

WAYS OF CHANGES IN PROPERTY RIGHTS

Funda Nezir, page 67-78

ABSTRACT

There are legal transactions that directly affect a right in the property of a person, transferring that right to another person, limiting it, changing or terminating its legal content. With the execution of legal transactions, the absolute and relative rights in the assets of the person are affected, causing changes in the concept of right ownership. Peculium process are usually done to settle a loan that is charged with a debt transaction. Absolute rights, relative rights and legal relationship in assets are among the rights that may be subject to peculium process. In our study, theoretically, in a narrow sense, the effect of legal transactions on assets has been discussed. Based on this scope; The effect of disposition on the right has been examined in terms of the peculium process, the types of affecting the right, and finally the absolute and relative rights in the assets.

Keywords: Assets, Peculium Process, Rights.



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1. THE EFFECT OF THE PECULIUM PROCESS ON THE RIGHTS

1.1. The Effect of Rights on Assets

The main subject of the peculium process consists of rights. The right in the assets of the right owner; It can be transferred, limited, terminated, or its content can be changed. While defining the peculium process, we see that in the doctrine, most authors have made a narrow definition of the peculium process and limited the definition only to the case when the right is affected¹. A group of authors in the doctrine that defines the concept of the peculium process, based on the affected right, argue that a legal relationship may also be the subject of a disposition transaction. As a matter of fact, some group of authors only made the definition of the disposition process and did not add the affected legal relationship element to this definition because they did not start from the affected right. In the peculium process, which can be divided into narrow and wide, the subject of the peculium process in a broad sense is the right or legal relationship. In a broad sense, the definition of the peculium process is as follows². Peculium process is a legal transaction that directly affects an existing right or legal relationship, transfers, restricts, terminates or changes its content. The doctrine argues that the right is subject of the peculium process³. According to Flume, the subject of the peculium process consists only of rights. If a legal relationship is canceled or if the right to withdraw from the contract for any reason whatever is used, it is not the legal transaction itself that is affected, but the right within this transaction and the subject of the transaction is affected. In the narrow sense, the peculium process includes only the right, while it is known that the peculium process in the broad sense includes the right or legal relationship⁴.

¹ Mustafa Dural, Suat Sarı, **Türk Özel Hukuku Cilt I Temel Kavramlar ve Medeni Kanunun Başlangıç Hükümleri**, İstanbul 2012, N. 1132; Hugo Oser, Wilhelm Schönenberger, **Kommentar Zum Schweizerischen Zivilgesetzbuch Das Obligationenrecht**, Erster Halbband: Art.1-40, Zürich 1929. N. 50.

² Lorenz, **a.g.e.**, s. 489; Bayerle, **a.g.e.**, s. 1079.

³ Flume, **a.g.e.**, 5b.

⁴ Robert Lauko, **Art. 152 Abs. 3 OR und die aufschiebend bedingte Abtretung**, Zürich 2012. s. 17; Andreas Von Tuhr, Hans Peter, **Allgemeiner Teil des Schweizerischen Obligationenrechts**, Erster Band, S 25, Zürich 1979, s. 194.

While explaining the peculium process, Von Tuhr, who discussed the peculium process more broadly, stated that it could be the subject of all kinds of rights or legal transactions that can be changed at the will of the parties. While it is not possible for the assets to be subject to the peculium process as a whole, it is concluded that only an element included in the asset may be subject to the peculium process. The right subject to the peculium process is affected as a result of this transaction, while this effect is either in the form of transferring, limiting, terminating the right or creating a change in the content of the right, consequently reducing the assets of the person making the transaction. What should be understood from peculium process in goods is actually peculium process on property⁵. When the subject of peculium process is not the item, it is the right on the goods and there is no peculium on the goods⁶. Depending on whether the right has a value that can be measured in money, the right is subjected to the distinction between the right of individual existence and right to property. Since the right to personal property does not have a monetary value and is excluded from the right of assets, it cannot be subject to disposal. Since the asset right has a quality that can be measured in money, it is divided into two as absolute rights and relative rights. Absolute right is divided into real right and intellectual right; In the relative rights group, there is the right to receive. Absolute rights and intellectual property rights can be subject to disposal, as they are property rights that can be measured by money⁷.

1.2. Effect on Rights Not Included in Assets

In order for a right to be the subject of a peculium process, as we have stated before, this right must be included in its assets. If the right is included in the assets, it will naturally be the subject of the peculium process. In the borrowing transaction, which paved the way for the formation of the peculium process, the inclusion of the right in the assets was not sought. If the person wishes, he can make a debt transaction regarding a right that is not included in his assets and this borrowing transaction is valid. This situation does not mean the same for the

⁵ Nuşin Ayiter, **Mamelek Kavramı Üzerinde İnceleme**, Ankara 1968, s. 27.

⁶ Von Tuhr, Peter, **a.g.e.**, s. 194; Haedicke, **a.g.e.**, s. 967; Kudret Ayiter, **Medeni Hukukta Tasarruf Muameleleri**, İstanbul 1953, s. 17.

⁷ Von Tuhr, **a.g.e.**, s. 239.

peculium process and raises the following question. Can a person make a right that is not included in his / her assets the subject of a peculium process? A right that is not included in a person's property may belong to another person or a right that does not exist in the realm of law⁸. The right belonging to someone else can be a right that the person can have later or a right to which he is not connected in any way. If a peculium process has been made regarding the right belonging to someone else, if the owner of the right approves this transaction later, or if the unauthorized person gains the right in this peculium process later in any way, the transaction becomes valid. Can this rule be applied to the right that does not exist? Subjecting a non-existent right to a disposal process and then applying the above-mentioned rule in any way constitutes a violation of the law in line with the principle of certainty. In terms of absolute and relative rights, it is not possible to attribute the state of disposition of non-existent rights to a general rule, but it is necessary to examine the issue by making a distinction between absolute rights not included in assets and relative rights not included in assets. The application of this principle to the disposition of the non-existent right would be contrary to the expression of the law.

2. WAYS TO EFFECT THE RIGHTS

While defining the peculium process, we stated that it is a legal transaction that directly affects the right. The right is affected in various ways. For example, in the transfer of ownership, when a right is transferred in the transfer of receivables; a right is restricted in establishing an easement right on the property; In the debt relationship, the content of the receivable right changes with the granting of a new period to the debtor and the right ends when the movable ownership is waived. As can be seen, the peculium process occurs in the form of transfer, termination, limitation and content change.

2.1. Transfer of the Right with the Peculium Process

The most common peculium process is the one in which a right is transferred. The peculium process causes the connection between the right

⁸ Andreas Von Tuhr, “**Verfügung über Künftige Forderungen**”, JZ, 1904/9, s. 428.

and the former owner to disappear as a result of the transfer of the right⁹. With the transfer of the right in the peculium process, the bond between the person and his right ends, and a new bond is established between the transferred right and the new person. With the transfer process, while the right is directly affected, the owner of the right also changes. The process of waiving a right and the transfer of the right does not mean the same situation. When a right is waived, there is no new bond between another person and the right, while in a peculium process where a right is transferred, the connection between the former owner and the right ends and the new owner of the right takes this place.

In order for a right to be a subject of transfer by being directly affected by the peculium process, the right must be a right that can be transferred. The inalienability of a right may arise from either the law, the nature of the right itself or the conclusion of a transfer prohibition agreement between the parties in terms of the right to receive. It is not possible to waive or limit this authority by any legal action. It is not possible to make a transferable right inalienable with the agreement of the parties, that is to prevent the transfer. In the transfer process, the person who transfers the right becomes the owner of this right from the moment of transfer.

The agreement of the parties that the transfer transaction has a retroactive effect is not valid because the transfer transactions create a forward-looking effect. Transfer transactions can be in the form of mutual or unrequited gains. Most of the transfers are usually done in a mutual form. An example for unrequited gains can be given a donation agreement. While the right is transferred in this kind of peculium process, the right is acquired without any need for transfer and gratuity since the person who earns the right does not make a payment in return for this transfer. Savings in order to transfer a right must be made by contract¹⁰. Even if the connection with the former owner of the right is terminated after the transfer, some liabilities may continue. After the transfer of the property right with the contract of sale, if the former owner has given a guarantee, his liability continues. In terms of absolute and relative rights, the transfer

⁹ Jale G. Akipek, Turgut Akıntürk, **Eşya Hukuku**, İstanbul 2009, s. 461

¹⁰ Von Tuhr, Peter, **a.g.e.**, s. 147.

of the right may have different results. In the transfer of the receivable right, the new owner has the right to demand the receivable¹¹.

2.2. Termination of the Right with Peculium Process

Peculium process is another way of transaction that terminate the right. The peculium process that terminates a right, a connection is not established between the right and a new person, the right is not transferred to another person, that is, the bond between the right and the right owner is definitively terminated. Regardless of whether the peculium process terminating the right is a unilateral transaction or contract, it is safe to use the word waiver for these transactions. Because renunciation means that the right owner relinquishes his right without transferring a right in his property to another person and without creating a new right¹². To be able to waive a right, that right must be a waiver. Because if the right is not transferable, the peculium process made in this case will not be valid. It is not possible to render a right that is waived at the parties own free will. This process in this direction refers to the limitation or abolition of the disposal authority through a contract. As a matter of fact, this transaction, which the person has promised not to waive with the borrowing transaction is valid, and on the contrary, the waiver may result in debt. The waiver takes effect with effect on the provisions. It is not possible to effectively relinquish absolute rights or claims to the past¹³. The waiver implicitly gives a right to the person, that is, the waiver of a right creates conditions suitable for the gain of another person, as this right will become unclaimed. In addition, the waiver can make another person's situation more favorable. As a result of a waiver of a limited right in rem, the owner becomes more favorable.

As we have mentioned before, the peculium process can manifest as a gaining and subtractive process. The type of transaction that terminates a right without transferring it, which is generally done as a unilateral transaction and does not provide a gain for another, is called a subtractive

¹¹ Von Tuhr, **a.g.e.**, s. 59.

¹² ¹² Von Tuhr, **a.g.e.**, s. 265; Heinrich Simons, **Der Verzicht im Bürgerlichen Gesetzbuch**, Köln 1935, s. 12.

¹³ Von Tuhr, **a.g.e.**, s. 272;

transaction. In the field of absolute rights, the person can disown this right by terminating and relinquishing his right of his own will, but this situation is unacceptable in terms of the right to claim. The removal of the receivable right from its assets is always a profitable transaction for another person, and in this case, the peculium process is a profitable peculium process. When we look at the right in the property, it is accepted that the right is a subtractive peculium process due to the waiver of the property of the person without entering the property of another person. A person can abandon an item in his possession and abandon this item. However, it is not possible to disown the debt right by unilateral waiver.

As an example of an exception to the rule that the right to claim will not be subject¹⁴ to a unilateral waiver, we can give the case where the will of the will waiver waives the claim right and this exception is accepted in the doctrine¹⁵. As we have stated, a claim rights cannot be the subject of a unilateral waiver, while a legal relationship cannot be subject to unilateral waiver. In order to abolish the legal relationship, that is, to be deleted from the legal realm, the parties must make a rescission agreement. Restraint agreement is a type of contract in which the parties of a legal relationship terminate by agreeing to their rights and receivables arising from the contract and their qualifications to be a party in the contract, in a broad sense of the nature of a peculium process.

2.3. Limitation of the Right by Peculium Process

While the acquisition of the right is in the form of transfer and actually acquisition, another type of acquisition is the establishment of the right. Establishing the right, based on a right in the property of the person, a right that was not included in the property independently before is established and another person immediately gains this right when this new right is established¹⁶. When limiting a property right to a limited real right or a right of debt to a pledge or usufruct right, a right that is actually

¹⁴ Nuredin, A. (2016). A Ius Cogens Rules in the International Treaty Law. *International Scientific Journal Vision*, 1(1), 17-28.

¹⁵ Von Tuhr, **a.g.e.**, s. 270.

¹⁶ Hatemi, **a.g.e.**, s. 8; M. Kemal Oğuzman, Nami Barlas, **Medeni Hukuk**, İstanbul 2012, s. 237; Rona Serozan, **Medeni Hukuk**, II S 7, İstanbul 2008, N. 3; Mustafa Dural, Suat Sarı, **Türk Özel Hukuku Cilt I Temel Kavramlar ve Medeni Kanunun Başlangıç Hükümleri**, İstanbul 2012. s. 1189.

included in the property is limited to another right, thus a right that was not previously included in the property of the person is established, that is, the new right is established and the new right is acquired by another. A right included in the assets can give more than one authority to its owner. The person can use his / her own property right, benefit from his / her benefits or consume it. In the establishment of the right, one or more of these powers that are included in the original right are separated from the original right.

Another right is derived with the peculium process restricting the right and this derived right belongs to someone else. As a result of the independence of one or more powers belonging to the original right, the derived right and the original right have a negative content. In other words, the original right owner is under the obligation to refrain or bear due to the derived right. While the original right may be subject to peculium process with the right that limits itself, the derived right may also be subject to peculium process in a separate form. In order for a right to be restrict able, it must have this feature. If the original right is transferred to another person, the new right owner will also be the owner of the limited derived original right. In case of waiver of the real right or the relative right, different situations arise in the derived right. If the right to be waived is the same right in kind, then the derived right continues to exist. If the relative right is waived, it will end in the derived right, so the derivative right holder must also consent to this situation. It allows the establishment of more than one derived right due to its proprietary right content. If there is more than one derived right on the same item, their relationship with each other is only determined according to the priority between them.

2.4. Changing the Content of the Right with the Peculium Process

It can be in the form of changing a right without losing its quality, changing its content or changing its side. As a result of the change in the content of a right with the peculium process, the content of the right changes without any change in the right owner¹⁷. With the change of the content of the right, the right strengthens, weakens or even if the content

¹⁷ Erich Schulz, *Der Begriff der Verfügung*, Breslau 1903, s. 41.

of the right has changed, the right may remain as it is. For example, the right to claim is strengthened by annotation to the title deed of the lease contract, and if the annotation is abandoned, then the right will be weakened. In order for a change to be made in the content of the right, the right must be changeable. Changing the content of the right may be prevented due to the provision of law or the agreement between the parties. For example, while it is not possible to change the property right due to the principle of commitment to type, it is possible to change the way of using the limited real right.

Transaction regarding the change in the content of the right are proactive and the parties cannot ensure that this change has an impact on the past. As a matter of fact, while this rule finds an application area without exception in terms of absolute rights, it is possible that the peculium process aimed at changing the right to claim can be retroactive. By changing the borrowing transaction or the right to claim, the debt transaction or credit right does not disappear, but only changes. The creditor is deemed to have made a disposition on the right to receive or legal relationship in the transactions of undertaking the debt, participating in the debt, undertaking the contract or participating in the contract. In undertaking the debt, the debtor changes, in participating in the debt or contract, someone else stands with the debtor as the debtor.

In these transactions, it should be accepted that the creditor accepts the change in the status of the debtor and this change made in terms of the debtor is a changing peculium process that directly affects the receivable right. In the event that the right of credit or the debtor of the contract changes, this may create a more beneficial or less beneficial situation for the creditor than before. Thus, in cases where the debtor of the right to receive changes or when a new debtor is added to the debtor, the transaction in which the debtor of the contract changes or a new debtor joins the debtor is a peculium process in a broad sense.

CONCLUSION

In our study, we have examined the transfer of real estate and movable properties, limitation, renunciation of ownership rights, and transfer of receivables, which are considered to be a peculium process. The law seeks

the existence of two elements in order for the transfer of a real estate property to be valid, that is, to make a provision. The first of these elements is the existence of a valid legal reason and the second is the request for registration. It should be accepted that the registration request is in the nature of a real contract. There are many indications to accept that the registration request is in the nature of a contract in kind. First of all, in the process of transfer of movable ownership, the existence of the same contract has been accepted. The same conclusion should be reached in terms of real property ownership. In the process of acquiring the real property of the buyer, a clear acceptance declaration is not required and if the proposal made within the appropriate time is not rejected, the parties in kind will be concluded.

The process of acquiring movable ownership is completed with the debt transaction, contract and transfer of possession. Even though the same contract is a peculium process, it does not result in the acquisition of the property right alone in the transition of the movable property. It is necessary to add a transfer of possession to the same contract. The transfer of possession without a real contract does not affect the right, nor does it affect the right to make a real contract on its own. In this process, the peculium process is created together with the same contract and the transfer of possession. The rule stating that the peculium process cannot be stipulated is also valid in terms of the peculium process regarding the movable property. The transfer of claims rights is a peculium process. Two transactions are required for the right of receivables to be transferred from the assets of the creditor to the assets of the new creditor. The first transaction is the borrowing transaction or the contract for the transfer of receivables, and the second is the peculium process.

The transfer of the receivable right to the assets of the transferee depends on the validity of the promise of transfer of the receivable that is a debt transaction. Otherwise, the receivable continues to remain in the assets of the transferring party, and in this case, there is no need for a refund request. The principle of commitment to cause must be accepted in the transfer and release of the receivable. The principle of dependence on cause is sought in the field of relative rights, during and after the disposal process. Thus, the reversal from the borrowing transaction regarding the relative right has the same effect and creates the result that the receivable right is automatically transferred to the assets of the former creditor

without any transaction. As a result, the peculium process made in both the area of absolute rights and relative rights depend on the cause.

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