Summary and Conclusions

1 INTRODUCTION

In Dutch law it is somewhat striking that there is still an obvious division between the closed law of property and the open law of obligations. Where the former has developed clear rules on, among other things, formation, content and extinction, the latter is characterized by extensive party autonomy and a broad limitation under the law as well as under the principle of reasonableness and fairness.
However, this division is less strict than it seems. Subject to the influence of social demands, over the years certain concepts have come to exist which operate outside the limitations of the classic system and existing laws have changed in character. In this respect law-of-obligations concepts which have commercial features have come to exist, such as, for example, lease, and obligations which were originally merely intended to have effect between parties acquired commercial characteristics in certain circumstances. One concept where the legislator, under pressure from legal practice, has emphatically broken through the traditional boundaries is that of the obligation attached to a certain capacity. The social desire to link obligations in favour of a person with certain property so that acquirers by particular title are also bound was so strong that, by the implementation of the new Civil Code in 1992, this desire had been accommodated. With the implementation of the obligation attached to a certain capacity the desire of the legislator, on the one hand, to distinguish obligations that are linked to property[1] and, on the other, the desire of legal practice to link the active side of an obligation to a specific person seem to have been sufficiently fulfilled. Nevertheless, this 'success achieved by practice' also has its downside. With the introduction of the obligation and its inclusion in Book 6 of the Civil Code it certainly seems that the law of obligations has been given a certain degree of flexibility, but the question also arises how this concept meets the requirements which the law imposes on rights *in rem*. The central question in this thesis is the following: what position does the obligation occupy within our legal system, what uses does it have and what are the consequences of the application of this concept? In this thesis I have attempted to make an inventory of the position of the obligation attached to a certain capacity from the point of view of the Dutch legal system, on the one hand, and the German and Scottish systems on the other.
Although the first approach was that the placing of the obligation in Book 6 would provide the key for answering the central question, it became clear from further research that this was not the case. Or rather, that this was not entirely the case. The

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1 In contrast to perpetual clauses which although they are not linked to property are in fact developing in this direction, see section 3.6.

mixing of legal fields which should basically remain in isolation gave rise to many questions which, unfortunately, could not all be answered unequivocally.

2 THE CONTENT OF THE OBLIGATION ATTACHED TO A CERTAIN CAPACITY AND THE AMENDMENT THEREOF

'A servitude without dominant tenement'[2] was how the obligation was typified in Parliament. By limiting the content of the obligation to 'tolerating or not doing' a law-of-obligations concept which is parallel to a servitude seems to have been created, with the only difference being the possibility to bind the obligation to a person instead of to property. The fact that this first impression is not correct already emerges from the determination of the obligation, as this is composed of two distinct elements. The first element is the obligation of one of the parties to tolerate or not do something with regard to his registered property in favour of the other party. I have called this the basic obligation. Secondly, there is the concept which emerges from the agreement between the parties whereby the basic obligation is also passed on to the acquirers of the property under particular title or the users thereof. For want of a shorter title, I have referred to this agreement as an agreement to attach to a certain capacity.

The intrinsic parallel with the servitude can only be drawn with regard to the basic obligation and even then only partly so. The servitude merely involves tolerating or not doing certain factual acts, while the obligation attached to a certain capacity can also extend to legal acts. It is somewhat striking that the extension to this category is not substantiated anywhere. Alongside this, it is conspicuous that the obligation can be extended to registered property and not only with regard to immovable property. With regard to the content itself, the parties to an obligation are bound by the law and the principle of reasonableness and fairness, whereby in the case of a servitude the obligations must have a 'sufficient connection' with the right *in rem* although it is still not completely clear what exactly is meant by a sufficient connection. The only concrete limitation which the legislator has imposed with regard to the content of the obligation is that it can imply a limitation on the possibility to dispose of or to encumber the property. From the point of view of being obligatory, such agreements are of course valid, although they cannot have an attaching effect.

It is striking, and in my view a missed opportunity on the part of the legislator, that additional obligations to do something are allowed in the case of a servitude, but not in the case of an obligation attached to a certain capacity. The background to this is the fear of a return to serfdom; possible assignees could be subjected to an

2 Parliamentary History Book 6, p. 942.

encumbrance which would disproportionately limit ownership or the right of use.[3] This explanation can be referred to as striking, certainly because this drawback is not experienced in the case of a servitude and, indeed, the freedom of the law of obligations must provide the necessary basis for a similar extension. In combination with the power of amendment contained in Article 6:259 of the Civil Code it seems that the fear of a return to a feudal relationship is somewhat exaggerated.

A complicating factor in this respect is, moreover, notarial disciplinary proceedings. If the purchasers of registered property, with regard to which the seller has attached a perpetual clause, refuse to abide by this perpetual clause, then the notary should refuse to cooperate with the conveyance. If he does not do this then his actions justify a complaint. By acting in this way the perpetual clause is given a semi-property-linked effect which does not fit within this purely obligatory concept.[4] The situation therefore exists that in limiting the content of a perpetual clause there is practically no way that it can have the same effect as a limited obligation attached to a certain capacity. In my opinion this is an undesirable development. I advocate that the perpetual clause should be left for what it is: an obligatory agreement. If the debtor defaults against the creditor by not imposing the necessary clause, then damages are in order. Although it may also be the case that in certain circumstances a third party will be acting unlawfully when he cooperates with or profits from the default of the debtor, ascertaining this and determining the consequences thereof is a matter for the courts.

In order to allow the obligation attached to a certain capacity to be used for its intended purpose (putting an end to the proliferation of perpetual clauses) the possibility must exist for additional obligations to be able to determine the content thereof. It would be even better if it were possible to allow obligations to do something to determine the content of the obligation. In order to encumber the return of tied situations the repressive possibility in Article 6:259 of the Civil Code should be extended.

As far as the history of the emergence of the obligation is concerned, it is striking that practically no attention was devoted to the benefit requirement. This requirement, which originally applied to the servitude, was dispensed with as far as the servitude is concerned as the requirement also does not apply to the obligation attached to a certain capacity. Now that it was also said about the obligation attached to a certain capacity that it can be regarded as a servitude without dominant tenement, the reasoning tended to bite its own tail. Further research shows that by setting a benefit requirement for the obligation attached to a certain capacity, no reasonable objective will be served because it is already ensured by means of

3 See the Parliamentary History, Book 6, p. 922 and section 3.2.3.
4 See also HR (Supreme Court) 17 May 1985, NJ 1986, 760 (Curaçao/Boye).

other provisions that the creditor derives benefit from the obligation, although it still remains peculiar that no attention has been given to this requirement.

If, during the course of the obligation, the parties wish to amend it, this can of course be done by a joint agreement. However, one of the parties can also initiate an amendment to an obligation. Two possibilities exist for this purpose, namely the regulation of the *imprévision*[5] (the unforeseeability doctrine or the *rebus sic stantibus* clause as it is sometimes referred to) and Article 6:259 of the Civil Code which has been especially established for the purpose of the obligation. The specially created power to amend again demonstrates close parallels with the possibilities to amend a servitude, although for the servitude this can be done within the first 20 years while for the obligation attached to a certain capacity a 10-year rule applies. The grounds for such an amendment are that the obligation is against the public interest or where a reasonable interest is lacking. The 10-year period has been justified by the legislator because of the need for the 'stability of legal relationships'.[6] Extending the possibilities for repression also fits in with my argument in favour of greater freedom for the parties to establish the content of an obligation, among other things by making additional obligations to act a part of it. Scrapping any time-limits for relying on this amendment possibility contained in Article 6:259 of the Civil Code also fits within this notion.

The other amendment possibility contained in Article 6:258 of the Civil Code can only be relied upon when there are unforeseen circumstances. This subjective requirement (no reference is made to 'unforeseeable') can provide a reason for drawing up standard clauses. Just as in the case of 'benefits and burdens' clauses in the purchasing of real property, the parties could choose to draw up lists of situations which might arise in the future. Although it may be completely unlikely that such situations should occur, the fact that all these possibilities have been included deprives the parties of the possibility to rely on Article 6:258 of the Civil Code in respect of these situations.

3 THE COMING INTO EFFECT OF THE OBLIGATION ATTACHED TO A CERTAIN CAPACITY

As a composite concept a distinction must be made between the coming into effect of the basic obligation and the agreement which attaches the obligation to a certain capacity. The basic obligation may for example follow from a legacy, but most commonly follows from an agreement. No further requirements apply to the formation of the basic obligation, which is entirely in keeping with what is generally

5 Art. 6:258 of the Civil Code.
6 Parliamentary History, Book 6, p. 984 and section 3.8.1.

the case in the law of obligations. In principle, requirements of form do not apply to this obligation to attach either. After all, this agreement, too, is and shall remain of a law-of-obligations character.
However, in order to obtain the desired effect *in rem*, certain other requirements do have to be fulfilled, namely requirements which are similar to those established for the creation of limited rights. I have consecutively examined whether the formation of the obligation has to be based on something like a good title, whether there has to be power of disposition and whether some act of delivery may be distinguished.

The basis of the fact that the obligation becomes attached to a certain capacity lies in both the basic agreement and the agreement to attach. If one of these is lacking, the obligation loses its attached character. By this it becomes clear that like under the law of property a certain kind of causal link may be distinguished. There is no ground to equate the basic agreement and/or the agreement to attach with a title as referred to in Article 3:84 of the Civil Code, but it can be concluded that without these two elements the desired *droit de suite* will not occur.[7]

That something like an act of delivery is needed is clear; the notarial deed and the required entry in the public registers are the same as the requirements for delivery under Article 3:89 of the Civil Code. This is thus a requirement as to form which is established to realize the attached nature of the obligation. The choice in favour of a notarial deed was made to guarantee the desired due care and the requirement of entry in the public registers to guarantee that others may know of the obligation.

The most crucial issue in the search for parallels with limited rights is whether there should be power of disposition in the formation of the obligation. In the law of obligations, power of disposition is not required; anyone can for example sell a property that is subject to registration. The requirement of power of disposition only comes into play in the delivery phase. In the case of the obligation that is attached to a certain capacity the requirement has to be fulfilled that the obligation is assumed by a person to whom the property 'belongs'. In my view, this belonging should be read to mean power of disposition in the meaning of this concept under property law. If belonging were read as 'ownership', the situation might occur that an owner who is bankrupt or has been put under administration may 'create' an attached obligation in a legally valid way. A sense of justice already tells us that this cannot be what was intended, but it is proving difficult to find the proper reasoning to support this instinctive conclusion. Eventually, the comparison with lease provided a solution. In the situation of lease the *effect in rem* only comes into effect if the disposal of the property takes place by the person who is entitled to do so (the owner of the leased property). In the case of the bankruptcy of the owner

7 See section 4.4.2.

of a leased property, and the disposal of this property by the trustee, no one will claim that the lease is not valid Although the bankruptcy trustee is not the owner, he does have power of disposition.[8] Where ownership and disposition diverge, as is the case when the owner is bankrupt, the power of disposition will be decisive when it comes to the question if the *effect in rem* will occur. In my opinion the same is valid for the obligation.

The formation of a legally valid obligation attached to a certain capacity thus not only requires two agreements,[9] but also an act of delivery and power of disposition. Now that a kind of causality is also to be found in the assumption of the obligation, it becomes clear that the parallels with the limited property rights are many.

The obligation may however also have been created in another way than by the agreement mentioned, namely through prescription. The problem with rights arising out of prescription is always that demonstrating the possession of the right in question is difficult or even impossible. Where in the case of servitude there is already considerable debate concerning the question of how someone can think that they have possession of the servitude,[10] the question in case of the obligation attached to a certain capacity is how someone can think that the stipulated obligation to tolerate or not to do is meant to be attached. As the attached nature of the obligation only exists if the notarial deed has been entered in the public registers, the conclusion will have to be that there can only be possession if the obligation has actually been entered in the registers. A flaw in the creation of a right which would cause this creation to have taken place incorrectly may, through entry in the public registers and the expiry of a prescription period of 10 or 20 years respectively, result in the creation by prescription of an obligation that is attached to a certain capacity.

Now that it has been established that for the formation of an obligation that is attached to a certain capacity the same requirements must be fulfilled as must be fulfilled in the case of the creation of limited rights, the question is to what extent third parties may be protected against flaws in the formation of the notion. I have consecutively examined to what extent the provisions protecting third parties as included in Articles 3:24-26 and 3:88 of the Civil Code may apply (by analogy).

Article 3:24 of the Civil Code has been written for acquirers of a (right to) a property that is subject to registration. According to a literal interpretation the obligation that is attached to a certain capacity does not qualify as such. Giving third-party protection to the creditor from the obligation perhaps on the one hand

8 See section 4.4.5.2.
9 Assuming that the basic obligation follows from an agreement.
10 See the extensive article by Van Vliet on this issue in NTBR 2005/4 and section 4.5.1.

goes beyond what is desirable given that his right is merely a right of action under the law of obligations, but on the other hand the rationale behind Article 6:252 of the Civil Code is to give *droit de suite* to an obligation. My conclusion therefore is that Article 3:24 of the Civil Code can in fact be applied, as can Articles 3:25 and 3:26 of the Civil Code.

Article 3:88 of the Civil Code concerns the situation that in the assignation of the right of action following from the obligation the debtor does not have power of disposition. Since the cause of the lack of power of disposition can be brought within the limits of Article 3:88 of the Civil Code, and as it concerns the effect in rem, being an element that corresponds with the law of property, the most satisfying solution is in my opinion to let Article 3:88 of the Civil Code also apply if the obligation is assumed by a person who lacks power of disposition.

Finally, Article 5:110 of the Civil Code which repairs an invalid division through the legally valid creation of a limited right to the (invalid) apartment rights must also apply by analogy. Given the rationale of the Article and again the considerable parallels that exist between the assumption of an obligation and the law of property, it is reasonable to let Article 5:110 of the Civil Code apply.

4 WHO PRECISELY ARE BOUND AND WHAT IS THE NATURE OF THIS BOND?

If there is a field in which the hybrid character of the notion is demonstrated to the full, it must be that of boundness. Obligations only have legal effect between the parties, whereas rights *in rem* can be enforced against any and all. The obligation that is attached to a certain capacity fits neither category.
According to the law, the parties may stipulate that the obligation will pass to the good's acquirers under particular title and that also bound will be such persons as will obtain from the entitled party a right to use the good. The terms used for both groups (acquirers versus users) require further examination. In my opinion, the notion of acquirer under particular title of a property only includes persons who obtain the ownership of a property and not also persons who for example obtain a ground lease to or the usufruct of property. It must always be kept in mind that the property in respect of which the obligation can be assumed may be any property subject to registration, i.e. also a ground lease or a right of superficies. Together with the conclusion that users of the property also include the superficiary and the usufructuary, the conclusion is justified that the parties can themselves determine the scope of their boundness. They can choose to let only the acquirers of the property be bound, but they can also themselves determine which user(s) will be bound. This is hugely different from the situation as regards rights *in rem* where

the binding nature extends to all persons.[11] The contents of the basic agreement will be decisive in answering the question of who is or are bound.

Knowing who is bound is not the same as knowing what the nature of that bond is. That the debtor in the basic agreement is bound because he is a party to the agreement is obvious, but how should we interpret the boundness of the acquirers and the users? Binding third parties to agreements between parties goes against the principle that agreements only have effect between the parties while the boundness of for example users does not equal that of a right *in rem* as it depends on the intentions of the parties. The boundness that follows from the attached nature is one that follows directly from the law and the parties' intentions. In the law provisions have been made for the contractual takeover of debts. I have examined in which areas where there are no specific provisions for our obligation, an association can be made with the legal provision for contractual takeover of debts.
The contractual takeover of debts requires creditor consent to the takeover of the debt. In view of the character of the obligation the aforementioned consent will not be required, since the automatic transfer of the debt is the underlying reason of giving the obligation its 'qualitative' character. Notification by the debtor to the creditor also does not appear to be necessary. After all, it is not in the least in the interest of the creditor to block the takeover of the debt in the case of non-notification, given that the debtor (the formerly entitled party) is no longer able to perform, while the newly entitled party does not have to perform.

Still, not requiring notification by the debtor that the debt has been taken over seems to me to be undesirable, namely because the situation could arise that the creditor is no longer aware of who his debtor is. I therefore argue in favour of attaching an additional obligation to the obligation attached to a certain capacity stipulating that any person who grants or acquires a right of use shall notify the creditor accordingly. This obligation would not have to be expressly agreed upon, but should as it were automatically form part of the obligation attached to a certain capacity.
The assumption that users can only be bound if and for as long as the acquirers under particular title of the property are also bound by the obligation I find incorrect. Although the text of the law may point in that direction, the legislative history gives room to the opinion that both groups can be bound apart from each other. The advantage of this view is that many combinations are possible, which increases the possibilities of application in legal practice. On the other hand new questions arise, for instance the question if the content of the obligation must be identical for all the persons bound.
In the case that users are also bound there is a plurality of debtors which leads to the joint boundness of the debtors, at least, if they are bound by the same obliga-

11 Section 5.1.2.

tion. As the starting point should be that the creditor has a separate right of action vis-à-vis each of his debtors, a violation of the obligation by one debtor will not affect the other(s). It is possible that the users, either together with the creditor, or through the intervention of the court based on Article 6:258 or 259 of the Civil Code, will proceed to amend the agreement. This amendment would only apply to their mutual relationship and would not affect the other debtors. Considered in this light, numerous obligations with different contents that are binding upon different parties may arise from a basic agreement.

Persons who acquire a personal right of use are not entitled to the consideration that may be agreed upon in exchange for the obligation. Only the usufructuaries and the superficiaries become entitled to the consideration based on what the law provides concerning the fruits of their right and insofar as this was not detracted from when the right was created. Other users will only acquire such rights where these have been expressly granted, either because a right to consideration is assigned to them, or because a right to consideration is agreed upon in their favour by means of a third-party clause as referred to in Article 6:253 of the Civil Code. If this were the case, a relationship would be created by operation of Article 6:261(2) of the Civil Code between the debtor/user and the creditor to which the provisions concerning the reciprocal agreement apply by analogy. As a consequence, acts such as termination and suspension come within the debtor's reach. Should the creditor who has been so kind as to cooperate in a third-party clause granting the user a right to consideration wish to prevent this result, it would have to be agreed in the third-party clause that the user will not be entitled to terminate the agreement. With respect to the possibility of assignment the problem may be prevented by making the debt non-assignable.

The right of use does not necessarily have to be granted by the person to whom the property belongs as referred to in the first sentence of Article 6:252 of the Civil Code and of whom we have determined that this person must also have power of disposition. Who can validly grant a right of use is determined by the answer to the question of which users must be bound. In this roundabout way it becomes clear who are entitled to grant such a right of use. In order to avoid misunderstandings it is recommended that the term 'right holder' in the provision is changed to 'entitled party'.

5 THE EXTINCTION OF THE OBLIGATION

The obligation can be breached and be extinguished, whereby the breach can be so extensive that the obligation loses all substance. However, legally speaking this does not result in the extinction of the obligation. If the obligation is breached, the

entitled party has a number of measures at its disposal, among which is specific performance.
As to the extinction of the obligation, a distinction must be made between the extinction of the basic obligation and the extinction of the agreement to attach to a certain capacity. That the attached character is lost does not necessarily mean that the basic obligation also ceases to exist. As the obligation is first and foremost a law-of-obligations concept I have first examined the way in which ordinary obligations are usually extinguished. Termination by the parties, termination by the court, confusion and prescription are the most obvious methods.
In the case of termination by the parties the question is whether the parties or one of them actually have this power. The main rule in the case of long-term agreements is that if the parties have not included an agreement on this it must follow from custom, the intention of the parties or reasonableness and fairness that the parties have the possibility to terminate. In the case of the obligation attached to a certain capacity the nature of the obligation will stand in the way of any power to terminate.

In the case of termination of the basic agreement by the court the result is that the parties must undo that which they have already done. In the case of tolerating or not doing this is impossible. Also, if performance has been flawless for years, termination by the court is perhaps too severe a measure. If the basic agreement is terminated by the court the basis of the agreement to attach to a certain capacity falls away and with it its attached character.
In the case of termination by the court of the agreement to attach the 'undoing' will amount to the removal of the property from the public registers.

Extinction by confusion could take place if the right of action arising out of the obligation is assigned to the debtor or the debtor inherits the right of action. If the owner of a servient property is not the only debtor (where for example users are bound) then the extinction of the obligation in favour of the owner does not necessarily have to mean that the obligation is also extinguished in favour of the users. In certain circumstances it may be undesirable to let the obligation be extinguished by confusion. A possibility to prevent such confusion is given in Article 6:161(2)(c) of the Civil Code which provides an exception to the main rule of confusion, namely if the union of capacities is the result of a legal act under a resolutive condition, as long as it is not established that this condition can no longer be fulfilled. In our case, the assignment of the right of action by A to B, which assignment would normally result in confusion, would have to take place under a resolutive condition. In addition to the exception to confusion mentioned, Article 6:161(3) of the Civil Code makes the confusion relative vis-à-vis persons who have a right to the right of action.

In the case of extinction by prescription the main problem is the position of the users. It might be the case that the right of the creditor becomes prescribed in respect of one of the users. How should this be formalized? If we look at the way in which limited rights are extinguished in order to examine whether the obligation is also extinguished in this way, we find that to relinquish a limited right the same requirements have to be met as for its creation. If an obligation attached to a certain capacity is relinquished this will be brought about because the creditor relinquishes his right of action. On the active side, power of disposition in the property law sense did not play a role in the creation of the obligation. The same will be true in the extinction. However, the person relinquishing will, as is the case with any other legal act, have to be able to relinquish in a legally valid way, which means that if for example he has been put under administration he will need the cooperation of his administrator.

A particularity is the notion of the release as referred to in Article 3:273 of the Civil Code. Due to a shortfall in the law it is unclear whether the right lapses after sale by an anterior mortgage holder. Whilst the right cannot be relied upon against the mortgage holder, the acquirers of the non-bound auction-buyer may in turn be bound now that they do not fall within the scope of any of the three exceptions under Article 6:252(3) of the Civil Code. It is unclear whether the obligation has lapsed, or whether it remains dormant and cannot be relied upon only in respect of certain parties. Also in the case that a seizor is the seller the law is not conclusive. Due to the fact that Article 6:252(3) of the Civil Code is referred to for the question of whether it is possible to invoke against third parties, the problem here too is that the obligation does not lapse. It is recommended that the legislator stipulate that after sale and payment the obligation lapses in the same way as the posterior limited rights. In my opinion it would be in accordance with the special position of the creditor of an obligation that is attached to a certain capacity also to offer compensation in exchange here, like Article 3:282 of the Civil Code provides for (former) limited right holders.

6 THE POSITION OF THE OBLIGATION IN SEIZURE AND BANKRUPTCY

In examining the position of the obligation in the situation of bankruptcy I have distinguished between the situation that the obligation had already been entered in the public registers and the situation where this had not yet happened. In the first case, if the property is part of the estate it will be impossible to enforce specific performance from the bankruptcy trustee and the creditor's right of action (for performance) will dissolve into a claim for payment of a monetary debt which can be presented for validation. In my opinion though, the trustee cannot violate the obligation in such a manner that it will lead to irreversible situations.

If however the trustee has indicated that he wishes to honour the agreement, or if the trustee, by not performing, acts unlawfully against the creditor, the debt which consequently arises will be a bankrupt's debt and thus preferential in respect of other debts. In the case of the sale of the property from the estate the trustee must sell the property together with the clause, contrary to what is provided in Article 35a of the Bankruptcy Act. If the obligation is not yet 'complete' at the moment bankruptcy sets in, three stages of 'development' have to be distinguished. It can be concluded in accordance with each stage in which the obligation finds itself whether or not the trustee and/or the estate are bound. As Article 35a of the Bankruptcy Act also applies to the obligation attached to a certain capacity a transaction that has been initiated cannot be completed. The above means that the trustee will have to conclude a new agreement to attach to a certain capacity with the creditor and enter it in the public registers.
Article 37 of the Bankruptcy Act can be applicable to both the basic agreement and to the agreement to attach to a certain capacity. Once the trustee has indicated that he wishes to make use of the possibility offered to honour the agreement, the possibility to apply Article 35a of the Bankruptcy Act will cease to exist.

After bankruptcy has set in, the bankrupt himself can only assume an obligation attached to a certain capacity if this benefits the estate or if the bankruptcy has not yet been entered in the public registers. In the latter case the creditor will be protected by the provisions of Article 3:24(1) of the Civil Code and the exception under Article 3:24(2)(c) of the Civil Code will lack application.

Finally the clause cannot be invoked against a seizor if the seizure was already an entry in the public registers at the time that the obligation was entered in the public registers. An exception has to be made in the situation as referred to in Article 505(3) of the Code of Civil Procedure. For the applicability of this provision, there is in my opinion no reason to treat the obligation any differently from a limited right, so that the conclusion – which clearly deviates from what the legislative history establishes on this point – must be that also in the creation of the obligation attached to a certain capacity the seizure will not stick if the deed concerning the attachment of the capacity is entered on, at the latest, the first working day following that on which the deed was passed, provided of course that the deed was passed before the property was seized.

7 THE POSSIBILITIES UNDER THE GERMAN SYSTEM

In German law there are a number of notions which show many similarities with the Dutch rights *in rem* and the obligation attached to a certain capacity. Especially usufruct and servitude are almost identical to their Dutch counterparts. The *beschränkte persönliche Dienstbarkeit* (bpD) on the one hand and the obligation

attached to a certain capacity on the other however differ considerably. Although they are the same in the sense that both are bound on the passive side, that the substance of both is obligations to tolerate or not to do, and that on the active side both notions serve to favour a person, the differences are still many. For example, additional obligations to do may be made the subject of the bpD, the active side is not transferable, the exercise of the bpD may be left to another person, and of course the bpD is simply a right *in rem*. There is no discussion concerning the manner of creation, extinction, changes to the contents, the position of users, the position in bankruptcy or otherwise. By contrast, the bpD does not offer the possibility to determine that its binding nature is limited to certain groups of persons and the obligation has to fit in with one of the three basic variations.[12] The large degree of freedom which I have noted in the obligation to attach to a certain capacity is not present in the bpD. It does have to be remarked however that under Dutch law the parties also have a reasonable degree of freedom where the substantiation of rights *in rem* is concerned. Under German law, this freedom appears to be more limited.

The *Reallast* is a notion with a completely different content, of which there is no Dutch equivalent. Not only does the *Reallast* entitle a person to performance of a certain kind, the property itself also guarantees the performance of the obligation. The obligation with which the *Reallast* is concerned is a positive obligation linked to property. Such a notion is completely unknown in our legal system. We only have obligations to do in an obligatory sense, unless they are the specifically described additional obligations to do which may be attached to a servitude. Although the notion has fallen into disuse, I believe it offers many possibilities, as the *wiederkehrende Leistungen* do not have to be limited to providing material benefit, but can also be that performance is due. If the debtor fails to perform the obligation he is not only liable himself, but the encumbered property is as well. In this way, the creditor has acquired a position that is much stronger than that of the creditor under Dutch law who only has an unsecured claim. The shapes in which the *Reallast* can appear – either transferable or non-transferable, or only transferable together with the ownership of the dominant property – make the notion an attractive addition to existing rights *in rem*.

Introducing a notion like the *Reallast* in the Dutch system would lead to the introduction of a notion which is a cross between a security interest, a servitude and an obligation attached to a certain capacity. A real break with tradition would be the contents as this would be an obligation to act, but apart from this I believe the notion could still be fitted into our system. An additional advantage could be that this notion would curtail the use of perpetual clauses still further.

12 Section 8.3.1.2.

8 THE POSSIBILITIES IN SCOTLAND

Finally, Scottish law owing to a fear of returning to the feudal system has been very sparse with the possibility to attach obligations linked to property and favouring a person to immovable property. Attaching obligations to immovable property is possible through what are called 'title conditions', which is the umbrella term for real burdens and servitudes. Since the adoption of the Title Conditions (Scotland) Act 2003, the main difference between the two categories is that obligations to tolerate can only be included in the shape of a servitude (with a dominant and a servient property, favouring the servient property as such), while the real burden may consist of an act or omission. Real burdens are either praedial, in which case they have a dominant and a servient property, or they are personal. In the latter case the burden serves to favour a (legal) person. Not everyone can act as the favoured party in the case of a personal burden; only certain specifically named or strictly defined categories of (government) bodies and institutions may act as the favoured parties of such burdens.

9 CONCLUSIONS

The central question in this thesis was binomial: is the qualitative obligation a suitable instrument to bind an obligation to property and what position does the obligation have within our legal system?

9.1 Is the qualitative obligation a fit instrument to bind an obligation to property?

The abovementioned question cannot be answered with a simple yes or no. A positive side to the obligation is the possibility to bind an obligation to property in favour of a person, since legal practice requires such a possibility. As the servitude always needs a dominant tenement, the obligation gives us the possibility to make a (legal) person the creditor apart from a dominant tenement. Another major advantage of the obligation is that the parties are given the freedom to choose whether they want to bind users, a freedom that is foreign to the law of property but that gives legal practice many extra possibilities. The possibility to choose between binding the acquirers, the users or both, as well as the possibility to make a distinction within the group of users, turns the obligation into a flexible instrument.
Given the fact that the content of the obligation is not necessarily identical for the various groups of those who are bound, it appears that the obligation is truly a concept which has a chameleon-like character.

The difference with the perpetual clause is that if the parties to the obligation have agreed to do so, the acquirers of the property are automatically bound by the

obligation. They do not have to agree upon the obligation to be bound. *Effect in rem* instead of the insecurity that is typical of the perpetual clause. Another advantage of the obligation is that users of the property are also bound to the obligation if that is agreed upon by the parties. Another plus side is that in seizure and bankruptcy the obligation will 'survive' whereas the perpetual clause will terminate.

A disadvantage of the concept I find to be the intrinsic limitation to tolerate or not to do something, since the perpetual clause does not have any intrinsic limits whatsoever. As a result of notarial disciplining proceedings the perpetual clauses are given a semi-property-linked effect. Even in the case of a servitude, additional obligations to do something are allowed, a possibility that is in general controversial in the law of property. The aforementioned practice makes it possible to give an effect in rem to obligations to do something. Since it is not possible to enter perpetual clauses in the public register, the situation where obligations are unknown to the public will occur, a situation that was feared when the introduction of the qualitative obligation was discussed.
In my opinion it should be possible to follow the 'regal route' and to amend article 6:252 of the Civil Code in such a manner that it is possible to make obligations to do something an actual part of the obligation. The possible negative side-effects of this possibility can be reversed by extending the repressive possibilities of Articles 6:258 and 259 of the Civil Code.
This vision was already expressed by Smalbraak in 1966. He was also of the opinion that the fear of overburdening the property was ill-based and that excesses could be combated with the possibilities given in Articles 6:258 and 259 of the Civil Code.

9.2 What position does the obligation occupy within our legal system?

This question also cannot be answered with a mere yes or no. Although Parliament expressly typified the obligation as being a servitude without a dominant tenement, and explained that the positioning in Book 6 of the Civil Code was disputable, the emphasis has always been on the obligational character of the concept.
The coming into effect (two agreements), the distinctive possibility to enter the obligation in the public register (Article 6:252 section 2 Civil Code) and the special provision of Article 6:252 section 3 Civil Code all point in the direction of the law of obligations with all its restrictions and possibilities.
In this research also many situations have been presented in which the 'obligational approach' is unsatisfactory and it is necessary to choose an analogical application of the concepts in the law of property.

In the separate conclusions in the various Chapters I have already pointed out in what situations we have to choose for the principles of the law of property in order to achieve the best possible result, but I will sum them up once more:

1. In determining the content of the obligation attached to a certain capacity the legislator has obviously chosen the same intrinsic limitation as applies to the servitude. It is not the freedom of the parties that applies to the perpetual clause, but the limitation to tolerate or not to do something as is familiar in the law of property. I have already expressed my opinion that this limitation is not a good one;
2. In order to obtain the *effect in rem* the agreements must be laid down in a notarial deed and entered in the public registers. These identical requirements apply to the creation of property rights.
3. In order to obtain the *effect in rem* the property must 'belong' to the debtor, a requirement that must be read as having the power of disposition;
4. As a result of the requirement of entry in the public registers, the provisions protecting third parties (Articles 3:24, 25 and 26) must apply (by analogy);
5. As a result of the requirement of power of disposition, it is also a natural conclusion to allow the provisions for protecting third parties in the situation that the debtor does not have a power of disposition to apply analogically;
6. In the situation of release as referred to in Article 3:273 of the Civil Code the obligation must lapse in the same way as posterior limited rights do. In my opinion it would here be in accordance with the special position of the creditor of an obligation that is attached to a certain capacity also to offer compensation in exchange, like Article 3:282 of the Civil Code provides for (former) limited right holders;
7. If the property to which an obligation is attached is seized Article 505(3) of the Code of Civil Procedure must apply. The seizure will not be effective if the deed concerning the attachment of the capacity is entered on, at the latest, the first working day following that on which the deed was made, provided of course that the deed was made before the property was seized;
8. When it comes to the explanation of the content of the obligation the objective method applies. This method also applies in the law of property. The 'Haviltex clause' does not apply;
9. Just as the extinction of a limited right can be entered in the public registers, it must also be possible to enter the extinction of the obligation;
10. In bankruptcy the trustee must comply with the obligation in the sense that the trustee cannot violate the obligation in such a manner that it will lead to irreversible situations. This is different from 'ordinary' obligations where it is not possible to demand specific performance from the trustee in bankruptcy.

This list of situations in which the application of the law of property leads to more satisfactory results than the application of the law of obligations is quite impressive. Could this lead to the conclusion that the legislator has made an incorrect decision by placing the obligation attached to a certain capacity in Book 6, and that it would have been better to place it in the fifth book relating to the law of property?

Would it not have been better to make the obligation a limited right, as has been done in Scotland and Germany?
Although this is a tempting idea, I do think the obligation belongs in Book 6. I admit that it is sometimes necessary to apply principles of the law of property in order to allow the concept to flourish, but the positioning in Book 6 has obvious advantages.
In my opinion the main advantage is the freedom which parties have to choose who is bound by the obligation. A principle of limited rights is that they are linked to property and that the person entitled to the right does not have the freedom to decide who is or who is not bound.
A second advantage is that even before the obligation is entered in the public registers, the parties are bound by the obligation. This advantage was already mentioned by the legislator and was an important reason for placing the obligation in Book 6.
Finally, it is possible, since the obligation has been placed in Book 6, to extend the content of the obligation to obligations to do something. If the obligation was placed in Book 5, the extension to obligations to do something would have been controversial.

In summary, the obligation attached to a certain capacity is in fact a hybrid concept. Placed in the law of obligations, its flexible character is nourished, but it needs the support of the law of property to obtain the effect *in rem* that distinguishes it from the 'ordinary' obligations and that gives it a special position in the transfer of the property, in bankruptcy and in seizure. Although the legislator has made the right choice by placing the obligation in Book 6, it is recommended that some adjustments should be made to Article 6:252 of the Civil Code, as well as to some other Articles, in order to give the concept its full effect.
The necessary adjustments are:

- amending Articles 3:273 and 3:282 of the Civil Code in the sense that it is made clear that the obligation also lapses, and that the former creditor is compensated;
- amending Article 505(3) of the Code of Civil Procedure in the sense that a seizure will not be effective if the deed concerning the attachment of the capacity is entered on, at the latest, the first working day following that on which the deed was made, provided of course that the deed was made before the property was seized;
- amending Article 3:17 of the Civil Code in order to make it possible to enter the extinction of the obligation in the public registers;
- amending Article 3:88 of the Civil Code in such a way that the Article also applies to the situation where the debtor does not have a power of disposition;
- amending Articles 3:24-26 of the Civil Code in such a way that they will also apply to the obligation attached to a certain capacity;

– amending Article 6:259 of the Civil Code in the sense that the ten-year term as well as section 2 are scrapped.

And, of course, amending Article 6:252 of the Civil Code in the following manner:

1. A contract may stipulate that an obligation to suffer or refrain from doing something in respect of a registered property of which the debtor has the power of disposition shall be transmitted to persons who acquire the property by particular title. The parties may also stipulate that those who acquire a right to use the property from the party entitled thereto are in fact bound.
2. For the stipulation referred to in paragraph 1 to have effect, a notarial deed regulating the contracts must be drawn up between the parties, followed by its registration in the public registers. The obligor of the obligation to which the stipulation relates must, in the deed itself, choose an address in the Netherlands for the purpose of registration.
3. Even after registration, the stipulation has no effect against:
   a. persons who, prior to registration, acquired a right to the property or a right to its use by particular title;
   b. persons who seize (*attach*) the property or a right thereover, if the registration had not yet taken place at the time of registering the official report of seizure (*attachment*);
   c. persons who acquired their right from a person who was not bound by the stipulated obligation.
4. Where, in exchange for the obligation, consideration (*counter-obligation*) has been agreed, the right to that consideration (*counter-obligation*) is also transferred upon the transmission of the obligation to the extent that it relates to the period following the transmission. Stipulations with respect to this consideration (*counter-obligation*) may also been registered in the registers.
5. This article does not apply to obligations which limit a party so entitled in its power to dispose of or to encumber the property.