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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 law[1] 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,

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* 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. Mª. 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.

customary law was against it, and thus at the end of the XIV century Law 203 of the *Leyes de Estilo* replaced it with another (reproduced by the *Nueva Recopilación* 5, 9, 1 and the *Novísima Recopilación* 10, 4, 4), which constitutes the precedent for the current presumption of jointly owned property of the Spanish Civil Code (art. 1.328 of the Draft of the Civil Code of GARCÍA GOYENA, originally art. 1.407 of the Civil Code, now art. 1.361).

Thus, article 23 of the Compilation was the only rule which remained faithful to the Roman law tradition and was based on its original spirit, although after numerous criticisms of the original wording the reform of 1984 replaced the Roman presumption, a rule of evidence linked to the social and family environment for which it was devised but not in any way to the social context of the time, with a "bankruptcy-related presumption", which is significantly different and based on a different system in line with what is laid down in art. 1442 of the Spanish Civil Code (Law 11/1981, of 13 May).

II. RECEPTION OF THE PRESUMPTION INTO CATALAN CIVIL LAW

Although it is true there have been many interpretations of the so-called *praesumptio muciana* of Roman law, and of its

original function[2], 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 her[3], 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 marriage[4], it was considered that the husband, unless proven otherwise, was the owner of said good or goods[5] 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 law[6]. 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 controversim 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 unclear[7].

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

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[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

presumed as having been donated and, thus, to be restored, was the good acquired by onerous title or the money (compensation) paid[8], this last solution being the one accepted by historical law[9].

Turning now to the subject of this article, it should be stressed that although the *praesumptio muciana,* in its Roman law formulation[10], was included in the *Partidas*, specifically in

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include in the presumption, the thing and the price paid for it (see his citations in TORTORICI PASTOR, *op. cit*, pp. 1191-1192, ns. 5-9).

[8] MARTÍNEZ DE MORENTIN, *Régimen jurídico de las presunciones*, cit., p. 98.

[9] Cfr. ARNAU I RAVENTÓS, L., *Les presumpcions de donació del deutor concursat al seu cònyuge. A propòsit de l'article 78. 1 de la Llei 22/2003, de 9 de juliol, concursal*, in *Revista catalana de Dret Privat*, 5 (2005) pp. 11 ff, p. 15; MARTÍNEZ DE MORENTIN, *id*. previous note.

In general, regarding this second phase, see DELGADO ECHEVERRÍA, J., *El régimen matrimonial de separación de bienes en Cataluña*, Madrid, 1974, pp. 170 ff; PARA MARTÍN, *Presunción muciana y nulidad de donaciones,* cit., p. 21 ff; CUENA CASAS, M., *La protección de los acreedores en el régimen económico matrimonial de separación*, Madrid, 1999, p. 30; ASÚA GONZÁLEZ, C. I., *La presunción muciana concursal, el artículo 1.442 del Código civil*, Valencia, 2000, p. 16.

[10] Known also in civilist doctrine as the "traditional *praesumptio muciana*". In this regard, cfr. among others, ÁLVAREZ OLALLA, M. Mª.,

Partida 3, 14, 2[11], custom was opposed to it and, at the end of the XIV century, Law 203 of the *Leyes de Estilo* replaced it with another (reproduced in the *Nueva Recopilación* 5, 9, 1 and the *Novísima Recopilación* 10, 4, 4) which constitutes the precedent of the presumption of the community of accrued gains[12] (art. 1.328 of the Draft Spanish Civil Code of GARCÍA GOYENA of 1851, art. 1.407 of the Civil Code, today art. 1.361). Thus, the *praesumptio muciana* disappeared from Spain's common civil law[13], as the Civil Code of 1889, in line with the Napoleonic Code of 1809 and the other civil codes which followed it in the

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Responsabilidad patrimonial en el régimen de separación, Pamplona, 1993, pp. 333 ff.; CUENA CASAS, *ibidem*; ASÚA GONZÁLEZ, *op. cit.*

[11] See *Las siete Partidas del Sabio Rey Don Alonso IX, con las variantes de más interés, y con la glosa del Lic. Gregorio López*, II, Barcelona, 1844, pp. 274 ff.

[12] "Como quier que el derecho diga que todas las cosas que han marido, e muger, que todas presume el derecho que son del marido fasta que la muger muestre que son suyas. Pero la costumbre guardada es en contrario, que los bienes que han marido, y muger, que son de ambos por medio, salvo los que probare cada uno que son suyos apartadamente…" (= *El Fuero Real de España, diligentemente hecho por el noble Rey Don Alonso IX, glosado por Alonso Díaz de Montalvo*, I, Madrid, 1781, p. 66).

[13] In short, as TORTORICI PASTOR notes, in *En torno a la muciana moderna*, cit., p. 1.200, the disappearance of the "muciana" and the acceptance of the presumption of joint ownership is a result of the evolution in the matrimonial property regime in common civil law.

course of that century, did not contain it[14]. In Spain, although the presumption remained in force in Catalonia, the Balearic

[14] With codification, the *praesumptio muciana*, in its Roman formulation, disappears from common civil law, but the concern for fraud, an idea until that date not associated with the presumption, as pointed out by ARNAU I RAVENTÓS, *Les presumpcions de donació del deutor concursat,* cit., p. 15, justified the incorporation within the Codes of commerce, only in favour of creditors (first, of husband declared bankrupt and, later, of either spouse in that position), of a presumption which continued to be called "muciana", given that it had its origins in Roman law, but which presented notable differences from the earlier presumption and formed part of a different regime. This modern version of the *praesumptio muciana*, known as the doctrine of the "*praesumptio muciana* for bankruptcy", was included for the first time in art. 547 of the *Code de commerce* of 1807, this model being followed by Italy (art. 673 of the *Codice di commercio* of 1865), Belgium (art. 555 C. de c. of 1865), Germany (paragraph 45 of the *Konkursordnung* of 1877) and Mexico (arts. 1549 and 1550 C. de c. of 1884). Concerning the French precept, its influence on later texts and the way in which this new version was adopted in other European countries, see VIRGILI SORRIBES, *Proyección de la presunción muciana*, cit., pp. 326 ff.; TORTORICI PASTOR, *op.cit.,* pp. 1.993 ff.; and the bibliography cited by ARNAU I RAVENTÓS, *ibidem,* p. 15, n. 11.

Likewise, regarding the disappearance of the *praesumptio muciana* for bankruptcy from certain European legislations, including France (art. 542 *Code du commerce* was repealed by the Law of 13 June 1967) and Germany (paragraph 45 KO was declared unconstitutional by the Judgment of the Constitutional Court of 24 July 1968), see ASÚA GONZÁLEZ, *La presunción muciana concursal*, cit., pp. 24 ff.

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),

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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 to[16], *removed it from their respective foral regions*.

Before the entry into force of the Catalan Compilation of 1960[17], 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 law[18], 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.

exception of the area of Tortosa, in which it was applied under the provisions of the *Costums* of that county[19].

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[19] *Costums* of Tortosa, 5, 1, 8: "…On per ço si s'esdeu que ella ensems ab lo marit fa nuyl contrayt de compres o de vends o d'altres contrats, et el nom de la Muller en les compres o els altres contrayts sia posat e entitolat, tota via es entes que tot es feut dels bens del marit e comprat, e que la muller no y ha re donat ne pagat ne mes del seu propri, si no toto dels bens del marit, si doncs ella o sos hereus no provarem legalmet que ella del seu propi hi hagues pagat. Exceptat aço, que pot venir a successio els bens del marit mort entestat, desfallentes els davallants los ascendents et els collaterals, ans que nuly altre Fisc o altre" (version of LALINDE ABADÍA, *id*. previous n.). ="The wife can not obtain any benefit from the gains or improvements that her husband makes ... for which reason if she together with her husband enters into contracts of purchase, or of sale, or of any other nature, even though her name is in the contract and she appears as titleholder, it shall be understood that this agreement has been made with her husband's goods and that she has neither offered nor paid anything that is hers; unless she or her heirs can legally prove otherwise" (English translation based on modern Spanish version in ROCA SASTRE, R. Mª., *Derecho hipotecario*, Vol. III, 5ª ed., Barcelona, 1954, p. 196 and n. 3).
In relation to this text LALINDE ABADÍA, *Capitulaciones y donaciones matrimoniales* cit., pp. 171-172, comments that the Roman presumption is contained in the customs of Tortosa, but somewhat unusually, since by solely considering the joint sale and purchase agreements entered into by the husband and wife, the presumption does not respond to the foundations that had inspired *Quintus Mucius Scaevola*, as in this instance there is no suspicion whatsoever of inept acquisition or conjugal infidelity. This claim is supported by PARA MARTÍN, *Presunción muciana y nulidad*

Thus, as can be see, in Spanish state the *praesumptio muciana* of Roman law only survived in Catalonia, article 23 of the Compilation of 1960 being its sole exponent[20] until the reform of 1984[21], when the original *praesumptio muciana* ceased to have any effect in Catalan law, giving way to an instrument of protection of creditors in the event of the bankruptcy of a married person[22], in line with the provisions of the Spanish Civil Code.

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de donaciones, cit., p. 21, who concludes that no Catalan legal text prior to the Compilation incorporated the Roman norm.
On this fragment of Customs, see RICART, E., *Desvanecimiento de la presunción muciana en el derecho familiar catalán,* in *La prueba y los medios de prueba: de Roma al Derecho moderno*, Madrid, 2000, pp. 635 ff, pp. 652-654.

[20] On the Law of the Catalan Government (*Ley de la Generalitat*) concerning the legal capacity of women and spouses of 19 June 1934 and the survival of the *praesumptio muciana* in Catalan law, see the accurate observations of PARA MARTÍN, in *Presunción muciana y nulidad de donaciones*, cit., pp. 29-30

[21] *Texto Refundido de la Compilación del Derecho Civil Especial de Cataluña* (English translation = Restated Version of the Compilation of the Civil Law of Catalonia), approved in Legislative Decree 1/1984 of 19 July.

[22] Art. 23 (English translation): "In case of the insolvency or bankruptcy of one of the spouses, if they are not legally or de facto separated, the property acquired by the other spouse by onerous title in the year prior to the declaration, or retroactively from a date specified in the judgment, shall be presumed as having been donated by the bankrupt spouse, except

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

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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".

attracts very little attention. Either because it did not give rise to dispute (Roman law was applied) or because it was considered obsolete"[23]. In other words, while the so-called "official legal tradition", represented by such authors as VIVES Y CEBRIÁ, DURAN Y BAS, DE BROCÀ, PELLA Y FORGAS, BORRELL I SOLER[24], hardly refers to the old rule of evidence of Roman law[25], the Catalan legal tradition immediately prior to the

[23] GETE-ALONSO, Mª. C., *Comentario al art. 23 de la Compilación de Cataluña*, in *Comentarios al Código civil y Compilaciones forales*, dir. by Mauel Albaladejo, XXVII, vol. 1, Madrid, 1981, p. 423, n. 1 with bibliography. In the same sense, LINARES, *Notas sobre la incorporación de la praesumptio muciana*, cit., p. 11.

[24] ROCA, E., in his introduction to the re-publication of the work of DE BROCÀ, G. Mª., *Historia del Derecho de Cataluña, especialmente del Civil y Exposición de las Instituciones del Derecho civil del mismo territorio en relación con el Código civil de España y la jurisprudencia* (1st ed. 1918), Barcelona, 1985, p. 17, underlines that with this re-publication the Ministry of Justice begins the publication of the work of the most representative Catalan jurists, "that is, of those who have constituted what has been referred to as the 'Catalan legal tradition'". This initiative, in the words of the author (English translation) "is extremely useful for knowledge of what could be described as the 'official legal tradition', as the works of the classic authors were up until a short time ago only known through quotations in works of Catalan jurists of the XIX and XX centuries. These are the jurists that have delimited the current structure and scope of Catalan civil law, as well as the sources of knowledge".

Compilation and subsequent to it, as shown by the studies of the *praesumptio muciana* in the civil law of Catalonia, "is better documented"[26].

Art. 23 of the Catalan Compilation of 1960[27] provides (English translation) that "The property acquired by the wife

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[25] In the same sense PARA MARTÍN, *Presunción muciana y nulidad de donaciones*, cit, p. 27, states that after the old legal authors, commentators of Common Law, "there was a long barren period of doctrinal vacuum". On this question, see LINARES, *Notas sobre la incorporación de la praesumptio muciana*, cit., pp.11-13.

[26] LINARES, *op. cit.*, pp. 13-15.

In the words of PARA MARTÍN, *ibidem*, pp. 27-28 (English translation), "at the end of the XIX century, DURÁN Y BAS breaks this lethargy in discussions concerning the *praesumptio muciana*, by including it in art. 99 of his Draft annex to the Civil Code (…) Before the Compilation, there are no more than the valuable contributions of VIRGILI SORRIBES and ROCA SASTRE". In the opinion of LINARES, *Notas sobre la incorporación de la praesumptio muciana*, cit., p. 15, what is said by GETE-ALONSO makes it necessary to modify the general idea, expressed by E. ROCA in his introduction to the re-publication of the work of G. Mª. DE BROCÀ, cit., p. 17, that the "official legal tradition" constitutes (English translation) "a sort of bottleneck of the Catalan legal tradition that conditions any subsequent discussions".

[27] Precept located in chapter III ("On gifts between spouses") of title III ("On the matrimonial property") of book 1 ("On the family"). Recall that

during the marriage, whose origin can not be justified, shall be presumed to be a gift from the husband. If the wife justifies the said acquisition, but not that of the price with which it was made, it shall be presumed that the price was donated by the husband. Article 20 and the others included in this chapter will apply to these donations "[28].

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art. 7, included in chapter I ("General provisions") of the same title and book, provides that (English translation): "The economic regime of the spouses shall be agreed in their nuptial contracts, which can be granted before or during the marriage, by notarial deed, and shall be deemed irrevocable except in the cases provided for in this Compilation. In the absence of agreement, the marriage will be subject to the separate property regime which recognizes for each spouse the ownership, enjoyment, administration and free disposal to their own property, without prejudice to the specific dowry regime, should this apply".

[28] The antecedents of this article lie in art. 99 of the Draft annex to the Civil Code of DURÁN Y BAS (contained in his *Memoria acerca de las instituciones del Derecho civil de Cataluña,* Barcelona, 1883, pp. 74 and 94), which establishes (English translation) that "The property acquired by the wife during her marriage is presumed to have been donated by the husband, if it is not fully justified that the property or its price have a different origin"; and in art. 38 of the Draft written in 1955 by the Commission of Jurists, according to which (English translation), "The property of the wife, including money, and other assets invested in the acquisition of other goods, shall be presumed to have been donated by her husband, if she cannot justify who she acquired them from. This shall be understood without prejudice to the husband's rights over property in his wife's name due to simulation or fiduciary duties". (= *Proyecte d'Apèndix i materials*

This reading of the precept highlights that while it incorporates the *praesumptio muciana* of Roman law, it is equally true that its content varies (D. 24, 1, 51 and C. 5, 16, 6)[29], by establishing that not only the property acquired by the wife, during the marriage[30], is presumed to have been donated by the husband if the wife is unable to demonstrate any other origin (that is, by title of acquisition), but also, in defect of the above, that when the wife has proof of this acquisition (provided the property was obtained by onerous means) but not of the origin

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precompilatoris del dret civil de Cataluya, Barcelona, Generalitat of Catalonia, Department of Justice, 1995, p. 783). On these antecedents, see also FAUS, R. and CONDOMINES, F. A., *Comentaris a la Compilació del Dret civil de Catalunya*, facsimile of first edition (Barcelona, 1960), with a foreword by Robert Follia Camps and two annexes, prepared by the College of Notaries of Catalonia, Barcelona-Madrid, 2003, pp. 63-64; PARA MARTÍN, *Presunción muciana y nulidad de donaciones*, cit, pp. 31 ff. Likewise, it should be noted along with MARTÍNEZ DE MORENTIN, *Régimen jurídico de las presunciones*, cit., p. 167, n. 459, that (English translation) "there is abundant case law from the Supreme Court, and from lower courts, on the subject, and interesting doctrinal comments recorded by DELGADO ECHEVERRÍA, *El régimen matrimonial de separación de bienes*, cit., pp. 181-198".

[29] In the same line, MARTÍNEZ DE MORENTIN, *ibidem*, p. 167.

[30] On the questions raised by the factual basis of the presumption, see PARA MARTÍN, *Presunción muciana y nulidad de donaciones*, cit, pp. 87-107

of the price with which the acquisition was made, then what is presumed as having been donated by the husband is the price[31].

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,

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(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.

the first presumption would be overturned[32]. For this reason, as ARNAU I RAVENTÓS points out[33], part of the doctrine proposed substituting the legal expression of the precept "property acquired" with "property possessed", as this reading would allow the presumption that the property possessed by the wife, during the marriage, whose source could not be verified, had been donated by her husband[34]. Finally, it should be added that in our opinion the proposed wording would be

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[32] Cfr. among others, ARNAU I RAVENTÓS, *Les presumpcions de donació del deutor concursat*, cit., p. 51; MARTÍNEZ DE MORENTIN, *Régimen jurídico de las presunciones*, cit., p. 168.

[33] *Id.* previous n.

[34] This interpretation can be attributed to PARA MARTÍN, *La presunción muciana*, cit., pp. 94-95. The author, in *Presunción muciana y nulidad de donaciones*, cit, p. 95, states that (English translation) "a logical interpretation of art. 23 of the Compilation leads us, therefore, to the consideration that the term "goods acquired" covers both cases – albeit infrequent – in which the actual title is proved, and those in which there is only proof of possession by the wife acquired during the marriage". However, see DELGADO ECHEVERRÍA, *El régimen matrimonial de separación de bienes*, cit., pp. 216-217, which argues a different opinion. In the view of PELAYO HORÉ, S., *La presunción muciana*, in *Revista de Legislación y Jurisprudencia*, 42 (1961) pp. 793 ff, p. 826 (English translation), "the wife fails to demonstrate the origin of property acquired in the case of money in her cupboard".

in line with what was stated by QUINTUS MUCIUS SCAEVOLA by way of POMPONIUS, in D. 24, 1, 51[35] .

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 paid[36]. In this case it is the price which is presumed to have been a gift from the husband to the wife[37].

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

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[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 sources[38], but rather it is a creation of ROCA SASTRE[39], 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 question[44], the subsequent doctrine, in particular during the long period of preparation of the Compilation, involved discussions about the object or scope of the presumption[45], with two basic theses being formulated[46], 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.

that had been donated by the husband[47]; and therefore, if he revoked the donation he could claim the property acquired[48].

However, for others, the principal proponent being ROCA SASTRE[49], when the wife could justify the source of the thing acquired (the title of acquisition), but not of the money spent in its acquisition, what should be presumed as having been donated by the husband was not the thing acquired, but the price paid for it[50]. Hence, when a Catalan woman subject to

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[47] VIRGILI SORRIBES is the main representative of this position, *La presunción muciana y los bienes adquiridos durante el matrimonio por mujer catalana,* in *Propiedad y matrimonio,* College of Notaries of Barcelona, *Conferencias pronunciadas de los cursillos de los años 1948 y 1949,* Barcelona, 1956, pp. 195 ff; *Id.*, *Proyección de la presunción muciana*, cit., pp. 277 ff.

[48] TORTORICI PASTOR, *op. cit.*, p. 1191, notes that the main basis of this doctrine is the confusion between the thing and the price: "if the wife acquired a thing with money donated by her husband, the status of the money was transferred to the thing that it had replaced and, as such, it should be considered that the wife had the thing by way of a donation her husband" (English translation).

[49] *Derecho hipotecario*, vol. III, cit., pp. 197 ff.

[50] See *supra,* n. 40. Commentators, such as BALDO, BARTOLO, MENOCHIO, FABRO and CANCER, had previously declared themselves in favour of the inadmissibility of the so-called "theory of real subrogation" (see *supra,* n. 7).

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 SASTRE[51], 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 patrimony[52]. 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

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[51] *Id*. n. 49.

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

application of the theory of real subrogation to the *praesumptio muciana*; a solution which in his opinion is more in line with the Roman precedents than the said theory.[53]

The *praesumptio muciana* of the Compilation of 1960 is, without any doubt, a presumption of donation and not of ownership[54]. And while it is true that art. 23 is in line with ROCA SATRE in its regulation of the presumption, for PELAYO HORÉ the same can not be said for a gift, since art. 20 of this legal text does not consider it a valid act, although

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[53] PARA MARTÍN, *La presunción muciana*, cit., p. 49. See C. 5, 16, 9 and C. 4, 50, 6, texts in which the author supports his opinion with respect to Roman law. For the opposing view, see RICART, *Desvanecimiento de la presunción muciana,* cit., pp. 646 and 652 (see also *supra*, n. 38).

[54] MARTÍNEZ DE MORENTIN, *Régimen jurídico de las presunciones*, cit., p. 169, argues that Roman law probably confined itself to presuming the ownership of the husband and, therefore, the Compilation added something more by considering that the goods regarding which the wife could not prove ownership originated as a gift from her husband. However, PARA MARTÍN, *Presunción muciana y nulidad de donaciones*, cit., p. 108, postulates that the presumption of donation in the original art. 23 of the Catalan Compilation adheres to historical precedents, arguing that although D. 24, 1, 51 does not speak of gifts, but rather of the husband as a source of the goods, neither does it explicitly state that the thing whose origin can not be justified must necessarily be presumed to belong the husband.

revocable, but rather a void act, albeit one that can be validated[55]. In his opinion, although art. 23 and, in general, the thesis of ROCA SASTRE being correct, the "catastrophe" occurs on combining it with art. 20 of the Compilation, which declares the nullity of donations between spouses (those made outside a matrimonial agreement), as instead of considering them valid but revocable[56], this precept goes much further and considers them void, albeit subject to validation[57]. PELAYO HORÉ, after noting that (English translation) "art. 20 introduced a new

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[55] Art. 20. 1 (English translation): "Donations made between spouses during marriage outside the marriage contract shall be deemed void; but if the donor spouse dies without having repented of them or revoked them, they will be be retroactively validated. In case of doubt, it shall be considered that it was the donor's will not to repent or revoke them".

[56] In this sense, DE BROCÀ, *Historia del Derecho de Cataluña*, cit., p. 846, relying on a judgment of the Supreme Court of 19 May 1903, admitted that although the presumption of a gift holds (that is, as established by the *praesumptio muciana*), the gifts "are of course not void, but voidable by the donor" (English translation).

[57] On the nullity of donations under arts. 20 and following of the Compilation, see LALINDE ABADÍA, *Capitulaciones y donaciones matrimoniales*, cit., pp. 74-75; PARA MARTÍN, *La presunción muciana*, cit., pp. 54 ff, *Id. Presunción muciana y nulidad de donaciones*, cit., pp. 122-124, pp. 182-183, pp. 204 ff; DELGADO ECHEVERRÍA, *El régimen matrimonial de separación de bienes*, cit., pp. 223-224.

formula which Roman jurists probably did not accept even in the time of QUINTUS MUCIUS SCAEVOLA", a view we do not share[58], 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 ese*.

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.

and restrained", turned out to be "terrible", not *per se*, but because of the influence arts. 20 and 22 had upon it [59].

The original foundations for the *praesumptio muciana* in Roman law remain one of the most highly debated doctrinal questions, to the extent that it remains unresolved to this day[60]. However, what does not seem to be in dispute is that the subsequent development of this evidentiary rule led to a transformation of its original meaning, to its being linked, in the context of the Roman marriage *sine manu*, to the prohibition on

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[59] PELAYO HORÉ, *La presunción muciana*, cit., pp. 828 y 832. Art. 22 establishes (English translation): "In the case of donations between spouses, until they are validated, the donee shall not be entitled to what is promised by the donor, nor shall the donee acquire ownership of the thing given. If it has already been delivered, the donee shall obtain simple possession of it; but if the donor outlives the done or regrets the donation or revokes it, the donor or the donor's heirs can claim it. If the thing given is not susceptible to being reclaimed or comprised money that has subsequently been invested, the donor or the donor's heirs may only claim the amount by which, at the time of the claim, the donee has grown richer thanks to the donation, without this amount being allowed to exceed the amount of the original donation".

[60] On this question, see DOMÍNGUEZ y POLO ARÉVALO, *Algunas consideraciones sobre la praesumptio muciana en el Derecho romano*, cit., pp. 244 ff.

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 marriage[61].

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 Compilation[62]. 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 followed[64].

[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 Commission[65], 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 way[66], with the presumption thus lacking an adequate basis in modern society (social reality of the day).

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[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,*

Bearing in mind the numerous criticisms which art. 23 of the Compilation has attracted, it suffices to say that one of the most controversial questions was that of whether the "muciana", as set out in the provision, was designed merely to favour the husband and his heirs (the only ones who could invoke it)[67], or also the husband's creditors[68]. On this question[69] we coincide with ARNAU I RAVENTÓS in believing that the creditors were excluded from the provisions of art. 23 and that they could not, therefore, demand the annulment of the alleged

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1965, pp. 379 ff, appears to accept this thesis under art. 23 of the Compilation.

[67] Cfr. ARNAU I RAVENTÓS, *Les presumpcions de donació del deutor concursat*, cit., pp. 52-53.

[68] Cfr. GARCÍA VALLÉS, *ibidem*. In this vein MARTÍNEZ DE MORENTÍN, in *Régimen jurídico de las presunciones*, cit., p. 165, notes that the *praesumptio muciana* had a two-fold purpose (English translation): "to prevent the wife's patrimony being increased unjustly at the expense of her husband's and to prevent any collusion between spouses to the detriment of a third party". In this same line, the author also cites SORRIBES and GETE-ALONSO *(op. cit.*, p. 165, n. 452).

[69] See the various doctrinal opinions in favour of one or another stance, as well as the case law relating to the subject, in PARA MARTÍN, *Presunción muciana y nulidad de donaciones*, cit, pp. 285 ff.

donation, having to resort to other mechanisms[70]. Thus, in line with most legal authors, it can be concluded that the 1960 Compilation designed the *praesumptio muciana* as a rule of evidence in the interests of the financial position of the husband (or his heirs) and that it could only be enforced against a wife and, where appropriate, her heirs, thus distancing it from its original function in Roman law, that is, favouring the wife and, all cases, the honour of her husband, and thus bringing it more closely in line with the purpose that it ended up having in Roman law.

We would not wish to finish this discussion without pointing out that the *communis opinio* was contrary to this

[70] ARNAU I RAVENTÓS, *id.* n. 67. Previously and in the same sense, PUIG FERRIOL, in *L'estat civil de dona casada,* cit., p. 69.

On the protection granted creditors, the 1960 Compilation provided the following (English translation): "Under the separate property regime, all acts and contracts which the spouses celebrate or enter into together, during the marriage, involving valuable consideration shall be valid; in the event of judicial challenge, the proof of onerous title shall correspond to the defendants." (art. 11). "Gifts made after the person making the gift has incurred debts shall not prejudice the creditors for those debts, provided that they have no other legal recourse to enforce payment." (art. 340. 3). See also in this regard DELGADO ECHEVERRÍA, *El régimen matrimonial de separación de bienes*, cit., pp. 248 ff; PARA MARTÍN, *Presunción muciana y nulidad de donaciones*, cit., pp. 285-291.

presumption[71] and that there were thus many voices raised in favor of its suppression[72], as there would be later in 1984 with the reform of the Catalan Compilation. The opposition argued against it on the grounds of its discriminatory nature, since it primarily benefited the husband[73]; because it constituted a considerable limitation on the principle of the freedom of contract[74]; and because it represented a major restriction on the capacity of the Catalan woman to act, leaving her property in a

[71] In this vein PELAYO HORÉ, *La presunción mucina*, cit., p. 834, observed that the Compilation would have been more humane if article 23 had not been included or, at least, if the possibility of invoking it had been confined to creditors and heirs (next of kin), as had been proposed by the Codification Commission.

[72] On the numerous criticisms of the text in which the presumption was contained (art. 23 of the Catalan Compilation, 1960), see, among others, PELAYO HORÉ, *ibidem,* pp. 823 ff; PARA MARTÍN, *La presunción muciana*, cit., pp. 66-67; *Id., Presunción muciana y nulidad de donaciones*, cit.; PUIG FERRIOL, *L'estat civil de dona casada,* cit., pp. 68-70; VVAA, *Llibre del II Congrés Jurídic Català*, 1971, Barcelona, 1972 (in general, the conclusions reached by the Congress); DELGADO ECHEVERRÍA, *El régimen matrimonial de separación de bienes*, cit., pp. 205 ff.

[73] See for all, PARA MARTÍN, *Presunción muciana y nulidad de donaciones*, cit., pp. 294 ff.

[74] PARA MARTÍN, *Estudio especial de las cuestiones derivadas de la contratación entre cónyuges, Conclusiones de la Ponencia de la Sección Tercera del II Congrés Jurídic Catalá*, in *LLibre del II Congrès Jurídic Catalá*, cit., p. 431.

grave situation of insecurity[75]. In short, it was argued that it failed to respond to the social reality of the family as originally provided for under Roman law, and, therefore, it was totally divorced from the Catalan social context that existed before, at the time of and after the issuing of the Compilation of 1960[76].

[75] PARA MARTÍN, *La presunción muciana*, cit., p. 67; and *Estudio especial*, cit., p. 431.

[76] Cfr. among others, PARA MARTÍN, *Presunción muciana y nulidad de donaciones*, cit., p. 69, MARTÍNEZ DE MORENTIN, *Régimen jurídico de las presunciones*, cit., p. 166.