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***Deductio in domum mariti* and the conclusion of an *iustum matrimonium*¹**

SUMMARY

Deductio in domum mariti* and the Conclusion of an *iustum matrimonium

According to the *communis opinio* the classical Roman law did not know any formal procedure of concluding a marriage, since its conclusion required only the mutual consent of a man and a woman (*affectio maritalis*, *consensus*). Nonetheless, the Roman culture developed a number of ritual acts related to the conclusion of a marriage, most of them deeply rooted in Roman tradition and history and being of a great symbolic significance. The central moment of a wedding ceremony seems to be *deductio in domum mariti* i.e. a ritual introduction of the bride into her future husband's household. The significance of such a ritual is reflected in the field of language, since the expression *uxorem ducere* (to lead a wife) is the most common expression used as a synonym of "to marry" and also in the field of law since, according to some jurists, when *deductio in domum mariti* had been accomplished, the couple was considered duly and legally married. The main function of the *deductio* was thus to give proof that the wedding had taken place and to manifest mutual *affectio maritalis*.

Deductio in domum mariti played a special role in the case of the conclusion of a marriage *inter absentes* (although it seems that the only person permitted to be absent could be the groom and not the bride). In this case, the formal ceremony of *deductio* seems to be an indispensable act constituting the only way in which a mutual *affectio maritalis* could be expressed. Since the bride's procession to her new husband's house was considered to be the public declaration of a *consensus* necessary for concluding a legal marriage, in the case of a "groomless" wedding such a ceremony was necessary as a proof that mutual *affectio maritalis* had been expressed and thus a marriage had taken place. Nonetheless, the necessity of leading the bride to her husband's home in the case of a *matrimonium inter absentes* could not be misunderstood with the constitutive character of *deductio in domum mariti*. A *consensus* still remained the

¹ I am much indebted to Agnieszka Adamczyk for the adjustment of the English translation.

only constitutive element and *deductio in domum mariti* constituted only the formal way in which, due to the particular circumstances, this consensus had to be expressed.

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According to the *communis opinio* in the classical Roman law, no solemn form of concluding of a marriage existed², although many rites and rituals

² The particular contribution to promoting the idea that Roman law knew one and the only form of marriage that was based on mutual *consensus (affectio maritalis)* was made by Edoardo Volterra in the thirties of the last century. This Romanist consequently claimed that the conclusion of *matrimonium iustum* was a separate act from the ceremony of *conventio in manum* and thus treated *affectio maritalis* as a constitutive element in the classical concept of *matrimonium iustum*. Cf. E. Volterra, *Corso di diritto romano. Diritto di famiglia*, Pisa 1931–1932, p. 184; E. Volterra, *La conception du mariage d'après les juristes romains*, Padova 1940 (= *Scritti giuridici*, vol. II, Napoli 1991, p. 4–68); E. Volterra, *Ancora sulla „manus” e sul matrimonio*, [in:] *Studi in onore di S. Solazzi*, Napoli 1948, p. 675–688 (= *Scritti giuridici*, cit., vol. II, p. 83–96); E. Volterra, *Nuove osservazioni sulla „conventio in manum”*, [in:] *Atti del Congresso Internazionale di Diritto Romano e di Storia del Diritto*, III, Verona 1948, p. 29–45 (= *Scritti giuridici*, II, p. 199–216); E. Volterra, *La nozione giuridica del „conubium”*, [in:] *Studi in onore di E. Albertario*, Milano 1953, p. 347–384 (= *Scritti giuridici*, II, p. 283–320); E. Volterra, *La conception du mariage à Rome*, RIDA 2 (1955), p. 365–379; E. Volterra, *Lezioni di diritto romano. Il matrimonio romano*, Roma 1961, in particular p. 121–156; E. Volterra, *Nuove ricerche sulla conventio in manum*, Mem. Lincei Cl. Sc. Mor. 8 S 12.4 (1966), p. 251–355 (= *Scritti giuridici*, III, p. 3–108). On the consensual character of Roman marriage and *affectio maritalis* as the one and the only prerequisite of the conclusion of *ustum matrimonium* cf. also P. Rasi, *Consensus facit nuptias*, Milano 1946; R. Orestano, *La struttura giuridica del matrimonio romano dal diritto classico al diritto giustiniano*, Milano 1951, in particular p. 187; O. Robleda, *El matrimonio en derecho romano. Esencia, requisitos de validez, efectos, disolubilidad*, Roma 1970, in particular p. 82–110; O. Robleda, *Il consenso matrimoniale presso i romani. Il mio punto di vista alla luce delle fonti*, [in:] *Conferenze storico-giuridiche dell'Istituto di storia del diritto e filosofia del diritto*, Perugia 1980, p. 101 ss.; C. Castello, *Remarques sur des cas concernant le début du iustum matrimonium*, RIDA 32 (1985), p. 239; W. Rozwadowski, *Nowe badania nad istota małżeństwa rzymskiego* [New Studies of the Essence of Roman Marriage], Menander 1987, vol. 42, no. 4–5, p. 243–244; M. I. Núñez Paz, *Consentimiento matrimonial y divorcio en Roma*, Salamanca 1988, in particular p. 55–77; S. Treggiari, *Roman Marriage. Iusti Coniuges From the Time of Cicero to the Time of Ulpian*, Oxford 1993, p. 54–57; J. Zabłocki, *Zgoda małżeńska w prawie rzymskim* [The Marital Consent in Roman Law], [in:] *Honeste vivere... Księga pamiątkowa ku czci Profesora Władysława Bojarskiego*, Toruń 2001, p. 303–312; J. Zabłocki, *Consensus facit nuptias*, [in:] *Marriage. Ideal – Law – Practice. Proceedings of a Conference held in Memory of Henryk Kupiszewski*, Z. Służewska, J. Urbanik (ed.), Warsaw 2005, p. 235–247; M. Kuryłowicz, *Wokół istoty małżeństwa rzymskiego* [On the Essence of the Roman Marriage], [in:] *Finis legis Chrystus. Księga pamiątkowa dedykowana księdzu profesorowi Wojciechowi Góralskiemu z okazji siedemdziesiątej rocznicy urodzin*, Warszawa 2008, p. 1142–1153. On Volterra's contribution to popularization of the idea of purely consensual character of Roman marriage and the alternative theories presented by other scholars see: O. Bucci, *L'operosità scientifica di Edoardo Volterra*, RIDA 32 (1985), p. 207–235, in particular p. 213–214, 228–229; W. Rozwadowski, *Nowe badania...*, p. 238–243; W. Wołodkiewicz, *Some Remarks on the Modern Research on Roman Marriage*, [in:] *Marriage. Ideal – Law – Practice*, op. cit., p. 219–233; W. Rozwadowski, *Istota małżeństwa w starożytnym Rzymie* [The Essence of Marriage in Ancient

were practised during a wedding ceremony³. The central moment of a wedding ceremony was *deductio in domum mariti*⁴ which was a solemn introduction of the bride into the future husband's household constituting an irrefutable proof that the marriage had taken place.

Due to the importance of the ceremony of *deductio in domum mariti* some romanists suggested that this act constituted the essential prerequisite of concluding of a valid marriage⁵. Currently this point of view is criticized by the authors who almost unanimously recognize the purely consensual character of Roman marriage. Nevertheless it should be noticed that in many cases, when it was for some reason important from the legal point of view to determine not only the day but also a moment from which the marriage was legally concluded, the Roman jurists referred to the ceremony of *deductio in domum mariti* as the a moment from which the marriage was deemed to be valid.

The importance of *deductio in domum mariti* is also supported by the fact that the procession of the bride to her new husband's home was the most common wedding ritual described in the ancient literature. According to the evidence given by these sources such a ceremony started in the evening after the wedding feast⁶ with the ritual mock abduction of the bride⁷. The bride was

Rome], „Gdańskie Studia Prawnicze” 2005, no. 14, p. 774–778; J. Zabłocki, *Zgoda małżeńska*, op. cit., p. 307–308; J. Zabłocki, *Consensus*, cit., p. 239–241.

3 On the rites and rituals practiced during a wedding ceremony and their symbolic significance cf. S. Treggiari, *Roman Marriage. Iusti Coniuges From the Time of Cicero to the Time of Ulpian*, Oxford 1993, p. 161–210; L. Winniczuk, *Ludzie, zwyczaje i obyczaje starożytnej Grecji i Rzymu [The People, the Customs and Traditions of Ancient Greece and Rome]*, 4th ed., Warszawa 2006, p. 202–205; M. Soszyńska, *Rzymskie obrzędy weselne – od czasów Cycerona do końca jurysprudencki klasycznej [Roman Wedding Rituals – From the Time of Cicero to the Classical Jurisprudence]*, the master thesis written under the supervision of prof. dr hab. A. Ziółkowski in the Department of Ancient History, Warszawa 2010; K. K. Hersch, *The Roman Wedding: Ritual and Meaning in Antiquity*, Cambridge 2010 with the literature quoted by the Author.

4 The term *deductio* derives from the phrase *uxorem ducere* meaning literally „leading a wife into her husband's house” and in a wider sense the conclusion of a marriage itself. The ceremony of a ritual procession of a bride to the groom's house was an indispensable element of a wedding tradition in most of the Indo-European cultures and its function was to manifest the change of a family and social status of a bride. Cf. E. S. Dick, *The Bridesman in the Indo-European Tradition: Ritual and Myth in Marriage Ceremonies*, “The Journal of American Folklore” 79.312 (1966), p. 338–339. According to Karen K. Hersch it is worth noting that although the Romans commonly used a phrase *uxorem ducere*, often as a synonym of an act of concluding of a marriage, there are not sources recording of a groom leading his wife anywhere during the wedding celebration.

5 E. Levy, *Der Hergang der römischen Ehescheidung*, Weimar 1925, p. 68–69; E. Albertario, *Honor matrimonii e affectio maritalis*, [w:] *Studi di diritto romano*, I, Milano 1933, p. 197–210.

6 Earlier in the brides' house, the *auspicia* were made. During the wedding feast also the dotal contracts (*tabula, tabellae nuptiales* or *dotaes*), were read aloud and successively ratified in the presence of the wedding guests. Cf. Cic., *Clu* 14; *ad Quint. Fratrem* 2.6.7; Plaut. *Curculio* 728; Tac. *Ann.* 15.37; Cat. 61.19–20; 62.3; 64.25–26; Serv. *Aen.* 4.166. Cf. S. Treggiari, op. cit., p. 162–165; K. K. Hersch, op. cit., p. 115–130.

7 The mock abduction symbolized the unwillingness of the bride to leave her family home and change her social status and also unwillingness to lose her virginity. According to the *communis opinio* this

dressed in clothes which particular elements represented certain values socially attributed to the figure of a bride: chastity, virginity, marriage and fertility⁸. At the light of torches (*taeda, fax*)⁹ the wedding procession moved from the bride's house towards the house of the groom. The participants were singing *fescennina*¹⁰ shouting *talassio*¹¹ and *hymenaios*¹² and also throwing nuts (*nuces*)¹³ to the bride. On her way to her new home the bride made a gift of coins to the *Lares familiares* and the *Lares* of the neighbouring crossroads in order to honour them and seek their favour for a new marriage. Such rituals not only symbolized taking the bride away from her family home but also made public the fact of concluding of a marriage. The next stage of the ceremony that started when the bride arrived to her new home constituted the rituals connected with an

ritual was related to the seizure of the Sabine women. Cf. Fest. 364L. On the ritual mock abduction and its symbolic significance see K. K. Hersch, op. cit., p. 144–148.

- ⁸ The dress of a bride was a woolen tunic (*tunica recta, tunica regilla*), fastened by a girdle knotted with a special complicated knot called *nodus Hercules (Herculaneus)*. Her hair was parted and plaited into six brands with a special tool – *hasta caelibaris*. Such a coiffure was decorated with woolen fillets and a crown made of garland. The main element of her „outlook” constituted of a flame-coloured veil called *flammeum, flammeum luteum* being a traditional requisite of a Roman matron. Cf. Gell. 15.15.2.3; Fest. 82L s.v. *flammeo*; Fest 55L s.v. *caelibaris hasta*; Fest. 363.21-25; Fest. 56L s.v. *corolla*; Plut., QR 87; Cat. 61.114-119; Plin., NH 8.194; Ovid., *Fasti* 2.557-562. As Karen K. Hersch maintains the particular elements of a bride's garb had a multiple symbolic significance as they symbolized not only the bride's present but also her blameless past (and thus also the probity of her *familia* who had protected her virginity until she got married) and her future as a woman ready to fulfill the wife's duties in terms of bearing the legitimate offspring and ability to assume the role of the chaste matron and to take care of a domestic industry. On the bride's garb and the particularity of its elements see in particular K. K. Hersch, op. cit., p. 65–114, 132–133.
- ⁹ Cf. Plut., QR 31; Fest. 478.34-37; 479.14-16. Torches were used to decorate the groom's house and accompanied the bride during the procession. Torches were commonly used in ancient culture, not only in Roman culture but Greek as well, during various celebrations, processions, feast and funerals. Their symbolic significance during the wedding is not very clear. For many years scholars believed they and served to protect spouses and wedding guests from evil forces. According to modern researches such a protective function is deemed to be performed by *Fescennini versus*. It could not be excluded that torches were symbols of an unbreakable link between spouses. Maybe they symbolize also the ability of a bride to fulfill her social duties as a wife and Roman matron. The other plausible explanation relates this ritual to the cult of Vesta, one of the divinities present in the wedding rituals. On the symbolic significance of the torches, the materials they were made, their number and torchbearers cf. K. K. Hersch, op. cit., p. 164–175.
- ¹⁰ Cf. ad. ex. Fest. 76.6-8L; Serv., *Aen.* 7.695. *Fescennini versus* or *Fescennini iocatio* were humorous and sometimes bawdy songs deriving from the folk tradition which were sung during the wedding procession. Cf. K. K. Hersch, op. cit., p. 151–156.
- ¹¹ Cf. Plut., QR 31; Plut., *Rom.* 15.2-4. The cry *Talassio* was shouted to commemorate the seizure of the Sabines or was a sign of wool working. Cf. K. K. Hersch, op. cit., p. 148–150.
- ¹² Cf. Cat. 61.12-13; Serv., *Aen.* 4.99; 4.127. *Hymenaios* were poems deriving from the Greek tradition containing a recurrent refrain *Hymen Hymenae* sung during the wedding procession. Hymenaeus, according to some literary sources was the god of the wedding, according to other traditions he was a youth who died on the day of his wedding and was therefore invoked during the wedding celebration. Cf. K. K. Hersch, op. cit., s. 236–261.
- ¹³ Cf. Plin., NH 15.86; Verg., *Ecl.* 8.31; Cat. 61.123-128; Hor., *Sat.* 2.3.171; Fest. 179L s.v. *nuces*. Cf. K. K. Hersch, op. cit., p. 156–158.

acquisition of the power over the household: anointment of the door with fat and attachment thereon of the woolen fillets (*vittae*)¹⁴ and making a careful entrance into her new home by avoiding stepping on the threshold¹⁵. After entering a house the ceremony of sharing fire and water called *aquae et ignis communicatio* took place. Such a ritual was of a great symbolic significance since, according to Varro and Ovid, the connection of water and fire symbolized the conjunction of two elements bound together with the force of Venus: the masculine represented by fire and the feminine represented by water and also the beginning of a new life¹⁶. The bride pronounced the symbolic words ‘*ubi tu Gaius ego Gaia*’, which act, according to Ovid, made her a wife¹⁷. The ceremony of the introduction of

¹⁴ Cf. Serv., *Aen* 4.458; Plut., *NH* 28. 142; 29.30. As many modern scholars suggest the fat symbolized the hope for the fertility of a bride and wishes of the prosperity of the entire household. As Karen K. Hersch maintains, supposing a bride was using wolf’s fat and affixed on the door *vittae* made of wool, such a ritual, as containing symbols of a predator and its prey, could symbolize that a bride would be all things to a groom. Cf. K. K. Hersch, op. cit., p. 177–180.

¹⁵ Servius explained such a ritual with a laconic statement *propter auspiciam castitatis*, when Varro wrote *ne a sacrilegio inchoarent si depositurae virginitatem calcent rem Vestae i. e. Numini castissimo consecratma*. Cf. Serv., *Aen*. 4.458; Varro, *ap. Serv. Verg. Ecl* 8.29. Plutarchus (Plut., *QR* 39) gave three plausible interpretations of such a ritual: to commemorate the seizure of the Sabine girl or to make impossible for a bride to escape or to manifest the unwillingness of a bride to lose her virginity. According to Karen K. Hersch trespassing the threshold could be symbolically related to the cult of Vesta or the loss of virginity. Maybe this ritual also represented the idea of a forced marriage. Cf. K. K. Hersch, op. cit., p. 180–182. The alternative explanation was proposed by M. B. Ogle. As he suggested in Greek and Roman tradition thresholds as well as graves and crossroads were places haunted by spirits since among ancient Greeks and Romans there was a wide-spread custom of burying the dead under the threshold or in front of the door. That explained why the threshold and the vicinity of the house-door were places where sacrifices and ritual purifications were made and this is why stumbling on the threshold was deemed to be a bad omen. Cf. M. B. Ogle, *The House-Door in Greek and Roman Religion and Folk-Lore, The American Journal of Philology* 32.3 (1911), p. 251–279.

¹⁶ See Varro, *de lingua latina* 5.61; Ovid., *Fasti*, 4.787-792. According to Paulus fire and water as sustaining human life were forbidden to the condemned and were offered to a bride on entering the house of a groom. See Paulus, [in:] Festus 3.1-3 L. For Servius on the other hand, the ceremony of sharing fire and water was related to the transfer of power over the woman during the act of *confarreatio*. Cf. Serv., *Aen*. 4.103. The meaning of such a ritual is thus not certain, neither is it known who was sharing fire and water nor to whom those were offered. According to Karen K. Hersch fire and water were shared by a bride and a groom as the symbol of the necessities of life and maybe also to purify a bride. Cf. K. K. Hersch, op. cit., p. 182–186.

¹⁷ Cf. Cic., *pro Murena* 27; Ovid., *Fasti* 4.791-791. The origin of this phrase is a very controversial question. Most scholars on the basis of Plutarch’s statement (Plut., *QR* 30) believed it originated from Gaia Caecilia i.e. Tanaquil and meant “where are you Master, I am Mistress”. But it couldn’t be known if these words were really reserved to express a consent to the marriage whether the bride spoke also other words neither if the groom also gave in some way verbally his consent. On the interpretations of the phrase in question cf. C. W. Westrup, *Recherches sur les formes antiques de mariage dans l’ancien droit romain*, Kobenhavn 1943, p. 26; S. Treggiari, op. cit., p. 26–27. As Patrizia Giunti suggested it could not be excluded that the names *Gaius* e *Gaia* were but conventional names that Roman jurists used to pronounce in the *formulae* of legal acts. Cf. P. Giunti, *Consors vitae. Matrimonio e rripudio in Roma antica*, Milano 2004, p. 171–185; K. K. Hersch, op. cit., p. 187–190.

a bride to her new home was accomplished when the newly married woman was led into her husband's bedroom, probably assisted by the same procession that accompanied her on her way to the house of the groom.

As the literary evidence seems to suggest the main function of the *deductio in domum mariti* was the parading of a bride in public to her new husband's home in order to give the proof of her virginity and chastity and probably also to express her consent for such a marriage. The wedding ceremony and in particular *deductio in domum mariti*, were laden with symbolic elements and ritual acts deeply rooted in the Roman religion and history, whose symbolism was interpreted even by Roman antiquarians in different ways. But as Karen K. Hersch noticed¹⁸, the question of their real origin and symbolism was in some way a secondary one, since the main function of these rites and rituals was not to fulfilled certain symbolic acts in order to provide spouses with the future prosperity but to make public the fact of concluding of a marriage. This role was played first of all by *deductio in domum mariti* being a public ceremony, to which anyone could attend, that constituted an irrefutable proof that the marriage had taken place. As the wedding feast and wedding rituals in the bride's house were reserved for the family and friends only, the procession leading a bride into a groom's house was a public event commonly available. The particular wedding clothes of a bride that made her visible in the crowd, her leading position at the top of the wedding procession, the ritual of making a gift of coins to the *Lares* of the crossroads and of her new home, the wedding guests shouting and singing bawdy songs during the procession, besmearing the doorposts with fat and decorating it with wool and even avoiding stepping on threshold – all those elements served to make a conclusion of a marriage a public event and thus to legitimize this marriage. What is more the public procession that accompanied a bride on her way to her new husband's house was not only the confirmation of her virginity and thus legitimacy of the groom's offspring but it also had a much wider significance as it transmitted and cultivated certain values and ideals recognized by the Romans as the values deeply rooted in the ancient Roman tradition and history¹⁹. The further consequence of the wedding procession was to manifest in public the existence of a mutual consent (*affectio maritalis*), being a necessary element for concluding of a legal marriage and certainly this aspect played a decisive role for Roman jurists in recognizing the importance of this ceremony from the legal point of view.

¹⁸ Cf. K. K. Hersch, op. cit., p. 222–226.

¹⁹ Although we may suppose because of the economic reasons the sumptuous wedding ceremony was proper exclusively for the narrow sphere of Roman elites, the wedding standards were in some way obligatory for all the brides regardless of their social position. The figure of a perfect bride laden with symbols of chastity, virginity and fertility as the values that Roman society attributed to a Roman woman at the moment of the creation of a new Roman family, and constituted also in some way a promise and a guarantee to perpetuate the community whose values she transmitted.

Although the wedding ceremony and more precisely *deductio in domum mariti* as described above was not deemed necessary for the existence of a valid marriage, its social significance was so important that it was often identified with concluding of a marriage. The significance of such a ritual was reflected in the field of language since an expression *uxorem ducere* (to lead a wife) was the most common expression used as a synonym of “to marry” and also in the field of law when according to jurists in certain situations the couple was considered duly legally married only when *deductio in domum mariti* had been accomplished.

Ulpianus discussing the case of a woman to whom a legacy was left on a condition *si in familia nupsisset* decided that such a condition should be deemed to be fulfilled when a ceremony of *deductio in domum mariti* had been accomplished (*ducta est uxor*), as from that moment the couple was legally married.

D. 35.1.15 (Ulp. 35 *ad Sab.*): *Cui fuerit sub hac condicione legatum ‘si in familia nupsisset’, videtur impleta condicio statim atque ducta est uxor, quamvis nondum in cubiculum mariti venerit. nuptias enim non concubitus, sed consensus facit.*

It should be noticed that Ulpianus interpreted *deductio* not as a formal act indispensable for a concluding of a valid marriage, but only as a proof of the expression of mutual *affectio maritalis* made by the spouses, which permitted to treat that moment as a moment of concluding of a legal marriage, even if a bride was not led into her husband’s bedroom (*nuptias enim non concubitus, sed consensus facit*).

In the other text Scaevola while discussing the validity of a gift made by a husband to his wife in the context of the possibility to claim back the money donated referred to the moment of *aqua et ignis accipere* as the moment from which the marriage was deemed to be valid.

D. 24.1.66.1 (Scaev. 9 *dig.*): *Virgini in hortos deductae ante diem tertium quam ibi nuptiae fierent, cum in separata diaeta ab eo esset, die nuptiarum priusquam ad eum transiret et priusquam aqua et igni acciperetur id est nuptiae celebrentur, optulit decem aureos dono: quaesitum est, post nuptias contractas divortio facto an summa donata repeti possit. respondit id, quod ante nuptias donatum proponeretur, non posse de dote deduci.*

In the case analyzed by Scaevola the facts were as follows: the bride was living in her future husband’s house before the wedding (in a separate part of the house). At the day of a wedding celebration she was given a gift of money from the groom (ten golden *aureos*). Hence the gift was made on the day of the wedding, in order to decide its validity from the legal point of view, it was important to

determine the precise moment from which the couple was considered duly and legally married. According to Scaevola if the gift of the money was made *priusquam ad eum transiret et priusquam aqua et ignis acciperetur id est nuptiae celebrentur* (before the wife was accepted with fire and water, that is before the wedding was celebrated) such a gift was treated as *donatio ante nuptias* and should not be deducted from the dowry after the divorce. This text may suggest that Scaevola identified the beginning of the marriage with a ritual act of *aqua et ignis accipere* that took place when the bride had arrived to the groom's house. In my opinion however Scaevola's decision should be interpreted strictly in the context of particular circumstances of the case he was discussing. That case was very unusual since the bride had been living in the groom's house before the wedding day. In such case the ceremony of a public procession leading a bride to her new house could not take place for only one house was involved. Thus it seems the celebration of the wedding took place exclusively in the groom's house probably being reduced to the symbolic leading of the bride to the part of the house reserved before only for her husband-to-be. Since according to the wedding tradition at the entrance of the bride to the groom's house the ceremony of sharing fire and water took place, Scaevola chose that moment as the proper in order to determine the beginning of a marriage as the moment of mutual expression of *affectio maritalis*. His opinion should not necessarily be treated as an opposite view in respect to the opinion expressed by Ulpianus in D. 35.1.15 who referred to *deductio in domum mariti* as to the moment from which the marriage was deemed to be concluded. We may suppose that Scaevola's intent was only to precisely identify from which moment the ceremony of *deductio in domum mariti* should be deemed to be accomplished (*id est nuptiae celebrentur*)²⁰. For this jurist such a moment should be the moment when after entering the husband's house, the bride in the act of *aqua et ignis communicatio* accepted ritually her duties as a wife and a Roman matron.

The special role played *deductio in domum mariti* in case of a conclusion of a marriage *inter absentes* (it seems that the only person absent could be a groom and not a bride). In this case the formal ceremony of *deductio* seems to be an indispensable act constituting the only way in which a mutual *affectio maritalis* could be expressed.

D. 23.2.5 (Pomp. 4 ad Sab.): *Mulierem absenti per litteras eius vel per nuntium posse nubere placet, si in domum eius deduceretur: eam vero quae abesset ex litteris vel nuntio suo duci a marito non posse: deductione enim opus esse in marito, non in uxoris domum, quasi in domicilium matrimonii.*

²⁰ Cf. K. K. Hersch, op. cit., p. 57–58.

According to Pomponius' opinion it was possible to conclude the marriage between a woman and an absent man by a letter or a messenger (*per litteras vel per nuntium*) if a bride was introduced into a groom's house (*si in domus eius deduceretur*). Such a possibility existed only in case of the absence of a man hence it was not possible to marry *per litteras vel per nuntium* the woman who was absent because of the impossibility to perform *deductio in domum mariti* being a *condictio sine qua non* of a conclusion of a marriage *inter absentes*.

The possibility to conclude the marriage in the absence of a groom was confirmed also in the text of *Pauli Sententiae*, that expressed the general rule according to which an absent man *uxorem ducere potest*, while a woman who was absent could not be married.

PS. 2.19.8: *Vir absens uxorem ducere potest: femina absens nubere non potest.*

From the texts referred above one may deduce that it was possible to conclude the marriage between persons physically separated and such a possibility constitutes further confirmation of the consensual character of Roman marriage. The absent part could be only a groom and not a bride hence in the absence of the latter the ceremony of *deductio in domum mariti* could not be celebrated. Such a ceremony meaning an introduction of a woman into her husband's household treated as the domicile of the marriage (*domicilium matrimonii*)²¹ constituted thus *condictio sine qua non* for the existence of a valid marriage concluded in the absence of a groom.

The analogous case of a "groomless" wedding is discussed by Papinianus in the text of D. 23.3.69.3:

D. 23.3.69.3 (Pap. 4 resp.): *In domum absentis uxore deducta, nullis in eam interea ex bonis viri sumptibus factis, ad exhibitionem uxoris promissas usuras reversus vir improbe petis.*

Papinianus maintains that in the case when a bride had been led to the groom's house in the absence of the latter and subsequently she didn't take any expense from his assets, the husband was not entitled to claim any interests.

The most controversial text concerning the possibility of concluding of a marriage *inter absentes* is the text from the 31th book of Ulpianus' commentary *ad Sabinum* in which Ulpianus seems to refer to the case when the marriage was concluded in the absence of a bride and not a groom:

²¹ According to Ricardo Orestano the groom's absence should be interpreted in relation to a house in which he lived and to which the bride was to be introduced during the wedding celebration. Cf. R. Orestano, *Il matrimonio*, op. cit., p. 153.

D. 23.2.6 (Ulp. 31 *ad Sab.*): *Denique Cinna scribit: eum qui absentem accepit uxorem, deinde rediens a cena iuxta Tiberim perisset, ab uxore lugendum responsum est.*

According to Ulpianus, a republican jurist Cinna gave an opinion that a man who after having married a wife *in absentia* died in the vicinity of Tiber on his way back from dinner, had to be mourned by his wife who was thus obliged to observe *tempus lugendi*²².

Because of the inconsistency with the other texts, in particular of the text of D. 23.2.5 and P.S. 2.9.8, that, due to the impossibility to perform a solemn ceremony of *deductio in domum mariti*, excluded the possibility of marrying an absent woman, the above cited text was widely discussed among Romanists. One of the issues raised was even the genuineness of the judgement made by Cinna²³, but most often the scholars called into question the fragment of the text *eum qui absentem accepit uxorem* that violated the rule *femina absens nubere non potest* expressed in P.S. 2.19.8.

Many scholars trying to resolve the problem of the passage suggested correcting *absentem* in *absens* which permitted them to reconcile the text of D. 23.2.6 with other texts regarding a marriage between a woman and an absent groom²⁴. A strong argument for supporting the hypothesis that a form *absentem* was only the result of a scribal error could be the text of the scholia sch. γυνή *ad Bas.* 29.1.65., which suggested that its author used a text of the same *responsum* in which *absens* was used in the nominative, and not accusative, forms²⁵.

²² On *tempus lugendi* cf. P. Niczyporuk, *Żaloba i powtórne małżeństwo wdowy w prawie rzymskim* [*Mourning and the Marriage of a Widow in Roman Law*], Białystok 2002, in particular, p. 22–105.

²³ Salvatore Di Marzo suggested that Ulpianus could have referred to the *responsum* gave by Servius Sulpicius Rufus, who had Cinna among his *auditores*. The genuineness of the text was also questioned by Pietro Pescani. Cf. S. Di Marzo, *Lezioni sul matrimonio romano*, Roma 1972, p. 58; P. Pescani, *Lenigma del cosiddetto responso di Cinna in D. 23.2.6*, “Studi Senesi” 76 (1964), p. 131–133; M. Lauria, *Matrimonio. Dote in diritto romano*, Napoli 1952, p. 14; G. Longo, *Il requisito della convivenza nella nozione romana di matrimonio*, “Annali dell’Università di Macerata” 19 (1955), p. 3–12 (= *Ricerche romanistiche*, Milano 1966, p. 323–332).

²⁴ In the Valentino Capocci’s view the use of the form *absentem* constituted a scribal error caused by the form of the pronoun *eum* at the beginning of the text and the following form of accusative *uxorem* after the verb *accepit*. Apart from the error of „assimilazione” the incorrect form *absentem* was also the result of the simplification of the text made by writer (“trivializzazione”), since the lecture *eum qui absens accepit uxorem* constituted *lectio difficilior* in regard to *eum qui absentem accepit uxorem*. In order to support his view Capocci cites other ancient Greek and Latin texts, in which the copyist made analogous errors as he supposed was made by the writer in D. 23.2.6. According to Capocci the incorrect use of the form *absentem* was not necessarily an error made by Justinian’s compilers but probably constituted an error of some later copyist from VI/VII century, maybe provoked by a person dictating the text. Cr. V. Capocci, *Il testo del responso di Cinna riferito da Ulpiano: D. 23,2,6, SDHI 24* (1958), p. 299–307.

²⁵ A. Masi, *Lo sch. γυνή ad Bas. 29.1.65 e il testo del responso di Cinna riferito da Ulpiano in D. 23.2.6*, “Studi Senesi” 74 (1962), p. 397–402.

Edoardo Volterra for the genuineness of the text of Ulpianus²⁶, suggesting that Cinna had referred to a case of marriage concluded in the absence of a bride when a mutual *affectio maritalis* was expressed in a different way than through the formal ceremony of *deductio in domum mariti*. Since the marriage was legally valid, the death of a man in an accident, obliged a woman to mourn her husband. According to Volterra, since the accident took place in the vicinity of Rome (*iuxta Tiberim perisset*), the groom as a Roman citizen was at his place of residence and thus wasn't *absens*²⁷. According to Volterra's reconstruction the facts were as follows: some man on his way back from the wedding feast²⁸, during which in the absence of a bride but in the presence of her family and relatives, the mutual consent was expressed, fell into the Tiber and perished²⁹.

The alternative reconstruction of the case discussed by Ulpian in D. 23.2.6 was recently proposed by Carlo Castello³⁰. This author accepted the correction of *absentem* in *absens*, but proposed to interpret the adjective *absens* in a different way not necessarily meaning the total absence of the groom during the wedding ceremony. According to Castello, the groom was present at the wedding feast in a house of the bride. After the traditional dinner he went back to Rome in order to attend his wife-to-be in his house but on his way back in unspecified circumstances perished near the Tiber. The problem discussed by Cinna in his *responsum* regarded the question if in these circumstances the marriage was legally concluded, since the wedding celebration had not been accomplished and the bride had not been led into her husband's bedroom. According to this author the text of Ulpianus speaks for the necessity of *affectio maritalis* as the one and the only prerequisite for the validity of *iustum matrimonium*. Since the text doesn't mention *deductio in domum mariti* at all, such a ceremony for Castello was not obligatory for the existence of a valid marriage.

The interpretation proposed by Castello seems to be not convincing for the term *absens* was consequently used by jurists to determine the continuing absence of one of the spouses during the wedding celebration. It would be thus an unusual use of such an adjective for describing his temporary

²⁶ Cf. E. Volterra, *La conception du mariage*, cit., p. 48; E. Volterra, *Lezioni*, op. cit., p. 143.

²⁷ See the critical remarks in P. Pescani, op. cit., p. 138.

²⁸ Cf. R. Ambrosino, rec. E. Volterra, *La conception du mariage d'après les juristes romains*, SDHI 11 (1945), no. 7, p. 348, who suggested that the phrase *rediens a cena* was incorrect due to the incorrect reading of the name of the place from which returned the groom. Thus this author proposed to correct *a cena* in *a Caere*. Also according to Pietro Pescani in the original version of the text instead of *cena* there was a name of a Sicilian town Cena situated near Agrigento. This author suggested that in the case analyzed by Cinna the groom who normally lived in Rome during his stay in Sicily married some woman. The wedding celebration took place in his house in Rome when he was away. On his return home his ship sank near the Tiber. Cf. P. Pescani, op. cit., p. 139.

²⁹ Similarly, Patrizia Giunti speaks for such an interpretation as the only plausible one in order to preserve the original lecture of *Florentina*. Cf. P. Giunti, op. cit., p. 159–161.

³⁰ C. Castello, op. cit., p. 237–245.

absence due to the presence in different place during some stage of the wedding ceremony.

In my opinion the *communis opinio* according to which the use of the adjective *absens* in the accusative form was due to a scribal error, seems plausible. Apart from linguistic reasons that make it probable that an error was made by a copyist substantive reasons also support this theory. The latter speaks for the impossibility of concluding of a marriage in the absence of a bride. First of all it should be noticed that the possibility of concluding of a marriage in the absence of one of the spouses-to-be should be treated as an extraordinary solution as it could provoke difficulties in deciding from which moment such a marriage should be deemed duly and legally concluded. In order to avoid doubts and discordances concerning the determination of a particular moment from which *affectio maritalis* should be deemed as expressed and the marriage thus concluded, the Roman jurists required the formal ceremony of *deductio in domum mariti*, which in a decisive manner confirmed the mutual consensus necessary for getting married. A groom expressed his *affectio maritalis* by allowing the introduction of a woman into his household (*domicilium matrimonii*), while a bride gave her consent by participating in a wedding procession and being subjected to the symbolic rituals connected with the celebration of a wedding. As far as the introduction of a bride into her future husband's household was possible in the absence of a groom, the absence of a bride as the main figure in the whole ceremony made impossible the celebration of a wedding and thus made impossible the expression of *affectio maritalis* necessary for concluding a valid marriage. Finally as one may suppose, also from the social point of view the possibility to conclude a marriage *per litteras vel per nuntium* was more important for men than women since it permitted a man to quickly marry a woman without being necessarily present at his place of residence where the wedding ceremony was to be celebrated³¹.

On the basis of the texts cited above one may deduct that in the case of a marriage concluded in the absence of a groom, for the existence of *iustum matrimonium* the solemn ceremony of *deductio in domum mariti* was needed. Such a ceremony constituted an irrefutable proof of the existence of mutual *affectio maritalis* between spouses. Nonetheless the necessity of leading a bride to her husband's home in case of a *matrimonium inter absentes* should not be misunderstood with a constitutive character of *deductio in domum mariti*. The

³¹ Taking into consideration the Augustan Legislation concerning marriage, in particular *lex Iulia de maritandis ordinibus*, that obliged a man immediately after his first marriage had come to an end to conclude a new marriage, the possibility to marry a woman *per litteras vel per nuntium* constituted a proper solution for a person, whose profession required traveling or staying away from Rome for a long period and who did not want to expose themselves at that time to sanctions provided for *caelibes*. On the Augustan legislation cf. M. Zabłocka, *Przemiany prawa osobowego i rodzinnego w ustawodawstwie dynastii julijsko-klaudyjskiej* [*The Changes of Law of Persons and Family Law in the Legislation of Julio-Claudian Dynasty*], Warszawa 1987, p. 34–93.

only constitutive element that remained was still the *consensus* and *deductio in domum mariti* constituted only the formal way in which, due to the particular circumstances, i.e. the absence of a groom, this *consensus* had to be expressed. Since in the absence of a groom his consent for a marriage could not be expressed directly, indirectly his *affectio maritalis* was shown in public during the ritual ceremony of *deductio in domum mariti* when he allowed the introduction of a bride into his household and during the same ceremony a bride, who played the main role in the procession, gave her consent for being married.

The necessity of celebrating of the introduction of a bride into a groom's house if the latter was absent during the wedding has to be understood as a necessity of making public of the expression of mutual *affectio maritalis* that, due to the absence of a groom, could not be expressed otherwise³². The possibility to marry a woman *per litteris vel per nuntium* constitutes the confirmation of the constitutive character of the *consensus* between spouses as the one and the only prerequisite of a legally valid marriage³³.

It's worth noting that the necessity of a solemn introduction of a bride into her future husband's house in case of a marriage *inter absentes* constitutes solid proof of the important role that the ceremony of *deductio in domum mariti* played in the Roman culture and society. Such a ceremony, commonly identified with the conclusion of a marriage, as the manifest of mutual *affectio maritalis* was of a great probative importance as an act confirming the conclusion of a marriage between a man and woman and the moment from which a marriage was considered to be legally concluded³⁴. Thus, in cases in which it was not possible to determine the particular moment in which the mutual consent for a marriage was given by spouses, the formal procedure of *deductio in domum mariti* was the guarantee and the proof of an expression of mutual *affectio maritalis*³⁵. For this reason the Roman jurists while discussing the legal issues

³² Cf. E. Volterra, *Lezioni*, op. cit., p. 142; R. Orestano, *La struttura*, cit., p. 157; E. Volterra, *Matrimonio*, cit., p. 742 n. 34, C. Fayer, *La famiglia romana: aspetti giuridici ed antiquari*, II, Roma 2005, p. 339; P. Giunti, op. cit., p. 161; M. I. Núñez Paz, op. cit., p. 61.

³³ According to Riccardo Orestano: "L'argomento della *deductio in domum* nel caso specifico del matrimonio fra persone lontane, pertanto, lungi dal potere essere addotto a riprova della necessità della convivenza che di fatto anzi, si direbbe, per definizione, mancava, assicura che l'elemento veramente essenziale e costitutivo, necessario e sufficiente del matrimonio, era l'incontro delle due volontà nel consenso scambievole e indubitamente espresso." Cf. Orestano, *La struttura giuridica del matrimonio romano. Dal diritto classico al diritto giustiniano*, Milano 1951, I, p. 157. Similarly, it also O. Robleda, *El matrimonio*, op. cit., p. 89.

³⁴ *Deductio in domum mariti* was deemed to indicate a moment from which the marriage was dully and legally valid not because of the constitutive character of the act itself but because it constituted a formal expression of *affectio maritalis* necessary for concluding of a valid marriage .

³⁵ If the celebration of such a ceremony was not possible (as for example in case of the absence of a bride during the wedding ceremony), there was no possibility to determine whether and when the marriage had been concluded.

concerning the restitution of a dowry or the invalidity of a donation made in marriage considered *deductio in domum mariti* the moment from which a marriage was fully and legally concluded.

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