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ISSN 1989-1970
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Derecho Romano,
Tradición Romanística y
Ciencias
Histórico-Jurídicas

REVISTA INTERNACIONAL DE DERECHO ROMANO

ON THE RECEPTION OF THE *PRAESUMPTIO MUCIANA* INTO SPANISH LAW

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I. Introduction.

The *praesumptio muciana* is outlined in two Roman legal texts, one from the Digest and the other from the *Codex*. Although they address two different hypothetical cases, both affirm the idea that if upon the death of her husband, a woman is unable to prove the provenance of any assets in her possession, it shall be presumed that said assets belonged to the husband. This presumption, attributed to *QUINTUS MUCIUS*[1], has been the subject of much doctrinal debate due to an overall

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* An approach to the *praesumptio Muciana* can be found in E.M. POLO AREVALO and P. DOMINGUEZ, *Algunas consideraciones sobre la praesumptio muciana en el Derecho romano y su recepción en el Derecho catalán*, in "Libro Homenaje al Prof. Armando Torrent", Madrid, 2016, pp. 241 ff. This previous work, published in Spanish, is the result of an initial research about the configuration of the Roman rule and its survival in the Catalan law, which it was presented at the International Congress of Women in the Ancient Mediterranean, held at the University of Murcia, in October 2015. The referred work analyses the Muciana presumption in Roman law and its reception in article 23 of the 1960 Compilation of the Special Civil Law of Catalonia (English traslation).

[1] With regard to this jurist, see A. SCHIAVONE, *Giuristi e nobili nella Roma repubblicana*, Roma-Bari, 1987, pp. 13 ff.; C.A. CANNATA, *Per una storia della scienza giuridica europea*, I, *Dalle origini alla opera di Labeone*, Torino, 1997, pp. 289 ff.; A. FERNANDEZ DE BUJAN, *Sistemática y Ius civile en las obras de Quintus Mucius Scaevola y de Accursio*, in "RJUA", nº 6, 2002, pp. 57 ff.

scarcity of information in the sources. The concept has numerous different incarnations, raising many questions about its meaning, function, pertinent factual situations, whose interests it was designed to protect, and many other queries that have yet to be definitively resolved.

Despite the aforementioned doubts, it remains clear that in its original formulation, the presumption is markedly procedural, given that it came into play in cases focusing on assets in a widow's possession after the passing of her husband. It also appears clear that the concept of the *praesumptio muciana* underwent an extreme transformation within the Roman legal system, evolving to the point where it was applied in cases of contravention of provisions prohibiting donations between spouses.

In historical Spanish law, it is evident that the *praesumptio muciana* was eventually abandoned; it appears in its original form only in the *Partidas*, failing to be mentioned in either the Spanish Civil Code or any other regulations. However, there has been a recent resurgence of interest in incorporating the presumption into insolvency law. This has been observed in the application of former Article 1.442 of the Civil Code and,

afterwards, in the donations-related presumption contained in Article 78(1-2) of the Insolvency Act.

II. The *praesumptio muciana* in Roman legal sources.

Only two texts from the Roman sources mention the so-called *praesumptio muciana*[2]: one by *POMPONIUS* in the Digest,

[2] Among those who write about the *praesumptio muciana* are M. VASELLI, *La presunzione muciana*, Padova, 1953, pp. 4 ff.; M. KASER, *Praesumptio muciana*, in "Studi in onore di Pietro Francisci", I, Milano, 1956, pp. 215 ff.; M. GARCIA GARRIDO, *Ius uxorium. El régimen patrimonial de la mujer casada en Derecho romano*, Roma-Madrid, 1958, pp. 119 ff. y *El patrimonio de la mujer casada en el derecho civil, I, La tradición romanística*, Barcelona, 1982, pp. 93 ff.; F. VIRGILI SORRIBES, *Proyección de la presunción muciana en el Derecho común*, in "Anales de la Academia Matritense del Notariado" (Conferencia pronunciada en la Academia Madritense del Notariado 9 de diciembre de 1955), X, 1959, pp. 280 ff.; S. PELAYO HORE, *La presunción muciana*, in "Revista General de Legislación y Jurisprudencia", 42, 1961, pp. 793 ff.; M.T. GONZALEZ PALENZUELA, *La presunción muciana: el propósito de Quinto Mucio y las aplicaciones de la regla*, in "BIDR", CI-CII, 1998-99, published in 2005), pp. 447 ff.; U. VICENTI, *La presunzione muciana e la sua connessione con il divieto di donazione tra coniugi*, in "Index", XXVII, 1999, pp. 451 ff.; E. RICART, *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.; M. G. SCACCHETTI, *La prseunzione muciana*, Milano, 2002 (see recension of U. VICENTI, in "IURA", 53, 2002 (published in 2005), pp. 375 ff.; F.

D. 24, 1, 51, and the other in the Codex (C. 5, 16, 6), which contains a rescript by *SEVERUS ALEXANDER*. This lack of sources has led to the presumption's original meaning being one of the most widely debated topics in Romanistic doctrine[3], although from KASER's[4] research, it seems quite plausible that its primary function was linked to the legacy of *quae uxoris causa parata sunt*; it was only afterwards that the concept's original meaning evolved and became linked to the prohibition of donations between spouses.

The aforementioned texts are as follows:

LAMBERTI, *La c.d. "presunzione muciana": un esempio di "multiplex interpretatio" nell'esperienza romana,* in "Quaderni Lupiensi di Storia e Diritto", 2009, pp. 127 ff.; J. L. LINARES, *Nota sobre la incorporación dela praesumptio muciana al inventario institucional de la Compilación del Derecho civil especial de Cataluña,* in "Revista General de Derecho Romano" (IUSTEL), 16, 2011, pp. 1 ff.

[3] LAMBERTI, *La c.d. "presunzione muciana"*, cit., p. 1.

[4] KASER, *Praesumptio muciana,* cit., pp. 215 ff. Later followed by GARCIA GARRIDO, *Ius uxorium,* cit., pp. 119 ff. and *El patrimonio de la mujer casada, I,* cit., pp. 93 ff.

D. 24, 1, 51.- (*POMPONIUS. Libro V ad Quintum Mucium*).- *Quintus Mucius ait, quum in controversiam venit, unde ad mulierem quid pervenerit, et verius et honestius est quod non demonstratur unde habeat existimari a viro qui in potestate eius esset ad eam pervenisse. Evitandi autem turpis quaestus gratia circa uxorem hoc videtur Quintus Mucius probasse*.

C. 5, 16, 6.- (*Impp. ANTONINUS A. NEPOTIANO*).- *Etiamsi uxonis tuae nomine res, quae tui iuris fuerant, depositae sunt, causa proprietatis ea ratione mutari no potuit, etsi donasse te uxorí res tuas ex hoc quis intelligat, quum donatio in matrimonio facta, prius mortua ea, quae liberalitatem excepit, irrita sit. Nec est ignotum, quod, quum probarní non possit,* unde uxor matrimonii tempore honeste quaesierit, de mariti bonis eam haubisse, veteres iuris auctores merito credidissent. (*PP. Non. Decemb. ALEXANDRO A. III. et DIONE Conss*. [229].

The excerpt from the Digest references a case seeking to establish the origin of assets in a widow's possession. *POMPONIUS* alludes to the legal presumption established by *QUINTUS MUCIUS SCAEVOLA*, which states that when a woman is unable to prove the origin of any given assets, it must be understood that they came from the husband, or whoever had previously retained legal authority over them.

This excerpt is found under the section entitled *De donationibus inter virum et uxorem,* which has led some authors to link the *praesumptio muciana* with the prohibition of donations between spouses established by Roman law[5]. Within this doctrinal sector, the presumption would have provided a means of keeping spouses who had not married via *conventio in manum* from contravening the prohibition of donations between them; here, the presumption is understood as a way of making right a violation of the aforementioned prohibition, as any donated assets would once again form part of the husband's estate. This interpretation presupposes an existing false pretence of business between husband and wife in order to contravene the prohibition against donations in effect at the time. In addition, it sought to protect the interests of the husband's heirs and possibly even his third-party creditors, to the clear detriment of the wife[6].

[5] F. DUMONT, *Les donations entre epoux en droit romain,* Paris, 1928, pp. 212 ff.; R. SOHM, *Instituciones de Derecho privado romano. Historia y sistema,* spanish translation by Roces, Madrid, 1936, p. 474; VIRGILI SORRIBES, *Proyección de la presunción muciana*, cit., pp. 280 ff.; PELAYO HORE, *La presunción muciana*, cit., pp. 793 ff.

[6] LAMBERTI, *La c.d. "presunzione muciana"*, cit., p. 25.

Meanwhile, the *Codex* text further reinforces this doctrinal position, given that it adopted the same principle as D. 24, 1, 51, complementing it by establishing that should a husband deposit any given assets in his wife's name, this in no way changes said assets, even in the event that they were considered donated. Within the framework of this prohibition, the emperor addresses the law of *veteres iuris auctores*, which held that if the origin of any given assets could not be established, they would be understood to form part of the husband's estate. However, this doctrinal position eventually lost strength, according to well-known research by KASER[7], who concludes that in its original incarnation, the presumption was never defined within the legal context of donations between spouses, although it was indeed later included in the relevant *sedes materiae*[8].

KASER begins with the assertion that formulary procedures did not impose any norms regarding burden of proof; rather, there were existing regulations that the judge could make use of and even complement with additional laws. Under this premise, the author examines the rescript written by *SEVERUS*

[7] KASER, *Praesumptio muciana*, cit., pp. 215 ff. In the same sense, GARCIA GARRIDO, *Ius uxorium,* cit., pp. 119 ff. and *El patrimonio de la mujer casada, I,* cit., pp. 93 ff.; A. D'ORS, *Derecho privado romano*, Pamplona, 1977, pp. 362 ff.

[8] KASER, *ibidem*, p. 216.

ALEXANDER, analysing the potential legal disputes that could arise between husband, wife, and their respective heirs. Such cases could involve vindicatory action taken by the husband against the wife's inheritors, a *condictio* on the part of the husband to claim for assets the wife had made use of during their marriage, or vindicatory action taken by the wife to reclaim any assets in the husband's power[9]. KASER concludes that in all of these cases, the presumption did not lift the burden of proving that either a donation of assets had in fact occurred – thereby contravening the prohibition against donations between spouses by default– or that the assets had been acquired through dishonest activity on the part of the woman[10].

KASER understands, therefore, that the *praesumptio muciana* must be based on a different premise; thus, he takes an initial excerpt from POMPONIUS, reconstructed by LENEL in the

[9] KASER, *Praesumptio muciana*, cit., p. 217. Cfr. SCACCHETTI, *La presunzione muciana*, cit., pp. 201 ff.

[10] According to the author, the *praesumptio muciana* first extends to the acquisition of assets via donation in the Basilicas (*Bas.* 30, 1, 48) and continues on to modern authors: "*So versteht in der Tat die pr. Muc. Schon der Anonymus der Basiliken, so versteht sie auch die gemeinrechtliche und ein Teil der modernen romanistischen Lehre*". KASER, *Praesumptio muciana*, cit., p. 220.

latter's *Palingenesia*[11]. This places him at D. 34.2.10, leading KASER to link the presumption to the *his, quae uxoris causa parata sunt* legacy. In effect, after a *conventio in manum,* the woman forfeited all patrimonial capacity, becoming *loco filiae*. From that point on, as QUINTANA[12] writes, the husband would need to leave a legacy in his wife's favour in order to ensure her financial stability[13]. In the case of a dispute between

[11] O. LENEL, *Paligenesia iuris civilis*, *Leipzig*, 1889, I, 759-4 y II, 64-3.

[12] E. QUINTANA ORIVE, *En torno al deber legal de alimentos entre cónyuges en el Derecho Romano*, in "RIDA", XLVII, 2000, pp. 179 ff.

[13] In *cum manu* marriages, the husband would often pass on an *inter caeteros* legacy to his wife, leaving her the *peculium,* anything she had used, enjoyed, and managed throughout their marriage, dresses, adornments, woollen cloths, jewellery, etc... Frequently, bequeathed items were made up by a specific type of property rather than specific, concrete goods. For example, the *de penus* legacy provided foodstuffs and products necessary for their preparation and preservation, the *de mundus* legacy established in D. 34, 2, 39 referenced beauty items and accessories for the woman. For more information, see GARCIA GARRIDO, *Ius uxorium. El régimen patrimonial...,* cit., p. 106 ff.; M. LAURIA, *Penus, Penus legata*, in "*Studi e ricordi*", Napoli, 1993, pp. 544 ff. and A. ORMANNI, *Penus legata. Contributi del legati disposti con clausula penale in età repubblicana e classica*, in "*Studi Betti*", IV, 1962, pp. 582 ff.; E. SANCHEZ COLLADO, *De penu legata*, Madrid, 1999, pp. 133 ff.; J.M. ALBURQUERQUE, *Alimentos y provisiones: observaciones y casuística en tema de legados (D. 34, 1 y D. 33, 9)*, in "Revista de Derecho UNED", II 2007, pp. 13 ff. See also A. MONTAÑANA CASANI, *La viuda y la sucesión en la República romana*, in "Actas del Tercer y Cuarto Seminarios de Estudios sobre la mujer en la Antigüedad

a wife and her husband's inheritors, the husband having left her a legacy of *vas vel vestimentum aut quippiam aliud, quod eius causa emptum paratumve esset,* the presumption would favour the wife's interest, as the *onus probandi* would have been reversed, with the burden of proof instead falling on the husband's inheritors[14]. As such, the woman could not only maintain control of the assets, but she would also protect her own honour by making it clear that the assets had not been acquired *clam virum,* thereby avoiding a *turpis quaestus gratia*[15].

It would seem that within a *sine manu* marriage, the presumption would not have been as meaningful, given that

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(Valencia, 28-30 abril 1999 y 12-14 abril 2000)", SEMA III-IV, Valencia, 2002, pp. 164 ff.

[14] KASER, *op. cit.,* pp. 221 ff. In the same line, GARCIA GARRIDO, *El patrimonio de la mujer casada, I,* cit., pp. 93 ff.

[15] The final sentence of D. 24.1.51 –referring to preserving the woman's honour by sparing her any investigation regarding the illicit or immoral origins of any assets in her possession. LAMBERTI writes that it should be noted that the term "*quaestus*" carried a very strong penal connotation, due mostly to the Augustan laws on adultery, adding that "*in età pomponiana esso ormai indicava prevalentemente il "commercio fatto del propio corpo", attività particolarmente riprovevloe se imputabile a "matronae"*. LAMBERTI, *La c.d. "presunzione muciana"...*, cit., p. 4. However, there are a wide range of interpretations of the ending of the text. See, for instance, SCACCHETTI, *La presunzione muciana*, cit., pp. 171 ff.

the woman would have maintained her patrimonial independence[16]. However, LAMBERTI has emphasised that nothing in the *dictum's* formulation suggests that the presumption was meant to refer solely to *nupta in manu*[17], adding that the system of matrimonial regime derived from *trinoctii usurpatio* would have been very widespread at the time of QUINTUS MUCIUS. Thus, if the wife did not fall under the *manus* of her husband, the author maintains that it would be difficult to distinguish assets falling under her own *domina* from those belonging to her husband that she had made use of throughout the marriage. LAMBERTI writes that additionally, in these cases the woman would often have difficulty proving ownership of assets, and the presumption would be in her favour[18].

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[16] The *uxor sine manu* could acquire assets if they were *sui iuris* or *in potestate* the assets could originate from the *paterfamilias*. KASER, *Praesumptio muciana*, cit., pp. 221 ff.

[17] LAMBERTI, *La c.d. "presunzione muciana"...*, cit., p. 12.

[18] LAMBERTI points out that "il problema riguardava la provinenza –in capo alla donna– dei beni controversi ("unde ad mulierem quid pervenerit"): laddove la mulier non si fosse cautelata precostituendosi un titolo (o meglio: la prova dello stesso), nell'acquistare un bene da un terzo, poteva obbiettivamente aver difficoltà a dismostrare, in una eventuale azione ereditaria, la propia titularità sul bene (pur avendolo ottenuto in modo del tutto lecito). Anche in tali ipotesi, insomma, la presunzione sovveniva ain favore della donna". LAMBERTI, *La c.d. "presunzione muciana"...*, cit., p. 13. However, it should be noted that although these legacies remained in the marriage without implementing the *manus*, the

What does appear very clear in the excerpt from POMPONIUS is the procedural nature of the *praesumptio muciana* apparent in the phrase *cum in controversia venit*, which highlights the presence of an existing dispute[19]. The specific case to which QUINTUS MUCIUS was referring remains unknown, as well as whether the woman was acting as claimant or defendant; unfortunately, there is not enough information available to determine the answer to this satisfactorily[20]. Similarly, as LAMBERTI points out, it is not

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truth is that it completely changes on a fundamental level, as the only donations a husband can gift to his wife were of articles of personal use she had been using. For more information, see D. 30, 109, *pr*.

[19] See LAMBERTI, *La c.d. "presunzione muciana"...*, cit., p. 4; KASER, *Praesumptio muciana*, cit., pp. 215 y ff.; VICENTI, Presunzione muciana..., cit., pp. 5 y ff.

[20] According to LAMBERTI, *La c.d. "presunzione muciana"...*, cit., p. 1, "il "cum in controversiam venit" avrebbe potuto originariamente ben aver riguardo ad una controversia concreta, della quale poi sarebbero stati eliminati gli elementi legati alla fattispecie singola, per generalizzarne la portata. Allo stato non pare possibile determinare se tale operazione, l'enucleazione di una formula generale dalla soluzione relativa a un caso pratico, sia riferibile già a Mucio ovvero si debba alla riflessione di Pomponio". It could also be that the woman had to claim her inheritance against an heir of her husband who had already entered into possession of the inheritance. As she would be the claimant, in these cases the burden of proof would mostly fall upon the woman to demonstrate ownership of

possible to know for sure that POMPONIUS and QUINTUS MUCIUS used the presumption to address the same legal issues[21].

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specific items in the legacy, some of which would she may have even possessed and used while her husband was still alive. RICART MARTI, *Desvanecimiento de la presunción muciana..*, cit., p. 639.

[21] Here the author formulates a plausible theory, explaining that in the Roman Republic and beginning of the Empire, it was difficult for a man to recover any assets his wife had acquired during their marriage through the *actio rei uxoriae*. If, after the divorce, the husband had died without recovering the assets, the action would pass on to his inheritors. If the marriage had dissolved as a result of the husband's death, and the inheritors tried to claim assets in the woman's possession. LAMBERTI understands that therefore, "non è da escludere, insomma, che, nel corso di una eventuale digressione all'interno della materia dei legati (digressioni per le quali era d'altro noto), POMPONIO si fermasse anche su altri aspetti del rapporto fra gli eredi del vir e la donna, come appunto la possibilità di convenirla in giudizio facendo valere una eventuale amotio rerum". In this way, *MUCIUS'* maxim could be used by the woman to avoid *de furtum* suspicion, assuming that her husband had in fact donated the assets. However, in the hypothetical case provided by LAMBERTI, the truth is that it is debatable whether the woman was truly the beneficiary, given that if the assets were presumed to have come from the husband, his inheritors could claim them as part of the deceased's remnant estate. LAMBERTI therefore links the *praesumptio muciana* with *THEODOSIUS* I's *de qua* constitution from 382 AD, with assets a husband had donated to his first wife going to the children born as a result of that marriage upon his death. The author argues that here, the presumption that assets in the woman's possession came from her husband clearly acts

In short, there are still a number of questions regarding the origin, significance, and primary function of the *praesumptio muciana*, although given the presumption's connection to legacies of *quae uxoris causa parata sunt*, it seems logical to conclude that these formed the main scope of cases in which the evidentiary rule would be properly enforced[22]. What does become clear is that the compilation committee would later lift the *Mucii sententia* from its original context and transpose it to a completely different one, that of gifts or donations between *vir et uxor*. Thus, further development of the concept would make it relevant within the framework of *sine manu* marriage, thereby

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in favour of the children. LAMBERTI, *La c.d. "presunzione muciana"...*, cit., pp. 14 ff.

[22] Some authors take a more literal interpretation of the text by *POMPONIUS*, understanding the underlying purpose of the *praesumptio muciana* as having been to safeguard the woman's sense of honour should she have found herself unable to prove the origins of an acquired asset; against suspicion that said acquisition was linked to an illicit or immoral act on the part of the woman –robbery, theft, or perhaps having derived from extramarital relations–, such assets were understood to have belonged to the husband, thereby settling any debate in regard to the provenance of the assets. In this case, the woman's pecuniary losses would be based on maintaining her level of decorum, which would have been closely linked to that of her husband. See H.J. ROBY, *Roman Private Law in the times of Cicero an of the Antonines, Cambridge*, 1902, pp. 165 ff.

becoming closely linked to the prohibition against donations between spouses that applied at the time. In a *sine manu* marriage, the woman maintained her patrimonial independence and was not entitled to her husband's estate and was responsible for her own debts. SCACCHETTI writes that as this form of marriage became increasingly widespread, greater priority was given to the economic interests of the husband and his heirs[23] or even third parties[24], rather than on a moral duty to uphold the woman's sense of honour and integrity. The *oratio Severi* of 206 AD formally recognised gifts between spouses provided the donor had predeceased their spouse without revoking the donation; as a result, the relevant Codex text is much more beneficial from the man's perspective, to the clear detriment of the woman's patrimonial capacity.

[23] SCACCHETTI, *La presunzione muciana*, cit., pp. 269 ff.

[24] Sources disagree on whether the *praesumptio muciana* of Roman law eventually extended to protect the rights of third-party creditors. VINCENTI has written against this theory, whilst RICART has written in favour of it. VICENTI, *La presunzione muciana e la sua connessione*, cit., pp. 461 ff. and RICART, *Desvanecimiento de la presunción muciana*, cit., p. 638. LAMBERTI believes that it may have extended to this, as she states that the law's full application remains unclear; while it may have been used as a method of increasing the value of the husband's estate at the expense of any of the woman's assets that were of uncertain origin, it may have also been a way of protecting the husband's third-party creditors. LAMBERTI, *La c.d. "presunzione muciana"*, cit., pp. 24 y 25.

Therefore, RICART asserts that the presumption is paradoxical because although it was subsequently maintained, its original foundation and purpose had been completely altered[25]. That the compilation committee members placed the two transcribed texts referencing the *praesumptio muciana* under the heading *De donationibus inter virum et uxorem* highlights the fact that even within the ancient Roman legal system, the concept in its original incarnation would see its scope of action shifted to preventing fraud committed by one or both spouses.

III. The purported reception of the *praesumptio muciana* into historical and current Spanish law.

The *praesumptio muciana*'s reception was formally recognised by Spanish historical law in the *Partidas*, which incorporated it under the same literal wording as D. 24, 1, 51:

[25] RICART, *Desvanecimiento de la presunción muciana*, cit., p. 638. According to the author, as the law evolved, the most protected parties were the husband's third-party creditors or his legitimate heirs, who may have otherwise seen their expectations circumvented as a result of donations gifted by the man to his wife for precisely that purpose.

P. III, 14, 2.- *...E otrosi dezimos, que cuando el marido muere, el fallan dineros, e ropa, e otras cosas en poder de su muger, que solia beuir con el, e pedian los herederos aquellas cosas en nome del finado, si la muger negare en su juyzio, que aquellas cosas non eran de su marido, elas razonare por suyas, o que ha algun derecho en ellas, tenuda es de lo prouar; e su desto non pudiere dar proeua verdadera, deuen ser entregados todos aquellos bienes a los herederos del finado. E esto touieron por bien los Sabios antiguos por esta razón:porque sospecharon, que toda cosa que fallasen en poder de la muger, que era de los bienes del marido, fasta que ella mostrase lo contrario; porque mas guisada razón es de sospechar, que poner dubda en los coraçones de los omes, que ella los ouisse ganado de mala parte. E esteo se deue entender de aquellas mugeres, que non usan arte, o menester, de que lo pueden ganar honestamente: mas si tal arte usan, tenemos por bien, que no sea desapoderada de aquellos bienes, que ella dize, que assi gano; e deuen ser oydas las razones della, e de los herederos, en la manera que mandan las otras leyes de nuestro libro, que fablan de esta razon.*

The regulation found in the *Partidas* faithfully inherits *POMPONIUS'* text, with the presumption clearly circumscribed to cases of legal disputes between a widow and her late husband's heirs, who sought to claim the right to money, clothing, or goods in the woman's possession after her husband's death. Within this context, the *onus probandi* of ownership of assets fell upon the widow, as the presumption

was established in favour of the husband and by extension, his ownership of the remnant estate. Similarly, the motive used to justify the presumption is the same found in the text from the Digest; that is to say, it would be more prudent for the woman to protect her level of decorum and avoid any suspicions regarding the acquisition of given assets. It can be seen how this put the widow in an unfair position in which she would have to choose between two equally unsavoury options: preserve her social honour while forfeiting the assets, or prove ownership of the assets, thereby making it clear that she had obtained them through a source other than her late husband and subsequently falling into disrepute.

Perhaps it was because the regulation in *Partidas* was perceived as being very difficult for widows, or perhaps because the marital property regime –a concept foreign to Roman law– as established in the *Fuero Real*[26] was never

[26] To this effect, C. TORTORICI PASTOR, *En torno a la muciana moderna del artículo 1.442 del Código Civil*, in "Anuario de Derecho Civil", 1990, pp. 1.189 ff., it is established that the disappearance of the *praesumptio muciana* and the enshrinement of a marital property regime is a result of the changes undergone by the marital property regime in general civil law. In its primitive conception, the *praesumptio muciana* corresponded to the system for division of assets. This system, along with the *praesumptio muciana*, prevailed in Castile as a result of Roman legal influence. When a marital property regime overtook the one for division of assets, the

abandoned; in either case, Act 203 of the *Leyes de Estilo* (as compiled in the *Nueva y Novísima Recopilación*[27]) established that the *praesumptio muciana* ran contrary to customary practice of society at the time, in which assets owned by a husband or his wife were considered to belong to both parties rather than the husband alone, unless proven otherwise:

...Como quier que en derecho diga que todas las cosas que han marido è 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 son de ambos de por medio salvo los que probare cada uno dellos que son suyos apartadamente.

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praesumptio was replaced by the presumption of marital community property. Here, it should be kept in mind that the latter presumption was not established in the *Partidas*, but nor was it repealed. As Y. ALARCON PALACIO notes, the *Fuero Real* had already established a marital property regime in Title III, Chapter 3, which was passed over by the *Partidas* in favour of a Roman tradition unfamiliar with this concept of joint ownership, before being reimplemented in the *Novísima Recopilación*. See Y. ALARCÓN PALACIO, *Régimen patrimonial del matrimonio desde roma hasta la Novísima Recopilación*, in "Revista de derecho de la Universidad del Norte" (Colombia), 24, 2005, pp. 2 ff.

[27] *Nueva Recopilación* V, 9, 1 y *Novisima Recopilación* X, 4, 4.

Thus, it appears that the *praesumptio muciana* did not evolve over time to lose its original meaning; rather, the law cited above formally repealed what had already fallen into disuse on a societal level in favour of a *de facto* presumption that both husband and wife could claim rightful shared ownership of any assets in their possession. In this way, the *praesumptio muciana* of Roman law had been replaced by a new presumption that favoured both spouses. While this latter concept remained a *iuris tantum* presumption, it lacked the markedly procedural character of the former, was not restricted solely to cases of inheritance disputes, and referenced assets belonging to both spouses rather than only addressing goods or property in the wife's possession.

Following the aforementioned ratification of Act 203 from the *Leyes de Estilo*, the *praesumptio muciana* was permanently abandoned in subsequent regulations, with the presumption of marital community property formally recognised by the Spanish Civil Code Project of 1851 in Article 1.328[28], and in

[28] Article 1.328.- *All marital assets shall be considered joint assets unless proved to belong privately to either husband or wife*. (English traslation).

Article 1.361[29] (formerly Article 1.407) of the current Spanish Civil Code.

Regardless of the presumption of marital community property, which clearly differentiates the Spanish legal system from the *praesumptio muciana* of ancient Roman law, current civil law doctrine has sought to establish a newer or more modern version of the *praesumptio muciana* within the field of insolvency law, with the understanding that it would be introduced on 13 May in Act 11/1981 under Article 1.442 of the Spanish Civil Code[30] as part of a series of modifications to the

[29] Article 1.361.- *All existing assets in a marriage shall be considered equally divided assets unless proved to belong privately to one of the two spouses*. (English traslation). The current wording of this article is found in Act 13/2005 from 1 July, which modified the Civil Code in regard to the right to marry.

[30] M.V. JIMENEZ MARTINEZ, *El concurso de persona casada: una aproximación a su regulación concursal*, in "Anuario de la Facultad de Derecho", Universidad Alcalá, III, 2010, pp. 419 ff.; M. LINACERO DE LA FUENTE, *La doble presunción de donación de persona casada en régimen de separación de bienes. Art. 78.1 y 2 de la Ley 22/2003, Concursal*, in "Foro, Nueva época", IX, 2009, pp. 125 ff.; O. M. FRADEJAS RUEDA, *Aproximación a la presunción muciana del Art. 78.1 de la ley concursal*, in "Estudios de derecho de sociedades y derecho concursal: libro homenaje al profesor Rafael García Villaverde", III, 2007, pp. 1.839 ff. and *Un anacronismo en la modernización de nuestro derecho concursal: la presunción muciana del artículo 78.1 de la ley concursal*, in "Estudios sobre la Ley

Civil Code with regard to filiation, parental responsibility, and marital property regimes. The amendment states that "declared a spouse in bankruptcy or insolvency, unless proved otherwise it shall be presumed to be for the benefit of creditors, who were donated property acquired via onerous title for consideration by the other during the year preceding the declaration or in the period retroactively covering the time passed from declaration of bankruptcy. This presumption shall not apply if the couple is separated, either via judicial or *de facto* separation".

It is widely accepted that the original Article 1.442 of the Civil Code constituted a formal reception of an apparent insolvency-related *praesumptio muciana*. However, in our view, the evidence shows that the law clearly protects the interest of third-party creditors, is applied in cases of bankruptcy or insolvency of a spouse, and focuses on the presumption of donated assets. As such, it is clear that the law in its current

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concursal: libro homenaje a Manuel Olivencia", IV, 2005, pp. 4.045 ff. In the same sense, C. I. ASÚA GONZÁLEZ, *La presunción muciana concursal, el artículo 1.442 del Código Civil*, Valencia, 2000; M. CUENA CASAS, *La protección de los acreedores en el régimen económico matrimonial de separación*, Madrid, 1999; M. P. ÁLVAREZ OLALLA, *Responsabilidad patrimonial en el régimen de separación*, Pamplona, 1996. For the opposing view, see J. MASSAGUER FUENTES, *La reintegración de la masa en los procedimientos concursales*, Barcelona, 1986, pp. 64 ff.

incarnation bears no true resemblance to the original *praesumptio muciana* of Roman law.

Similarly, Article 78(1-2) of the 9 July Insolvency Act 22/2003 did not implement the *praesumptio muciana* either, not even in an ostensibly more modern or newer formulation, as some would argue. The Insolvency Act serves to complicate the overall picture of Spanish law in this regard, maintaining the so-called "new *praesumptio muciana*" or "*praesumptio muciana* of insolvency" without ever repealing Article 442 of the Civil Code[31]. In article 78, entitled "Presumption of donations and right of survival between spouses. Primary residence of the couple", the first paragraph establishes that "Upon declaration of bankruptcy by a person married under separation of property, it will be presumed for the benefit of the estate, unless

[31] The discrepancy between these two articles forced legal doctrine to seek solutions in order to reconcile the two precepts, even going so far as to consider the Civil Code article as having been tacitly repealed when it could not be reconciled with the Insolvency Act. See A. DOMÍNGUEZ LUELMO, *Comentario al art. 78 de la Ley Concursal*, in Comentarios a la Legislación Concursal, II, J. Sánchez-Calero y V. Guilarte Gutiérrez (dirs.), Valladolid, 2004, p. 1.593 y 1.594; R. BERCOVITZ RODRÍGUEZ– CANO, R., *Manual de Derecho civil. Derecho de Familia*, Madrid, 2007, p. 188; A. NUÑEZ IGLESIAS, *Aproximación a la nueva presunción muciana de la Ley Concursal*, in "Libro Homenaje Prof. Manuel Albaladejo García", I, Murcia, 2004, pp. 3.572 ff.

proved otherwise, that adequate consideration was donated by one spouse to the other for the acquisition of assets via onerous title when said consideration is derived from the estate of the party declared bankrupt", adding that "if the origin of the consideration cannot be established, it shall be presumed unless proved otherwise that half the sum was donated by the bankrupt party to his spouse, provided that the assets were acquired at least a year prior to the declaration of bankruptcy" and to finalise the second paragraph, establishing that "the presumptions to which this article refers shall not apply if the couple is separated, either via judicial or *de facto* separation".

This article therefore contains a significant innovation, given that the two presumptions established within it refer to consideration fulfilled by assets found to be suspect, whereas Article 1.442 of the Civil Code does not presume that the funds used to acquire any given assets, and therefore any resulting assets, belonged to the party declared bankrupt; rather, the article assumes that half of the assets have been donated, with the presumption passing to any assets acquired. The discrepancy between the Civil Code and the Insolvency Act was resolved on 2 July 2015, when Article 1,442 was reformed as Act 15/2015 under the Voluntary Jurisdiction, which

amended the law in order to provide for express remission of the matter as it pertains to insolvency law[32].

In conclusion, despite efforts to argue the *praesumptio muciana's* permanent existence in the commercial sphere, specifically with regard to insolvency laws, our analysis of the sources does not provide evidence of its continued presence in the Spanish legal system. To the contrary, the presumption appears to have been completely abandoned. What has been labelled the "new *praesumptio muciana*" or "*praesumptio muciana* of insolvency" does not share any similarities at all with the formulation of the presumption found in Roman law in either its original wording or over the course of subsequent modifications. On the other hand, the presumption of marital community property does maintain a connection to the *praesumptio muciana* in post-*Partidas* law, although this is only to abolish it due to disuse and replace it with another. Since then, the presumption has been recognised neither by past historical regulations nor in the Spanish Civil Code.

[32] Article 1.442.- Should a spouse have declared bankruptcy, insolvency law provisions will apply. (English traslation).