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**SOME OBSERVATIONS OF THE RECEPTION OF THE
PRAESUMPTIO MUCIANA INTO CATALAN LAW**

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I. INTRODUCTION

As its title suggests, the aim of this study is to report a series of considerations regarding the reception, and exceptional survival, of the *praesumptio muciana* from Roman law¹ into Catalan law, until the reform of the 1960 Compilation in 1984.

This investigation is fully justified in view of the fact that only the Compilation of Special Civil Law of Catalonia of 1960, albeit with some variations, maintained this presumption with the same structure and, at first sight, the same objective as in Roman law, in which it had already undergone development.

Although it is true that the *praesumptio muciana* of Roman law appeared in the *Partidas*, specifically in *Partida 3, 14, 2*,

* Published in Spanish, with some alterations, under the title *Algunas consideraciones sobre la praesumptio muciana en el Derecho romano y su recepción en el Derecho catalán*, in *Libro Homenaje al Prof. Armando Torrent*, published by Dykinson, Madrid, 2016, pp. 241-263, at pp. 252-263. This is a more extended work by P. DOMÍNGUEZ and E. M^a. POLO ARÉVALO, which also looks at the configuration of the concept in Roman law.

¹ For an examination of this presumption in the light of Roman legal sources, see the recent study by DOMÍNGUEZ and POLO ARÉVALO, *Algunas consideraciones sobre la praesumptio muciana*, cit., pp. 241-251.

original function², it may be defined as a presumption according to which property acquired by a woman while she is married, or to be more precise property possessed by her³, the origin of which can not be proved, is presumed to come from her husband. Thus, by virtue of this presumption, which was of a clearly procedural nature as it only applied in the context of court dispute between a wife and her husband or his heirs concerning ownership of a good or goods unlawfully held by the wife, in the course of marriage⁴, it was considered that the husband, unless proven otherwise, was the owner of said good or goods⁵ or that he had made a gift of it to his wife.

The Roman law *praesumptio muciana* passed into medieval common law, and from there, it came to form part of Catalan civil law⁶. Commentators of the *Ius commune*, particularly

² See *id.* n. anterior, pp. 244 ff.

³ Cfr. VIRGILI SORRIBES, F., *Proyección de la presunción muciana en Derecho común* (Presentation to the *Academia Madritense del Notariado* 9 December 1955), in *Anales de la Academia Madritense del Notariado*, X (1959), p. 293.

⁴ As made apparent in the text of POMPONIUS, D. 24, 1, 51 5 *ad Quintum Mucium*: ...*cum in controversiam venit*,...

⁵ See in this regard, MARTÍNEZ DE MORENTIN, L., *Régimen jurídico de las presunciones*, Madrid, 2007, p. 169.

Catalan commentators (such as BALDO, BARTOLO, CANCER, FONTANELLA, MENOCHIO, FABRO...), discuss the use of the Roman presumption and although it is true they throw a little more light on various questions it raised, by application of Roman law, it is also the case that there are important questions which remain unclear⁷.

At this point history, MARTÍNEZ DE MORENTIN points out, the presumption would also be applied to cases in which the wife was able to demonstrate acquisition by onerous title from a third party, it being presumed *iuris tantum* that the consideration or price paid came from the husband. Indeed, as the author notes, in the *Ius commune* it appears that this presumption referred to this case of “external acquisition” by the wife. And therefore, on the understanding that the husband, unless proven otherwise, provided the consideration, the main object of discussion was to determine if what should be

⁶ Cfr. among others, PUIG FERRIOL, LL., *L'estat civil de dona casada segons dret vigent a Catalunya*, Barcelona, 1971, p. 65; PARA MARTÍN, A., *Presunción muciana y nulidad de donaciones entre cónyuges en Cataluña*, Barcelona, 1981, p. 21; TORTORICI PASTOR, C., *En torno a la muciana moderna del artículo 1442 del Código Civil*, in *Anuario de Derecho Civil*, 43-part 1 (1990) pp. 1189 ff., p. 1191.

⁷ PARA MARTÍN, *ibidem*, pp. 21 and 26. In line with this it should be pointed out, for example, that these commentators rejected what is today called the “theory of real subrogation”, as they distinguish between, and

Islands and Navarre, precisely because of the application of Roman law, it only managed to survive in Catalan civil law, as art. 3. 3 of the Balearic Compilation (approved by Law 5/1961 of 19 April)¹⁵, and law 103 c) of the Compilation of the *Foral* Civil Law of Navarre (approved by Law 1/1973 of 1 March),

In Spanish law, under art. 1442 of the Civil Code (Law 11/1981 of 13 May, by which certain articles of this Code relating to filiation, parental authority and the matrimonial property regime were modified) and art. 12 of the Family Code of Catalonia (Law 9/1998 of 15 July); in the legislative studies for the reform of the bankruptcy law (art. 264 of the APLC 1983 and art. 79 of the PAPLC 1995), the decision was taken not only to uphold this presumption, but to transfer it from the civil code to the law regulating bankruptcy. In keeping with successive attempts to reform bankruptcy law, Law 22/2003 of 9 July, transferred the *praesumptio muciana* for bankruptcy from the civil code to that of bankruptcy, with a regulation that clearly differs from the aforementioned precedents and the law then in force until its approval, that is, arts. 1442 of the Civil Code and 12 the Catalan Family Code.

¹⁵ Transcribed in the same terms in the Consolidated Version of the Compilation of the Civil Law of the Balearic Islands (approved in Legislative Decree 79/1990 of 6 September): “The goods that belong to each of the spouses on the establishment of the regime of separate property and those they acquire by means of any title while this regime remains valid, shall be considered the the private property of each of them” (English translation).

when the regime for the separation of goods was agreed to¹⁶, removed it from their respective foral regions.

Before the entry into force of the Catalan Compilation of 1960¹⁷, in the absence of any rules of general application concerning the presumption originating from the laws of the Principality itself, it was enforced in Catalonia, as has been said, by virtue of the “roman rules” as supplementary law¹⁸, with the

¹⁶ Reproduced by Foral Law 5/1987 of 1 April (which modified the Compilation of Navarre) and in which it can be read (English translation) “It shall be presumed that the goods and rights for which there is no record of private ownership belong to the two spouses in equal and undivided halves”.

¹⁷ Law 40/1960 of 21 July, on the Compilation of the Special Civil Law of Catalonia.

¹⁸ Cfr. among others, LALINDE ABADÍA, J., *Capitulaciones y donaciones matrimoniales en el derecho catalán*, Barcelona, 1965, p. 170; PARA MARTÍN, *La presunción muciana en el Derecho civil de Cataluña*, in *Estudios jurídicos sobre la mujer catalana*, Barcelona, 1971 pp. 19 ff; *Id.*, *Presunción muciana y nulidad de donaciones*, cit., p. 58; ARNAU I RAVENTÓS, *Les presumpcions de donació del deutor concursat*, cit., p. 16; MARTÍNEZ DE MORENTIN, *Régimen jurídico de las presunciones*, cit., p. 16; LINARES, J. L., *Notas sobre la incorporación de la praesumptio muciana al inventario institucional de la Compilación del Derecho civil especial de Cataluña de 1960*, in *Revista General de Derecho Romano (IUSTEL)*, 16 (2011) pp. 1 ff, p. 11.

The *praesumptio muciana*, as correctly stated by GETE-ALONSO at the beginning of his commentary on art. 23 of the Compilation, is a question discussed (English translation) “Especially in the (sc. Catalan doctrine)...immediately prior to the Compilation and after it, as...in the older literature it

that the latter, on making the acquisition, or before this event, possessed sufficient income or any other kind of resources to make the acquisition”.

There is no doubt, as stated by ARNAU I RAVENTÓS, *Les presumpcions de donació del deutor concursat*, cit., p. 50, that the reform of Law 13/1984 of 20 March of the Compilation of the Special Civil Law of Catalonia, was the most significant milestone in the evolution of Catalan law, which on this subject has now arrived at the current art. 231-12 of the Civil Code of Catalonia, a provision that regulates the presumption of donation between spouses in the event of bankruptcy, that is, the so-called *praesumptio muciana* in case of bankruptcy, in which it is established that (English translation) “1. In case of one of the spouses being declared bankrupt, the property acquired by the other spouse by onerous title in the year prior to the declaration shall be subject to the following regime: a) If the consideration for the acquisition proceeds from the bankrupt spouse, the property shall be presumed to be a gift. b) If the bankrupt party cannot prove the origin of the consideration, it is presumed the gift amounts to half the price paid. 2. The presumption made in paragraph 1.b is destroyed if it can be proved that, at the time of the acquisition, the acquirer had sufficient income or funds to make the acquisition. 3. The presumptions established by this article shall not apply if the spouses were legally or de facto separated at the time of the acquisition”.

of the price with which the acquisition was made, then what is presumed as having been donated by the husband is the price³¹.

Thus, as recognised by the *communis opinio*, this article established two successive presumptions, so that the elimination of the first possibly giving rise to the subsidiary application of the second, provided that onerous title of acquisition could be proved, but not the source of the price paid.

In the case of the first presumption, that is, with regard to the goods that the wife acquires during marriage and whose source can not be justified, note that if we interpret this *ad litteram*, it would be unlikely to be applicable, as either the husband or his heirs would be unable to prove that the thing was acquired by the wife during the marriage (which is not presumed), or, if this was proved, it would be possible to demonstrate its origin in the sense of art. 23, and, consequently,

(analysis of the terms “property/goods”, “acquired, “during the marriage”).

³¹ For a summary of the contributions made by studies of the *praesumptio muciana* in the civil law of Catalonia in the period immediately before the Compilation and in the years after it, see the comments (*glosa*) on art. 23 by FAUS and CONDOMINES, in *Comentaris a la Compilació del Dret civil de Catalunya*, cit., and also GETE-ALONSO, *Comentario al art. 23 de la Compilación de Cataluña*, cit., pp. 355 ff.

in line with what was stated by QUINTUS MUCIUS SCAEVOLA by way of POMPONIUS, in D. 24, 1, 51³⁵.

As regards the second presumption of the precept, it would only be applicable when the wife could prove that the acquisition was by onerous title, but was unable to justify the origin of the price paid³⁶. In this case it is the price which is presumed to have been a gift from the husband to the wife³⁷.

In view of the above, it may be stated in line with the general doctrine that the double presumption of the precept

³⁵ *Quintus Mucius ait, cum in controversiam venit, unde ad mulierem quid pervenerit, ...*

³⁶ As pointed out by ARNAU I RAVENTÓS, *Les presumpcions de donació del deutor concursat*, cit., p. 52, n. 82, there was likewise no consensus concerning the type of justification that could be accredited by the wife. On this question see the bibliography cited by the author, *ibidem*.

³⁷ As the civil doctrine points out, in the case of registrable acts a married Catalan women will generally have documentary evidence to overturn the first of the presumptions. Concerning the unnecessary character of this second presumption, insofar as it would be included in the first of the presumptions formulated in generic terms, see PARA MARTIN, *Presunción muciana y nulidad de donaciones*, cit., pp. 108-110.

does not derive directly from Roman sources³⁸, but rather it is a creation of ROCA SASTRE³⁹, to protect, as far as possible, the property registration system from the effects of the *muciana*⁴⁰. In

³⁸ However, for RICART, *Desvanecimiento de la presunción muciana*, cit., pp. 646 and 652, the opinion that Roman law only interpreted the *praesumptio muciana* in its original sense was inaccurate, given that the later doctrine extended its scope (GETE-ALONSO, *Comentario al art. 23 de la Compilación de Cataluña*, cit., p. 426). In her opinion, the reference to the *Oratio Severi*, in D. 24, 1, 32, 1 *Ulp. 33 ad Sab.*, is clearly to what is later called by the civilists as “real subrogation”: “the validation extends to all the donations between husband and wife, including those in which the husband acquires to make a gift to his wife (*Oratio...donationibus non solum ad ea pertinet, quae nomine uxoris a viro comparata sunt...*). On this text, see RICART, *op. cit.*, pp. 640-641. The Romanist, having stated that this was noticed and did not raise any difficulties in Roman sources, acknowledges nevertheless that it was never made the object of interpretation.

³⁹ This was the view of PELAYO HORÉ, *La presunción muciana*, cit., pp. 824 ff. See ROCA SATRE, *Derecho hipotecario*, vol. III, cit., pp. 195 ff.

⁴⁰ In support of this construction, ROCA SATRE, *ibidem*, cites various constitutions of the Code, namely, C. 5, 16, 9 (a. 238 d. C.); C. 4, 50, 6 (a. 293-304 d. C.); C. 4, 50, 8 -9 (a. 393-305 d. C.), the latte under the significant rubric “*Si quis alteri vel sibi sub alterius nomine vel aliena pecunia emerit*”, and also fragments of FONTANELLA. In his view, *op. cit.*, p. 200, in the Roman context the fragments are related with the rule “*per extraneam personam nihil nobis acquirii potest*”, so that, by extension, “the woman married under the separate property regime may never be considered an instrument of acquisition of her husband's property” (English translation).

this way, as pointed out by LALINDE ABADÍA (English translation)⁴¹, “it is possible to guarantee an acquisition by a third party, insofar as the goods fall outside the presumption when they are the object of normal trade”.

The fact of one of the spouses, in our case, the husband paying so that the other acquires goods raises the question, according to RICART, of what the civilists refer to as “real subrogation”⁴²; the Catalan legal tradition and the civil law doctrine highlighted in relation to the *praesumptio muciana* the idea that “it is not (only) what is acquired that is presumed as having been donated by the husband, but also the price invested in this legal transaction”⁴³.

The author concludes (p. 201) that, except in cases of simulation, when the woman under the separate property regime purchases with her husband's money, real subrogation does not occur, but rather the wife acquires the ownership of the property if it is delivered to her, and the husband only has a personal action for the price.

⁴¹ *Capitulaciones y donaciones matrimoniales*, cit., p. 174.

⁴² RICART, *Desvanecimiento de la presunción muciana*, cit., p. 652.

⁴³ GETE-ALONSO, *Comentario al art. 23 de la Compilación de Cataluña*, cit., cited by RICART, *ibidem*, p. 652, n. 37.

Although the classical authors of the Catalan legal tradition do not expressly refer to this question⁴⁴, the subsequent doctrine, in particular during the long period of preparation of the Compilation, involved discussions about the object or scope of the presumption⁴⁵, with two basic theses being formulated⁴⁶, thus:

For some, it simply had to be presumed *iuris tantum* that the property acquired by the wife originated from a donation received from the husband, which means that although the wife could accredit the (onerous) title of acquisition, but not the origin of the price paid, in virtue of the “theory of real subrogation” it should also be understood that it was the good

⁴⁴ RICART, in *Desvanecimiento de la presunción muciana*, cit., p. 654, speaks of “donations between spouses by real subrogation”.

⁴⁵ GETE-ALONSO, *id.* n. 43, considers the culminating moment of the dispute occurred in the 10 years prior to the approval of the Compilation (1960). RICART, *ibidem*, p. 656, criticises the fact that in this dispute (English translation) “the true Roman view of the presumption is missing, which was always placed at the procedural level, and whose effects were felt in the reversal of the burden of proof, and never at the dogmatic level”.

⁴⁶ Cfr. TORTORICI PASTOR, *En torno a la muciana moderna*, cit., pp. 1190-1191. For a complete summary of the theories defended on the subject, see ROCA SASTRE, *Derecho hipotecario*, vol. III, cit., pp. 197 ff.

separation of matrimonial property acquired anything with her husband's money, there was no real subrogation, she acquired the ownership of the property if it was delivered to her, and the husband could only resort, in turn, to a personal action for the price.

The main support or basis for the view of ROCA SASTRE⁵¹, which, as has been seen, is that used by art. 23 of the Compilation, is that under the separate property regime, typical of Roman law, it is not possible to apply the mechanism of real subrogation because there is no common patrimony, there are simply two patrimonies -the private patrimony of the husband and the private patrimony of the wife- between which there is no connection whatsoever; which means each spouse is the sole instrument of acquisition of their own patrimony⁵². The consequence of this is that if the husband, in his lifetime, revoked the gift, or his wife died before him, he could claim from her or from her heirs the money used in the acquisition, but not the property acquired, which belonged to the wife. In short, we concur with PARA MARTÍN that the solution adopted by the precept served to resolve the doctrinal dispute prior to the introduction of Compilation concerning the

⁵¹ *Id.* n. 49.

⁵² TORTORICI PASTOR, *En torno a la muciana moderna*, cit., p. 1191.

formula which Roman jurists probably did not accept even in the time of QUINTUS MUCIUS SCAEVOLA”, a view we do not share⁵⁸, concludes that art. 23 promoting the *praesumptio muciana*, and which was undoubtedly “meant to be prudent

⁵⁸ Although the origin and basis of the rule prohibiting gifts between spouses can not be dealt with here, what is undeniable is that the prohibition was mitigated in 206 AD with a *senatusconsultum* from SEVERO and CARACALLA (*Oratio Severi*), at a much later date than the period in which the jurist QUINTUS MUCIUS SCAEVOLA lived (assassinated in 82 BC), and which is reported by ULPIANUS in D. 24, 1, 32 33 *ad Sab.*: (pr.) *Cum hic status esset donationum inter virum et uxorem, quem antea rettulimus, imperator noster antoninus augustus ante excessum divi severi patris sui oratione in senatu habita auctor fuit senatui censendi fulvio aemiliano et nummio albino consulibus, ut aliquid laxaret ex iuris rigore. (1.) Oratio autem imperatoris nostri de confirmandis donationibus non solum ad ea pertinet, quae nomine uxoris a viro comparata sunt, sed ad omnes donationes inter virum et uxorem factas, ut et ipso iure res fiant eius cui donatae sunt et obligatio sit civilis et de falcidia ubi possit locum habere tractandum sit: cui locum ita fore opinor, quasi testamento sit confirmatum quod donatum est. (2.) Ait oratio fas esse eum quidem qui donavit paenitere: heredem vero eripere forsitan adversus voluntatem supremam eius qui donaverit durum et avarum esse.*

In this *senatusconsultum* it was ordered that a gift made by the husband to the wife could be validated when the husband died, if he had not indicated his intention to revoke it. In this respect, see also C. 5, 16, 24 pr.

Concerning the impossibility of identifying exactly the origin of this prohibition in Roman law, see RICART, *Desvanecimiento de la presunción muciana*, cit., p. 648, n. 28, with bibliography.

donations between spouses, in order to protect the economic interests of the husband and his heirs in case of conflict with the wife or the widow regarding the source of property acquired during the marriage⁶¹.

Various opinions have also been expressed as to the basis and the purpose of the presumption contained in the original art. 23 of the Catalan Compilation⁶². The opinions stated, in the words of PARA MARTÍN (English translation)⁶³, “coincide substantially in basing the *praesumptio muciana* on what any presumption is founded: a maxim of experience. In the view of the legislator it is normal for whatever the wife acquires to be a donation from her husband”. What this does not mean, however, as PARA MARTÍN is at pains to point out, is that this was appropriate to the Catalan social reality of 1960 or in the years that followed⁶⁴.

⁶¹ It has been debated whether in Roman law this presumption could also be extended to protect the rights of the husband's creditors. On this question, see DOMÍNGUEZ and POLO ARÉVALO, *op. cit.*, n. 41.

⁶² See GETE-ALONSO, *Comentario al art. 23 de la Compilación de Cataluña*, *cit.*, pp. 423-444; PARA MARTÍN, *Presunción muciana y nulidad de donaciones*, *cit.*, pp. 121 ff.

⁶³ *Ibidem*, p. 119.

⁶⁴ *Id.* previous n.

It is not disputed that the basis for the presumption in the times of QUINTUS MUCIUS ESCAEVOLA was completely outdated by the time of the Catalan Compilation of 1960, as family structures by that time had nothing in common with those of Roman society. If we accept this, the immediate question is why it was maintained in Catalan civil law. A possible answer can be found in art. 29 of the draft prepared by the Codification Commission⁶⁵, who saw “the muciana” as a rule against fraud given that it was the only grounds that could still be enforced, with its effects being limited to the creditors and heirs of the husband. But as PELAYO HORÉ has pointed out, art. 23 of the Compilation unfortunately diverged from this proposal, making it impossible to interpret the precept in this way⁶⁶, with the presumption thus lacking an adequate basis in modern society (social reality of the day).

⁶⁵ “Property acquired by the wife during the marriage, including money and assets invested in the acquisition of other goods, shall be presumed to have been donated by her husband, if she does not justify from whom they were acquired. This presumption may only be invoked by the husband’s heirs and creditors: the latter to the extent necessary for the recovery of their claims” (English translation).

⁶⁶ PELAYO HORÉ, *La presunción muciana*, cit., pp. 817-818. Contrary to this generally held opinion, GARCÍA VALLÉS, R., *La presunción muciana y la Compilación de Derecho especial de Cataluña*, in *Revista Jurídica de Cataluña*,

