this state-
The first extensive treatment given section 4-303 was made in a January 15, 1954, memorandum by Robert H. Brome. He criticized section 4-303 because "there may be a period of time before an item is finally paid during which the item nevertheless has 'priority of payment' over the indicated item." He said that this result of section 4-303 gives rise to some practical problems of which he gives examples. The first of his three examples sets forth a situation that is hauntingly close to the West Side case which was

131. Chairman of the Subcommittee on Bank Deposits and Collections of the N.Y. State Bar Association's Special Committee to consider the Uniform Commercial Code. Formerly Assistant Counsel of the Federal Reserve Counsel to consider the Uniform Commercial Code. Inside house counsel for Bankers Trust Company of New York City. His comments about section 4-303, which Malcolm also records verbatim, are as follows:

Sec 4-303. When Items Subject to Notice, Stop-Order, Legal Process or Set-Off; Order in Which Items May Be Charged or Certified. This section provides, in effect, that there may be a period of time before an item is finally paid during which the item nevertheless has priority of payment over indicated items.

This is a substantial change in the law and may give rise to some practical problems including:

1) If before posting but after settlement by separate remittance or evidencing its decision to pay short of posting, the bank receives a stop order, what is the basis of the bank's liability if it recognizes the stop order and returns the item as unpaid within the time permitted by Secs. 4-301 and 4-302? It would appear that there is none.

2) If the bank has settled for an item by separate remittance (this is the so-called "non-cash" item presented for separate remittance) in the form of a draft, may it thereafter stop payment on that draft on the ground that it has not "finally paid" the item for which the draft was given? Would the bank not remain liable on its draft?

3) If the bank has not finally posted under Sec. 4-213 but has become liable for the item under Sec. 302 for late return and then an attachment is served, must the bank forthwith debit the check to the account and make settlement therefor notwithstanding its return? In other words, how long will the existence of the liability hold off the levy?

1 COMMISSION REPORT 318 (1954).

132. Id. Brome here uses the word "item" twice and the word "items" once. The first and second one of the word item apparently here refers to a check while the use of "items" apparently refers to the four legals: the notice, stop order, legal process or set-off.

133. See supra note 130.
not to come up for some fourteen years. He asked about a drawee bank's liability if it receives a stop payment order against a check before the check is posted but after the bank has evidenced its decision to pay short of posting, and subsequently the bank recognizes the stop payment order and returns the check as unpaid within the time permitted. He concluded that there is no basis for a drawee bank's liability in such a case.

Assuming that we may equate the word "posted" in Brome's hypothetical with section 4-213(1)(c)'s "completed the process of posting," and the phrase "evidenced its decision to pay short of posting" in the same hypothetical with section 4-303(1)(d)'s omnibus clause, it appears that Brome has identified an area in which a drawee bank can jump either way without liability. For example, if a drawee bank has in fact "evidenced by examination of such indicated account and by action its decision to pay" a check according to section 4-303's omnibus clause, but has not yet gone so far as to complete the posting process under section 4-213(1)(c), then Brome suggested that the drawee bank is not liable to the holder of a check if it decides to honor the stop payment order. His reasoning is apparently based on section 4-213(1)'s accountability language not coming into play because the process of posting has not yet been completed. On the other hand, if that same drawee bank in the same situation refused to honor the stop payment order and paid the holder of the check, even though it was not accountable for the amount of the check under section 4-213(1)(c)'s completion of the posting process, there could be no basis for liability against the drawee bank on the part of the drawer because the stop payment order has come too late under section 4-303's omnibus clause to be obeyed.

Brome's analysis of section 4-303 revealed a grave concern about this period of discretion on the part of the payor bank which occurs prior to completion of the posting process under section 4-213(1)(c) and after the bank evidences its decision to pay short of posting under section 4-303(1)(d)'s omnibus clause. This period of discretion identified by Brome has been noted many times by legal commentators; all seem to agree with Brome's assessment.135

134. The accountability language is as follows: "Upon a final payment under subparagraphs (b), (c) or (d) [of 4-213(1)] the payor bank shall be accountable for the amount of the item." U.C.C. § 4-213(1).

135. See surpa note 10. See also Note, supra note 77, at 353 n. 27.
Malcolm, then acting as the reporter for Article 4, was the logical person to address the criticisms leveled at section 4-303. Surprisingly, Malcolm brushed aside Brome's comments: "The hypothetical cases you posed under this section have theoretical difficulty. Query—How frequently will they arise in contested cases." Malcolm thus does not deny the effect of section 4-303's omnibus clause on a payor bank's discretion; he defends it by calling the situation posing it theoretical and suggesting that it will rarely arise.

Although Malcolm acknowledges in his brief legislative history of section 4-303 that Brome replied to his short comment about section 4-303, he places the reference to Brome's reply in a footnote and never states what Brome said in response. The New York Law Revision Commission reports reveal that Brome responded to Malcolm's comment in a long June 4, 1954, letter.

136. Fairfax Leary, Jr., the original reporter for Article 4, had stepped down by this time and was replaced by Malcolm.


138. 1 COMMISSION REPORT 342 (1954). Malcolm did, however, have much to say about criticism leveled by Brome at other sections of Article 4. Malcolm quotes his response verbatim in his legislative history.

139. Malcolm, supra note 21, at 28 n. 9. Actually Brome's reply to section 4-303's criticism begins two pages earlier than Malcolm records in his footnote.

140. This provision (Sec. 403) is discussed below, but at the risk of being repetitious, this writer would like to point out that it is not "practical" for the following reasons:

(a) The giving of unconditional credit is not final payment but under this section an attachment, etc., received after the giving of such credit but before final posting is entitled to "priority", which means that the payor bank must somehow recover the unconditional credit or, to the extent that the section is effective, be responsible for the amount of the item twice.

(b) By creating an area where a stop payment is not given "priority" even though received before the item is "finally paid", you either (i) have an absurdity because the payor bank may refuse to pay the item without liability to anyone except the customer who has ordered payment stopped, or (ii) you indirectly transform the item into an assignment and make the payor bank legally obligated to the holder to pay because it has received a stop order.

(c) You single out the "separate remittance for the particular item" as an act giving the item priority over stop orders, etc. Under some circumstances which a remittance would constitute any unconditional credit (but no reason is indicated why this form of unconditional credit is more sacred than any other), and under other circumstances it would
clearly not be unconditional. For instance, this is the customary form of remittance for non-cash items which are, as you know, always sent for collection and remittance, i.e., the bank is expected to remit only if the item is paid. Why should this form of unconditional credit give the item “priority” where unconditional credit in some other form does not (e.g., clearing house credit that has become unconditional because the item can no longer be returned through the clearings)? And on the other hand a small bank may receive or send a cash letter with only one item. Under current deferred postings that one item would be remitted or immediately subject to return the next banking day. Why should this completely provisional settlement give the item “priority”? I have never seen any good reason expressed for trying to establish one time when items have “priority of payment” over stop orders, etc., and another when they are finally paid.

1 COMMISSION REPORT 359 (1954).
Sec.4-3039. When Items Subject to Notice, etc.

In my memorandum I noted three practical problems here which your brush off as “theoretical”. You ask “how frequently will they arise in contested cases?” This, I think, is typical of your broad brush. I have discussed these points above, but I would like to consider them again in the light of your comment here.

(1) You make a great point of this provision which gives “priority of payment” to certain items before they have been “finally paid”, although I have found nothing in the comments or literature on this section to indicate the reason for this difference. I pointed out that in the case of stop orders, at least, the bank apparently could disregard this section and return the unpaid item without liability. Doesn’t this illustrate that the provision is just a little silly? Stop orders are given with great frequency and often involve a race with time. Accordingly, I think banks will be faced fairly frequently with the problem—do we give effect to the customer’s stop order, return the item to the holder and risk a possible test suit under this statute, or do we give priority to the item and argue with the customer as to how far we had gone in the posting process.

(2) I pointed out that the customary way of paying (and I mean finally paying) for non-cash items (as you know they are normally not settled for provisionally) is by separate remittance. I then inquired whether the bank would stop payment on its draft (separate remittance) on the ground that it had not “finally paid” under the statute because it hadn’t posted the item as required for final payment. I don’t blame you for side-stepping this question. Among other things, I think it helps to illustrate the absurdity of the rule that separate remittance for the particular item is not final payment in any case. I strongly suspect that a properly informed court would hold that such a remittance for a non-cash item represents an agreement varying the terms of the Code, just as informed courts will probably hold in the case of other unconditional credits, but these sections certainly invite confusion and litigation. Such separate remittances are made daily, and I am not prepared to guess how
ated by section 4-303 "where a stop order is not given priority" even though received before the item is "finally paid," an obvious reference once again to that period of time between final payment under the completion of the posting process of section 4-213(1)(c) and something short of the posting process under the omnibus clause. He commented that there are two possible results from the creation of this period of discretion: the payor bank may refuse to pay the check without liability to the holder, or the check is indirectly transformed into an assignment making the payor bank legally obligated to pay the holder because it has received the stop order. In one short summary, Brome has summed up the opposing arguments between the drawee bank and the holder which will appear in the West Side briefs and in subsequent cases to be discussed in this article. The drawee bank argues Brome’s first result: the payor bank may honor the stop order and refuse to pay the holder because final payment has not occurred under section 4-213(1)(c)’s completion of the posting process. The holder of a check argues Brome’s second result: the drawee bank must pay the holder because the stop order has arrived too late.

In the same letter, Brome directly answered Malcolm’s query about how frequently his earlier hypothetical would arise in contested cases. In a prophetic manner, Brome said:

Stop orders are given with great frequency . . . Accordingly, I think banks will be faced fairly frequently with the problem—do we give effect to the customer’s stop order, return the item to the holder and risk a possible test suit under the statute, or do we give priority to the item and argue with the customer as to how far we have gone in the posting process.

many contested cases will result. One would be bad enough if it involved my bank.

(3) I pointed out that legal process is entitled to “priority” over an item until but not after the bank has become liable for the item under Sec. 4-302 dealing with late returns. A bank having returned an item late would not, of course, have charged the same to the drawer’s account (or might have first charged and then reversed the charge); and I asked must the bank forthwith re-charge the account (and thereupon finally paid the item?) or just how long will the bank’s liability hold off the levy? If this question is theoretical then so are the provisions of the section.


141. “A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable of the instrument until he accepts it.” U.C.C. § 3-409.

142. 1 COMMISSION REPORT 361 (1954).
Certainly, Marine National Exchange Bank of Milwaukee, Wisconsin, had to answer Brome's question in August of 1966 when Paine, Webber's stop order arrived after the bank had sent the check through the sorting and encoding machines and the electronic computer and after it had charged the check to the customer's account, affixed a "paid" stamp to it, photographed it, cancelled it, and filed it in its customer's account.143

Brome's overall criticism of section 4-303 can be summarized in his statement that he had never seen any good reason expressed for trying to establish one time when items have priority of payment over one of the four legals and another when they are finally paid.144 Brome, who knew that time of payment determined priority under pre-Code law, is obviously referring to the effect of section 4-303's omnibus clause which could cut off the effectiveness of the four legals prior to a payor bank's final payment under section 4-213, thus establishing one time for priority and another time for payment. Indeed, if the omnibus clause were eliminated from section 4-303(1)(d), the concept of payment would again bring about priority under the Code since the events under section 4-303 on priority would then be identical with the events under section 4-213 on final payment.145

Brome and Malcolm again confronted each other during hearings held by the Law Revision Commission. Malcolm defended Article 4 in the presence of Brome and many others. Section 4-303 naturally came up in the hearings, but Brome's criticism of its establishment of one time for priority and another time for payment

143. 37 Wis. at 662, 155 N.W.2d at 589. Malcolm, in reviewing section 4-303's legislative history, was apparently not impressed with Brome's prediction of the West Side case. He noted, "This review of the legislative history of Section 4-303(1) indicates that New York Counsel were concerned with various possible difficulties with the priority language but the difficulties they expressed were various theoretical uncertainties quite far removed from the facts arising in West Side." Malcolm, supra note 21, at 30. For the difficulties on this "priority" language see pages 79-83, supra.

144. 1 COMMISSION REPORT 359 (1954). This statement seems to indicate that Brome has at least read some of the reasons for establishing one time for priority and another for payment, such as those expressed in Leary, supra note 82 or the comments on the prior drafts of section 4-303 before the 1952 official text version. Later in the same June 4, 1954 reply, Brome says that he has found nothing in the comments or the literature on this section to indicate the reason for the differences. 1 COMMISSION REPORT 361 (1954).

145. Except, of course, for section 4-303(1)(a)'s acceptance or certification.
never surfaced.\textsuperscript{146}

The New York Law Revision Commission nevertheless continued to scrutinize section 4-303 and its omnibus clause. Two extensive memorandums dealing with Article 4, including section 4-303, were filed with the Commission in late 1954.\textsuperscript{147} In the first memorandum, William J. Hickey\textsuperscript{148} came out squarely on Brome's side in stating that section 4-303 alone does not create any duty of the payor bank running to the holder or presenter to pay a check.\textsuperscript{149}

\textsuperscript{146} 1 Commission Report 473 (1954). 1 New York Revision Commission, Report for 1954 at p. 473 (1954). Perhaps the problem was never mentioned as a result of the two memoranda later filed with Commission by research assistants Hickey and Killian discussed later in the text on pages 77 and 78.

\textsuperscript{147} Only one of the two memoranda, the September 29, 1954 memorandum by John D. Killian, III, is mentioned in Malcolm's article setting out the legislative history. No portion of the Killian memorandum is quoted in the article. Malcolm, supra note 21, at 28.

\textsuperscript{148} Hickey is listed as a research assistant under the direction of Professor William Tucker, Dean of the Cornell Law School.

\textsuperscript{149} 2 Commission Report 1250 (1955). Hickey does not state on what authority he makes this statement. His analysis of section 4-303 is as follows:

Section 4-303: This section is written in terms of "priorities" between items considered as claims against an account and a stop-payment order, "notice" or legal process against the account or the bank's own right of set-off which is its own claim against the account. In effect, the Section states detailed rules as to when a stop-payment order, notice or service or process against the account "comes too late" to require the payor bank to interrupt the process of payment. Section 4-303 in itself does not create any duty of the payor bank running to the holder or presenter to pay an item. It does give the bank an immunity from liability for its disregard of a stop-payment order, "notice" or process. When an item placed for collection has been received by a payor bank and one of the five conditions of subsection (1) has been met, it is then too late to subject the account to a "notice", stop-order, legal process of set-off which would otherwise have priority. Liability to the executor of a decedent drawer or to a drawer or his levying creditor then hinges on action or non-action specified in the section. Payment of an item where the "notice", stop-payment order or process would be effective apart from this section to preclude the bank from charging its customer's account may be considered action taken in the course of collection to the same extent that the act of payment has been treated as within the meaning of Section 4-102(2) in discussion of other sections. However, the "liability" in question is not liability for the act of payment. It is, rather, liability on the undischarged debt of the bank to its own customer. (See Stella Flour & Feed Corporation v. National City Bank 285 App. Div. [sic] 182, 136, N.Y.S. 2d 139 (1st Dep't (1954)). On the other hand, in jurisdictions where the liability of a bank for disregarding a stop-payment order is treated as arising from breach of a duty of ordinary care, Section 4-302
Hickey then suggested a purpose for section 4-303 never expressly mentioned before; he said that it gives the bank an immunity from liability for its disregard of a stop payment order, notice or process.\textsuperscript{180} Presumably, he meant that if a bank is confronted with the decision whether to pay a check or to honor one of the four legals, and it makes its decision correctly according to section 4-303, the bank will be immune from any liability in favor of the party which instituted the stop payment order, notice, or legal process. Put more simply, section 4-303 will act as a shield for the drawee bank if it uses it correctly. Hickey did not mention Mr. Brome's concern about the establishment of one time for determining priority questions and another time for determining payment questions.

In the second memorandum filed with the New York Law Revision Commission, John D. Killian, III,\textsuperscript{181} began by noting that

\textsuperscript{180} Lewis: The Omnibus Clause of U.C.C. Section 4-303(1)(d): A Holder's Swor

\textsuperscript{181} Id. at 1250.

\textsuperscript{150} Id. at 1250.

\textsuperscript{151} Killian is also listed as a research assistant under the direction of Professor William Tucker, Dean. His analysis is set forth as follows:

Under present law, the question whether a notice, stop-order, or legal process received by the bank is effective to prevent proper payment of the item is made to depend (so far as the time element is concerned) upon whether the payor bank has "paid" the item, \textit{i.e.}, whether the collection process within the payor bank with respect to the particular item has progressed to that point where the item has been discharged by payment and the payor bank has become accountable for it.

\textit{Id.} at 1460.

In drafting the Code, the draftsmen have considered that the factors to be given effect in determining whether a notice, stop-order or legal process received, or valid setoff exercised by a payor bank, is timely are not necessarily the same as those determining when the item is "finally paid" for other purposes. The draftsmen note that other acts, by the payor bank such as certification, acceptance, and the sending of a separate remittance for the item-acts which do not constitute "final payment" (except the case where a separate remittance now constitutes an "irrevocable credit" under N.Y.N.I.L., \S\ 350-b, although not under the Code)-place the payor bank in such a position that on policy grounds it should not be required to reverse its action and attempt to recover its former position. Thus, Section 4-303(1) has been drafted to state relative "priorities" rather than rules of time of payment. It lists among the actions
of the payor bank which give the item "priority" those acts which constitute final payment by a payor bank under Section 4-213(1), and also certain acts which occur before that stage of the process is reached where the item is "finally paid by the payor bank". It also includes in the list the accrual of liability of the bank for late return of the item, under Section 4-302, which operates to render the payor bank liable to the customer of the depository bank for the amount of the item as if it had fully paid the item.

Id. at 1460-61.

By stating the relative priorities of various legal events and items held by the payor bank, the Code is in effect defining the "timeliness" of those various legal events which in a given case take priority. A legal event effective in other respects may be said to be "effective" from the point of view of "timeliness" when it affects the account of the drawer and eliminates or freezes all or part of whatever balance is available to pay the item, so as to preclude a payment of the item. Conversely, a legal event which is not timely does not preclude a "payment" of the item and no person acquires from that legal event a right to say that the bank should not have paid the item or that its action in charging the account of the customer is either a nullity or is unjustified. (See Comment (1) to § 4-303.). It should be emphasized that the provisions of Section 4-303(1) in no way define or affect the validity of the legal event involved in a particular case in any respect other than its timeliness to intercept payment of particular items. The text of the section does not clearly indicate that effectiveness of the legal events enumerated is being defined only in the sense of timeliness. The only evidence for such analysis which the Code supplies (apart from the purpose of the section as it may be inferred from existing law) is to be found in Comment (5) to Section 4-303 which states:

In the case of notice, stop orders and legal process the effective time for measuring their priority status or lack of it, is receipt plus the extra time required or specified in Sections 1-201(27) and 4-403. In the case of set-off, the effective time is when the set-off is actually made. (Emphasis added.)

It should also be observed that the proposition that an item has "priority" over a notice, stop-order or legal process does not mean that the holder of the item thereby acquires a right to have it paid by the bank. Some of the facts stated in the lettered paragraphs of Section 4-303(1) are facts that, in themselves, give the holder a right against the bank either to payment of the item, or to remittance of the proceeds, or for the amount of the item (i.e., where the item has been accepted, or the bank has completed the process of posting, or has become liable for late return). Indeed, the circumstance that the bank has become obligated for the amount of the item in these cases justifies the rule that a stop-payment or legal process thereafter comes too late. In other cases the bank will have no obligation to the holder of an item, even though it has "priority" but it still has its obligation to its own customer to honor his checks, and, under Section 4-303, may be liable for wrongful dishonor if
it fails to do so. This conclusion seems to follow from the language of the preamble that “Any notice, stop-order or legal process received and valid set off exercised . . . is entitled to priority over any item drawn on or payable by and received by the bank until but not after the bank has done any of the following”.

With an exception in the case of the payor bank becoming liable for late return under Section 4-302, each of the events enumerated in Section 4-303(1) which give the item priority occur concurrently with or subsequently to one particular point in the collection process within the payor bank (except in special cases), namely, the point when the payor bank makes its decision to pay or dishonor, i.e., when the bookkeeper for the maker’s or drawer’s account determines or verifies that the item is in good form and that there are sufficient funds in the maker’s or drawer’s account to cover it. This decision is made prior to acceptance, certification, cash payment, settlement by separate remittance, or the completion of the process of posting, but after such preliminary acts such as receipting for the item in a passbook or making another form of provisional settlement, which acts do not evidence the payor bank’s final decision to pay. Evidence that this decision is the controlling point of time in the collection process within the payor bank when the item is to receive priority under the Code, is to be found in the language of paragraph (d) of Section 4-303, “or otherwise has evidenced by examination of such indicated account and by action its decision to pay the item.”

This reasoning is not new in the Code. In Nineteenth Ward Bank v. First National Bank, 184 Mass. 49, 51, 67 N.E. 670, 671 (1903), in determining whether a notice of insolvency had been received by the payor bank prior to payment of the item (a note payable at the bank), the Court said:

In this state of things the cashier, charged with the duties and invested with the powers of the defendant both as to the plaintiff [the presenting bank] and as to the makers respecting this note [the item in question], proceeds on October 7, 1901, soon after the beginning of the day’s business, to the performance of his tasks. He intends, as agent of the makers, to pay this note to his own bank, the indorsee and holder, and as such entitled to receive payment and discharge the note. He intends as cashier of his own bank to cancel and discharge the note when paid, and then as agent for the makers to hold the paid note for them. After the note has been paid, he intends to send the proceeds to plaintiff. With these intentions, he begins. The note is before him. He first draws on a bank in Boston his check as cashier of the defendant, payable to the order of the plaintiff for the amount of the proceeds of the note. It is to be observed that this is not the check of the makers nor is it made by the cashier as their agent, but in his capacity as agent of the defendant, and in the performance not of a duty owed by the makers but of a duty owed by the defendant to the plaintiff. It is not the check by which the note was paid because none was needed, but was the check by which the proceeds were to be trans-
mitted by the defendant to the plaintiff. He then makes a memorandum of this check upon a block, stamps upon the face of the note “Paid Oct. 1901, First National Bank, So. Weymouth, Mass.,” and perforates the note in three places. He then puts the note thus stamped and mutilated in the file with his checks, so that the proper record of the transaction may be entered at the end of the day upon the permanent books. So far he has gone when he is called to the telephone and notified that the makers have made an assignment for the benefit of their creditors, and he is requested by the assignee to hold the account. He replies that there is one (meaning this) note which he had paid or “made a check for it.” Soon afterwards, at the request of the assignee, he withheld the check he had drawn and undertook to retrace his steps.

We are of the opinion that prior to the call to the telephone the note had been paid by the makers to the defendant, and that the only remaining duty resting upon the defendant was to remit the proceeds to the plaintiff...

Comment (3) to Section 4-303 describes this reasoning as follows:

The sixth event conferring priority is stated by the language “or otherwise has evidenced by examination of such indicated account and by action its decision to pay the item.” This general “omnibus” language is necessary to pick up other possible types of action impossible to specify particularly but where the bank has examined the account to see if there are sufficient funds and has taken some action indicating an intention to pay. One example is what has something been called “sight posting” where the bookkeeper examines the account and makes a decision to pay but postpones posting. The clause should be interpreted in the light of Nineteenth Ward Bank v. First Nat. Bank of Weymouth, 184 Mass. 49, 67 N.E. 670 (1903). It is not intended to refer to various preliminary acts in no way close to a true decision of the bank to pay the item, such as receipt of the item over the counter for deposit, entry of a provisional credit in a passbook, making of a provisional settlement through the clearing house or the mailing of a general remittance covering a group of items including the one in question. In view of Section 4-301 any of these actions is provisional and none of them evidences the bank’s decision to pay the item.

*Id.* at 1461-64.

Comparison of Section 4-303 with Present Law

As pointed out above, the question of priorities under present law is resolved as a question of whether the item has been paid. The time “time of payment” is decisive, and the question [sic] is not phrased in terms of relative priorities. Brannan’s *Negotiable Instruments Law* 882 (6th ed. 1938) states:

But if a check or note payable at a bank is presented to the bank by the holder in person, stamped by the teller “paid”, but before he had paid over the money, the teller is notified that the drawer had made as assignment for the benefit of creditors, or had not the money on deposit, or the deposit had been garnished, and
the teller then erased the paid mark and returned the check, it
could hardly be claimed that this was a payment so as to discharge
the drawer. . . . So also, if the instrument was sent by the holder
to the bank by messenger or by mail. The instrument has not, in
fact, been paid, but it may well be that the holder or the collecting
bank, even in the absence of any custom or usage, should have the
option of holding the drawee bank because of the manner in which
it had dealt with the instrument, which was the holder’s property,
or of holding the drawer or maker because the instrument has not
be honored.

Thus at the outset, Section 4-303 represents a departure from pre-
sent law by phrasing the problem differently.

This change in emphasis can best be noted by observing the reason-
ing of a New York court in deciding that an acceptance was affected by a
subsequent notice of claim against the drawer’s deposits and therefore
the holder’s action against the acceptor on the acceptance was not barred
by the judgement of the claimant against the acceptor. In Consolidated
(2d Dep’t 1908), where this decision was reached, the Court reasoned
that the check was “paid” by its acceptance, when it was marked as paid,
and the amount of the check credited to the holder’s account, and that
these acts constituted the accepting bank a “debtor” to the amount of
the credit given, citing Oddie v. Nat. City Bank, 45 N. Y. 735, 6 Am.
Rep. 160 (1871). The Court said: “In legal effect there was just as much a
payment of the check... as though a messenger from the plaintiff bank
had presented the check at the teller’s window... and received therefor
the currency.” Rather than state that the acceptance gave the item “pri-
ority” over the notice of claim, the Court merely said that inasmuch as
the acceptance occurred prior to the notice and commencement of the
action, “that action cannot of course be a bar to the maintenance of this
[action on the acceptance].” (See Hamburger Bros. v. Third Nat. Bank,
bankruptcy).)

“Final payment” under present law as found in N.Y.N.I.L., § 350-b
includes payment in cash, completion of the process of posting, and the
giving of an irrevocable credit. Thus, with respect to subparagraphs (b)
and (c) and the first half of (d), of Section 4-303(1), present law generally
relies upon similar events as constituting acts or events sufficient to give
the item “priority”. With the exception of the liability for late return
category, in subparagraph (e), of Section 4-303(1), New York law is in
accord with the acts which give the item priority. First National Bank v.
National Park Bank, 181 App. Div.[sic] 103, 168 N. Y. S. 422 (1st Dep’t
1917), indicates that New York law, like the Code, regards the bank’s
decision to pay or dishonor as the crucial point of time after which a
notice or other legal event cannot get priority. In that case, the defen-
dant-drawee, appealed from a judgment for plaintiff, payee of a check,
and from an order denying defendant’s motion for a new trial and for
leave to reopen the case. The plaintiff-payee had brought the action on
the theory that the defendant-drawee had irrevocably accepted the check where the plaintiff had forwarded the check to its correspondent for collection and the correspondent presented the check through the New York Clearing House, of which the defendant was a member, and the defendant made a tentative entry on its books on receiving the check, but made no unequivocal act indicating an intention to pay the check and returned it the same day to the correspondent after receiving the notice that the drawer had been taken over by the State Banking Department of New Jersey. After receiving this notice the defendant had erased the entry made in its balance ledger account and returned the check, receiving the amount of the check for which the correspondent had received credit on the tentative settlement, through the clearing house. The plaintiff's argument was that the defendant in receiving the check at the clearing house became the agent of the owner to present it to itself for payment, and that while it then had a right to reject it for any reason the same as it would have had a right to refuse payment as between it and the owner of the check, had the check been presented over the counter still that by passing on the check to the extent shown and making the entry in the balance ledger account it manifested its intention to pay the check and to ratify the payment there of which it had already made tentatively through the clearing house. The Appellate Division reversed the judgment for the plaintiff and granted a new trial to the defendant. The importance of the holding lies in the fact that the Court recognized that the process of collection in the drawee bank had not progressed far enough to a point where the action of the bank was irrevocable or could be said to amount to payment, and that the limited action that had been taken was not sufficient to prevent a notice from freezing the deposit balance in the drawer's account.

With respect to the event based upon liability for late return which gives the item priority, no case authorities have been found to compare present law with the Code. However, an inference may be drawn from N.Y.N.I.L., § 350-b that the payor bank would be held liable for late return under that section. If so, it would seem to follow that such liability would be construed as sufficient to give the item priority.

Following are some illustrations of cases dealing with notices, stop orders and legal process which serve to indicate that the principle and most of the rules of Section 4-303 are a codification of existing case law in this State. Included are some references to cases from other jurisdictions.

In Chrzanowska v. Corn Exchange Bank, 173 App. Div. [sic] 285, 159 N. Y. S. 210 (1st Dep't 1916), the plaintiff sought to cash a check at a branch of the defendant bank in which he had an account. The check was drawn upon an account in another branch of the defendant. The drawer died a few hours before the check was presented. The teller at the depository branch entered a credit for the amount of the check in the plaintiff's passbook and informed plaintiff that she could draw upon this balance immediately. The following day plaintiff drew a check for $100. Subsequently the check was sent to the drawee branch through the main
bank and at the time it arrived the drawee branch was notified (appar-ently orally) of the drawer's death. The check was returned unpaid and the depositary bank charged back and demanded a return of the $100 which the plaintiff had withdrawn. The plaintiff brought this action to recover the balance of the account before the charge-back was exercised. The Appellate Division reversed a judgment for the plaintiff and entered judgment for the defendant on its counterclaim for $100. The Court stated its findings of fact and law as follows:

A check is not the assignment of the fund on deposit to the credit of the drawer pro tanto, and the holder is merely the agent of the drawer for the purpose of collecting it, and upon the death of the drawer before presentation the authority of the holder is revoked, and the bank is no longer authorized to pay; but on principles of necessity incident to the banking business, if the bank pays in good faith and without notice of the death of the drawer, it is protected. (Glennan v. Rochester Trust & Safe Deposit Co., 209 N.Y. 12.) If the plaintiff did not know the law, and acted in good faith in failing to disclose the death of the drawer, then the teller in crediting the check to the plaintiff's account acted under a mistake of a material fact, and if the plaintiff knew the law, and purposefully concealed the death of the drawer from the teller, she perpetrated a fraud on the bank, and in either case she obtained a credit to which she was not entitled, for in any event her authority to collect the check had been revoked by the death of the drawer. Much stress is laid by the learned counsel for the respondent on the fact that the check was credited to plaintiff's account and that she was informed by the receiving teller that she would draw against it. The only significance of that is its bearing on the question as to whether the check was accepted and credited to the plaintiff's account unconditionally, or received for collection and credited to her account subject to being charged back if not paid, for manifestly these facts present no evidence of estoppel upon which it could be held that the bank could not thereafter be heard to say that the plaintiff might not draw the undrawn balance of the credit it gave her on the check. . . .

(See Chaffee v. Bank, 40 Ohio St. 1 (1883) (Bank had no authority to pay a check drawn after it had received notice of the assignment of the drawer; it was held that the bank paying a check of a depositor, who to their knowledge had made an assignment for the benefit of credits before the presentment of the check, was liable to make payment again to the assignee when it turned out that the check was given after the assignment, although in fact it was antedated and appeared to have given several days before the assignment was made.))

In Paino Bros., Inc. v. Central National Bank of Yonkers, 270 N.Y. 588, 1 N.E. 2d 342 (1936), aff'd 245 App. Div.[sic] 751, 280 N.Y.S. 458 (2d Dep't 1935), the jury was allowed to find that the depositor and the drawee bank had entered into a special agreement whereby the checks were treated as cash as soon as deposited. The jury having so found, the
Court held the drawer had no right to stop-payment once the checks were deposited.

Another case, *A Sidney Davison Coal Co., Inc. v. National Park Bank*, 201 App. Div. 309, 194 N. Y. S. 220 (1st Dep't 1922), held that a verbal stop-order to a bank, requesting it to refuse payment of a trade acceptance payable at the bank, was insufficient in the absence of a showing that the stop-order "was given prior to the payment of the draft or a sufficient time prior thereto" to have enabled the bank, in the exercise of reasonable diligence, to act upon the order.


N.Y.N.I.L., § 325-a (not part of the U.N.I.L.) provides that payment cannot be stopped on an instrument after it has been certified at the request of the drawer, payee or holder.

§325-a. No stopping payment after certification

A bank, banker or trust company which has certified a check, note, or other instrument for the payment of money at the request of the drawer, payee or holder thereof shall not thereafter be required to stop or refuse payment thereof upon the order, demand or request of the drawer or of any other party thereto.

In *Rosen v. Rosen*, 17 Cal. App. 2d 601, 62 Pac. 2d [sic] 384 (1936), it was held that where the drawee back received a check, ran it through the adding machine, sorted it alphabetically and checked for date, indorsement and genuineness of the signature of the drawer, all before a levy of execution was made on the bank account, the bank accepted the check before the levy and the payee of the check was entitled to the amount thereof as against the judgment creditor under the levy. (It should be observed that this would not constitute "acceptance" under Code §3-410. It might under §4-303(d) constitute evidence of decision to pay.)

See annotation, 84 A. L. R. 412 (1933), entitled "Negotiable Instruments law as affecting rights as between holder of check or draft and attaching creditor, receiver, assignee for creditors, or administrator of drawer whose rights attached before presentment." *Cf. New York Life Ins. Co. v. Patterson*, 35 Tex. Civ. App. 447, 80 S. W. 1058 (1904). No New York cases have been found dealing with the relative priorities of legal process and items drawn upon the account which the process has been executed.

Subsection (2) provides:

Subject to the provisions of subsection (1) items may be accepted, paid, certified or charged to the indicated account of its customer in any order convenient to the bank.

There are no rules in the statutes, decisions, Federal Reserve Regulations, or clearing house rules, requiring banks to complete certain actions before others. What rules there are prescribe time limits and set standards of ordinary care and operation for the bank's handling of items it receives. Therefore since the order of operations and actions is not prescribed, the banks under present law may govern their internal affairs
pre-Code questions of priority were determined by payment\textsuperscript{165} but that the draftsman of the Code believed that factors considered in determining whether a legal came too late were not necessarily the same as those used in determining whether an item was finally paid. He, therefore, recognized immediately the establishment of the two different times criticized by Brome, and he attributed the drafter's position to "policy grounds" that a bank sometime before payment should nevertheless not be required to reverse its action as a result of a legal.\textsuperscript{166} Killian did not criticize the use of a step, such as the omnibus clause, prior to payment under section 4-213 to end the effectiveness of a legal as did Brome in his June 4, 1954, letter to Malcolm.

Killian's memorandum further supported Hickey's two views of section 4-303. Killian said that the proposition that a check has "priority" over one of the legals does not mean that a check's holder acquires a right to have it paid by the bank.\textsuperscript{167} Additionally, he said that if a legal comes too late, it does not preclude payment of the check, and no one acquires from that legal a right to say that the bank should not have paid the check or charged the account; in other words, the bank is immune from liability for paying a check if the legal comes too late under section 4-303.\textsuperscript{168} Again section 4-303 is mentioned as a shield for the drawee bank.

When Killian finally mentioned the omnibus clause, he identified it as the controlling point in the collection process within the payor bank when a check is to receive priority.\textsuperscript{169} He said that the

\textsuperscript{165} See discussion of pre code questions of priority in text at pages 41 and 42 supra.

\textsuperscript{166} 2 Commission Report 1460 (1955). Killian does not mention the omnibus clause as one factor to be used in determining priority but not payment; he mentions certification, acceptance and the sending of a separate remittance for an item. The sending of a separate remittance draft was later eliminated from section 4-303 as a factor to used in determining priority.

\textsuperscript{167} Id. at 1462.

\textsuperscript{168} Id.

\textsuperscript{169} Id. at 1463.
omnibus clause is the point when the payor bank makes its decision to pay or dishonor and brings about priority at that time; everything else under section 4-303(1)\(^{157}\) comes after that decision, and he mentioned the acts of acceptance, certification, cash payment, settlement by separate remittance, and the completion of the posting process.\(^{158}\) Once again, Killian clearly saw the drafter's apparent intention to establish one time to decide priority questions and another time to decide payment questions.

Killian did not join in Brome's criticism of section 4-303 for its establishment of the two different times for priority in payment. Furthermore, he said that present New York law is in accord with the acts which section 4-303(1) provide for giving priority.\(^{159}\) He then cited a case which he said indicates that New York law, like the Code's omnibus clause, "regards the bank's decision to pay or dishonor as a crucial point of time after which a notice or other legal event cannot get priority."\(^{160}\)

Indeed, the only criticism of section 4-303 offered by Killian is that present New York law phrased the question in terms of "time of payment" and not in terms of "relative priorities" as did the Code.\(^{161}\) In other words, section 4-303 represented "a departure from present law by phrasing the problem differently."\(^{162}\) Rather than speaking in terms of payment giving priority to a check or lack of payment giving priority to a stop order, the New York

\(^{157}\) The one exception is the case of a payor bank becoming liable for late return under section 4-302. He apparently means section 4-302(1)(a) when a payor bank, which is not also a depositary bank, retains a check beyond midnight of the banking day of receipt. Such an action could well come prior to a bank's decision to pay or dishonor.

\(^{158}\) 2 COMMISSION REPORT, supra note 152, at 1462.

\(^{159}\) Id. at 1468. He lists one exception to this statement—section 4-303(1)(e)'s liability for late returns—but he later even justifies section 4-303(1)(e) with New York law. Id. at 1469.

\(^{160}\) Id. at 1468. The case cited is First National Bank v. National Park Bank, 181 A. D. 103, 168 N.Y.S. 422 (Supp. Ct. 1917). This case merely holds that a stop payment order which came after the payor bank had made a charge to the drawer's account but before the check had been examined for "regularity and genuineness" was not paid and thus the stop order was timely. It is not a case which shows that a stop order under prior New York law might be too late and yet the payor bank still not be liable to the holder. Indeed, New York law still decided priority by the payment concept, 2 COMMISSION REPORT 1460 (1955); and if payment had occurred in that case, surely the payor would have been liable to the holder and the stop payment order too late to be effective.

\(^{161}\) Id. at 1461, 1467.

\(^{162}\) Id. at 1467.
courts spoke in terms of payment having occurred prior to, or subsequent to, the receipt of a legal.

This criticism of section 4-303's use of priority language was apparently taken to heart by the Law Revision Commission. The only change that it recommended in section 4-303 was that the preamble be revised to eliminate the phrase “entitled to priority” and to substitute language making it clear that the section was concerned only with the question of when a legal “comes too late.”163

In its 1956 report, the Editorial Board recommended the amendment of section 4-303 to its present-day form. The recommendation was based on the New York Law Revision Commission's view and the realization that New York was crucial in winning acceptance of the Code.164 The old preamble, phrased in

163. Section 4-303. When Items Subject to Notice, Stop-Order, Legal Process or Set-Off; Order in Which Items May be Charged or Certified. [As revised in Supplement No. 1.]

1. It was suggested that the intention of this section is not to establish rules of priority, or to determine questions as to the validity or effectiveness of a notice, stop-order, legal process or service, except to the extent that “priority” and effectiveness are determined by the timeliness of receipt of the notice or stop-order, service of process, or exercise of a set-off - i.e., that the meaning of the section is that a notice, stop-order or legal process which, under other rules of law, would be effective to terminate or suspend or otherwise modify the bank's privilege to charge the customer's account for an item it pays, and a set-off which would, by other rules of law, be effective to terminate or suspend the bank's duty to its customer to pay an item, “comes too late” if the notice or order is received, or the process is served, or the set-off is exercised, after the bank has done one of the things specified in Section 4-303.

2. It was recommended that the language of the preamble to Section 4-303 be revised to delete the phrase “entitled to priority” and substitute language making it clear that the section is concerned only with the question whether the notice, etc., “comes too late.” It was also recommended that the text be changed to include the proposition noted in the comment, that the time involved is the time of receipt plus the extra time the bank needs for taking action, which it has under Section 1-201(27) and Section 4-303. It has also recommended that reference to “knowledge” be included.

3. Subject to item 2, Section 4-303 was approved. The Commission also recommended that the text be changed to include “the time of receipt plus the extra time the bank needs for taking action,” but that change has no relevance to the issue discussed in this article. Id.


164. Malcolm, supra note 21, at 29.
terms of a legal being "entitled to priority," was replaced by language phrased in terms of a legal coming too late. The reason given for the revision specifically acknowledges the suggestion of the New York Law Revision Commission that the language be changed.165

Brome’s letters, and Hickey’s and Killian’s memoranda, show that the Commission believed that section 4-303’s omnibus clause could end the effectiveness of a legal at an earlier stage in time than final payment under section 4-213; yet, the Commission made no recommendation that the omnibus clause be eliminated. The letters and the memoranda also indicate that the Commission considered that section 4-303 could not impose liability upon a payor bank and that it acted as a shield for the payor bank;166 no suggestions to change that effect of section 4-303 were made.

The only conclusion to make then from this legislative history is that the Commission intended the omnibus clause to end the effectiveness of the legals prior to the completion of the posting process under section 4-213 if the payor bank had otherwise evidenced the decision to pay; at the same time the payor bank would still not be accountable to the holder until the process of posting was actually completed under section 4-213. The Commission must have also realized that section 4-303 would indeed act as a shield for the payor bank, thereby protecting it from any liability to its customer or customer’s creditors if it refused to honor the legal as a result of using section 4-303 correctly in deciding not to honor the legal.

165. Reason:
In the 1952 Text the relative position of items, on the one hand, and notices, stop order, legal process and setoff, on the other hand, were stated in terms of "priority." Such formula of "priority" has evoked criticism and some uncertainty. The New York Law Revision Commission has suggested the substitution of the words "comes too late" to more aptly describe the rule and result intended. The Revision adopts this suggestion.

Id. (citing the 1956 REPORT OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, at 158).

166. Mr. Malcolm’s version of the Law Revision Commission’s resolution differs somewhat from the recorded in note 163, supra. His version actually includes in it a statement that section 4-303 “has no effect in itself to give the holder of a ‘item’ a right to payment.” Malcolm, supra note 21, at 29.
V. VIEWS OF THE TWO RecorderS OF ARTICLE 4

Fairfax Leary, Jr., and Walter E. Malcolm, the initial and final recorders respectively of Article 4, have fortunately made known their views on the question of whether the omnibus clause of section 4-303(1)(d) can be used by a holder to impose accountability on a payor bank. As stated earlier, the two recorders take opposite views.167

Malcolm made his views known soon after the West Side decision. In his article, "Reflection on West Side Bank; A Draftsman’s View,"168 Malcolm unequivocally stated that section 4-303(1) was the first or primary section that should have been considered on the facts of West Side because it involved primarily the relative status of an item being processed by a payor bank as against a stop payment order.169 He questioned why there was only a passing reference to section 4-303 in the decision of the lower court and no reference to it in the Supreme Court’s decision.170

Prior to beginning his analysis of the West Side case and the use of section 4-303, Malcolm reviewed a portion of the legislative history171 and stated that “no one clearly foresaw in 1956 the facts presented by the West Side case.”172 He then said that at all times section 4-303(1), to him, was intended to prescribe the rules as to “who wins” between the item being processed for payment by the payor bank and each of the four legals.173 This view held, he said, under both the original “priority” language and the Law Revision Commission “comes too late” language. He added that he believed that if a bank saw fit to disregard the natural result of one of the rules of section 4-303(1), as Marine National certainly did when it honored Paine, Webber’s stop payment order, then the bank must bear the consequence of jumping the wrong way. Consequently, he thought it unnecessary to insert language holding the bank “accountable” under section 4-303(1)(d). Malcolm then impliedly confirmed the validity of the conclusions which Brome, Hickey and

167. See supra p. 284.
169. Id. at 26.
170. Id.
171. See text and foot notes in “Legislative History” section of this article for the portion of the legislative history reviewed by Malcolm.
172. See “Legislative History” section of this article for some close predictions of the West Side case, all of whom Malcolm, as the recorder of Article 4, surely saw.
Killian placed before the Law Revision Commission by concluding that it would have been wrong to have added accountability language in section 4-303 since a check "might win" as against one of the "four legals" under the omnibus clause but still have not progressed far enough to reach final payment and the accountability stage under section 4-213(1)!!

Although Malcolm wrote his article on the West Side case soon after the decision was rendered, Leary spoke out first on the question of whether the omnibus clause can be used by a holder to impose accountability on a payor bank. Writing in 1965,175 the year before Paine, Webber wrote the check to Byron Swidler, and some three years before the Wisconsin Supreme Court decided West Side, Leary noted a possibility that the differences between the section on "final payment" before the payor bank becomes "accountable for the item,"176 and the time when the notice or stop order comes too late,177 may afford the payor bank some discretion. Leary did not hesitate to express his opinion on a payor bank's liability to a holder in such a situation: "It is axiomatic law that, at least until final payment has occurred, a payor bank is under no liability to the holder of a check." He reasoned that section 4-213(1) specifies the point in time when the payor bank becomes liable, and the Code gives no indication of imposing any obligation at an earlier date because it speaks in terms of suspending the payor bank's "right or duty" to pay an item. The "duty," he said, is owed to the drawer of the check and the "right" is personal to the payor bank. Thus, "the payor bank may reverse entries and honor a stop order, or notice of adjudicated insolvency or other legal without liability to the owner/depositor of the check."178

Leary later confirmed his opinion of the use of the omnibus clause in imposing liability on a payor bank in an article written after the West Side decision.180 His reasons for believing that the omnibus clause cannot impose liability on a drawee bank remained the same.181 He also articulated a function for section 4-303 which

174. Id. at 31.
175. Leary, supra note 10.
176. U.C.C. § 4-213(1).
177. U.C.C. § 4-303(1).
178. Leary, supra note 10, at 364.
179. Provided, of course, the payor bank has the consent of its customers. Id. at 364-65.
180. Leary, supra note 23.
181. Id. at 929, 931.
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is quite different from that suggested by Malcolm. The function of section 4-303, he said, is "to settle disputes between a payor bank, its depositor and third parties other than holders of items in course of collection." The obvious section for a holder to use in a dispute with the payor bank is section 4-213, the section which Leary maintained was correctly used in West Side, a case in which the suit was indeed by a holder.

VI. A LOOK AT THE RECENT CASES

Article 4 of the Uniform Commercial Code has been enacted now in all states for over a decade. Numerous state and federal courts have relied on section 4-303(1) to resolve questions concerning a contest between a check and one of the four legals. The opinions have been collected for ready reference in various standard sources. The issue of whether a drawee bank can be held liable or accountable by a holder under section 4-303(1)(d)’s omnibus clause has never been specifically addressed in any of those cases. Some of them, however, touch close to the issue; thus, they may reflect future treatment.

Some of the cases suggest that courts will greet the issue with a certain degree of confusion. Gibbs v. Gerberich, which appeared prior to West Side, is a good example. Gerberich, the drawer, wrote a check to Hewit, the payee, who later deposited the check in his depositary bank. When Hewit’s bank presented the check for payment, Gerberich’s payor bank charged the check to his account. On that same day, however, a restraining order, issued to prevent payment from the account, was served upon Gerberich’s payor bank which immediately restored the credit to Gerberich’s account. The check was apparently returned to Hewit’s depositary bank and subsequently to Hewit. The payee, Hewit, claimed in a suit against the payor bank that the check had been “paid” within the meaning of the Uniform Commercial Code prior to the payor bank’s receipt of the restraining order; thus, the receiver under the

182. Malcolm suggested that the function of section 4-303 was to prescribe rules as to “who wins” as between an item being processed for payment by the payor bank and each of the four legals. Malcolm, supra note 21, at 30.
183. Leary, supra note 23, at 931.
184. Id. at 929.
185. Even Louisiana has enacted Article 4 of the Uniform Commercial Code.
restraining order had no right to the money.

The Ohio Court of Appeals decided the case merely on whether the posting process had been completed. After an examination of the testimony, which indeed indicated that the check had been posted to the drawer's account, the court held that the posting process had not been completed because there was no evidence indicating the bank's decision to pay. The testimony showed that all checks, in the ordinary course, were immediately posted after they arrived at the payor bank; that the actual decision to pay by the payor bank was usually made on the checks much later; and that checks received by the payor bank were not "voided or cancelled" until the posting run was completed. The check in question had only been posted to the account; no decision to pay it had been made, nor had it been voided or cancelled.

On the surface, the opinion shows no confusion whatsoever. However, it sets out section 4-303(1)(d)'s omnibus clause and section 4-213(1)(c) on the completion of the posting process and never specifies whether the court used section 4-303(1) or section 4-213(1); thus, it is unclear which Code section, or whether both sections, actually controlled.

Another case exhibiting some degree of confusion is *Schultz & Sons, Inc. v. Bank of Suffolk County.* Unisops, Inc., drew a check made payable to H. Schultz & Sons, Inc., the payee and drawn on the Bank of Suffolk County. The payee deposited the check for collection at its depositary bank which then forwarded the check to the Federal Reserve Bank of New York which in turn presented the check for payment to the payor bank, the Bank of Suffolk County. On the same day that the payor bank received the check it was photographed, proven and debited to Unishop's account. The following day the payor bank learned of Unishop's bankruptcy and gave telephone notice of dishonor to the Federal Reserve Bank. When the check was returned dishonored to the payee, it sought a judgment against the payor bank alleging that it had "finally paid" the check and could not later refuse payment based on its subsequent receipt of notice of Unishop's bankruptcy. The United States District Court considered testimony that showed no additional processing of the check would have taken place prior to the sending out of Unishop's monthly statement and, rejecting any argument based on the *West Side* case, held that the payor bank had indeed completed its process of posting and was

accountable to the payee.

Like the *Gibbs v. Geberich* case, the *Schultz* opinion seems clear on the surface. But once again the court cited both sections 4-213(1)(c) and 4-303(1)(d) without saying which was applicable or whether both were.189

Another reaction of the courts to the issue is one of avoidance. In *Community Bank v. United States National Bank*,190 the issue, at least as the parties argued it, was squarely presented to the Supreme Court of Oregon. In that case, several checks were drawn on the payor bank, the United States National Bank, and were received by the depositary bank, Community Bank, as deposits from some of its own customers. Community Bank presented the checks for payment and they were processed the same night through the payor bank’s central computer. The next day, the payor bank delivered the checks to its branch accounts service center for filing to its customer’s individual accounts. That same day, before the checks had been filed, the payor bank received orders to stop payment on them. The stop payment orders were honored, and the checks were returned to the depositary bank. The depositary bank, which held the checks, sued the payor bank, arguing that under section 4-303(1) the stop order had come too late to affect the bank’s right or duty to pay the check to it. The payor bank, on the other hand, argued that the governing statute was section 4-213(1) because that section provided when a payor bank would be “accountable.” It cited section 4-213(1)(c) in full as one of the things that would bring about final payment and thus accountability.

The court, however, found it unnecessary to decide whether section 4-301(1)(d) or section 4-213(1)(c) governed the rights of the parties. It found that the depositary bank never contended that the payor bank had made a decision to pay in any manner other than that by the completion of the posting process; therefore, there was no reason for the court to decide whether the payor bank had under the omnibus clause “otherwise evidenced by examination of such indicated account and by its action its decision to pay” the checks. Thus, the only issue perceived by the court was whether the payor bank had completed the process of posting, and it noted that the process of posting language was exactly the same under section 4-303 and section 4-213, so it would not make any differ-

189. See the strong criticism of this opinion because of its reference to both section 4-213(1) and section 4-303(1). Note, *supra* note 126, at 742.
ence which section governed in this particular case—a nice, if proper, avoidance of the issue! In the end, the court decided that the trial court had not made a sufficient finding of facts to determine whether the process of posting had been completed and it remanded the case.

The early Code case of Yandell v. White City Amusement Park191 is an important case. It was the first case to decide what steps constitute those "actions" described by the omnibus clause. In Yandell, judgment creditors sought to garnish the checking account of their judgment debtor in the payor bank. The issue in the garnishment action was the amount of money in the judgment debtor's (drawer's) account at the time the notice of garnishment was served upon the payor bank. The federal district court which heard the case relied entirely on section 4-303(1)(d)'s omnibus clause to hold that the payor bank—when its officer penciled a notation of the check on the drawer's ledger, stamped the checks with a "bullseye" stamp and initialed them—had, under the omnibus clause, examined the account and evidenced a decision to pay the checks. Since the payor bank's examination and decision to pay was prior to the service of process in the garnishment action, the court held that the payor bank was correct in paying the holders of the checks even though the posting process was not completed until the day after the service of the garnishment notice.

Citizens and Peoples National Bank of Pensacola v. United States192 is similar to the Yandell case because it discusses what steps constitute the "actions" under the omnibus clause. The suit was between the Internal Revenue Service and a payor bank which was also the payee of the check in question. A customer of the payor bank had written a check on the bank in order to pay a note which was payable to the order of the bank. The customer delivered a check to the payor bank to pay the balance due on the note, but the teller, when she received the check, told the drawer that an additional amount representing interest was still due on the note. The drawer left that check with the teller and the next day delivered an additional check to pay for the accrued interest. At that time, the teller took both checks and the note and put them aside for the moment. An hour and a half later, during which time the teller took no further action concerning the checks, an Internal

192. 570 F.2d 1279 (5th Cir. 1978).
Revenue Service agent served the payor bank with notice of a levy on the customer’s account. The payor bank argued that, under the omnibus clause, it had otherwise evidenced by examination of the customer’s account, and by its action, its decision to pay the check prior to the time of the levy. The Internal Revenue Service, on the other hand, argued that the bank had not taken action which was described under the omnibus clause prior to its levy. Both parties, then, agreed that the omnibus clause controlled.

Although the lower court had decided that the payor bank had indeed taken sufficient steps to constitute the “actions” of the clause and thus the levy came too late, the Court of Appeals for the Fifth Circuit disagreed. It held that the only action by the bank which was capable of objective ascertainment was the action of the teller who physically placed the checks with the note, and it held that the omnibus clause required some action more than that. It also noted that the teller did not engage in any sight posting or make any bookkeeping entries whatsoever. Therefore, the levy came in time so that the checks should not have been paid to the payee.

VII. CONCLUSION

As reflected by the Yandell and Citizens and Peoples National Bank of Pensacola cases, the courts have begun to describe what steps will constitute those “actions” described by the omnibus clause. Comment 3 to section 4-303 had said that the omnibus language was necessary to pick up other possible types of actions impossible to specify particularly, and now the courts are indeed specifying on a case-by-case basis what type of action should constitute the actions described under the omnibus clause.

Unfortunately, as reflected by the Gibbs, Schultz, and the Community Bank cases, the courts are apparently not sure how section 4-303 should be used, apparently because it so closely parallels the “final payment” language of section 4-213. Since the recorders of section 4-303 disagreed as to how it should be used, it is not surprising that the courts are confused as well. Nevertheless, the use of the omnibus clause is one area in which confusion need not exist.

Based upon the first and second analysis of section 4-303’s language in this article and its extensive legislative history before the New York Law Revision Commission, the proposition that section 4-303’s omnibus clause cannot be used by a holder as a sword to impose liability or accountability on a payor bank seems to be
correct. The corollary that section 4-303 acts as a shield in the hands of a payor bank to protect itself against either a party whose legal was not honored or a holder whose check was not paid would then naturally follow.

Certainly section 4-303's pre-Code history shows a definite attempt on the part of the drafters to protect the holder's rights to payment in the face of extended time given to a payor bank to reverse the collection process, and the omnibus clause is apparently a direct result of that attempt. Malcolm, the chief advocate of making section 4-303 a sword in the hands of the holder, can justify his contrary proposition with nothing much more than that, to him, the section was at all times intended to prescribe the rules as to "who wins." Even Malcolm would not have added words of accountability to section 4-303 precisely because of the effect of the omnibus clause in bringing about a cut-off of the legals prior to final payment and accountability under section 4-213.

In fairness to Malcolm, a priority section would not ordinarily include words which would impose liability or accountability; thus, the exclusion of such words in drafting a section like 4-303 is logical. Priority statutes, however, depend on liability or accountability existing elsewhere in favor of two or more parties against a third party. The priority statutes then do not have to impose liability or accountability; they merely decide which party can exercise its right to enforce that liability accountability at the expense of any other party that would wish to do the same. Unfortunately for Malcolm's contrary proposition, the two parties seeking to enforce their rights of liability or accountability, the holder or the issuer of the legal, have no such rights of liability or accountability to enforce when, in the words of Brome, a bank receives a stop payment order against a check before the check is posted but after the bank has evidenced its decision to pay short of posting. If, of course, both parties could show a right to enforce liability or accountability, section 4-303 would indeed be the section to say which one would win; that is, which one would be able to enforce his rights of liability or accountability at the expense of the other.

There are factors that overwhelmingly point to use of the omnibus clause as a payor's shield, not as a holder's sword: the lack of

193. For example, the priority provisions of U.C.C. sections 9-301 and 9-312 in Article 9 on Secured Transactions contain no words imposing liability.

194. See supra p. 311.
accountability language\textsuperscript{195} in section 4-303 and the interpretation so easily attached to the "right or duty" language in the present preamble\textsuperscript{196} of section 4-303, and the awareness of the New York Law Revision Commission and Malcolm that a discretionary area existed as a result of the omnibus clause so that a payor bank would not be accountable to a holder and yet at the same time would not have to obey a legal. Therefore, in a suit by a holder who wishes to impose accountability against a payor bank, section 4-213, the final payment section, is the section which should be used as the sword.\textsuperscript{197} The payor bank, on the other hand, may use section 4-303 as a shield to protect itself from any liability or accountability\textsuperscript{198} if it is sued in a situation involving a holder of a check and one of the legals. Indeed, if a payor bank carefully follows the dictates of section 4-303 in honoring a legal as opposed to a check, or vice versa, section 4-213 can never be used to impose accountability on it. The similarity of section 4-303 to section 4-213\textsuperscript{199} and the omnibus clause's being a separate, prior event short of the posting process under section 4-213\textsuperscript{200} guarantees that section 4-303 will form the perfect shield in the hands of the payor bank.

\textsuperscript{195} See supra p. 287.
\textsuperscript{196} See supra pp. 293-95.
\textsuperscript{197} See supra p. 328.
\textsuperscript{198} If it has carefully complied with the language of section 4-303.
\textsuperscript{199} See supra p. 287.
\textsuperscript{200} See supra p. 292.