1 Introduction

Lease contracts often contain a clause providing that if the lessor should decide to sell the leased premises, the tenant will first be given the opportunity to buy the premises, before it may be sold to an outsider. Similar clauses granting a preferential opportunity to contract are often found, inter alia, in company statutes, partnership contracts, mineral contracts, supply and distribution contracts, franchise agreements, publishing, music recording and software development contracts, patent licensing agreements and employment contracts. The traditional terminology applied to all these types of arrangements have been that they give rise to “rights of pre-emption,” connoting preferential rights to buy, or “rights of first refusal,” which suggests a wider concept – a right to be given the first opportunity to decide whether to enter into a specific transaction or not. As an alternative to “first refusal contracts,” a number of writers have appositely termed these transactions “preference contracts” or “voorkeurkontrakte”.

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6 This article is based largely on chapter 3 of my unpublished LLD thesis The Legal Nature of Preference Contracts (2003). I wish to thank Gerhard Lubbe for very helpful comments and Dale Hutchison and Jacques du Plessis for stylistic corrections. Professor Hans Ankum and Reinhard Zimmermann brought works on Germanic law to my notice. I am indebted to the National Research Foundation, Harry Crossly Fund and Deutsche Akademische Austauschdienst for financial assistance.

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2 See, for example, Owsianick v African Consolidated Theatres (Pty) Ltd 1967 3 SA 310 (A); Krauze v Van Wyk 1986 1 SA 158 (A) and Hirschowitz v Moolman 1985 3 SA 739 (A).

3 Theterm “right of first refusal” has also been used interchangeably with “right of pre-emption”, for example in Dithaba Platinum v Econovad Ltd 1985 4 SA 615 (T).

4 Reinecke & Otto “Voorkeupe en ander voorkeurkontrakte” 1986 TSAR 18 21; Van der Merwe et al Contract: General Principles 2 ed (2003) 76. Cf Kerr The Law of Sale and Lease 2 ed (1996) 338 (“preferent conditional right”), Van der Merwe et al Contract 76 (“preferential right”), “preferential right to buy”, “preferential right to lease”). As various other rights are described as “voorkeuregte” or “preferential rights”, the narrower term “preferential right to contract” (“voorkeurreg om te kontrakteer”) is preferable. “Right of first refusal” is also not objectionable, but is perhaps not wide enough to encompass all forms of preferential rights to transact, and has been said to automatically encompass a duty to make an offer. This is disputable, however, and this loaded term will therefore not be used in this article.
preferential right to contract are not only created contractually, but are also encountered in wills and statutes.

In view of the wide scope of application of preference arrangements, it is rather surprising that the legal rules on the basic rights, duties and remedies of parties thereto are enveloped in uncertainty and controversy in South African law. This problem is exacerbated by the typically brief and ambiguous formulations used by South African drafters of preference arrangements.

1.1 Conflict in the case law

One side of the conflict is represented by the majority decision in Owsianick v African Consolidated Theatres per Botha JA. According to the majority of the appellate division in this case, the grantor of a pre-emptive right only ever has a negative obligation, an obligatio non contrahendo cum tertii. Botha JA’s viewpoint was interpreted in subsequent cases and by commentators to mean that an order for specific performance in the form of an order that the grantor should make an offer, can never be obtained. He held that the obligation to offer to the holder under certain circumstances is not an enforceable one, but merely refers to the means or method whereby the property may be freely sold. The majority also held that no procedure is known to our law whereby the holder could in the event of a sale in conflict with his rights demand that he be allowed to step into the buyer’s place. This view is similar to that espoused by a provincial division in Hartsrivier Boerderye (Edms) Bpk v Van Niekerk.

In stark contrast to the courts’ views in Owsianick and Hartsrivier, the majority of the appellate division per Van Heerden AJA (as he then was) held in Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd that the holder of a right of pre-emption may indeed demand that he be allowed to step into the buyer’s place upon a sale in conflict with his rights, a remedy which came to be known as the Oryx mechanism.

1.2 The tenability of Botha JA’s view in the Owsianick case

It is true that a number of academic commentators writing after Oryx
have dismissed Botha JA’s view as “erroneous” and as “a misleading simplification” on the grounds of commercial efficacy, principle, practical utility, reasonableness and logic. However, their criticism rests on very vague grounds and they do not explain their aforesaid objections. It is submitted that Botha JA’s view of the residual rules of preference contracts is not meaningless from a practical or commercial perspective. The balance of bargaining power in a particular case could very well result in the grantor agreeing only to be subject to an interdict or damages claim in case of breach (or the setting aside of a transfer to a *mala fide* third party). The holder might also be satisfied with such an arrangement. In any event, regardless of the construction followed, there is always a danger that the grantor may sell and transfer to a *bona fide* third party, so that only damages may be claimed. No one contends that to restrict relief to a claim for damages in such a situation makes no commercial sense. If the holder discovers in time that the grantor has concluded a sale and intends to transfer, or has transferred to a *mala fide* third party, an interdict (and an order setting aside the transfer) will adequately restore the *status quo*, a solution that makes practical sense.

The negative construction does not make of the holder’s right something other than a “right of first refusal” or a “right of pre-emption.” Although not enjoying a conditional right to purchase, the holder still has a preferential right: he must be preferred above any other potential purchaser by the grantor. A “preference” implies a negative: the non-selection of others, but does not necessarily indicate when and how a selection must take place. The construction is therefore not “illogical”. Neither does logic dictate that “refusal” imports an offer, from which a duty to make an offer is to be inferred. As was stated by Botha JA in *Soteriou v Retco Poyntons*, “a right of first refusal” could also refer to

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15 Cooper *Landlord and Tenant* 144; *cf* Du Plessis *Spesifieke Nakoming* 14. The latter relies on the inadequacy of damages where the grantor has contracted with and delivered to a *mala fide* third party. However, in such a case damages is not the only remedy anyway – the transfer may be set aside by reason of the doctrine of notice. *Smuts v Booyens; Markplaas (Edms) Bpk v Booyens* 2001 4 SA 15 (SCA).
16 Cooper *Landlord and Tenant* 144.
20 Or a third party who did not know about a right of pre-emption in company statutes (*Smuts v Booyens; Markplaas (Edms) Bpk v Booyens*).
21 As was held in *Manchester Ship Canal Company v Manchester Race Course Company* 1901 2 Ch 37 (CA), relied upon by the majority in *Soteriou v Retco Poyntons* supra 932G and by the court in *Cohen v Behr* 1946 CPD 942 946-948. See Flack 2001 SALJ 842 834 and Du Plessis *Spesifieke Nakoming* 17, who accept this statement as a truism.
22 *Soteriou v Retco Poyntons* supra.
the first chance to refuse any voluntary offer which the grantor may, but is not obliged, to make. 23

The construction of a right of pre-emption would be very simple and would not give rise to theoretical problems if the view of Botha JA were accepted as the only correct one. 24 It also accords with policy considerations that restraints on alienation must be narrowly construed. 25 Moreover, a negative construction such as that supported by Botha JA has been championed in Germany as the default construction of pre-emption rights entailing an *obligatio non contrahendo cum tertii* (the so-called Vorhand contracts of German law). 26 It is also apparently the default construction in Scotland. 27 Therefore each approach has some merit.

1.3 Problematic aspects of the two leading cases

The aforesaid appellate division decisions (*Owsianick* and *Oryx*) are problematic as wrong interpretations of previous decisions were relied upon and contrary decisions disregarded. 28 In fact, many other cases on preference contracts reveal a similar breakdown of the system of precedent, which adds to the confusion. 29 Moreover, pronouncements on the nature and enforceability of the grantor’s duty in the two leading

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26 BGH 22, 347 (decision of the Bundesgerichtshof of 1956); Henrich *Forvertrag, Optionsertrag, Vorrechtsvertrag* (1956) 305 et seq. For details see Naudé *Preference Contracts* 112 et seq.

27 In Roebuck v Edmunds 1992 Scots Law Times 1055 the court refused an offer that the holder may buy at the price agreed with a third party where the grantor acknowledged that the transfer to the third party should be set aside. In effect, only the *status quo ante* was restored. It argued that pre-emption clauses should be strictly construed and that the clause does not go beyond a duty *not to convey* the property to another without a prior offer to the holder. The court saw no legal basis for a positive obligation to convey the property to the holder in the case of breach. On the other hand, *Matheson v Tinney* (OH) 1989 Scots Law Times 535 537 contains an *obiter* statement that “A clause of pre-emption does not prohibit alienation [so as to contravene a statute of 1746] but simply gives the superior or the disponent an option to purchase if the vassal or disponent decides to sell.”

28 For details, see Naudé *Preference Contracts* ch 2. Eg. the court in *Oryx* wrongly relied on the minority judgment of Ogilvie Thompson JA in *Owsianick* in support of the *Oryx* mechanism, insofar as it suggested that Ogilvie Thompson JA had been of the opinion that the holder obtains a claim over the *mess* as soon as the condition, which lends only latent operation to the right of pre-emption, was fulfilled. Ogilvie Thompson JA’s view was in turn strongly influenced by a mistaken reading of *Le Roux v Odendaal* 1954 4 SA 432 (N) at 320D-G. The cases relied upon by Botha JA in *Owsianick* also do not support his position. Eg in *Sher v Allen* 1928 OPD 137 (referred to at 321F–G), the court specifically stated that the holder was entitled to an offer by the grantor.

29 For details, see Naudé *Preference Contract* ch 2.
decisions, Owsianick and Oryx, may be argued to constitute obiter dicta. In neither case was full argument heard on these issues.

Neither Owsianick nor Oryx comprehensively considered the policy considerations at stake. Both decisions rest on the presupposition that there is one “correct” construction prescribed by precedent and historical authority. Historical argument played a major role in both decisions.

The Roman-Dutch and Roman law sources considered by the majority per Botha JA in Owsianick were understood in an entirely different sense in Oryx. Oryx considered that contractual preferential rights to contract operated like Germanic ex lege rights of retraction (naastingsrechte) which allowed the holder to step into the shoes of the grantor on breach. The majority in Owsianick disagreed. No attempt was made in Oryx to counter Botha JA’s statement that the Dutch law of naasting, relied upon by Van Heerden AJA, is not part of the modern law.

14 The role of historical research

The aim of historical research is not to speak the final word on what the position was in Roman-Dutch law at a certain time so as to dictate what the South African law is today. Courts should not simply state a rule of law on the strength of historical authority, without considering whether the result accords with modern needs and the values that modern law seeks to advance, as agreed by many judges. In fact, the reception in Holland itself amounted to a selective, as opposed to a wholesale, adoption of rules from Roman law adapted to suit the requirements of the day. Roman law is also renowned for a continuous process of development over the centuries. It would therefore be contrary to the spirit of Roman and Roman-Dutch law to tie South African law on preference contracts interminably to the Roman-Dutch position. Historical argument should be regarded rather as an avenue of approach to the legal problem, which may ultimately be solved differently to the historical position.

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30 The decision in Owsianick turned on the fact that the grantor could not be said to have manifested a desire to sell during the currency of the lease. In the Oryx case both counsel agreed that the holder may lay claim to the merx after a sale in breach of his right, as pointed out at 904D.

31 Cf Hirschowitz v Moolman supra 760G-H.


33 Cf Schurig Das Vorkaufsrecht (1975) 37.

A thorough historical study of a legal institution or rule is, however, valuable for at least three reasons. Firstly, a historical study is necessary to understand the reasons for the development and underlying premises of the institution or rule. Such understanding serves to test the rule’s compatibility with modern values or policy considerations and other established legal principles. In the present case, a historical study may also explain the plurality of constructions encountered in South African law. Secondly, where there is a balance of policy arguments in favour of two conflicting understandings of a legal figure, the fairest solution is the historically authoritative one. This results in continuity and predictability in the law, itself a determinant of “fairness”. Thirdly, a thorough historical study of a controversial legal institution will render any proposal thereon more acceptable to traditionalists who may regard historical authority as of decisive importance.

In this article, the emphasis will therefore be on examining whether the texts selected by the judges in the two leading cases do indeed provide authority for their conflicting propositions according to traditional understandings of the theory of sources as well as to establish the reasons for the development of different constructions.

To these ends, the known Roman and Roman-Dutch texts on contractual preference arrangements, as well as those of the *ius commune* writers relied upon in the leading cases, will be considered. Where relevant, reference will be made to modern writers on Roman law and the *ius commune*. The old authorities from Holland will be considered separately from those from other areas to render the study more acceptable to proponents of the narrow definition of Roman-Dutch law.

Of course, the historical researcher should also be prepared to accept that there might very well not be any clear historical position. In such a case all the different possible interpretations must be treated as potential solutions or avenues of approach, to be evaluated in the light of modern policy considerations.

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35 Further on this argument, see Naude *Preference Contracts* ch 6.
36 However, I shall not examine all possible pronouncements on preference contracts by writers from the *ius commune* not referred to by the leading cases and Roman-Dutch authorities.
37 There is support for the view that our courts take a broader European perspective not merely as indirect evidence to establish the law of Holland, but more directly because the legal tradition transplanted was a supra-national *ius commune* (Hahlo & Kahn *The South African Legal System and its Background* (1968) 562 et seq; Zimmermann “Synthesis in South African Private Law: Civil Law, Common Law and Usus Hodiernus Pandectarum” 1986 SALJ 103 268; Fagan *Roman-Dutch Law in its South African Context* in Zimmermann & Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 41-45; Van der Merwe 1998 *TSAR* 17; Lubbe 1997 ZEUR 428 429-430 and cases there cited; Zimmermann *Roman Law in a Mixed Legal System: The South African Experience* in Evans-Jones (ed) *The Civil Law Tradition in Scotland* (1995) 41 et seq, 82 et seq. As law is, at least to some extent, a “discourse of persuasion”, it seems sensible to use a strategy more likely to also persuade the traditionalists. (The terminology is that of Hutchinson, quoted by Van der Merwe 1998 *TSAR* 15). Cf Lubbe 1997 ZEUR 428 435 and Fagan *Roman-Dutch Law* 45 for indications that some kind of hierarchy of authorities may be useful.
2 Roman Law

Two fragments in the Digest of Justinian, D 18 1 75 and D 19 1 21 5, deal with sales of land on condition that the buyer should not sell to anybody but the seller.38 The latter text was relied upon in Owsonianck v African Consolidated Theatres (Pty) Ltd39 and Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd.40 Another text mentions an agreement between co-heirs that, if one of them should sell his part, it would be sold only to his co-heirs at a fixed price.41

Such preferential opportunities to buy were not only created by agreement. At the venditio bonorum, or sale in execution of a judgment debtor’s estate, certain persons had the preferential opportunity to better the highest bid obtained.42 In Justinian’s time, the emphyteuta (quitrent holder) wishing to sell his emphyteusis (quitrent right) had to notify the owner of the terms of the proposed contract of sale. The owner could then declare his wish that the quitrent right be sold to him at the same price within two months.43 Where a sale was concluded subject to the seller not receiving a better offer within a specified period, the buyer had the preferential opportunity to obtain the merx on the same terms as any better offer received in the absence of contrary agreement.44

These texts do not label such arrangements. The term pactum protimeseos, generally used by Romanists to describe an agreement granting a seller a preferential right to buy,45 was first used in a post-Justinian Greek novella.46 For convenience’ sake this term will be used to refer to such agreements.

Not much is known about the construction of the pactum protimeseos and the exact remedy available to the seller on breach.47 The pactum protimeseos was not widely used as it did not form part of the numeros clausus of actionable agreements (contractus). If it was concluded ancillary to and simultaneously with a contractus bonaefidei, like empto venditio (sale), it could be indirectly enforced by the action on the main

38 D 18 1 75 and D 19 1 21 5.
39 Owsonianck 320A.
40 Supra 905E-G.
41 D 45 1 122 3.
42 D 42 5 56.
43 C 4 60 3.
44 D 18 2 7. D 18 2 8. This type of pact is known as an in diem addicio. Cf Schurig Das Vorkaufsrecht 22.
45 See e.g. Zimmermann The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 570;
contract – usually with the actio venditi (action on sale). It was thus recognised as a pactum adiectum, or ancillary pact.\textsuperscript{48} D 19 1 21 5 (Paulus) simply refers to the actio venditi being available on a sale to a third party, without stating precisely what may be claimed.\textsuperscript{49} D 18 1 75 (Hermogenianus) grants the seller the action on sale (actio venditi) “\textit{ad compleendum id quod pepigerunt}.”\textsuperscript{50} This phrase has been translated as “to enforce execution of the bargain,”\textsuperscript{51} “for the honoring of such obligation”\textsuperscript{52} and “\textit{om die beding af te dwing}.”\textsuperscript{53} However, the text does not clarify what relief exactly the actio venditi would be directed at.

Many writers treat this subject rather cursorily and do not discuss the exact remedy available to the preference holder.\textsuperscript{54} A German Romanist, Peters, identifies four possible outcomes that could arguably be obtained with the actio venditi in this context:

1. The actio venditi could be directed at restoration of the merx, on the basis that the sale to an outsider gives the seller the right to cancel the original sale causing the merx to fall back into the hands of the seller. On this construction, the pactum protimeseos operates like a lex commissoria.
2. The actio venditi could be directed at delivery of the thing to the seller, on the basis that the sale to an outsider brings about a second contract of sale with the erstwhile buyer as seller.
3. The actio venditi could be directed at a contractual penalty.
4. The actio venditi could be directed at the payment of damages.

According to Peters, only the fourth possibility holds water.\textsuperscript{55} His reason for rejecting the first possibility is that, if the pactum protimeseos had the effect of a lex commissoria, there would have been no need for the usual agreement requiring the buyer to sell to the seller, when the buyer wants to alienate. However, that argument wrongly presumes that the texts mention a duty on the buyer to sell to the seller. The emphasis in the

\textsuperscript{48} The formula of the actio venditi ordered the \textit{iudex} to take \textit{bona fides} into account when reaching his verdict. If the parties to a sale concluded ancillary agreements relating to the main agreement, good faith demanded that these agreements be honoured. Only pacta adiecta entered into simultaneously with the main contract could in themselves give rise to the action on sale. If such a pactum was entered into later, it could only give rise to a defence (D 2 14 7 5; Zimmermann \textit{Obligations} 510).
\textsuperscript{49} D 19 1 21 5.
\textsuperscript{50} D 18 1 75.
\textsuperscript{51} Mackintosh \textit{The Roman Law of Sale (with modern illustrations): Digest XVIII.1 and XIX} translated with notes and references to cases and the “Sale of Goods Bill” (1892) 127, relied upon by Ogilvie Thompson JA in Owsianick 320A.
\textsuperscript{52} Watson’s translation in Mommsen et al \textit{The Digest of Justinian II} (1985).
\textsuperscript{53} Van Heerden AJA in the \textit{Oryx} case 90E-F.
\textsuperscript{54} See, eg, Zimmermann \textit{Obligations} 570; Kaser \textit{Das Römische Privatrecht} 561. Cf Schurig \textit{Das Vorkaufsrecht} 25 who states without reference to authority that the pactum protimeseos obliges the buyer to sell the thing to the seller on the same terms as agreed with a third party interested in buying the thing. Cf also Floyd 1986 \textit{THRHR} 533 555 n 22 who concludes that the discussion by De Zulueta \textit{The Roman Law of Sale: Introduction and Selected Texts} (1945) 57, Moyle \textit{The Contract of Sale in the Civil Law} (1892) 176, and Buckland \textit{A Text-book of Roman Law from Augustus to Justinian} 3ed (1963) 495 rests on mere speculation.
\textsuperscript{55} Peters \textit{Die Rückrittsvorbehalte} 283-284.
texts is rather on the negative obligation: the buyer may not sell to anyone else than the seller.

The second possibility, supported by various writers,\(^56\) is based especially on Hermogenianus’s formulation “*ad complendum id quod pepigerunt.*” Thus Peters admits that *complendum* (“fulfilment”) could be directed at the seller’s desire to obtain the land.\(^57\)

The main reason why Peters rejects an order to deliver as possible relief is the absence of any indication in *D 18* 1 75 and *D 19* 1 21 5 as to the terms of the contract of repurchase. The texts do not state that the seller would be entitled to buy on the terms which the buyer is prepared to accept from a third party or on the terms of the original contract of sale.\(^58\) Another argument militating against enforced delivery of the goods to the seller, is that, during the classical period, all judgments would have had to sound in money in accordance with the rule *omnis condemnatio pecuniaria est.* Even in Justinian’s time, it cannot be concluded with certainty that a buyer would be entitled to specific performance of the seller’s obligation to deliver the *merx.*\(^59\) Although Peters admits that a contractual penalty would be an effective remedy in this context, the fragments by Hermogenianus and Paulus do not mention such an agreement. By contrast, *D 45* 1 122 3 specifically mentions an undertaking to pay a penalty on breach. Accordingly, for Peters, only the last possibility remains, namely that the *actio venditi* was directed at damages upon a sale in breach to a third party.\(^60\) In my view, however, Peters has not clearly ruled out the possibility of the *pactum protimeseos* having functioned like a *lex commissoria.*

An overview of the position in Roman law reveals uncertainty regarding the construction of the *pactum protimeseos*.\(^61\) The suggestion in the *Oryx* case that the holder of a *pactum protimeseos* had the same

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\(^{56}\) See Peters *Die Rücktrittsvorbehalt* 284 n 8.

\(^{57}\) That admission presupposes the existence of such a desire, whereas the seller’s primary desire could be to ward off unwanted buyers of the land formerly belonging to him (Schurig *Das Vorkaufsrecht* 26 at n 66–67).

\(^{58}\) By contrast, *D 45* 1 122 3, specifically refers to a price having been fixed by the parties. *C 4* 66 3 (dealing with the *ex lege* preferential right to transact) specifically refers to the owner being entitled to indicate that he would buy on the same terms as can be obtained from a third party. Peters’s second argument for rejecting this second construction is less convincing. The prohibition in the texts of a sale to a third party leads Peters to conclude that the *pactum protimeseos* cannot function like the *Vorkaufsrecht* created by the German civil code, the *BGB*, whereinunder nothing less than the sale to an outsider triggers a remedy which ultimately enables the holder to enforce delivery of the thing by the grantor (285). (See further Naudé *Preference Contracts* par 4 1 1). Thus, as a sale to a third party is prohibited, Peters argues that nothing can trigger availability of the remedy of enforcement of delivery. Hermogenianus could, however, have meant that a lesser manifestation of a desire to sell, such as an offer to sell to an outsider, would trigger the remedy contemplated by him. Peters argues that, if this was so, an indication in the text of the terms of such an offer would be expected.

\(^{59}\) Zimmermann *Obligations* 772 and authorities cited there. Cf *D 19* 1 1 pr; Kaser *Das Römische Privatrecht* 561–562.

\(^{60}\) Peters *Die Rücktrittsvorbehalt* 285. A seller who sold at a lesser price than he otherwise would because he believed that he would be able to buy back the thing could then claim the difference in price as damages. Cf also Floyd 1986 *THRHR* 253 261–262; Du Plessis *Specifieke Nakoming* 1–2.

rights as an ordinary buyer in Roman law, including entitlement to delivery of the *merx* upon breach, is therefore open to doubt. The court appears to have placed much weight on its mistaken reading of *D 18 1 75* as granting the original seller the *actio empti* – the action of a buyer – on breach. The court implied that the holder of the *pactum protimeseos* would thereby be entitled to enforce the grantor’s duty to deliver just as a buyer could against his seller. The text however grants the seller the *actio venditi* – the action of a seller – simply because that is the only action with which the *pactum protimeseos*, as a *pactum adiectum* to a sales contract, could be enforced. The name of the action has no bearing on the relief that could be obtained in this instance.

3 Germanic Law

As has been indicated above, different conclusions were reached in the two leading cases on whether the feudal or Germanic law figure of contractual *naastingsrechte* displaced the Roman law *pactum protimeseos* in Roman-Dutch law. To understand the construction of the *naastingsrecht* or *ius retractus* of the Roman-Dutch sources, and to evaluate the reasons for its development, a brief investigation of Germanic law is required.

The term “Germanic law” refers to the legal rules of the Germanic tribes who lived in Western Europe after the fall of the Roman empire in the West prior to the reception of Roman law. Although these rules varied territorially, some common characteristics may be identified, such as the absence of the concept of ownership of land as an abstract, absolute right vesting in a specific person. Classical Germanic feudalism, applied in the Frankish areas, including the “Low Countries,” from the eighth century, denies the possibility that land could be owned – it could only be held in tenure. The concept of tenure again comprises a number of different juridical relationships with regard to land. Around the thirteenth century, as a compromise between feudal and Roman principles, the concept of tiered ownership (superior and inferior ownership) came to be used to describe these different relationships. Tenure thus came to be regarded as one of the different possible tiers of ownership. “Ownership” was therefore more of a conglomerate of various rights or powers to use and exploit the thing than an abstract concept.

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62 Oryx case supra 905E-G.
63 See par 1 3 supra in fine.
66 Gretton Feudal System 50-62.
68 Schurig Das Vorkaufsrecht 27.
According to some writers, the existence of preferential rights to buy in Germanic or feudal law confirms the theory that in ancient times ownership of land was not merely tiered, but collective.69 After the development of individual ownership, relics of the ancient concept of collective ownership manifested themselves in various limitations on ownership in favour of certain classes of people, who may be identified with the co-owners of former times.70 The rights of retraction existing in Germanic law are examples of such limitations. Known in German as Nähererrechte and in Dutch as naastingsrechte,71 they entitle those who are “closer” to a thing, for example, by reason of family ties, to retract or “draw to themselves” the thing in the event of its sale to an outsider. Retraction may take place on payment of the agreed purchase price. For the purpose of this discussion, the term rights of retraction will be used.72

The idea that family land should remain preserved for future family members was strengthened by the consideration that family farming was the most important income source for the rural population and that voting rights depended on land possession.73 An owner could thus only alienate his land if he first offered it for sale to his heirs who declined to buy. If he failed to offer, they could claim the land from the buyer against payment of the purchase price.74

This ex lege right probably developed from an outright prohibition on the alienation of land without the consent of the nearest heirs.75 Heirs were regarded as having incomplete ownership of the land which they would inherit on the death of the owner. If the owner sold to an outsider, the heirs’ incomplete ownership immediately waxes to full ownership.76 On breach of this prohibition, the heirs, as owners, could have the alienation set aside and, as owners, could obtain the land as if the seller had died; thus even against outsiders and without paying the purchase price.77

69 Schurig Das Vorkaufsrecht 27 at n 75 and writers cited there. See Moorman van Kappen Met open buydel en in de baren gelei (1973) 13-14 and De Blécourt & Fischer Kort Begrip 97-98 for criticism of this view.
70 Schurig Das Vorkaufsrecht 28; De Blécourt & Fischer Kort Begrip 101 et seq.
71 Naastingsrechte in Old Dutch.
72 Laue Begriff und Wesen des Vorkaufsrechts 11 defines the right of retraction as the right created by statute or custom for a certain class of persons, to appropriate sold land against performance of the obligations undertaken by the buyer. Note that no reference to the grantor is found in his definition.

The right is directed at the land itself. There were various kinds of ex lege rights of retraction in Germanic law. For details, see Naude Preference Contracts ch 3 n 58.
73 Moorman van Kappen Met open buydel 14; De Blécourt & Fischer Kort Begrip 97 et seq
74 Schurig Das Vorkaufsrecht 31; De Blécourt & Fischer Kort Begrip 97 ff; Allgäuer Vorkaufs-, Rückkaufs- und Kaufrecht 4.
75 Schurig Das Vorkaufsrecht 31-32. Moorman van Kappen Met open buydel 14; De Blécourt & Fischer Kort Begrip 99.
76 Schurig Das Vorkaufsrecht 31-32. De Groot calls this real right of the heirs eigendomsverwacht, a type of gebrekelijke eindom (Int 2 3 10-2 3 11 & 2 47 6). Schurig refers to an Erbenschutzrecht 29 & 30. See also Moorman van Kappen Met open buydel 14 who refers to the terms Anwartschaftsrecht in German and droiture in French. Cf, however, De Blécourt & Fischer Kort Begrip 99-100 who indicate that in the Frankish-Germanic period (± 500-900) the family’s consent was necessary to alienate immovables. If no consent was given, the alienation could be declared void by judicial decree. They do not mention an automatic and direct right of relatives to claim the land for themselves on alienation.
77 Schurig Das Vorkaufsrecht 31-32; Allgäuer Vorkaufs-, Rückkaufs- und Kaufrecht 9.
However, an exception arose in terms of which an owner could, in the case of real necessity, alienate the land on condition that he first offered it to his nearest heirs. This exception became the general rule: the prerequisite of necessity disappeared. However, the remedy of the heir in the case of breach was retained: he could claim the land, even from the third party, but now against payment of the purchase price. As owner, the holder could thus simply ask for an order that the transfer to the third party be set aside.

The significance of this development is that the proprietary remedy ascribed to the *ex lege* right of retraction, which allows the holder of the right of retraction to lay claim to the land, preceded the later construction of the *ex lege* right of retraction, which places a duty on the owner to make an offer to contract before selling. That explains why the remedy for breach of the right in its later form was not, as should be expected, an order to make an offer, but was directed at delivery of the land. This remedy cannot be equated with specific performance of the right of retraction. Rather, the idea that the holder’s incomplete ownership waxed to full ownership accounts for the remedy of laying claim to the land.

Rights of retraction created by juristic act were also recognised in feudal times before the reception. Modelled on *ex lege* rights of retraction, they were created simultaneously with the transfer of the land in favour of the seller or a third party. The buyer thus did not obtain unrestricted ownership. His ownership was regarded as limited by the agreement of retraction, and the right of retraction created a similar real right enforceable against everyone. As these rights of retention apparently always applied to land, the element of publicity essential in modern law for real rights or the operation of the doctrine of notice did exist due to the formalities accompanying transfer of land.

The Germanic remedy described here immediately brings to mind the *Oryx* mechanism. Both make an order to submit an offer superfluous, as they allow the holder to lay claim to the thing on a mere declaration of intention to exercise her right after the grantor’s breach. The two figures differ in that the *Oryx* mechanism is no longer regarded as enforcement of a real right. The significance of the development described here is the recognition that the formulation of the *Oryx* remedy may be described as an accident of history. Its Germanic predecessor was not formulated in an attempt to strengthen the protection of the holder’s interests, but rather as an attempt to water down the holder’s limited ownership. The rejection of the concept of tiered ownership that provides the historical basis for the *Oryx* mechanism accounts for the difficulty which courts face in dealing with the problem.

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78 Schurig Das Vorkaufsrecht 42; Allgäuer Vorkaufs-, Rückkaufs- und Kaufsrecht 9.
79 See also Laue Begriff und Wesen des Vorkaufsrechts 10.
80 Schurig Das Vorkaufsrecht 34-35. Cf Gail Practicarum Observationum (1626) 19.
81 Schurig Das Vorkaufsrecht 35, 46.
82 Schurig Das Vorkaufsrecht 35, 46; Allgäuer Vorkaufs-, Rückkaufs- und Kaufsrecht 12.
83 See par 11 supra (in fine) on the meaning of “Oryx mechanism.”
and commentators have in explaining the *Oryx* mechanism in terms of Romanist terminology.  

### 4 Roman-Dutch Law

Rights of retraction did not disappear as a result of the reception of Roman law in the Germanic territories – in fact some new forms developed.  

The family *naastingsrecht* was described as the *ex lege* right of blood relatives of a seller of land to place themselves in the position of the buyer within a specified time period, if the buyer was not also a blood relative of the seller. If the thing was already delivered to the buyer and if he had paid the purchase price, then the buyer had to deliver the thing to the *naaster* against compensation of the purchase price. If the thing had not yet been delivered, the seller had the duty to deliver to the *naaster*. A court could also order delivery by the seller or third party.

Details as to who exactly may retract or *naasten*, and when and how this could be done, varied territorially. In some areas the procedure of retraction (naasting) could take the form of a pre-emption (or *voorkoop*) procedure, in order to protect the buyer from the possibility of losing the thing at any time after the sale through naasting. This involved that the seller first had to publicly declare his intention to sell, whereupon the relatives had a certain period within which to buy, failing which the right of retraction was lost. However, the seller could still sell without first publicising his intention, in which case he had to publicise the sale giving his relatives the chance to retract the thing (thus through a *nakoop*-procedure).

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84 Cf Schurig *Das Vorkaufsrecht* 60. See also Van der Walt & Kleyn *Duplex Dominium: The History and Significance of the Concept of Divided Ownership* in Visser (ed) *Essays on the History of Law* (1989) 213 216 who conclude that, although the similarity between the modern concept of ownership and its Roman counterpart has been exaggerated, South African law conceives of ownership as a right which is in principle unrestricted and therefore absolute. See also Schulz *Classical Roman Law* (1951) 338. See eg Van der Merwe *Sakereg* 171-173; Schurig *Das Vorkaufsrecht* 20, 27 for the view that Roman ownership was in principle unrestricted and absolute. Cf Kaser *Das Römische Privatrecht* 400-403; Birks “The Roman Law Concept of Dominium and the Idea of absolute Ownership” 1985 *Acta Juridica* 1.

85 Schurig *Das Vorkaufsrecht* 36; De Blecourt & Fischer *Kort Begrip* 102-3. After the fall of the Western Roman Empire (in AD 476), and before the reception in Western Europe, the Germanic concept of rights of retraction had already penetrated Roman law. In the West, landowners resisted the Romanisation of land law after the reception (Moorman van Kappen *Met open buydel* 4-5). Sanction of the family right of retraction by the Bible appears to have contributed to its survival (Gail *Practicarum Observationum* 19).

86 Or “incorporal things” regarded as immovable like quitrent (*erfpacht*), or long leases. Moorman van Kappen *Met open buydel* 6; De Groot *Inf* 3 16 5.

87 De Groot *Inf* 3 16 2; cf Van der Keessels *Praelectiones* on Gr 3 16 2.

88 Van der Keessels *Praelectiones* on Gr 3 16 11.

89 Moorman van Kappen *Met open buydel* 5; Zimmermann *Kaufvertrag in Feenstra & Zimmermann Das römisch-holländische Recht: Fortschritte des zivilrechts im 17. und 18. Jahrhundert* (1992) 192. One reason was that many rights of retraction were introduced by legislation or created by local custom (De Blecourt & Fischer *Kort Begrip* 101-102).


91 Moorman van Kappen *Met open buydel* 8; De Groot *Inf* 3 16 1 mentions *nakoop* as a synonym for naasting. So also De Blecourt & Fischer *Kort Begrip* 101.
The important question is whether contractual arrangements creating preferential rights to transact also operated like the Germanic *ex lege* right of retraction. Four possibilities exist:

1. All contractual arrangements creating preferential rights to transact operated like Germanic rights of retraction and the Roman law *pactum protimeseos* disappeared.
2. All contractual arrangements creating preferential rights to transact were assigned the construction of the Roman law figure.
3. Contractual *naastingsrechte* and Roman law *pacta protimeseos* were available as alternative constructions.
4. The constructions influenced each other so that a mixed figure evolved.

In De Groot’s time, *naastingsrechte* did not exist throughout the province of Holland. A relative wishing to exercise a *naastingsrecht* had to allege and prove that such a right existed in the area where the immovable property was situated. The variation in influence and operation of *ex lege naastingsrechte* might have resulted in a variation in the construction of contractual preference arrangements. As *ex lege naastingsrechte* did not exist throughout the province of Holland, it is more likely that the construction of such rights had a lesser influence on contractual arrangements creating preferential rights to transact there, than in areas where *ex lege naastingsrechte* were more prevalent.

4.1 Writers from Holland

De Groot only considers *ex lege naastingsrechte* in his discussion *van naesting*. The omission of the contractual figure might indicate that, in Holland, the construction of the contractual right of pre-emption differed from that of the *ex lege* right of retraction.

Voet, on the other hand, does discuss the contractual right of retraction (which he also calls a *ius retractus*) in conjunction with the family right of retraction. However, he distinguishes the construction of the *ex lege* right of retraction from the contractual figure. He specifically mentions that in the case of the family right of retraction the retracting party steps as completely into the place of the purchaser as if he and not the purchaser has bought the property, with the result that
the tie between the vendor and the first purchaser is broken. Thus he says, the exercise of the ex lege right of retraction is considered as one sale and one contract which the retracting party is considered to have himself entered into by ousting the purchaser and stepping into his place and transferring to himself the whole effect of the contract, so that fines and charges relating to alienation do not have to be paid again. He distinguishes this construction from that applying to the contractual right of retraction. Perhaps this implies that the exercise of the contractual right of retraction brings about a second, separate contract, so that the holder may also have to pay fines and charges on alienation. If this is what Voet means, it remains unclear when the separate contract comes into existence – would that be only on the acceptance of a subsequent offer by the grantor, or would a sale in breach and a unilateral act by the holder cause the contract to come into existence? In any event, Voet confines the remedy of “stepping into the place of the purchaser” to the ex lege right of retraction.

The method Voet prescribes for the exercise of the right of retraction mirrors that prescribed in the Codex where the quitrent holder wants to sell his quitrent right, namely that notice should be given of the intended sale, whereafter the holder (the owner in the case of the Roman ex lege right) has two months to declare his intention to buy.

The only other comment Voet makes on the construction of the contractual right of retraction is that the grantor “can in no way be compelled under that agreement to sell the thing, either by Roman law or by modern custom; but if he afterwards sells it to another party I have an action in respect of the damage which his breach of agreement has caused to me.” It is not certain whether his statement that the grantor cannot be compelled to sell the thing refers also to the situation after breach by the grantor or merely to the situation before the occurrence of the trigger event. As he does not limit the statement, both meanings are possible. Some judges have interpreted his statement that damages may be claimed after a sale to a third party as only applicable when transfer to a bona fide third party had taken place. There is no compelling reason to interpret the text in this way and the possibility that Voet means to disallow the holder the remedy of specific performance, or an order that the grantor deliver the thing even before transfer, cannot be excluded.

Van Heerden AJA in Oryx also relied on Van Leeuwen in support of his contention that the contractual right of retraction operated like the

97 18 3 27.
98 18 3 27.
99 18 3 29.
100 C 4 66 3; Voet 18 3 10; Floyd 1986 THRHR 253 256.
101 My translation of Voet 18 1 2.
102 Ogilvie Thompson JA in Owsianick supra 319D-E; Van Heerden AJA in the Oryx case supra 907A.
ex lege naastingsrecht.\textsuperscript{103} Van Leeuwen does not discuss the remedies of the holder of a contractual right of retraction in detail. His definition of the contractual right of retraction includes an agreement that the purchaser is bound to resell at the option of the seller, as well as an agreement that, if the thing is sold to another, the original seller “on offering the same price, is preferred and retracts the sale.”\textsuperscript{104} Elsewhere he defines a “naastingsrecht” by way of agreement as entailing that the purchaser shall return the property sold at the option of the vendor or within a certain time, at the same price; or that, in sale the vendor “must always be the nearest, should he so wish”.\textsuperscript{105}

The implications of these definitions for the remedies of the holder are not explained. Van Leeuwen says it is doubtful whether handing back the merx to the seller constitutes a new sale, so that transfer duties must be paid again.\textsuperscript{106} He reasons that the original sale from the holder to the grantor is rather confirmed when the merx is handed back as this is done in accordance with the original sale. He then states that “upon such retraction or giving back of the thing, the buyer is not liable to pay the duty; except that he must reimburse the purchaser the original expenses incurred on that account.”\textsuperscript{107} Van Leeuwen’s argument allows for the acceptance of a remedy like the Oryx mechanism, but his view on the holder’s remedies is unclear. That the holder may be entitled to delivery of the thing itself is perhaps implicit in the statement that “he is preferred and retracts the sale.”\textsuperscript{108} Whether this means the same as in the case of an ex lege right of retraction, namely that the holder is to institute proper proceedings, after which the third party is bound to restore the thing to the holder,\textsuperscript{109} or whether it simply means that the sale to the third party buyer may be cancelled so that the thing is restored to the grantor, is not clear. Accordingly, Van Leeuwen does not provide clear authority for the view that the holder is entitled to stronger relief than restoration of the status quo ante by setting aside the transfer to a third party purchaser with notice.

Van der Keessel focuses his discussion on ex lege rights of retraction. He merely mentions the conventional retractus appended to a sale and does not discuss the remedies available to the holder.\textsuperscript{110} His reference to the Digest of Justinian in this context suggests that he would construe the conventional retractus like the Romans did. Elsewhere, he emphasises
that Grotius's definition of the *ius retractus* as a right in respect of immovable property entailing that the holder is preferred upon a sale and steps into the place of the buyer, is limited to *ex lege* rights of retraction.\textsuperscript{111}

It can therefore be deduced, especially from Voet, that the holder of a contractual right of retraction probably could not step into the shoes of a third party buyer on a sale in breach of his right. That was a remedy confined by Voet to *ex lege* rights of retraction. It is not clear whether the holder could enforce delivery on breach either. Van Leeuwen appears to treat the contractual right of retraction as analogous to the one arising *ex lege*. What is undisputed is that the holder could claim damages. Thus the writers of Holland do not provide clear authority for an *Oryx* mechanism type remedy, nor for a remedy of specific performance in the form of an order to sell or make an offer, nor do they unanimously and clearly exclude such remedies.\textsuperscript{112}

\subsection*{4.2 Other Dutch writers}

All three judges in the two leading South African cases referred to Van Zutphen of Utrecht and Schrassert, who wrote on the law of Gelderland.\textsuperscript{113} Botha JA also referred to the Frisian writer, Sande.\textsuperscript{114} The opinions of Sande (1586-1638) were treated with great respect by the writers of Holland and still carry much weight in South Africa.\textsuperscript{115} Sande states that if an agreement has been made by a pact appended to a contract that the one party will not sell or lease the property to anyone but the other, a personal action for damages would arise out of such a pact on breach by the owner provided the other party had some interest why the owner should not alienate.\textsuperscript{116} Damages are also payable where an owner had on transfer of his property made it a condition of the sale that the purchaser shall not alienate or sell to any one but him.\textsuperscript{117} Sande makes no mention of a contractual *naastingsrecht* or a remedy aimed at delivery or transfer to the holder. The arrangement discussed by him is constructed rather like the Roman law *pactum protimeseos*.

Van Zutphen, who practised in Utrecht, wrote a chapter on *voorcoop* in

\begin{footnotesize}
\textsuperscript{111} VanderKeessel *Praelectiones* on Gr 3 16 2.
\textsuperscript{112} Cf also Floyd 1986 *THRHR* 253 265; Du Plessis *Spesifieke Nakoming* 4-5. In his discussion of D 18 75, Groenewegen *De Logibus Abrogatis* merely refers one to his remarks on C 4 6 3, where he emphasises that immovables cannot be subjected to a real burden by contracting parties unless a written document of the transaction is executed before a magistrate. He makes no comment on D 45 1122 3 or D 19 1215. Van Bynkershoek *Quaestionum Juris Privati* 313 only discusses *ex lege* rights of retraction. No other Roman-Dutch writers from Holland discuss the construction of contractual rights of retraction or pre-emption.
\textsuperscript{113} Owsianick *supra* 320A-C, 321H-323D and *Oryx* *supra* 905H-906D.
\textsuperscript{114} Owsianick *supra* 323C-D.
\textsuperscript{115} De Wet *Die Ou Skrywers in Perspektief* (1988) 144.
\textsuperscript{116} Sande *Tractatus de Prohibita Rerum Alienatione* 4 2 2.
\textsuperscript{117} De Wet 4 2 11 (referring to D 18 175 and D 19 1215). He contemplates the interest of the owner to ward off unwanted third parties as near neighbours (4 2 12).
\end{footnotesize}
his book on Dutch law. He does not mention ex lege naastingsrechte in favour of relatives. He does refer to the question whether a co-owner has a reg van voorcoop (right of pre-emption) in respect of the other co-owners’ share, but denies this unless local legislation has created such a right of pre-emption. The rest of his discussion is on rights of pre-emption created by agreement.

Like Voet, Van Zutphen holds that the grantor must give notice to the holder if he intends to sell the thing, upon which the holder has two months to declare whether he wants to buy the thing. If the holder fails to make a declaration within those two months, the right of pre-emption terminates. But he goes further than Voet and says that, if the seller (grantor) sells to a third party without any notice, the holder may attack (immitteren) the contract of sale and retract (retraheren) “the same”. It is not entirely clear whether “the same” (het selve) in this sentence is meant to refer to the preceding noun, namely the contract of sale, or whether it refers to the merx. Grammatically, a reference to the contract of sale makes more sense. Presumably “retraction” therefore only means that the contract in breach of the holder’s right of pre-emption may be set aside. However, in later paragraphs the verb “retract” has as its object the sold goods. If it means the same here, there is scope for an interpretation that the holder may claim delivery of the goods from the seller upon a sale to a third party. Alternatively it could mean that, like the infringing contract, the transfer to the third party may simply be set aside so that the goods revert to the grantor.

Van Zutphen does say that, had the goods been delivered to the purchaser without notice to the holder, the sale cannot be rescinded. His reason is that the holder only has a personal action against the seller to sue the seller for damages and interesse. He does not limit this reasoning to the situation at hand, and the statement is open to the interpretation that the holder may only claim damages on breach. However, he adds that, if the goods had been delivered to a buyer with knowledge of the right of pre-emption, the holder may retract and “revoke” (revoceren) the goods.

The critical question is the meaning of “retraction” and “revoke” in this context. Van Zutphen does not spell out whether this means the same

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118 Van Zutphen Practycke der Nederlandsche Rechten van de Daghelyjsche soo Civile ts Criminele question (1645).
119 From the Latin verb immittere meaning (1) to send in, cause or allow to go in, (2) to let loose, let go free or (3) to let go against, launch against, to attack, to incite against (Simpson Cassell’s Latin-English English-Latin Dictionary 5ed (1968) 287).
120 From the Latin verb retrahere meaning, literally, to draw back and figuratively, to hold back or withdraw, to draw on again and to induce (Simpson Cassell’s Latin-English English-Latin Dictionary 521).
121 Van Zutphen Practycke sv voorcoop par 4 (‘‘alsdan mach den ghene die de voorcoop competeteert zijn selven het contract van veroopinghe immitteren ende het selve voor de gheedane leveringe retraheren.’’)
122 See par 6, 9, 11, 14 and 15.
123 From the Latin revocere meaning to call back, recall, recover or bring back something.
124 Van Zutphen Practycke sv voorcoop 785-786 par 6.
thing as in the *ex lege* right of retraction, namely that the holder may step into the place of the purchaser and demand delivery to himself on having taken certain prescribed steps. Neither does he say whether a new contract of sale comes into existence upon retraction. His statement that the buyer only has a personal right for damages may perhaps be reconciled with the statement that the buyer may retract the goods, by interpreting the latter to mean that the holder may have the transfer to the third party set aside, without being able to enforce delivery to himself. In that way the goods are in fact "recalled" or "drawn back" at the instance of the holder, but to the grantor. On the other hand, he does use the verb *naesten* as a synonym for *retraheren*, which possibly implies that delivery to the holder may be enforced, as may be done by the holder of an *ex lege naastingsrecht*.\(^{125}\)

Schrassert, writing on the law of Gelderland, discusses the question whether a provision in a partition agreement that the former co-owners will be preferred if the land be alienated, entitles a son of a party to the agreement to retract the thing with force on alienation.\(^{126}\) The use of the verb *retraheren* in this context again raises the issue whether delivery of the thing may be claimed by the holder on a sale to an outsider.

He says that the agreement does not create a real right but a personal right for the *interesse* (damages) if the thing had been transferred to the third party buyer. But if transfer had not taken place so that the grantor still has possession, the holder may institute action for the fulfilment of the grantor’s promise to him, and for the sale to himself, and on a refusal, to vouch for the purchase price.\(^{127}\) This text does not necessarily support the view that the holder could step into the shoes of the third party buyer on the sale. It may in fact provide support for the construction that an agreement of sale can be brought into being upon judicial action. Certainly, it conflicts with the view that only damages may be claimed upon a sale to a third party.

To summarise, Sande provides no authority for any other remedy than a claim for damages. It cannot be said with certainty whether Van Zutphen’s work provides support for the construction espoused in the *Oryx* case, as the judge argued. Neither is it totally clear what remedy exactly Van Zutphen has in mind. Schrassert, on the other hand, clearly indicates that the holder may institute legal action for fulfilment of the promise to sell to him.

### 4.3 Other writers of the *ius commune*

Van Zutphen relies heavily on the German writer, Berlichius, as authority for his discussion of the holder's remedies. Both Berlichius and

\(^{125}\) Par 11, 14 & 15.

\(^{126}\) Schrassert *Practicæ Observationes* (1736) 92.

\(^{127}\) *Obs* 92 4 (my translation).
Van Zutphen rely on the German writer, Gail. Berlichius is also referred to in the two leading cases. Accordingly the writings of Berlichius and Gail will be examined.

Berlichius clearly distinguishes the contractual right of retraction from the *ex lege* figure. Regarding the remedies of the holder of the contractual right, he says that, if the seller (grantor) does in fact sell the goods without notice to the holder, the holder may attack (*immittere*) the contract of sale, and may retract (*retraheren*) the thing before delivery. Had delivery taken place to a *mala fide* buyer, the holder can retract the sold goods “with force” from a pact of such a kind, and revoke the alienation. However, if a penalty was stipulated for on breach, the holder may not have the sale rescinded and retract the goods, but is limited to the stipulated penalty.

Unfortunately, Berlichius does not spell out what retraction of the goods involves, that is, whether it refers merely to the holder being able to set aside the transfer so that the merx reverts to the grantor or whether it means claiming the goods for himself.

Gail does not discuss the remedies of the holder of a contractual right of retraction. He therefore provides no authority for Berlichius and Van Zutphen. To this extent Botha JA may perhaps be right in saying that Van Zutphen wrongly imported the legal position applicable to the *ex lege naastingsrecht* to the contractual right of retraction (*voorcoopsreg*). Thus these writers do not clearly indicate what the exact remedy of the holder of a contractual right of retraction would be.

### 4.4 Modern legal historians

The construction of the contractual *naastingsrecht* in Roman-Dutch law or the *ius commune* has apparently not received as much attention as the *ex lege naastingsrecht* from modern legal historians, but the conclusion in the previous section that no certainty exists as to the remedies of the holder of a contractual right of retraction in Roman-Dutch law, is supported by Floyd.

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128 Van Zutphen *Practycke uv voorcoop* par 4, Berlichius *Conclusiones Practicabiles* (1670) 40 55.
129 *Owsianik* *supra* 320A, 32ID-H and the *Oryx* case *supra* at 906C.
130 *Conclusiones Practicabiles* 40 53.
131 *Conclusiones Practicabiles* 40 54.
132 *Conclusiones Practicabiles* 40 64 (my translation).
133 *Conclusiones Practicabiles* 40 58.
134 Van Zutphen *Practycke uv voorcoop* 4, Berlichius *Conclusiones Practicabiles* 40 55.
135 *Owsianik* *supra* 323C.
136 See eg Zimmermann *Kaufvertrag; De Blecourt & Fischer Kort Begrijp Moorman van Kappen Met open buidel and “Voorkeurs- or voorkoopsrecht” 1976 NJB 831; Fockema Andreae & Van Appeldoorn Inleiding tot de Hollandsche rechtsgeleerdheid beschreven bij Hugo de Groot met Aantekeningen vol II 3ed (1926) on Gr 3 16, who all focus on *ex lege naastingsrecht*.
137 1986 *THRH* 253 262-263, 256. His statement that there was a great degree of similarity between the *ex lege naastingsrecht* and the contractual right of retraction (255) is not justified by his later conclusions on the uncertainty surrounding the contractual figure (256 and 262-263).
Another writer who has investigated the historical development of preference contracts is the German writer, Schurig, who wrote a thesis on rights of pre-emption. Schurig is more concerned with the historical reasons for the eventual formulation of the BGB Vorkaufsrecht and does not investigate the precise operation of the contractual right of retraction in the sixteenth, seventeenth and eighteenth centuries. His discussion focuses instead on the attempt, especially in the nineteenth century, to distinguish the pactum protimeseos from the Germanic institution and to adapt the latter to the system of Roman law.

Schurig is nevertheless of the view that there is no reason to believe that the pactum protimeseos of Roman law did not exist in the earlier period. It could then be used as an independent contract as there was no longer a numerus clausus of contracts. However, the stronger, more effective right of retraction appears to have been more widely used in Germany. That both existed followed not from juristic or economic need, but was the fortuitous result of historical events. Schurig accepts that the Roman figure only gave rise to a claim to the preferential conclusion of a contract of sale, thus to a preferential offer to contract and not to a real right. The Germanic right of retraction gave rise to a real right. He accepts that on the exercise of this right by unilateral declaration of the holder, a contract of sale (or relationship governed by the rules relating to sale) came into existence as if an offer to sell had been accepted. He accepts that in the case of the Roman figure an actual offer by the owner (to which the holder was entitled) and the acceptance thereof by the holder were necessary to bring a contract of sale into existence.

4.5 Overview of the position in Roman-Dutch law and the ius commune

The investigation into the position after the reception reveals that the construction of contractual preference arrangements in Roman-Dutch law and the ius commune is not entirely clear. The possibility cannot be excluded that the Roman pactum protimeseos figure, which may have only given rise to a claim for damages, and possibly an order setting aside a sale to a third party, or of a transfer to a mala fide buyer, survived into this era. The “retraction” terminology used by some writers in the context of preference contracts, opens the possibility that the holder could also enforce delivery to himself on a sale to a third party, just like the holder of an ex lege right of retraction.

138 Schurig Das Vorkaufsrecht.
139 Schurig Das Vorkaufsrecht 38-45.
140 Schurig Das Vorkaufsrecht 41.
141 Schurig Das Vorkaufsrecht 43.
142 Schurig Das Vorkaufsrecht 45, 49.
143 Schurig Das Vorkaufsrecht 49, with no reference to authority at that page. He describes the conflicting arguments by nineteenth century historians on the legal nature of rights of retraction at 38-40.
144 Schurig Das Vorkaufsrecht 45 n 176, 49.
5 Early South African Law

As no clarity exists on the construction of preference contracts in Roman-Dutch law, it is difficult to say what rules were received into South African law. Botha JA in Owslanick decided that the Dutch law of naasting is not part of our law, and that there is no procedure known to our law whereby the holder may, on a sale in breach with his rights, demand that he be allowed to step into the buyer’s place.\(^{145}\) He was of the opinion that the holder of a contractual right of first refusal was only entitled to an interdict or damages on breach.\(^{146}\)

Some of the early South African cases decided in the previous century, provide oblique support for Botha JA’s contention by virtue of the courts’ refusal to order the grantors to sell or transfer to the holders. Instead, damages or orders that the contract between the grantor and third party be declared void were mostly granted.\(^{147}\) Of course, this may be the result of a reluctance to grant specific performance under English influence, and not necessarily reflect their understanding of the holder’s rights.\(^{148}\)

In one case decided in the nineteenth century, Malan v Schalkwyk and Odendaal,\(^{149}\) the court was prepared to order that the contract with the third party was void and that the holder (the erstwhile seller) “become entitled to and become possessed of the land” on payment of the original purchase price, as agreed in the preferential arrangement. This order is arguably analogous to the remedy applicable to the ex lege right of retraction, which Botha JA regarded as not part of our law. On the other hand, in Malan the holder as original seller had not yet given transfer under the contract of sale. It could therefore be argued that the court’s order amounts to cancellation of the contract of sale and restoration of the status quo ante as a result of breach of the pre-emption clause, instead of specific performance of the preference agreement.

Moreover, it is submitted that SABreweries v Francis & Sons,\(^{150}\) which Botha JA relied upon for his conclusion that naasting is not part of modern law, does not exclude the possibility that the contractual Germanic ius retractus forms part of our law.

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\(^{145}\) Owslanick supra 323D-E. This conclusion is supported by Floyd 1986 THRHR 253 255 who relies on the same authority as Botha JA for his statement that neither the ex lege nor the contractual naastingsrecht was received into our law. Cf also Wessels History of the Roman Dutch Law (1908) 606.

\(^{146}\) See further Naudé Preference Contracts 20-23.

\(^{147}\) See, eg, Joseph’s Executor v Peacock 1868 Buc. 247, where the court a quo refused the holder’s prayer for transfer of the object; granting damages instead. Unfortunately, the only issue dealt with on appeal was the passive transmissibility of the right. Cf Transvaal Silver Mines v Jacobs, Le Grange & Fox 1891 5 SAR; Van Pietersen v Henning 1913 AD 82; McGregor v Jordan 1921 CPD 301; Sher v Allen 1929 OPD 137.

\(^{148}\) In Haynes v King William’s Town Municipality 1951 2 SA 371 (A) the court reaffirmed that a party is in principle entitled to specific performance, subject to the court’s unfettered, equitable discretion. This was confirmed in Benson v SA Mutual Life Assurance Society 1986 1 SA 776 (A) 783.

\(^{149}\) J S 225 (1852).

\(^{150}\) SABreweries v Francis & Sons 27 NLR 648 (1906).
That case did not deal with a right of first refusal. A lease provided that the tenant would not mortgage any of the movables on the premises without the Breweries’ (the lessor’s) consent.\(^{151}\) Another clause provided that whenever the lease shall terminate, the Breweries shall be entitled to purchase the movables at a price, failing agreement, to be determined by certain third parties. This clause was preceded by a *lex commissoria* in favour of the Brewery, which also authorised the Brewery “to enter upon the premises and take possession of the whole.”\(^{152}\) The tenant purported to pass a notarial bond over the movables. The Breweries argued that the tenant’s ownership of the movables was qualified by the conditions imposed. The decision turned upon the fact that the bondholders did not know of this limitation. Bale CJ did, however, during argument, state to counsel that the *ius retractus* was obsolete,\(^{153}\) referring only to *Seaville v Colley*.\(^{154}\) He did not answer counsel’s contention that the comments in the Seaville case could only apply to a *ius retractus ex lege* and not to the conventional (contractual) *ius retractus*.\(^{155}\) Bale CJ’s statement was clearly *obiter*. In the reasons for the court’s decision he stated that, even if the *ius retractus* had not become obsolete, it did not apply in this case.\(^{156}\)

The case of *Seaville v Colley*,\(^{157}\) referred to by Bale CJ, concerned the rule of Dutch law that a debtor sued by a cessionary of his creditor could discharge the debt by paying the cessionary the (lesser) sum for which the cessionary had obtained the claim.

The court, per De Villiers CJ, referred to this rule as the debtor’s right of retraction.\(^{158}\) It then referred to the *ius retractus* that existed in “the greater portion of Holland”, entitling the nearest relatives of the seller of land to step into the purchaser’s place and demand a completion of the sale in their favour.\(^{159}\) The court quoted Van Bynkershoek’s statement that “every form of retraction, which is nowadays in use, . . . savours of the utmost unfairness, inasmuch as it robs the purchaser of his honestly acquired right in order to prop up a policy which is of far less importance than the enforcement of contracts.”\(^{160}\) De Villiers CJ then stated that the law of retraction as applied to immovable property was not general throughout Holland and that he takes it for granted that it was never introduced in this country.\(^{161}\)

From his example of such a *ius retractus* and the last part of the quotation from Van Bynkershoek, the judge clearly only meant to refer

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151 The lessor had sold the movables on the premises to the tenant.
152 SA Breweries supra 650.
153 SA Breweries supra 658.
154 9 Juni 39.
155 SA Breweries supra 658.
156 SA Breweries supra 659.
157 Supra.
158 Seaville supra 41. He stated that Voet also treated it as a branch of the law relating to retracts in 184 18.
159 Seaville supra 41.
160 Seaville supra 41, quoting Van Bynkershoek Quaesttionum Juris Privati 3 13.
161 Seaville supra 42.
to the *ius retractus* *ex lege* as being obsolete. Van Bynkershoek would not have referred to a conventional *ius retractus* as reprehensible: such a *ius retractus* is also obtained “honestly.” To deny its force would also deny the important policy of “the enforcement of contracts.” Clearly, the case therefore does not concern contractual rights of retraction.

The court in *Seaville v Colley* furthermore referred to the presumption that every “law” introduced from Holland is still in force, unless it is inconsistent with South African usages, the best proof of which is found in unoverruled decisions.162 In *Transvaal Silver Mines v Jacobs, Le Grange & Fox*,163 decided five months before *Seaville* and not referred to in that case, the court held that the plaintiffs had “the right of pre-emption, i.e. a species of *retractus.*”164 However, the construction of a right of pre-emption or of a *ius retractus* was not considered. Apparently it was merely taken for granted that the kind of *ius retractus* under consideration was received into South African law.165

6 Conclusion

No certainty exists regarding the construction of the *pactum protimeseos* in Roman law. Van Heerden AJA’s suggestion in the *Oryx* case that the holder of a *pactum protimeseos* had the same rights as an ordinary buyer in Roman law, including entitlement to delivery of the *merx* upon breach, is doubtful at best and is largely based on a mistaken reading of a text from the Digest.

The possibility cannot be ruled out with certainty that Roman-Dutch contractual preference arrangements gave rise only to a claim for damages or the setting aside of the sale to the third party, as Botha JA in *Owsianick* would have it. On the other hand, they could possibly have operated like the *ex lege* right of retraction. Neither can the possibility of both constructions being received into early South African law be excluded. The absence of a clearly defined, unified default regime for preference contracts in Roman-Dutch law may account for the plurality of constructions in South African law.

The *Oryx* mechanism has its roots in the Germanic *ex lege* right of retraction, which allowed the holder to lay claim to the land on a sale in breach of his right. This was a proprietary remedy that developed from the view that the holder had incomplete ownership that automatically waxed to full ownership on breach. This concept of tiered ownership that forms the historical basis for the *Oryx* remedy does not form part of our

162 *Seaville* supra 44.
163 1891 5 SAR 116.
164 *Tvl Silver Mines* supra 119.
165 *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 188 holds that a contract not to sell to a third party without giving the other contracting party an opportunity to purchase is analogous to a contractual right of *naaisting, Sher v Allen* 1929 OPD 137 141 also quotes Voet on the contractual *ius retractus*, indicating that the law relating to *intra retractus* may have been received into our law.
This accounts for the difficulty that courts and writers have in explaining and formulating this remedy in terms of Romanist obligation terminology, and the resultant resort to the language of fiction.

In view of the uncertainty in Roman, Roman-Dutch and South African law, courts should not, when considering the basic default rules of preference contracts, resort merely to argument based on historical authority and precedent. These can provide no ready made authoritative solutions, but only the raw materials from which solutions may be developed.

OPSOMMING

Leidende hofsake oor voorkeurregte openbaar lynreg opponerende sienings van die basiese regte en pligte van die partye tot ’n voorkeurooreenkoms. Die presiese toepassingsgebied, aard van en gesag vir die sogenoemde Oryx-meganisme wat sedert 1982 algemeen aanvaar word as ’n gepaste remedie vir kontrakbreuk van ’n voorkeurooreenkoms is ook onseker. Hierdie konflik en onsekerheid is deels te wye aan opponerende interpretasies van die Romeinse, Romeins-Hollandse en ius commune bronne. Die leidende hofsake onderzoek nie die beleidsoorwegings betrokke by hierdie kontrakstipes nie en baseer hulle beslissings hoofsaaklik op historiese gesag en precedent. Afwykende sienings in vorige hofsake is egter dikwels geïgnoreer of nie behoorlik ondersoek in latere regspraak of akademiese bydraes nie, wat die verwarring vererger. Hierdie bydrae ondersoek die historiese gesag waarop daar gesteun word in die leidende hofsake om lig te werp op die kontroversie. Daar word aangetoon dat die historiese gesag waarop die leidende hofsake steun nie eenduidig steun bied vir hulle verskillende sienings nie, onder andere omdat sekere tekste verkeerd verstaan is. ’n Onderzoek van die Germaanse, Romeins-Hollandse en vroeë Suid-Afrikaanse reg werp ook lig op die meervoudigheid van konstruksies wat gevind word in die Suid-Afrikaanse reg en die aard van die Oryx-meganisme.

166 In any event, not of our non-statutory law.