# RESTITUTION AND FINAL PAYMENT

ANDREW KULL*

What is the relation between common-law restitution and the rules determining "final payment"? The expression is ambiguous, because "final payment" might mean two different things entirely. The first kind of finality determines the time at which the payment transaction will be regarded as fully executed, in the sense that it gives the payee rights to the money as against the payor. Until payment is final in this sense, a person who had previously been intending to pay is free to change his mind and reverse whatever steps he might have taken so far: put his hand back in his pocket, stop payment on a check, reverse an entry on a ledger, or revoke a provisional settlement. After payment is final in this initial sense, the money belongs to the payee, and the payor needs a legal remedy to get it back. Restitution is interested in this first kind of final payment, because final payment in this sense is where restitution begins.

This was the issue in *Chambers v. Miller*,[1] an English case from 1862, in which a bank teller inadvertently paid £150 on a check drawn on insufficient funds. Unfortunately for the teller, he realized his mistake a moment after he had pushed the sheaf of five-pound notes through the window to the customer. The teller demanded the money back while the customer was still standing at the window, counting the notes, but the customer refused to surrender it. The customer was then invited into the bank "parlor," where he continued for a period of several hours to resist repeated invitations to give back the money. The bankers eventually reacquired the money by force: this was held to be conversion. If they wanted their money back at this point, they needed a claim in restitution.

Whether restitution would have been available in this case depends on a second kind of finality rule; this is why the two kinds of "final payment" are so often interlinked. Because the bank in *Chambers v. Miller* made a mistaken payment—a payment that the payor was not obligated to make and (if properly advised) would not have made—the bank was prima facie entitled to recover the money from the payee. The question then becomes

* Professor of Law, Boston University School of Law; Reporter, Restatement Third, Restitution and Unjust Enrichment.

1. (1862) 13 C.B.(N.S.) 125, 143 Eng. Rep. 50 (C.P.).

whether some rule of restitution law gives the payee an affirmative defense. If it does, the mistaken payment is "final" in the second (and somewhat figurative) sense that restitution will be denied. On the facts of *Chambers v. Miller*, the customer would have been protected against the bank's restitution claim by the rule of *Price v. Neal*[2]—at least if the customer was unaware that he was presenting a bad check.

*Chambers v. Miller* is thus a good illustration of the way payment cases sometimes involve both finality issues in succession. First, a court must decide whether payment has actually been made. If it has, the next question is whether restitution is available to get the payment back by legal process. Put this way, the two phases of the inquiry are not that hard to distinguish; the two modes of "final payment" would never have been confused—it seems safe to say—but for the fact that two different U.C.C. committees, preparing the original versions of Articles 3 and 4, unfortunately decided to use the words "final" and "payment" to refer to both of these distinct ideas.[3] Post-revision, the confusion between these two kinds of "final payment" is not so easily blamed on the U.C.C., but cases continue to arise in which the relation between the two kinds of finality appears to be misunderstood or ignored. The result is that some payors obtain restitution when it should be denied, and some are denied restitution when it should be available.

A rule that determines when payment has been completed is relevant to the availability of restitution for mistaken payment, because it determines whether the payor must resort to restitution (as opposed to self-help) to get the money back. So the first cases that interest us are those in which restitution for mistaken payment might not be available. The payee has a defense if he took payment for value and without notice of the payor's mistake, or if he changed position on receipt of the payment.[4] Conversely,

2. (1762) 3 Burr. 1354, 97 Eng. Rep. 871 (K.B.) (Mansfield, C.J.) (denying restitution to a drawee who pays a draft bearing the forged signature of the drawer).

3. Pre-revision section 4-213(1) (like revised section 4-215) refers to the circumstances in which "[a]n item is finally paid" to identify the point in a payment transaction at which the payee obtains rights to the money against the payor. Unfortunately, pre-revision section 3-418 described the affirmative defenses to common-law restitution—these consist mostly of the rule of *Price v. Neal*—by saying that in such cases "payment or acceptance . . . is final." The apparent parallel wording of the two sections naturally invited confusion. The problem was eventually sorted out by decisions such as National Savings & Trust Co. v. Park Corp., 722 F.2d 1303 (6th Cir. 1983), and Demos v. Lyons, 376 A.2d 1352 (N.J. Super. Ct. Law Div. 1977). Revised section 3-418 (1990) expanded the statutory account of the payor's restitution claim and strengthened the official comments to warn against the previous misunderstanding. The pre-revision "final payment fallacy" is further discussed in text accompanying note 24 *infra*.

4. This is the way the answer would be stated as a matter of common law. *See* RESTATEMENT OF RESTITUTION § 33 (1937); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 6, cmt. h (tent. draft 1, 2001). *Compare* U.C.C. § 3-418(c) (2005) *with id.* § 3-418 cmt. 3 (indicating that

if the payment has not yet been completed when the payor changes his mind—supposing the teller in *Chambers v. Miller* remembers to verify the account just before he hands over the money, instead of just after—the fact that the payee would have had an iron-clad defense to restitution no longer matters.

This two-step analysis is nicely illustrated by *DeLuca v. BancOhio National Bank, Inc.*,[5] involving a check for $75,000, the drawer of the check (an elderly lawyer in failing health), and the payee (his long-time secretary). Both the lawyer and the secretary had accounts at the payor bank. The secretary presented the $75,000 check for deposit in her account, informing the teller she needed immediate access to the money. After verifying that the balance of the lawyer's account was more than enough to cover the check, the teller suggested that the secretary could get available funds more quickly if the transaction were recorded as if the check had been cashed and the cash deposited. The deposit slip was prepared accordingly, though the teller and the secretary naturally did not bother to pass $75,000 in currency back and forth across the counter. The secretary's sense of urgency was explained when it transpired, shortly thereafter, that the check in question had been made out to her and signed by the lawyer with the amount left blank; that she had been at his bedside during his final illness; and that in the hours after the lawyer's death, she had (following his dying instructions, or so she said) gone to the office, found the check in her name, completed it in the amount of $75,000, and presented it for deposit. When these facts came to light, the bank reversed the $75,000 credit to the secretary's account and paid the money instead to the lawyer's estate.[6]

In subsequent litigation between the secretary and the bank, the first question was whether the check had been finally paid in the ambiguous transaction between the secretary and the teller. The bank argued that the check had merely been taken for deposit, not paid in cash; on this view, the credit to the secretary's account was merely a provisional settlement that the bank properly revoked prior to its midnight deadline.[7] If the bank was right in this contention, which was not implausible, the significant point for our purposes is that the bank would thereby succeed in recovering the funds (to the extent it ever parted with them) without recourse to a legal

the availability of the defense depends on the payee's having "no reason to know that the check was paid by mistake when payment was received"). The statute was so interpreted in Morgan Guaranty Trust Co. v. American Savings & Loan Ass'n, 804 F.2d 1487, 1496 (9th Cir. 1986), and Bank Leumi Trust Co. v. Bally's Park Place, Inc., 528 F. Supp. 349, 353–54 (S.D.N.Y. 1981).

5. 598 N.E.2d 781 (Ohio Ct. App. 1991).

6. *Id.* at 782–83.

7. *Id.* at 785; *see* U.C.C. § 4-301(b).

claim in restitution. The bank in that case would not need to show that its payment was induced by fraud or mistake, nor would it need to refute the secretary's affirmative defenses, because the secretary never acquired rights to the money against the bank.

The Ohio Court of Appeals took the better view (I think) that what took place at the counter between the teller and the secretary was equivalent to the payment and subsequent deposit of $75,000 cash.[8] This decision did not necessarily change the outcome of the litigation, but it meant that the bank had to establish a claim in restitution that would be good against the secretary. On the facts of *DeLuca* this is probably not difficult, whether the restitution claim is described in common-law or U.C.C. terms;[9] but a case that moves to this second phase of the analysis can easily come out the other way. Thus, if the bank's mistake had been to "cash" in the same way a check given for value, but drawn on insufficient funds, rather than a check that was completed after the death of the drawer, the threshold decision that the check has been paid means that the bank will bear the loss—not because "final payment" forecloses restitution, but because the payee of such a check will have an affirmative defense to the bank's restitution claim.[10]

If a court gets the first step wrong and rules erroneously that a final payment is not "final," the result is likely to be restitution via self-help—because the bank teller has retaken the money by force, or the depositary bank has reversed a prior credit to its customer's account. The error might still be immaterial if the case is one in which the payor would have been entitled to recover the money anyway by an action in restitution. But it changes the outcome if the case is one in which common-law restitution would have allowed the payee to keep the money.

The consequences for restitution of this first kind of error are illustrated by a recent case involving a professional litigant named Robert J. Triffin. Mr. Triffin is a 1990 law school graduate who has thus far failed to obtain admission to the bar, leading to extensive litigation with Pennsyl-

8. *DeLuca*, 598 N.E.2d at 787.

9. At common law, the bank would argue that the secretary's completion and presentation of the check was fraudulent; alternatively, that the bank paid by mistake and that the secretary (as a donee) had no affirmative defense to restitution. Within the U.C.C. framework, the same result is reached through sections 3-418(b) and (c). The court in *DeLuca* held that the bank could recover the amount of the check from the secretary for breach of her presentment warranty that the check had not been altered. *Id.* at 789; *see* U.C.C. § 3-417(a)(2). But it is questionable whether the bank could actually establish damages for breach of warranty in the amount of the check (section 3-417(b)), inasmuch as the check (even if fraudulently completed) could properly have been charged by the bank to the account of its deceased customer. *See* U.C.C. §§ 3-407(c), 4-405(a).

10. For a well-known case presenting these facts, see Kirby v. First & Merchants National Bank, 168 S.E.2d 273 (Va. 1969).

vania and New Jersey officials over questions of character and fitness.[11] He has carried on a high-profile U.C.C. practice nevertheless, representing himself in transactions in which he purchases dishonored negotiable instruments from check-cashing agencies, then sues to enforce them against drawers or payor banks. Triffin generally has the better side of the legal issues involved in these negotiable-instrument cases, and he has probably done more than any other individual to defend the vitality of the "shelter principle" in American commercial law.[12] His occasionally unfriendly reception in the New Jersey courts presumably has something to do with the rancorous litigation surrounding his bar admission.

The case of *Triffin v. Mellon PSFS*[13] is a modern-day version of *Chambers v. Miller*—in which the teller tried to snatch back the banknotes—except that the New Jersey courts eventually let the bank get away with it. Forged checks in the amounts of $335 and $365, purportedly drawn on the account of a Burger King franchisee at Mellon Bank, were cashed by an entity known as Check Cashing Services and deposited with First Union for collection. Mellon paid the checks on presentment but learned from its customer, perhaps two weeks later, that the checks were forgeries. Two weeks later still, Mellon recredited Burger King's account and returned the checks to First Union. First Union charged them back to the account of Check Cashing, and Check Cashing sold them to Triffin, presumably at a healthy discount.

Triffin's lawsuit against Mellon involved an important U.C.C. version of "final payment." Mellon had paid the forged checks because it "made a provisional settlement for the item and failed to revoke the settlement in the

11. *See In re* Triffin, 701 A.2d 907 (N.J. 1997) (recounting various episodes in Triffin's career to that point); Triffin v. Nix, No. 93-5519, 1994 U.S. Dist. LEXIS 5407 (E.D. Pa. Apr. 25, 1994), *aff'd*, 43 F.3d 1463 (3d Cir. 1994); Triffin v. McGinley, No. 92-3255, 1992 U.S. Dist. LEXIS 9666 (E.D. Pa. July 9, 1992); Triffin v. Pettit, No. 90-7882, 1991 U.S. Dist. LEXIS 6100 (E.D. Pa. May 6, 1991); *see also* Triffin v. DiSalvo, 643 A.2d 118 (Pa. Super. Ct. 1994) (holding Triffin to the rules governing attorney conduct even though he is not a lawyer, since he holds himself out as an attorney).

12. Triffin's single most notable contribution has been his successful suit to enforce some stolen money orders that had been fraudulently completed and negotiated to a holder in due course, then sold to Triffin after dishonor. Triffin v. Dillabough, 716 A.2d 605 (Pa. 1996). The opinion for the majority of the Pennsylvania Supreme Court contains an unusually lucid explanation of the important issues of negotiability raised by the case—not just the "shelter principle" allowing Triffin to enforce the instruments, but why negotiability was not destroyed by a legend on the back of the instruments to the effect that "This money order will not be paid if it has been altered or stolen." *Id.* at 609; *see also* Triffin v. Cigna Ins. Co., 687 A.2d 1045, 1046–47 (N.J. Super. Ct. App. Div. 1997) (transferee from holder in due course may enforce against drawer checks previously dishonored on drawer's order to stop payment).

13. The decision by the trial court is unreported. The judgment against Triffin was subsequently *aff'd on other grounds*, 855 A.2d 2 (N.J. Super. Ct. App. Div. 2004), *motion to reconsider denied*, 858 A.2d 1 (N.J. Super. Ct. App. Div. 2004), *aff'd on other grounds sub nom*. Triffin v. TD Banknorth, N.A., 920 A.2d 649 (N.J. 2007).

time and manner permitted by statute,"[14] namely, within the U.C.C.'s midnight deadline.[15] This meant that Mellon was not entitled to self-help restitution some four weeks later, when it sought and obtained a refund from First Union. Rather, Mellon needed a valid claim in restitution if it was going to recover the funds it had paid by mistake. Of course, restitution would not be available against First Union, Check Cashing, or anyone else who had taken the forged checks in good faith and for value. The rule of *Price v. Neal* puts this loss on Mellon, unless it can find a payee (like the forger) who is not entitled to an affirmative defense.[16]

Triffin's attempt to recover the funds from Mellon—together with a handful of parallel lawsuits against other banks, on similar facts—was ultimately derailed by the New Jersey courts, when they embraced the dubious proposition that a payor bank that has missed its midnight deadline is liable to the original payee and to collecting banks, but not to an assignee who purchases the check with notice of dishonor.[17] The idea that there could be a *nonassignable* right to payment of a negotiable instrument—a right that would be good in the hands of Check Cashing or First Union, but not assignable by them to others—is so obviously contrary to commercial principles that we might almost imagine this was a special rule for instruments assigned in the State of New Jersey to Robert J. Triffin.[18] Indeed,

14. *Id.* at 7 n.4 (citing N.J. STAT. ANN. § 12A:4-215(a)).

15. U.C.C. §§ 4-215(a)(3), 4-302(a)(1) (2005).

16. In U.C.C. terms, Mellon had no recourse via the presentment warranties because there was no suggestion that either Check Cashing or First Union knew that the checks were forged. *See id.* § 3-417(a)(3) & cmt. 3 (explaining that this provision carries forward the rule of *Price v. Neal*, (1762) 3 Burr. 1354, 97 Eng. Rep. 871 (K.B.)).

17. *See* Triffin v. Bridge View Bank, 750 A.2d 136, 138 (N.J. Super. Ct. App. Div. 2000). New Jersey's eventual conclusion that rights derived from a bank's missing its midnight deadline are nonassignable emerges from a series of intertwined Triffin cases that resist convenient citation. The nonassignability idea, first adopted in *Triffin v. Bridge View Bank,* was the basis of the original (unreported) ruling against Triffin in *Triffin v. Mellon PSFS*. The Appellate Division reversed the trial court on this point (expressly rejecting the reasoning of *Triffin v. Bridge View Bank*), 855 A.2d at 5–6, but held that Triffin lost anyway (as will be related in the text). Meanwhile, two more Triffin cases (eventually known as *Triffin v. TD Banknorth* and *Triffin v. Wachovia*) had been dismissed at trial on the theory of *Triffin v. Bridge View Bank*. A different panel of the Appellate Division consolidated these two cases for appeal; considered and rejected the views on assignability expressed in *Triffin v. Mellon PSFS*; and affirmed the dismissals on the ground that rights based on the midnight deadline are nonassignable. Triffin v. TD Banknorth, 2006 WL 1752166 (N.J. Super. Ct. App. Div. June 28, 2006). The Supreme Court granted certification to resolve the conflict between the different panels of the Appellate Division and eventually gave its express approval to the nonassignability rule of *Triffin v. Bridge View Bank*. Triffin v. TD Banknorth, N.A., 920 A.2d 649, 650 (N.J. 2007).

18. The New Jersey decisions rejecting the possibility of assignment to Triffin rely on decisions by two other courts that could easily have been distinguished in favor of a more sympathetic assignee. In both American Title Insurance Co. v. Burke & Herbert Bank & Trust Co., 813 F. Supp. 423, 427–28 (E.D. Va. 1993), *aff'd*, 25 F.3d 1038 (4th Cir. 1994), and Lawyers Title Insurance Corp. v. United American Bank, 21 F. Supp. 2d 785, 792–94 (W.D. Tenn. 1998), the courts were concerned with a fundamentally different question: whether sureties who had paid the fraud losses of their insureds should be subrogated to rights that their insureds might have asserted against payor banks that had

the Appellate Division in *Triffin v. Mellon PSFS* had properly identified and rejected this attack on the basic shelter principle.[19] But after finding that rights to final payment based on late return were fully assignable, the intermediate court in *Triffin v. Mellon PSFS* blandly announced that "the evidence does not give rise to any inference that Mellon might have failed to meet the midnight deadline."[20] Because Mellon—as previously noted—only discovered the forgeries some two weeks after it had paid the checks, the court's reasoning on this point is frankly baffling. Triffin moved for reconsideration, pointing to evidence that Mellon had stipulated at some point that the checks in question were presented on August 23 and returned on October 1. The court issued a further opinion, acknowledging that "Mellon paid the checks when presented and only later . . . pursue[d] reimbursement," but persisting in its prior determination that these facts were not "conclusive as to the alleged midnight deadline violation."[21]

There are some obvious things wrong with this version of final payment via the midnight deadline. But the interesting feature of the error has to do with the relation between final payment and restitution—the same two-step analysis of the problem that we saw in the *Chambers* and *DeLuca* cases. Rejecting Triffin's claims that Mellon was liable for missing its midnight deadline, the court added the following observations:

> [A] bank's rights with respect to a paid item are not permanently fixed when the clock strikes twelve. . . . [W]hile the bank's obligations are ordinarily fixed upon making "final payment," as defined by [U.C.C. section 4-215], the bank may still seek reimbursement even after it has "finally paid" an item, [U.C.C. section 3-418]. . . . Accordingly, even if we were to accept the stipulation on its face and ignore all the other evidence in the record, as plaintiff mistakenly argues, the stipulation remains entirely consistent with Mellon's exercise of a right of reimbursement pursuant to [section 3-418] and not a breach of the midnight deadline.[22]

missed their midnight deadlines in connection with the fraudulent activities that led to the insured losses. The issue in such cases is a difficult question at the margins of insurance subrogation: the extent to which it is equitable that a compensated surety be permitted to recoup amounts paid under fidelity or performance bonds from innocent persons against whom their insureds might otherwise have had recourse. *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 26, cmt. f (tent. draft 2, 2002). The decision to deny subrogation in the two cases cited is clearly defensible, since the question in such circumstances necessarily turns on a difficult balancing of equities. Read in context, the cases do not support the conclusion that rights against a payor bank that misses its midnight deadline are somehow not assignable at all.

19. Triffin v. Mellon PSFS, 855 A.2d at 5–6.
20. *Id.* at 7.
21. Triffin v. Mellon PSFS, 858 A.2d at 2.
22. *Id.* at 3.

This comment is both right and wrong at the same time. The court notes correctly that "final payment" is not the end of the story: a bank that has made final payment is remitted to a legal claim for "reimbursement" (alias restitution), codified in this context by U.C.C. sections 3-417 and 3-418. But the court fails to see that the rules of restitution do not work properly without the rules governing final payment. Mellon Bank's claim under section 3-418 would have failed against either First Union or Check Cashing, because both parties (we are assuming) had taken the forged checks in good faith and for value. So the net result in *Triffin v. Mellon* was successful (but wrongful) self-help restitution by Mellon Bank. Because the New Jersey Supreme Court held against Triffin on the issue of assignability, these statements about Mellon's "right of reimbursement" received no further review.

The same misunderstanding can also run the other way. If a court fails to see the difference between "final payment" and restitution, and concludes that "final payment" means "no restitution," the result is too little restitution rather than too much.

The principal illustrations on this side of the problem belong to an obsolete controversy over the meanings of the original Articles 3 and 4, surrounding what I will call the "final payment fallacy." The fallacy, in its purest form, was the view that when original Article 4 referred to the means by which items were "finally paid," and went on to specify that "final payment" made a bank "accountable" for those items,[23] the payments thus designated "final" were not subject to restitution at all. This meant that the entire common law of restitution for payments induced by fraud or mistake had been eliminated without acknowledgment—except to the extent that some of this law was captured in the presentment warranties—as regards "items" paid by banks. Because the great majority of disputed cases involved payments that became final when a payor bank missed its midnight deadline, the more usual form of the final payment fallacy tended to describe the elimination of restitution as a penalty purposely imposed on "tardy banks" and (as such) a critical element of the statutory scheme for achieving speed and certainty in the bank collection process.[24]

The controversy is obsolete because the 1990 revisions to Articles 3 and 4 make it clear that "final payment" and "accountability" under Article 4 do not mean "no restitution," and I have been unable to find any decision

23. *See* U.C.C. § 4-213(1) (1989).

24. For the most sympathetic account of the final payment fallacy, see 1 BARKLEY CLARK & BARBARA CLARK, THE LAW OF BANK DEPOSITS, COLLECTIONS AND CREDIT CARDS § 6.02[2][n] (rev. ed. 2006). Most previous adherents have long since recanted. *See, e.g.*, 2 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 20-3 (4th ed. 1995).

squarely to the contrary under the revised statutes.[25] But the roots of the final payment fallacy extend much deeper than a mere U.C.C. revision can reach. Beyond the textual misunderstandings to which the original versions evidently gave rise, the courts and commentators that were prepared to jettison almost the whole law of restitution for mistaken payment were predisposed to read the statutes that way because they regarded this part of our partially-codified commercial law with suspicion and mistrust. By and large they still do. There are many reasons for this state of affairs, most of them beyond the narrow scope of the present topic. But part of the explanation brings us back to our starting point, which is the failure to distinguish final payment and restitution, and to see how they work together.

The consistent refrain accompanying the final payment fallacy in all its forms is that our banking system "could not function effectively if banks were not required to make prompt and effective decisions on whether to pay or dishonor checks."[26] It is thought that "[i]f banks were allowed to retain instruments beyond the time specified in the U.C.C. and avoid liability on equitable grounds, finality and certainty would not exist in the business world."[27] The fear, in short, is that the mere possibility of restitution for mistaken payment runs counter to the efficient working of the payment system. Precisely how it has this effect is never spelled out.

To begin with, the courts that are worried about the breakdown of our banking system if the midnight deadline is undermined by restitution seem to miss the point that the checks in almost every midnight deadline case have already been paid. This is the effect of "final payment" under section 4-215(a)(3). ("Accountability" under section 4-302 actually has nothing to do with it, because a payor bank only becomes "accountable" for a check it has managed to avoid paying.[28]) Of course, if a payee or depositary bank is

25. The closest thing to an exception might be Channel Equipment Co. v. Community State Bank, 996 S.W.2d 374 (Tex. Ct. App. 1999), in which the court states emphatically that payor banks under section 4-302 are "strictly accountable for the value of checks that they fail to return by their midnight deadline, subject only to the defenses of fraud and breach of presentment warranty expressly set forth by section 4.302(b)." *Id.* at 379. But the court then allows the defendant bank to resist liability based on late return of n.s.f. checks by asserting what is in effect a restitutionary counterclaim: because the payees had previously obtained payment of the debts for which the checks in question were issued, making the bank liable for the amount of the checks (because of late return) would unjustly enrich the payees at the expense of the bank. Although the court deprecates the idea that payor banks might "use equitable principles to contest their accountability under section 4.302 for checks they have failed to return by their midnight deadline," *id.*, the logic of the bank's implicit counterclaim is that of equitable subrogation, analogous to the remedy described in U.C.C. section 4-407.

26. Town & Country State Bank v. First State Bank, 358 N.W.2d 387, 395 (Minn. 1984).

27. State & Sav. Bank v. Meeker, 469 N.E.2d 55, 59 (Ind. Ct. App. 1984).

28. The point is emphasized by one of the official comments to Article 3:

> The second situation [in which a check is dishonored] arises if the drawee bank has made such a [provisional] settlement and does not return the check or give notice of dishonor or nonpayment within the midnight deadline. In that case, the settlement becomes final payment

suing a payor bank for missing its midnight deadline, we can infer that the payor bank has somehow managed to get this payment back; but that only means that the payor bank has engaged in wrongful self-help restitution, exactly as in *Triffin v. Mellon PSFS*. The point is that the effect of the midnight deadline in requiring banks to make "prompt and effective decisions on whether to pay or dishonor checks" is entirely independent of the availability of restitution in those cases where the bank has made the wrong decision. A bank that dithers will be treated as if it had paid cash over the counter.

So the real question is a broader one: whether the law of restitution and the possibility of reversing a transaction to avoid unjust enrichment impose unacceptable costs on our system of payments and commercial law generally. Restitution for unjust enrichment based on mistaken payments has been a feature of our legal system and its antecedents for some 350 years—put there by the hard-headed and efficiency-minded Lord Mansfield—without any substantial evidence that it constitutes an obstacle to the proper functioning of the payment system. Courts and commentators attracted by the final payment fallacy tend to miss the fact that common-law restitution is significantly self-limiting, through its self-imposed affirmative defenses. The practical effect of the defenses allowed to bona fide creditors,[29] let alone to payees who (without giving value) have changed position on receipt of the payment, is to clear a highway through the restitution thicket that is broad enough to accommodate every transaction in the ordinary course, and then some.

Restitution in payments cases works in much the same way as provisional settlement. Because most checks are good, we pay them all, then return the relative few that are bad. So long as we do this before the midnight deadline, revocation of settlement is no more and no less than (legitimate) self-help restitution. Of the checks that are finally paid in this way, only a tiny proportion—incomparably fewer than the percentage for which settlement was revoked—will ever give rise to a viable claim in restitution for mistaken payment. We concentrate our energies on the few that do, deciding in that handful of cases whether the payor's claim is well founded and whether the payees can assert affirmative defenses.

> of the check under Section 4-215. Because the drawee bank already has paid such an item, it cannot be "accountable" for the item under the terms of Section 4-302(a)(1). Thus, no dishonor occurs regardless of whether the drawee bank retains the check indefinitely or for some reason returns the check after its midnight deadline.

U.C.C. § 3-502 cmt. 4 (2005).

29. *See* Andrew Kull, *Defenses to Restitution: The Bona Fide Creditor*, 81 B.U. L. REV. 919 (2001).

The cost of restitution to the legal system is normally justified by the goal of avoiding unjust enrichment, but its effect on the efficiency of the payment system is presumably positive rather than the reverse. Restitution is efficient for the same reason that provisional settlement is efficient. The payor settles on presentation, without investigation, because he can revoke the settlement for the items he does not want to pay. By the same token, we are likely to get final payment faster if the law of restitution allows the payor to reverse a mistake in the exceptional case. At both stages, and for the same reasons, a system that encourages prompt payment with the possibility of restitution in some limited number of cases will operate more smoothly than a system—frankly hard to imagine—in which every completed payment was made final without the possibility of recourse. Such a system would concededly have the quality of "certainty," but the wait at the teller's window (and its various electronic equivalents) would suddenly get a lot longer.