



**Philosophia Scientiæ**

Travaux d'histoire et de philosophie des sciences

**20-1 | 2016**

**Le kantisme hors des écoles kantienne**

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A Legal, Metaphysical and Science-Theoretical Puzzle

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### Electronic version

URL: <http://journals.openedition.org/philosophiascientiae/1162>

DOI: 10.4000/philosophiascientiae.1162

ISSN: 1775-4283

### Publisher

Éditions Kimé

### Printed version

Date of publication: 25 February 2016

Number of pages: 167-183

ISBN: 978-2-84174-750-4

ISSN: 1281-2463

### Electronic reference

Giuliano Bacigalupo, "On the Fiction of the Retroaction of the Condition in Contracts", *Philosophia Scientiæ* [Online], 20-1 | 2016, Online since 25 February 2019, connection on 31 March 2021. URL: <http://journals.openedition.org/philosophiascientiae/1162> ; DOI: <https://doi.org/10.4000/philosophiascientiae.1162>

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# On the Fiction of the Retroaction of the Condition in Contracts. A Legal, Metaphysical and Science-Theoretical Puzzle

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**Résumé :** Cet article porte sur la fiction de la rétroactivité dans les contrats conditionnels, un outil très ancien du droit qui remonte à l'Antiquité romaine. Tout d'abord, nous abordons la notion de contrat avec condition suspensive, à savoir un contrat dont l'effet est subordonné à un fait futur et incertain. Comme on le verra dans la deuxième partie, ce type de contrat est souvent lié à la fiction de la rétroactivité de la condition (régie par exemple en France par l'article 1179 du Code Civil et en Italie par l'article 1360 du Codice Civile) : lorsque la condition est satisfaite, on fait comme si la condition était satisfaite au moment où le contrat a été stipulé. Dans la troisième partie, nous nous penchons sur la stratégie de rationalisation développée par Gottfried Wilhelm Leibniz : bien que fausse (comme toute fiction), la rétroactivité nous permet d'aboutir à des conclusions vraies dans le cadre d'une métaphysique déterministe. Enfin, après avoir soulevé des objections contre la solution leibnizienne, nous développons une approche alternative : la rétroactivité nous conduit à des conclusions vraies parce qu'on peut aboutir aux mêmes conclusions à partir d'un principe d'équité ou, à défaut, à partir d'une loi qui demeure seulement possible mais pertinente.

**Abstract:** In this paper, I focus on the fiction of the retroaction of the condition in contracts, a very old tool of law which may be traced back to Roman antiquity. In the first part, I introduce the notion of a contract with a suspensive condition, i.e., a contract whose efficacy is subordinated to a future uncertain event. As discussed in part two, this kind of contract is often linked to the fiction of the retroaction of the condition, e.g., the article 1179 of the French Civil Code and the article 1360 of the Italian Civil Code: When the

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condition of the contract is fulfilled we should proceed as if the condition was fulfilled at the very time of the stipulation of the contract. In part three, I turn to an attempt by Gottfried Wilhelm Leibniz to rationalize this fiction: though false—like every fiction—, the retroaction of the condition allows us to reach true conclusions with respect to a deterministic metaphysics. Finally, after having raised some objections to the Leibnizian account, I develop an alternative rationalization of the fiction: The fiction does indeed lead us to true conclusions because the same conclusions may be reached by relying on an equity-principle or, alternatively, on a merely possible yet expedient law.

## 1 The standard approach

Since at least Roman antiquity, law is very well acquainted with contracts with time-dependent conditions. It is indeed very common among parties that enter into a contractual relation to subordinate the efficacy or the resolution of the contract to a future, uncertain event. For instance, someone may stipulate a contract in which he commits himself to buy a plot of land if he is granted the right to build something on it. In this case, the law speaks of a suspensive condition of the contract, i.e., a contract, the obligation of which is linked to a future, uncertain event. On the other hand, someone may stipulate a contract in which he commits himself to buy a plot under the condition that within a year he will be granted the right to build something on it. In this case, the law refers to a resiliatory condition, i.e., a contract the efficacy of which may be extinguished in relation to a future, uncertain event. In this context, I am going to discuss contracts with suspensive conditions, the reason being that it is on this kind of condition that the fiction of retroaction comes to bear, i.e., the main focus of this paper.

A standard example of a contract with a suspensive condition is the following one:

- (1) If a ship arrives from Asia, Primus has to give 100 to Secundus.

Contemporary legal systems, following the blueprint of Roman law, provide the following interpretation of such contracts, e.g., the articles 1168 and 1181 of the French Code Civil, the article 1353 of the Italian Codice Civile as well as the § 158 (I) of the German BGB, the Italian Codice Civile 1353, and the German BGB § 158 I:<sup>1</sup>

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1. For instance, Article 1181 of the French Code Civil reads: “L’obligation contractée sous une condition suspensive est celle qui dépend ou d’un événement futur et incertain, ou d’un événement actuellement arrivé, mais encore inconnu des parties.” In the present context, I am going to abstract from the fact that, according to French law, the condition may also be a past unknown event. For a discussion of the relation

(SA) Given a conditional contract with a suspensive condition, the obligation is dependent on the fulfillment of the condition.

This is what I will label as the Standard Approach (short: SA) to contracts with suspensive conditions. It is important to underline how, according to SA, it is the time-related event of the ship arrival which—so to speak—brings Primus' obligation to pay 100 to Secundus into existence. From this perspective, one may draw an analogy between (1) and conditional statements about causal relations such as (2):

(2) If it rains, it is wet.

As the fact that it rains makes it the case that it is wet, so the fact that the ship arrives makes it the case that Primus owes 100 to Secundus.

On the other hand, the difference between a contract such as (1) and conditionals about causal relations such as (2), and, for that matter, conditional statements in general, should not go unmentioned. From the fact that at time  $t$  it does not rain, we cannot infer that at time  $t$  it is not wet. This would simply be a fallacy of denying the antecedent. Yet, from the fact that the ship has not arrived, we seem entitled to infer that it is not the case that Primus owes 100 to Secundus. The obligation is not only brought into existence by, but dependent upon the fulfillment of the condition. This means that if the condition is not fulfilled, there is no obligation.

The problem raised by the just mentioned disanalogy has been recently discussed in relation to the Leibnizian theory of contracts with conditions (more on this below). For instance, Armgardt explains the difference in logical behavior by interpreting contracts with conditions not as conditional statements but rather as hidden bi-conditional statements [Armgardt 2001]. According to such a picture, the deep logical structure of (1) should thus be that of a bi-conditional: *if and only if* a ship arrives from Asia, Primus has to give 100 to Secundus. Thiercelin, Magnier & Rahman, Magnier, and Rahman, on the other hand, have developed alternative, logically more complex accounts of the difference between contracts with conditions and conditional statements: [Thiercelin 2009, 2011] relies on connexive logic, [Magnier & Rahman 2012] and [Magnier 2013, 2015b] on epistemic logic and [Rahman 2015] on constructive type theory.

For the scope of the present paper, however, I will not enter into the details of this discussion. Rather, I will simply assume without argument a radically different account of contracts with conditions as those suggested by the aforementioned authors. The assumption is as follows: The analogy between (1) and (2) does not really break down and should rather be upheld. As from the fact that it does not rain we cannot infer that it is not wet, so—strictly speaking—from the fact that it is not the case that a ship from Asia

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between the two kinds of suspensive conditions, i.e., future and uncertain on the one hand and past yet unknown on the other, see [Magnier 2015a].

has arrived, we cannot infer that it is not the case that Primus owes 100 to Secundus. Indeed, that would be a fallacy of denying the antecedent.

Nevertheless, what we can infer is that, if it is not the case that the ship from Asia has arrived, it is not the case that Primus owes 100 to Secundus *because of* the contract (1). Indeed, this inference is allowed in the case of (2) as well: If it is not the case that it rains, it is not the case that it is wet *because* it rains. Still, as it may be wet for reasons other than rain, so there may be an obligation to pay 100 for reasons other than the contract (1). Notice, moreover, how such an approach does not in any way contradict SA: SA does not speak of an obligation in an absolute way but rather of the contract's obligation, i.e., the obligation which may exist because of the contract. As it happens, *this* obligation really depends upon the fulfillment of the condition.

I would like to underline how nothing in what I am going to say in the following hinges on this particular interpretation of contracts with conditions. More sophisticated accounts as for instance the one addressed above may always be plugged into the analyses that are going to be offered. The reason is that, in the present context, I am going to focus on a problem of contracts with conditions which is orthogonal to the one just briefly discussed. However, the problem may only be addressed by at least assuming a specific interpretation of contracts with conditions.

The main concern of this paper is going to be the status of the obligation in what in German is called the *Schwebezeit*, i.e., the time between the stipulation of the contract and the possible fulfillment of the condition. Can we really say that there is no obligation at all during this time, of course abstracting from the obligation that a contract, once stipulated, cannot be unilaterally rescinded? For instance, does Secundus not have something akin to a right to Primus paying him 100 even before the ship has arrived? Or is the right a mere nothing as long as no ship has arrived? These questions circumscribe the problem on which I am going to focus.

The paper is going to be structured as follows. First, I address how different law systems address the problem of the *Schwebezeit* by means of a fiction, namely the fiction of the Retroaction of the Condition (short: RC). Then, I turn to a possible way to rationalize the fiction of RC that was suggested by the young Leibniz. Leibniz's crucial intuition was to deem RC as a shortcut to an outcome which we may also reach by following a more long-winded yet non-fictional path. Thus, from such a perspective, the fiction of RC does not lead to any mistakes while at the same time being useful and—in this sense—it is rational. Finally, after having raised some objections to Leibniz's approach, I develop an alternative rationalization of RC: I will argue that Leibniz was correct in considering RC as a shortcut but that he misidentified the circuitous path by which we may reach the same conclusion.

## 2 The fiction of the retroaction of the condition

As addressed above, according to SA, there seems to be no obligation at all in the *Schwebezeit*. This approach, however, becomes problematic as soon as the object of the obligation is an individual and not something like the generic 100 at stake in (1). Let us slightly modify the standard example:

(3) If a ship arrives from Asia, Primus owes Secundus his collection of stamps.

Now, according to SA, it seems that Primus may sell his precious collection of stamps to someone else between the moment the contract is stipulated and the hypothetical arrival of a ship. After all, the stamps are his during this time. But what happens if Primus sells the stamps and later on a ship arrives from Asia? It seems that, to avoid such scenarios, we have to introduce something like a right of Secundus on the collection of stamps prior to the arrival of the ship. But how should we proceed?

Some legal systems have an elegant solution to this problem, which, as SA, may arguably be traced back to Roman law too (see [Bergmann 2010, 24–27]):<sup>2</sup> They invoke the fiction of RC. The fiction of RC, which may be for instance seen at work in the French and Italian law (Code Civil 1179; Codice Civile 1360),<sup>3</sup> runs as follows:

(RC) When the condition of a contract with a time-dependent condition is fulfilled, it is as if the condition was fulfilled at the time of the stipulation of the contract.

The fiction makes it possible to say that, once the condition is fulfilled, it is *as if* the obligation came into existence at the very moment of the stipulation of the contract. In the given example, this would mean that, if a ship arrives from Asia, it is as if Secundus owned the stamps from the very moment of the stipulation of the contract. As a consequence, retrospectively no sale of the stamps should have occurred and Primus has to either retrieve the stamps or pay compensation to Secundus. The problem of the *Schwebezeit* is thus solved: In one sense it is indeed the case that there is no right of Secundus on the stamps before the condition is fulfilled; but in another sense there is one, namely according to an “as if”-sense.

One should note how—at least since the times of Jeremy Bentham—the presence of fictions in legal systems is viewed with suspicion. As Bentham

2. As noted by Bergmann, however, the question whether Roman law really operated with the fiction of RC is subject to debate. Armgardt has shown that the fiction of RC was at least applied by Roman jurists in some specific cases [Armgardt 2010].

3. For instance, article 1179 of the French Code Civil reads: “La condition accomplit a un effet rétroactif au jour auquel l’engagement a été contracté.” German law, on the other hand, has developed a different legal mechanism, which I am not going to discuss in the present context, i.e., the *Anwartschaftsrecht*, see [Wieling 2007, 241–253].

wrote, legal fictions—and thus also a fiction such as RC—are “the most pernicious and the basest sort of lying” [Bentham 1962, 92]. However, if taken at face value, this accusation misconstrues legal fictions: Legal fictions do not change reality—and thus are not a lie. What legal fictions do, rather, is to instruct us to treat two states of affairs in the same way despite their difference (see for instance [Larenz 1991, 262]). More precisely, as argued by [Bacigalupo 2015], who builds upon [Vaihinger 1911],<sup>4</sup> legal fictions should be understood as meta-norms of a legal system: Given a juridical state of affairs  $x$ , all the juridical norms should be applied to this state of affairs as they would be applied to a different juridical state of affairs  $y$ .<sup>5</sup>

The reason why legal fictions should be interpreted as meta-norms is as follows. If, for instance, SA and RC would be located at the same level of the legal system, one may derive contradictory conclusions. Let us consider for instance the case in which a ship arrives from Asia in 2016. By RC we would then be entitled to infer that Primus owed the stamps to Secundus already in 2015. Yet, by SA, we may still infer that Primus did not owe the stamps to Secundus in 2016. So, the preferred path has to be to interpret RC as a meta-norm: If and when the condition is fulfilled, all the first-order norms, and thus SA, should be applied as if a ship had arrived from Asia in 2015.

There is, however, a second way to understand Bentham’s objection so as to make it relevant to legal fictions and thus to RC. What is the reason why we should treat an actual state of affairs in the same way as a given non-actual one? Even though no deception is involved here, one may argue that the problem should be located at the level of the arbitrariness of the fiction. Of course, one may argue that the legislator may do as she pleases: She may establish all the analogies she likes. More precisely, the legislator may say about a state of affairs  $x$  that the juridical norms should be applied to this state of affairs as they would be applied to a different, arbitrarily chosen, juridical state of affairs  $y$ . But the question remains: Why does she pick a given state of affairs  $y$  and not a different one? In the next section, I address a first possible rationalization of this choice, namely the one put forward by Gottfried Wilhelm Leibniz.

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4. Vaihinger is crucial for having introduced fictionalism into the contemporary philosophical debate [Vaihinger 1911]. In his preface to the English translation, Vaihinger characterizes fictionalism as follows by drawing a comparison with pragmatism: “Fictionalism does not admit the principle of pragmatism, which runs: ‘An idea which is found to be useful in practice proves thereby that it is also true in theory, and the fruitful is thus always true.’ The principle of Fictionalism, on the other hand, or rather the outcome of fictionalism, is as follows: ‘An idea whose theoretical truth or incorrectness, and therewith its falsity is admitted, is not for that reason practically valueless and useless; for such an idea in spite of its theoretical nullity may have great practical importance’ [Vaihinger 1935, viii]. The fiction of RC provides a perfect example of the fictionalist principle.

5. For an alternative recent attempt at defining legal fictions, see [Del Mar 2013].

### 3 Leibniz's approach to contracts with time-dependent conditions

Leibniz devoted his entire bachelor thesis for his law degree at the University of Leipzig to the problems of contracts with conditions: *Disputationes juridicae de Conditionibus* (1665). This text was later revised by Leibniz and published under the title *Specimen certitudinis seu demonstrationum in jure exhibitum in doctrina conditionum* (1669) [Leibniz 1923] (see [Armgarth 2001, 5]). This is the version that has recently drawn attention both from a legal and logico-philosophical perspective (see [Armgarth 2001], which provided the first translation in a modern language of the *Specimen*, [Thiercelin 2009, 2011], [Magnier & Rahman 2012], [Magnier 2013, 2015b], [Rahman 2015]). Before that, however, it was mainly known for its interpretation of the fiction of RC (see [Armgarth 2001, 339]). This is the aspect upon which I am going to focus.

Leibniz's interpretation of RC runs as follows. First of all, one should bear in mind that, already in this early work, Leibniz endorses determinism: Whether something will take place in the future is now either true or false. From such a perspective, it is thus tempting to link the efficacy of contracts with conditions (in Leibniz's terminology: *Conditionatum*) to the truth of the condition (in Leibniz's terminology: *Conditio*) understood as a contingent proposition about the future: "Conditionatum a Conditionis, non tempore, sed veritate pendere" [Leibniz A, VI, I, 421]. Thus, what we may label as Leibniz's Approach (LA) is tantamount to dropping SA and to substitute it with the following:

- (LA) Given a contract with a suspensive condition, the obligation depends upon the truth of the condition understood as a future contingent proposition.

This new approach—it should be noticed—presupposes a minimal paraphrase strategy of the contracts at stake. For instance, a contract such as (1) should be interpreted as (1') ('now' refers to the time of the contract's stipulation):

- (1') If it is true (now) that a ship will arrive from Asia, Primus has to give (now) 100 to Secundus.

The consequence of this approach is that the given obligation either comes into existence at the very moment when the contract is agreed upon because the condition as a proposition about the future is true; alternatively, the obligation does not come into existence at the very moment of the stipulation of the contract and will never come into existence because the condition is false. Or, more precisely, the obligation does not come into existence and never will—at least insofar the contract (1) is concerned.<sup>6</sup>

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6. This, of course, only if one follows the account of the inference at stake that was sketched above. Leibniz, on the other hand, does not introduce this qualification



Furthermore, Leibniz may claim that, from a practical perspective, his approach does not change substantially the behavior of the parties of the contract. True, the obligation will either be existent or non-existent from the very beginning, since, metaphysically speaking, the condition as a future contingent is (now) either true or false. Nevertheless, the parties will have to wait for the event of a ship arriving from Asia to *know* whether the obligation was there all along or not. Our only epistemic access to the truth-value of future contingent propositions is to wait for the fact at issue to happen. Leibniz clarifies this point by relying on the notion of a prophet [Leibniz A VI, I, 421]: If we had a prophet at our disposal, this waiting would not be necessary and we could determine at the very time of the stipulation of the contract whether, say, Primus owes 100 to Secundus or not. But since prophets are at least hard to find, our epistemic access to the truth-value of the future contingent proposition has to take the indirect path: It is the obtaining or non-obtaining of the fact which will give us access to the truth or falsity of the condition.

Let us now turn to the contract (3) and the problems related to it. As with (1), (3) as well has to be minimally rephrased as (3'):

- (3') If it is true (now) that a ship will arrive from Asia, Primus owes (now) his collection of stamps to Secundus.

Clearly, from the Leibnizian perspective, there is no need anymore for the fiction of RC: As Leibniz remarks, the fiction becomes superfluous (*supervacaneus*). The reason is that, if and when the condition is fulfilled, we do not have to behave anymore as if the condition was fulfilled at the very time of the stipulation of the contract. As it happens, in such a case the obligation would have been there all along without any need of a fiction: Primus owed from the very stipulation of the contract his collection of stamps to Secundus.

The Leibnizian approach to RC bears an interesting affinity to the groundbreaking fictionalist approach to mathematics developed by Field [Field 1980]. In a nutshell, according to Field mathematics is a discourse which, by assuming the existence of certain entities, in the first place numbers, allows us a shortcut to conclusions which we may have also reached otherwise. In Field's terminology, this means that mathematics is *conservative*. In a first approximation—which is sufficient for present purposes—the notion of conservativity is defined by Field as follows:

If you take any body of nominalistically stated assertions  $N$ , and supplement it with a mathematical theory  $S$ , you do not get any nominalistically-statable conclusions that you wouldn't get from  $N$  alone. [Field 1980, 9]

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while interpreting the inference. This is because according to Leibniz contracts with conditions should not be considered as plain conditional statements but rather as bi-conditionals (see [Leibniz A, VI, I, 375]—or, at least, this is the interpretation of Leibniz defended by [Armgarth 2001]). Thiercelin, Magnier and Rahman have argued for alternative interpretations of Leibniz's approach [Thiercelin 2009, 2011], [Magnier & Rahman 2012], [Magnier 2013, 2015b], [Rahman 2015].

Coming back to the problem we were discussing, this seems to be very close to Leibniz's attitude towards the legal fiction of RC: There is indeed nothing wrong in employing RC since the same result—i.e., that Primus owed the stamps to Secundus from the very stipulation of the contract—may be reached in a more circuitous way by a theory that does not rely on the questionable assumption that the past may be changed. As mathematics is conservative with respect to any given nominalistically stated scientific theory, so the fiction of RC is conservative with respect to Leibniz's deterministic metaphysics. Or, in Leibniz's words, the fiction is superfluous.

Although elegant, however, it is easy to raise objections to Leibniz's approach to contracts with conditions. In the first place, it does not seem advisable to build a legal theory upon the controversial metaphysical assumption of determinism (see [Thiercelin 2009, 37–38]). A second objection may address the paraphrase strategy enforced by Leibniz: It seems implausible that while stipulating a contract such as (1) or (3), what we really mean is, respectively, (1') or (3'). Rather, we should uphold the analogy with conditionals in general, and, in particular, with conditionals about causal relations, e.g., (2), while interpreting such contracts. As it is not the case that it is wet now because it is true that it will rain tomorrow, so it is not the case that Primus owes 100 to Secundus now because it is the case that a ship will arrive from Asia tomorrow.

This last remark leads me to a final objection. It seems to me that the very idea of an obligation of which no one can be aware of, except the hypothetical prophet, is a *contradictio in adiecto*. I agree with Leibniz at least to the extent that we should not reduce the obligations we have to the obligations we are actually aware of. This would in fact lead to a very strange construal of obligations—something which may be easily seen if we turn from legal obligations to another kind of obligation, namely moral ones. For instance, one would have to grant that if I forget that I promised to do something, then I do not have any obligation. What we need instead is at least a (empirical) possibility of being aware of an obligation—no matter whether moral or legal—in order to be able to speak of an obligation in the first place. Thus, obligations like the ones postulated by Leibniz which are—abstracting from prophets—empirically inaccessible should be ruled out.

These objections notwithstanding, I am sympathetic with the overall aim of Leibniz's discussion of RC. The legal fiction of RC may very well be useful and perfectly legitimate. Yet we should be able to show how we may reach the same conclusions without relying on a fiction. Otherwise, we would be left with the feeling that the fiction is an arbitrary one. In other words, I agree with Leibniz that RC should be revealed in a certain sense to be superfluous or, relying on Field's terminology, conservative. This is going to be the aim of the next section.

## 4 An argument from equity

We may start by noticing how Roman law did not develop any unified theory of legal fictions even though many legal fictions may be traced back to it. This task had to wait for medieval glossators such as Cinus da Pistoia, Bartolus de Saxoferrato and Baldus de Ubaldis. Bartolus was especially crucial for establishing a strong link between the notion of legal fiction and the notion of *aequitas*, i.e., a notion of morality broadly construed: A legal fiction is legitimate insofar as it is in accordance with *aequitas* (see [Olivier 1975, 16]). This insight suggests a different path than Leibniz's while trying to interpret legal fictions, and more precisely, the fiction of RC. While assessing whether RC is legitimate we should not consider metaphysical assumptions which may lead to the same conclusion. Rather, what we should take into considerations are equity-assumptions. Going back to the terminology of Field, if it is to be legitimate, it is not with respect to any metaphysical assumption that RC should be conservative. Rather, RC should be conservative with respect to some equity-assumptions.

Let us spell out more precisely what it would signify for RC to be conservative with respect to some equity-assumptions. One possibility may follow the same path as Leibniz's. The fiction is conservative because the following conclusion may be reached by means of an equity-argument: Given the fulfillment of the condition, Primus owed the stamps to Secundus from the very stipulation of the contract. But this notion of an invisible obligation was already criticized above. So, the conclusion with respect to which the fiction of RC should be conservative has to be a different one. But which one should that be? I do not think we have to look too far away. The fiction that Primus owed the stamps to Secundus from the very stipulation of the contract is instrumental to conclude that Primus should not have sold the stamps. As it happens, this is all we need to state that, given the scenario in which a ship arrives from Asia and Primus has sold the stamps, he was not allowed to do so (and thus he either has to retrieve the stamps and give them to Secundus or he has to provide him compensation). Thus, the conclusion with respect to which the fiction has to be conservative is: Primus should not have sold the stamps given the scenario in which a ship has arrived from Asia.

Before we start reconstructing the argument from equity, one more remark is due. As already addressed, the conclusion we have to reach is that Primus should not have sold the stamps given the scenario in which a ship has arrived from Asia. However, since we do not want the present to influence the past (this is what cannot but lead to a fiction), this conclusion should be couched as follows: Primus should not sell the stamps as long as it is still (empirically) possible for a ship to arrive from Asia. On the other hand, as soon as it is (empirically) impossible for a ship to arrive from Asia, we want to give back to Primus his freedom to keep his stamps. So, what we need is an equity-argument to prove that, given the contract (3) together with the possibility

that a ship arrives from Asia (4), Primus should not sell his stamps to anyone (5):

- (3) If a ship arrives from Asia, Primus owes Secundus his collection of stamps.  
(By assumption)
- (4) It is possible that a ship arrives from Asia. (By assumption)
- (5) Primus should not sell his collection of stamps.

In what follows, I am going to reconstruct the equity-argument which leads to the desired conclusion backwards, i.e., moving from the conclusion to the needed equity-premises.<sup>7</sup> Then, I am going to argue for the fact that the needed equity premises are indeed true or, more precisely, good: They qualify as equity-principles, i.e., moral principles broadly construed. Eventually, I am also going to show how the premises at stake do not have to be construed as equity premises, in order to avoid what may sound like too strong a link between law and morality, even though only broadly construed.

We may start by noticing how from (3) and (4) we may infer that it is possible that Primus owes his collection of stamps to Secundus by a rather uncontroversial rule which, in modal logic, is usually labeled as DR3: from if  $p$  then  $q$ , we may derive that, if it is possible that  $p$ , then it is possible that  $q$  (see, e.g., [Hughes & Creswell 1996, 35]). Thus, we may add (6) to our argument:

- (6) It is possible that Primus owes his collection of stamps to Secundus. (By 3, 4, and DR3)

At this stage, we may also add a rather uncontroversial fact to our argument, namely that if Primus sells the stamps to someone, and it becomes impossible for him to fulfill his obligation to Secundus since he is no longer the owner of the stamps and therefore cannot make any disposition concerning them. Indeed, in such a case he would simply not be in the position to fulfill his obligation to Secundus. So let us introduce (7):

- (7) If Primus sells his stamps, it is impossible for him to fulfill his obligation to Secundus.

Given this set of premises and the conclusion, it is not too difficult to spot the missing premise, namely (8):

- (8) If it is possible that Primus owes his stamps to Secundus and if it is the case that if Primus sells his stamps, then it is impossible for Primus to fulfill his obligation to Secundus, then Primus should not sell the stamps.

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7. The debate whether inference-relations may hold between norms or rules—and not only between assertions—is a well-known subject of controversy. For a defence of the view that it does indeed make sense to speak of inference in the case of norms and rules, see [Vranas 2008, 2010].

Notice that we have arrived at (8) just by constructing the first premise we would need to infer by *modus ponens* (5) from (7) and (6).

The question we should raise now is whether (8) is a good equity-principle. In order to address the question, we should start by spelling out the equity principle at stake by generalizing (8) (it is the essence of moral principles that they have to be general, and thus of equity-principles as well):

- (9) If it is possible that  $x$  should do  $p$  and if it is the case that if  $x$  does  $q$ , then it is impossible for  $x$  to fulfill his obligation to do  $p$ , then  $x$  should not do  $q$ . (Equity-principle)

So, the question we have to address is whether (9) is a good equity-principle. I take this to be the case. Yet, since I do not want to argue for it by means of any given ethical theory, which, as every theory, is debatable, I am simply going to rely on examples to drive this point home.

A first example may be the following. A friend of mine is very sick and I have promised him to take care of his children if he were to die. Can I do something which will make it impossible for me to fulfill my possible obligation, as for instance moving to a deserted island and becoming a misanthrope? Intuitively, the answer would be negative. Or, to give a less extreme example, I have promised to a friend of mine that if he comes to visit me on a certain date, he may crash on my couch. May I then invite someone else to sleep on my couch while I am not sure yet whether my friend is coming or not? Again, I assume that the intuitive answer would be a negative one. Thus, I take (9) to qualify as a good equity-principle.

One should note, however, that (9) qualifies as a good moral principle only with respect to a very specific kind of possible commitment: It has to be restricted to possible commitments which are the result of contractual obligations, which of course in an equity-context should be construed as promises. Clearly, no one can make her further actions dependent upon all possible commitments that one may incur on. For instance, tomorrow I may be committed to help an old man to cross the street, simply because it may so happen that I will be at a given street corner at a given time. But no one is expecting from me that I act so that tomorrow I will be at the right time at the right street corner to help the old man crossing the street. In this case there clearly is no sense in talking of an obligation. Things, however, would be essentially different if I had promised the old man to help him cross the street at a certain time at a certain street corner.<sup>8</sup>

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8. I would like to note that (9) cannot be challenged by remarking that many things may happen which could so to speak erase an obligation that results from a promise. For instance, competing obligations may come into being which trump the obligation at stake. Or, more simply, brute facts may occur which would make the fulfillment of the obligation impossible (to take the example of the promised couch, my house may be destroyed by an earthquake). This kind of situation, however, do not threaten principle (9) since in such cases it would simply not be the case anymore that it is possible that  $x$  should do  $p$ . What such examples show, on the other hand,

If (9) qualifies as a good equity principle, we may also conclude that the fiction of RC is conservative with respect to the argument from *aequitas*: The fiction simply provides us with an alternative path to reach the same conclusion. In this sense, the situation is perfectly analogous to mathematics, at least if we follow Field's construal thereof: Mathematics is a fiction which allows us to derive the same nominalistically storable conclusions we may also have reached relying solely on nominalistically storable assertions. Furthermore, exactly as the fiction of mathematics provides us with shortcuts to reach conclusions which we may have also reached otherwise, so the fiction of RC provides us with shortcuts to conclusions which we may have also reached by means of an equity-argument alone. Indeed, the equity-argument is a rather elaborate one and complicated by the presence of modal notions and principles. The fiction of RC thus simplifies the inference procedure exactly as mathematics does.

A caveat should now be added to address the controversial relation between law and morality, if only broadly construed, upon which the previous line of reasoning hinges. In fact, one may prefer not to follow the medieval glossators and avoid any reference to equity while trying to assess the legitimacy of legal fictions in general and of RC in particular. After all, this may just be a relic of the old natural law approach which we have arguably left behind us since the advent of legal positivism. From this perspective, however, I would like to point out how one may simply consider (9) not as a good equity-principle, but rather as a merely possible law (i.e., a law which is not actually part of the legal system but may very well be). If this approach is chosen, then one should not consider the fiction of RC to be conservative with respect to an equity-argument, but rather to be conservative with respect to a merely possible law. Moreover, I would like to stress that arguments similar to those I have relied on to defend (9) as an equity-principle may also be relied on to advance the view that (9) is a merely possible and yet expedient law. If this path is chosen, finally, it is clear how an analogous restriction to (9) as an equity-principle would have to be applied to (9) as a merely possible law: (9) does not apply to all possible future obligations but only to possible future contractual obligations.

A final remark should address SA. As we have seen, Leibniz implicitly criticized the standard approach: To him, it is not only the fiction of RC that is fictional, but, in a certain sense, SA as well. His solution is, as a matter of fact, an alternative to SA. The approach to RC just discussed, on the other hand, avoids this consequence. It is still the case that, as long as a ship has not arrived from Asia, there is no obligation for Primus to give his stamp collection to Secundus, at least with respect to the contract at stake. But this does not mean that there is no obligation at all. What is there is the obligation to keep open the possibility of fulfilling the possible future obligation. This,

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is that our promises and, more generally, our obligations may cease to exist because of a change of circumstances beyond our control.

however, is a different obligation—though clearly closely related to the one at stake in the contract. Indeed, the equity-principle (or, alternatively, the merely possible yet expedient law) (9) is what establishes this relation.

From this it follows that SA may be upheld: As long as for instance a ship has not arrived from Asia it is indeed not the case that Primus owes his stamps to Secundus—at least with respect to the contract at stake (there clearly may be other reasons why he has such an obligation). This is good news since—at least from the perspective endorsed in this paper—SA is nothing but an explication of the rule of *modus ponens* in a legal context: I have assumed from the beginning that there is no relevant difference between contracts with conditions and conditional statements in general. Thus, from such a perspective, it would definitely be problematic to question SA.

## 5 Conclusions

In this paper, I have first addressed what I have labeled the Standard Approach (SA) to contracts with conditions which may be found in different legal systems and traced back to Roman law. However, SA is by itself problematic as can be shown by considering contracts about definite objects. A possible way to address this issue is by the introduction of the fiction of the Retroaction of the Condition (RC), which may again be found in different legal systems and traced back to Roman law as well. There is, however, something disturbing about RC, namely that it presupposes that the past may be changed, even though only with respect to the existence of certain obligations. Thus, there seems to be a need to rationalize RC: Why is law allowed to introduce such a fiction?

Leibniz presented a first attempt at rationalizing the fiction of RC. The problem, however, is that his approach relied on a non-uncontroversial metaphysics as well as on a questionable notion of obligation which is, so to speak, invisible. In the last part, thus, I have put forward a second attempt at rationalizing the fiction by relying on an equity-argument. According to this approach, law is allowed to introduce RC because one may show how the same conclusions that may be reached by means of RC may also be reached otherwise, namely by means of an equity-argument. This argument, moreover, relies on a good equity premise so that we may consider it to be not only valid but sound. In other words, and relying on Field's terminology, RC is a good fiction, because it is conservative with respect to a set of premises that are not in any sense fictional, i.e., to a certain extent false. Alternatively, one may prefer to avoid any reference to equity and thus to morality broadly construed. From such a perspective, one should simply say that the fiction of RC is conservative with respect to a conclusion that may be reached by relying on a merely possible yet expedient law. Even in such a context, the upshot

of the fiction would still be the same since it would allow us a shortcut to a conclusion that may also be reached by other means.

To conclude, I would like to stress that the present paper has not argued that every legal fiction should be shown to be conservative with respect to an equity-principle or a merely possible yet expedient law. Rather, following an intuition by Leibniz, I have tried to show how this may be done with respect to a specific kind of fiction, namely RC. Whether such an approach may be generalized with respect to all or at least some other legal fictions cannot but be the object of further studies.

## 5.1 Acknowledgments

This work has been supported by the DFG-ANR Project JuriLog (ANR11 FRAL00301). A first version was presented at the conference “G. W. Leibniz—Connections between Law and Logic” (Third JuriLog Conference), University of Constance (12-14 November 2013). A revised version was presented at the “Formal Ethics 2015” Conference, University of Bayreuth, (3-5 July 2015). I would like to thank these different audiences for their helpful comments. Especially, I would like to thank the following members of the JuriLog Project for their crucial feedback: Juliana Albuquerque-Katz, Matthias Armgardt, Reinhart Benghez, Patrice Canivez, Sandrine Chassagnard-Pinet, Karlheinz Hülser, Bettine Jankowski, Sébastien Magnier, Shahid Rahman, Juliette Sénéchal, and Juliele Sievers.

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