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ROMAN LAW TRADITION IN THREE CASES OF FIRST IMPRESSION

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1. **Introduction**

In 1958 Raphael Powell – an English lawyer and the professor of Roman law at University College London – published an interesting article titled 'Roman Law in Common Law Courts". After the comprehensive presentation of different English law cases in which reference was made to the authority of Roman law, R. Powell defined three principles applicable to the utilisation of civilian solutions in English courts. He proclaimed that: (1) "the Roman rule can be applied only where the common law is silent"; (2) "the Roman law rule must be capable of fitting the conditions of the age in which it is sought to apply it"; and (3) "the mere fact that English law had adopted a Roman doctrine or institution does not mean that all the Roman law rules applicable to that doctrine or institution also apply in English law".[1] These principles show that the English Romanist had on his mind situations commonly called "legal gaps". Before it is possible to relate the aforementioned ideas to the actual cases, it is necessary to discuss shortly the notion of the legal gap in English legal tradition.

[1] Powell, R., *Roman Law in Common Law Courts*, in *Current Legal Problems* (1958), pp. 31-34. See also an interesting observations of Moccia, L., *English Law Attitudes to the 'Civil Law'*, in The Journal of Legal History 2 (1981), s. 157-168.

2. Gaps, Loopholes and Cases of First Impression in English Law

Situations where lawyers are forced to deal with a lack of legal rulings or an ambiguity in these legal rulings constitutes a common, sometimes everyday, challenge to lawyers all around the world. In the sphere of the common law, it is possible to enumerate several distinctive terms regarding this experience. First of all the English lawyers may speak about the legal gaps or *lacunae iuris*. As the literal meaning of the term "gap" suggests, the *lacunae* are the situations when there is no particular law that might be exploited in a certain legal situation. Neha Jain briefly explains it: "the law is silent (…), absent, or simply unavailable to resolve an issue".[2] Aside from the term legal gap, the lawyers refer also to the term "loophole". It concerns the ambiguity of the law, a situation when two or more solutions are foreseen in the particular situation or when two or more legal solutions preclude each other.[3] In such situation it is possible to find a technical means or exception to evade the intent of the particular law. As a consequence it may even open the possibility of the abuse of law. The source of both lacunae, as well as the loopholes, can be

[2] Jain, N., *Judicial Lawmaking and General Principles of Law in International Criminal Law*, in *Harvard International Law Journal* 57,1 (2016), p. 114. See also Garner, B.A., *A Dictionary of Modern Legal Usage*, 2nd ed. (Oxford, 1995), p. 496.

[3] Garner, B.A. *op.cit.*, p. 538. For an extensive study on loopholes see Katz, L., *A Theory of Loopholes*, in *Journal of Legal Studies* 32 (2010), 1-31.

twofold – legislative or judicial. In case of the English law, the second source brings the greater problem. In cases of legislative lack or ambiguity of ruling the amendment of the relevant statutory text generally resolves a problem. The judicial gap or loophole, instead, has to be seen from the perspective of the leading factor of the common law system, i.e. the doctrine of precedent. Its existence is manifested in the maxim *stare decisis et non quieta movere*. As a general rule, the lower courts are bound to follow the decisions of the higher courts if only the facts of the cases are similar. It means that the *ratio decidendi* of the case should be parallel to the one of the established precedent. It is conceded that this is an overly simplified explanation. In practice, the doctrine of precedent may generate a number of particular problems.[4]

A judicial answer to the legal gaps and loopholes are the so-called cases (or questions) of first impression (*res nova* or *res integra*). As was mentioned earlier, the standard rule is that a common law judge shall decide a case upon any existing binding precedents or an Act of Parliament. This rule disintegrates whenever the case is a first of its kind and it is impossible to find a suitable precedent or when there are many

[4] See e.g. Cross, R., Harris, J.W., *Precedent in English Law,* 4th ed., (Oxford, 1991); Oldham, J., *Lord Mansfield, Stare Decisis, and the Ratio Decidendi 1756 to 1788*, in Bryson, W.H., Serge, D. (eds.), *Ratio decidendi. Guiding Principles of Judicial Decisions*, vol. 1, *Case Law* (Berlin, 2006), pp. 137-150; Duxbury, N., *The Nature and Authority of Precedent*, (Cambridge, 2008).

similar precedents, but none of which directly resembles the discussed case.

If there is no formal source of law to decide a case, the question arises as to what kind of factors the judges may utilise to decide a case in the situations outlined above. One must remember that it is not possible, at least overtly, to base the judgement solely on personal views or moral adjudication of the judge.

In the eighteenth century, when the doctrine of precedent was still developing, it was suggested that such cases should be judged by the use of "natural reason".[5] In modern cases, however, such situation requires the use of *inter alia* an analogy[6] as well as answering the question what the law ought to be, which in fact moves the burden of the discussion into the area of morality.[7] It has to be remembered also that modern legal systems, including the English law, generally reject the *non liquet* i.e. the judicial refusal to decide the case.[8]

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[5] Lobban, M., *A History of the Philosophy of Law in the Common Law World, 1600-1900*, (Heidelberg-New York-London, 2007), p. 106.

[6] Koszowski, M., *The Scope of Application of Analogical Reasoning in Precedential Law*, in *Liverpool Law Review* 37 (2016), p. 21.

[7] Downard, J.B., *The Common Law and the Forms of Reasoning*, in *International Journal for the Semiotics of Law / Revue Internationale de Sémiotique Juridique* 13 (2000), pp. 398-405.

[8] See Rabello, A.M., *Non liquet: From Modern Law to Roman Law*, in *Annual Survery of International and Comparative Law* 10 (2004), pp. 1-25. On Roman origin of the concept see Duff, P.W., *Non liquet*, in *Butterworths South Africa*

In the first impression cases, the most commonly used font of reference is the analogy. The analogy as such is the subject of doctrinal or theoretical discussions and not one to be undertaken by the legal historian. Nevertheless, one type of analogy deserves a closer look. Although English law is proudly separate from other European legal systems, its lawyers do not hesitate from employing examples and authority of legal institutions other than their own when needed. The use of foreign solutions is hard to imagine for continental lawyers, except perhaps in international private law cases. English lawyers do not, however, restrict themselves to the conflict of laws.[9] On a contrary, there are no particular obstacles in referring to foreign legal traditions. According to M. Bobek, this sort of analogy might be called the "voluntary use of foreign law" and "non-mandatory use of foreign law".[10]

The use of foreign law by English judges is hardly incidental. The variety of cases shows the comparative taste of

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Law Review (1956), pp. 39-40. See also the description of the use of an oath *sibi non liquere* by judge in ancient Rome: Gell. 14, 2.

[9] For the use of foreign law in English conflict of laws cases see Fentiman, R., *Foreign Law in English Courts. Pleading, Proof and Choice of Law*, (Oxford, 1998).

[10] Bobek, M., *Comparative Reasoning in European Supreme Courts*, (Oxford, 2013), pp. 33-35. See also an interesting list of cons and pros of referring to the foreign legal solutions by the courts: Kadner Graziano, Th., *Is it Legitimate and Beneficial for Judges to Compare?*, in Andena, M., Fairgrieve, D. (eds.), *Courts and Comparative Law*, (Oxford, 2015), pp. 26-39.

many of them. The use of foreign laws is not limited, however, just to the contemporary law. In practice, the historical argumentation is also popular. This means, of course, that the Roman law in its many impressions – ancient, medieval or early modern – can also function as a *terra comparationis*.[11]

3. **Roman Law as an Argument in "Cases of First Impression"**

As it was mentioned above the cases of first impression can take different forms. On some occasions they may concern legal gaps, and on the others, the case will be an answer to the unresolved and ambiguous question.

In the following analysis it is intended to focus on three decisions that illustrate the diversity of first impression cases. Additionally, in all three cases, judges referred to the Roman law. The research was limited to the jurisdiction of the Appellate Committee of the House of Lords which until 2009 acted as the highest court for the United Kingdom.[12]

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[11] On the use of foreign law, including the Roman law, by Lord Rodger see Lord Mance, *Foreign Laws and Languages*, in: Burrows, A., Johnston, D., Zimmermann, R. (eds.), *Judge and Jurist. Essays in Memory of Lord Rodger of Earlsferry*, (Oxford, 2013), pp. 85-97.

[12] About the ceasing the judicial functions of the House of Lords and the creation of the new Supreme Court of the United Kingdom see Le Sueur, A., *From Appellate Committee to Supreme Court: A Narrative*, in Blom-Cooper, L., Dickson, B., Drewry, G. (eds.), *The Judicial House of Lords, 1876-2009*, (Oxford, 2009), pp. 64-97.

3.1. *Keighley, Maxsted & Co. v. Durant*

First of the relevant cases is *Keighley, Maxsted & Co. v. Durant*. The case was decided by the House of Lords in May 1901.[13] The dispute arose between corn entrepreneurs. At first, Keighley, Maxsted & Co. had authorised a corn merchant named Roberts to acquire wheat on the joint account of himself and the company. In advance, they fixed a certain price for wheat. Roberts's first attempt to buy wheat was unsuccessful. Then he decided on his own to buy wheat at a higher price from a merchant named Durant. The transaction was incompatible with the scope of Roberts's authorization. Indeed, during the trial, the corn merchant pointed out that he was willing to enter the contract on his own behalf and on behalf of Keighley, Maxsted & Co., but it was revealed that he had never disclosed that intention to Durant. The day after the transaction was made the manager of Keighley, Maxsted & Co. agreed to accept the wheat, but in the event, it was never collected from Durant. Finally the corn was sold by Durant to another party but at a lower price. Durant sued both the company and Roberts for the amount of money which was lost by him. The company claimed, however, that it should not be sued due to the fact that the contractual parties were only Durant and Roberts and the contract did not require the company's ratification. The opposite argument was introduced by Durant's counsel. They argued that there are many decisions upon which

[13] *Keighley, Maxsted & Co. v. Durant* [1901] A.C. 240.

it was established that "if the agent intends to make the contract on behalf of a principal, though he does not express the intention, the contract may be ratified by the principal so as to bind him".[14]

The key question during the judicial proceeding was related to the relevance of the undisclosed principal to determine the validity of the contract of agency. Additionally, the law lords were eager to set the rules in the event of a consequent authorization of agent's acts by his principal.

An issue of authorization or ratification[15] made it possible to link the discussion to the Roman concept of *ratihabitio*[16], disclosed in the case by the prerequisite of *contemplatio*. The Roman element in the case was not relied on by the counsels of the parties, but by Lord Justice Collins, who decided the case in the Court of Appeal.[17] In the lengthy deliberations he recalled

[14] *Keighley, Maxsted & Co. v. Durant* [1901] A.C. 240, 243

[15] About the ratification see Tan, Ch.-H., *Unauthorised agency in English Law*, in Busch, D., Macgregor, L.J., (eds.), *The Unauthorised Agent. Perspectives from European and Comparative Law*, (Cambridge, 2009), pp. 199-212.

[16] About the *ratihabitio* in Roman law see Zimmermann, R., *The Law of Obligations. Roman Foundations of the Civilian Tradition*, (Oxford, 1996), p. 434, n. 8; Kacprzak, A., *La "ratihabitio" nel diritto romano classico*, (Napoli, 2002); Isola, L., *D. 3, 5, 8 und die Regel "ratihabitio mandato comparator"*, in *Tijdschrift voor Rechtsgeschiedenis* 83 (2015), pp. 107-125.

[17] See also Goddard, E.C., *Ratification by an Undisclosed Principal*, in *Michigan Law Review* 2 (1903), pp. 26-27.

the authority of Justinian's Digest numerous times[18], though he proclaimed also himself that:

"the doctrine of ratification would seem, as its name imports, to have come into our law from a Roman source; but, so far as I am aware, no argument can be drawn from the Digest that the person acting without authority in the affairs of another must avow that he is acting for him in order to let in ratification".[19]

It is quite striking, however, that Lord Collins referred mainly to the fifth chapter of the third book of the Digest *De negotiis gestis*. The members of the Appellate Committee rejected this argument and a counter argument was presented by Lord Robertson.

This Scottish law lord pointed out that Lord Collins based his argumentation on the writings of Roman jurists which dealt with the exaction of a debt by a *negotiorum gestor*. In addition, he noticed that "nothing that is cited from civil law relates to contracts". He stressed also that the term *contemplatio* is an important one for the problem argued in the case, but he believed that it was necessary to remember that the issue had arisen in the context of a longer discussion. Instead of that, the

[18] *Durant & Co. v. Roberts and Keighley, Maxsted & Co.* [1900] 1 Q.B. 629, 647-650.

[19] *Durant & Co. v. Roberts and Keighley, Maxsted & Co.* [1900] 1 Q.B. 629, 647.

passage quoted by Lord Collins "is a mere episode" in that extended analysis. Lord Robertson did not present the discussion concerned in detail, but he pointed out that the key question should be: "in what cases shall a person interfering in the affairs of an absent man have an action (for reimbursement or the like) against that man?". The Scottish judge explained that the interference should have a "friendly" character and should not be "a selfish intervention truly in the interest of the intervener himself or of a third party". He mentioned finally that the *contemplatio*, i.e. the implied will of the principle to establish an agent, should only be considered in the above-mentioned context.[20] The law lord illustrated his deliberations by describing the case of Seius which was preserved in the Digest, in the passage attributed to Ulpian.[21]

Lord Robertson was likewise critical in a further part of his judgement where he pointed out that Lord Collins cited also the Digest's passages related to delictual liability. He showed that these rules "are not the same as apply to a man being

[20] *Keighley, Maxsted & Co. v. Durant* [1901] A.C. 240, 259-260.

[21] D. 3, 5, 5, 12(10) (*Ulpianus libro decimo ad edictum*) Idem ait, si Titii debitorem, cui te heredem putabam, cum esset Seius heres, convenero similiter et exegero, mox tu ratum habueris: esse mihi adversus te et tibi mutuam negotiorum gestorum actionem. Adquin alienum negotium gestum est: sed ratihabitio hoc conciliat: quae res efficit, ut tuum negotium gestum videatur et a te hereditas peti possit. More about the Seius's case see Kacprzak, A., op.cit., pp. 77-79.

introduced into a contract with a third party".[22] In consequence, the law lords decided to reverse the decision of the Court of Appeal.

The featured case is an example of the case of first impression understood rather as a situation when the judges have to deal with many contrary precedents. The Roman arguments were introduced as a possible solution already in the Court of Appeal, the truly interesting analysis of them can be found only in the House of Lords.

Lord Collins had depicted interesting deliberations on the subject of *contemplatio*, but it is necessary to agree with Lord Robertson that the selection of the sources was rather surprising. No doubt that his comment on the wrong choice of the Roman sources and their connection to the *negotiorum gestio*, instead of contracts is most appropriate. Additionally, Lord Robertson's bias against the idea of referring to the Roman concept of the unauthorised managing of someone else's affairs suits common opinion among the English lawyers that the *negotiorum gestio* did not evolve in the common law environment.[23]

Although the Roman law did not influence the final decision of the House of Lords, nevertheless it is worth mentioning that it was considered in the resolution of a case

[22] *Keighley, Maxsted & Co. v. Durant* [1901] A.C. 240, 260-261.

[23] See Sheehan, D., *Negotiorum Gestio: A Civilian Concept in the Common Law?*, in *International and Comparative Law Quarterly* 55 (2006), pp. 260-263.

that became an important precedent in the English law of agency.[24] Additionally, it is interesting to recall the statement of another law lord who decided in the case – Earl of Halsbury, L.C. After the rejection of the Roman legal solutions, he declared that:

"there are parts of the Roman law which undoubtedly we have made part of our own law, and they are binding on us, not because they are part of the Roman law, but because they have become part of our law".

This declaration is strong and important voice in the discussion of the influence of civilian tradition on the English law.

3.2. National Bank of Greece and Athens S.A. v. Metliss

Another case that fit the concept of first impression questions was decided by the House of Lords in 1957. The case is known as National Bank of Greece and Athens S.A. v.

[24] Goodhart, A.L., Hamson, Ch.J., *Undisclosed Principals in Contract*, in: *Cambridge Law Journal* 4 (1930-1932), p. 325; Krebs, Th., *Ratification*, in Busch, D., Macgregor, L., Watts P. (eds.), *Agency Law in Commercial Practice*, (Oxford, 2016), pp. 19-21.

Metliss25 and has regard to the concept of universal succession which at the time was unknown to the English law.[26]

In 1927 the National Mortgage Bank of Greece issued sterling mortgage bonds. The repayment as to principal with interest was set for 1957. The guarantee of the transactions was provided by the National Bank of Greece. In a case of any legal disputes, the English courts were declared to be competent. In 1941 the interest ceased to be paid because of the war. Later, in 1949 the new Greek government declared the suspension of the payments of all Greek bonds payable abroad. Finally, in 1953 the guarantor bank and another one (irrelevant for the case) were merged into new National Bank of Greece and Athens S.A. The new bank was declared as the legal successor of the two previous banking entities.

The legal dispute arose between Cyril Metliss, who held bonds worth £29.700 and a newly created bank. Dealing with the "new" bank was a grave problem for the English courts that dealt with the case. The bank's counsel argued that the inasmuch as the English courts were the proper one to deal with the case, they were obliged to employ English law. In such situation, the new bank would not be liable for the obligations of the two former banks.

[25] *National Bank of Greece and Athens S.A. v. Metliss* [1958] A.C. 509.

[26] Collier, J.G., Conflict of Laws, 3rd ed., (Cambridge, 2001), p. 19. See also Buckland, W.W., McNair A.D., *Roman Law and Common Law*, 2nd ed., (Cambridge, 1965), pp. 143-146.

The case was positively adjudged in favour of C. Metliss by the Queen's Bench Division of the High Court of Justice in March 1957.[27] Nevertheless, the bank's counsel asked for granting leave to appeal to the House of Lords.

It is clear that the civilian concept of the universal succession was elevated by the lawyers who represented C. Metliss. Among the Lord Justices the most fully report on the Roman universal succession may be found in Lord Denning's judgement. He proclaimed that the "concept of universal succession is derived from the Roman law, and particularly from succession of an heir on the death of the testator".[28] In addition, he recalled the maxim hereditas est successio in universum jus quod defunctus habuit that he found after "looking again into the books of Roman law". The quoted phrase originates in Justinian's Digest[29], but it is used commonly as an explanation of the rule of the universal succession, and also in English law treatises[30].

[27] *Metliss v. National Bank of Greece and Athens S.A.* [1957] 2 Q.B. 33.

[28] *Metliss v. National Bank of Greece and Athens S.A.* [1957] 2 Q.B. 33, 42-43.

[29] D. 50, 16, 24 (Gaius libro sexto ad edictum provinciale). The form of the maxim is not usual. It was deprived of few additional words. The form used by Lord Denning can be found only in Campbell, G., A Compendium of Roman Law, (London, 1878), p. 67.

[30] The maxim is, for example, quoted by Bracton (see Thorne, S.E., *Bracton On the Laws and Customs of England*, vol. 2, (Cambridge, Mass., 1968), p. 184) as well as in Fleta (VI, 1, 10).

In further part of the same paragraph, Lord Denning disclosed the problem of heir's liability for the debts and Justinian's invention of beneficium inventarii.[31] He had pointed out also the relevant passages from the Digest's title De separationibus.

In the House of Lords, the key judgement was issued by Viscount Simonds, L.C., who declared that the English law did not provide arguments that would enable the judges to deliver a just decision. Although he summarised Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft, he noticed also that "no other authority" supported the appellants' argumentation. He believed then that the question which appeared in the instant case "is rather of principle and analogy". Immediately, however, he explained that "analogies are dangerous and principles difficult to state with precision".[32] Although it appears that the law lord was suspicious about both methods, he finally decided to lean his further argumentation on to the concept of analogy taken from the Roman law.

The judge mentioned the Roman notion of universal succession which was later taken over by many legal systems, including the Scottish one. The law lord recalled also the Latin maxim eadem persona cum defuncto that may be traced back to

[31] *Metliss v. National Bank of Greece and Athens S.A.* [1957] 2 Q.B. 33, 43.

[32] *National Bank of Greece and Athens S.A. v. Metliss* [1958] A.C. 509, 524.

the writings of Lord Stair[33] and John Erskine[34]. To a civilian, it is quite obvious that Viscount Simonds, as well as the rest of the judges, had limited the scope of the meaning of the term universal succession. Every time they referred to that concept they pointed out that it regards the heir who was becoming a universal successor to the testator's property as well as the universal successor liable for his predecessor's obligations. The case of the two bank companies was regarded by the judges as similar to the heir and testator configuration. In reality, however, this way of thinking is directly opposite to the principle. For the civil lawyers, at least for Roman lawyers, the universal succession was and still is a general conception. The heir-testator relation and the creation of a new company in place of the older one are simply the examples of the broader rule recognised in the civilian legal systems.[35] It is true, however, that the inheritance connotation is the most common (it might be said even "paradigmatic") for the idea of universal succession.

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[33] Lord Stair, *Institutions of the Laws of Scotland*, 1, 17, 14.

[34] Erskine, J., *An Institute of the Law of Scotland*, 3, 8, 51.

[35] For the universal succession *inter vivos* in Roman law see Sanfilippo, C., *Instituzioni di diritto romano*, 10th. ed., curata ed aggiornata Corbino, A., Metro, A., (Soveria Mannelli, 2002), pp. 333-334. It is very common, however, even among the scholars to restrict the meaning of the term universal succession just to the inheritance law see e.g. Pelletier, G.A., Sonnenreich, M.R., *A Comparative Analysis of Civil Law Succession*, in *Villanova Law Review* 11, 2 (1966), pp. 323-356.

As a result, Viscount Simonds decided that the rule of universal succession could be exploited in the present case. He did not hesitate, however, to mention that according to him, the base for such ruling would be the principle of rational justice. It seems quite striking that even when there was direct use of civilian concept the law lord felt obliged to give a non-civilian explanation for his argumentation.[36] It seems that he sought to avert potential allegations that he was using a civilian legal solution rather than a common law solution.

In addition, a judgement in the same case was given by Lord Keith of Avonholm. His arguments appear, at first, to be more coherent from acivilian point of view, than the Lord Chancellor's. He refuted the solemn proclamation of the previous law lord that the universal succession was used only in the sphere of the inheritance law. Lord Keith pointed out that the concept was "used generally with reference to an heir".[37] In subsequent statements he tried to explain, what he considered to be most important consequence of the civilian notion: "the persona of the deceased is regarded as continued in the heir, or, as it is otherwise expressed, he is eadem persona cum defuncto". His subsequent statement, however, raises doubts about the accuracy of the law lord's deliberations. He had suggested that the universal successor should be regarded as a new party of the already existing contract. And additionally, it

[36] *National Bank of Greece and Athens S.A. v. Metliss* [1958] A.C. 509, 525.

[37] *National Bank of Greece and Athens S.A. v. Metliss* [1958] A.C. 509, 530.

allowed him to make a parallel to English concepts of an executor or an administrator of the estate. Both ideas need to be approached with caution. First of all universal succession is primarily a concept from the sphere of property law. It is essentially connected with the notion of the acquisition of rights. The transfer of the duties or obligations, although it falls under the term, is more closely connected with entering into the sphere of proprietary rights obtained from the predecessor.[38] An important feature of the succession discussed is also the amalgamation of the estates of the predecessor and the successor. This effect, however, was not directly commented upon by either Viscount Simonds nor Lord Keith. Secondly, the reference to the figures of executor and administrator of the estate is rather surprising. The law lord was attempting to explain his opinion by quoting the passage borrowed from Lord Stair:

"Heirs in law are called universal successors, quia succedunt in universum jus quod defunctus habuit, they do wholly represent the defunct, and are as one person with him, and so they do both succeed to him active, in all the rights

[38] This is certainly the most natural configuration. It is true, however, that the universal succession could cause the taking up of obligations without any proprietary rights. To avoid the negative consequences of such succession, in the sphere of inheritance law, the Romans invented the so-called *beneficium inventarii*.

belonging to him, and passive, in all the obligations and debts due by him".[39]

The text does not, however, reproduce the idea presented by the law lord. If someone was eager to make a parallel between English executors and administrators of the estate, much closer comparison would be done by calling over the figure of familiae emptor, one of the central personalities in the ancient testamentum per aes et libram. The familiae emptor was a trusted man who obtained an order from the testator as to how to dispose of his estate after his death. Technically, the emptor was acquiring the property of the estate and then he was transferring it into the indicated heir.[40]

Contrary to his earlier contractual hints, Lord Keith explained much more profoundly in the further part of his judgement that "there are material differences between a succession and a novation. In succession no question of contract arises".[41] He noticed that in both circumstances the creditor

[39] Lord Stair, *Institutions*, 3, 4, 23. It seems that the Latin maxim recalled by Lord Stair is modified version of the Paulus's passage *Hi, qui in universum ius succedunt, heredis loco habentur* (D. 50, 17, 128, 1, Paulus libro 19 ad edictum). This passage is recalled also by O.W. Holmes Jr. in his famous lectures on common law, see Holmes, O.W., *The Common Law*, (London, 1882), p. 361.

[40] See Buckland, W.W., *A Text-book of Roman Law: From Augustus to Justinian*, rev. Stein, P., 3rd ed., (Cambridge, 1966), pp. 284-285.

[41] *National Bank of Greece and Athens S.A. v. Metliss* [1958] A.C. 509, 530-531.

would confront the situation of changing the debtor's identity, but in the case of succession, he would not lose the security of the debtor's assets.

Finally, all the law lords declared that the bank was liable and was the universal successor of the two banks that were amalgamated in 1953. The cognizance of English courts was reaffirmed. Although the quality of civilian references may be disputable, it is certain that the judges were obliged to accept the civilian concept of the universal succession in the case. It is worth mentioning also that the concept of the "institutional loan" was not taken from the Scots law, but from the Greek legal order which informs the civilian tradition.[42]

3.3.DPP v. Jones

The last case in question is DPP v. Jones, a case decided by the House of Lords in March 1999.[43] This time, the character of the case as the question of first impression is less obvious. Although similar cases had been previously decided and the appellant was calling into question the authority of particular Act of Parliament, the novelty of the case rested on more efficient use of the Roman argumentation during the proceedings.

[42] More about this case and other similar see Grodecki, J.K., *The Greek Bond Cases*, in *Modern Law Review* 24,6 (1961), pp. 701-714.

[43] *DPP v. Jones* [1999] 2 A.C. 240.

It is interesting that the appeal to the House of Lords was basically a criminal appeal. Nevertheless, some private law issues appeared and it was in this respect that Roman law materialised in court.

The defendant in the case was a member of the assembly which had gathered at the highway that was out of public use. Due to that, he was accused of committing a crime named as a "trespassory assembly".[44] On 1 July 1995, a group of around twenty people assembled on the roadside of the A344 road at a close distance to Stonehenge. The group was celebrating the tenth anniversary of the so-called "Battle of the Beanfield" – an encounter between the police and the followers of the New Age movement. According to the police, the assembled crowd entered an area of limited public right to access as well as creating a great threat to an object of the historical importance.
The Roman reference may be retrieved in the judgement of the learned Scottish judge, Lord Hope. After extensive deliberations on the subject of the right of passage, he concluded that "the right is to pass or repass, not to remain".[45] To illustrate that rule he raised a Chancery case, Attorney-

[44] Sec. 14A Public Order Act 1986 (c. 64).

[45] *DPP v. Jones* [1999] 2 A.C. 240, 274. In the mean time Lord Hope recalled inter alia the authority of Lord Wilberforce's opinion in the case *Wills' Trustees v. Cairngorm Canoeing and Sailing School Ltd.*, 1976 S.C. (H.L.) 30, 125. Although it is not stated in the Lord Hope's judgment, but it is worth mentioning that in 1976 case Lord Wilberforce used extensively the argumentation derived from the Roman law.

General v. Antrobus decided in 1905 by Justice Farwell.[46] Its subject was a query as to whether the public may acquire by prescription a right to visit an object of historical value upon private property or more simply, is it possible to obtain jus spatiandi by the public. The judge declared that the public cannot acquire any right by prescription, including the jus spatiandi.[47] Directly connected with the aforementioned decision is another one delivered by Sir Raymond Evershed M.R. in 1955 while deciding the Re Ellenborough Park case.[48]

The Master of the Rolls agreed with Justice Farwell's statement about the lack of existence of the right to roam in English law. He wondered, however, what could be an inspiration for Farwell to make such decision. In his opinion, it was plausible that the rejection of the existence of the jus spatiandi in English law was a consequence of a similar rejection in Roman law. In reference to that, the Master of the Rolls quoted a passage from the Digest attributed to Paulus: ut spatiari, et ut coenare in aliena possimus, servitus imponi non potest.[49] The statement is part of a wider passage that deals with the impossibility of creating the servitude solely for the purpose of collecting fruits, walking about or eating the meals.

[46] *Attorney-General v. Antrobus* [1905] 2 Ch. 188.

[47] *Attorney-General v. Antrobus* [1905] 2 Ch. 188, 198.

[48] *Re Ellenborough Park* [1956] Ch. 131.

[49] D. 8, 1, 8, pr. (*Paulus libro 15 ad Plautium*).

Sir R. Evershed immediately paused to notice that "there has been (…) no judicial authority for adopting the Roman view in this respect into the English law".[50] He observed that the right described by Paulus and the right appraised in the case were two different legal issues. An English case should, instead, find its solution in the rules related to the easements.

In such situation Master of the Rolls enumerated four characteristics of English easements set out by Geoffrey Cheshire in his textbook titled Modern Law of Real Property.[51] First, there must be a dominant and a servient tenement; second, an easement must accommodate the dominant tenement; third, the dominant and servient owners must be different persons; and fourth, a right over land cannot amount to an easement unless it is capable of forming the subject-matter of a grant.

Although the judge was attempting to escape the field of civilian tradition, it is obvious for any civilian that the English characteristics resemble closely the Roman law relating to servitudes, including some of their chief principles.[52] The

[50] *Re Ellenborough Park* [1956] Ch. 131, 163.

[51] Master of the Rolls referred to the seventh edition of the textbook. The up-to-date eighteenth edition enumerates the same characteristics of the easements, see Burn, E., Cartwright, J., *Cheshire and Burn's Modern Law of Property*, (Oxford, 2011), pp. 636-641.

[52] For the Bractonian borrowings of the Roman concepts regarding the servitudes see Holdsworth, W.S., *A History of English Law*, vol. 3, 3rd. ed., (London, 1923), p. 154.

existence of two tenements is a natural consequence of the existence and erecting a servitude in Rome or easement in England. The accommodation of the dominant tenement fulfils the civilian concept of a utility of the servitude. The third English rules is an equivalent of Roman maxim nemini res sua servi (no one can have a servitude over his own thing). Finally, the last principle resembles the civilian concept called by B. Biondi as the "possibility" of the servitude.[53]

Finally, Sir R. Evershed, M.R. claimed that the jus spatiandi can be acquired by the public according to the rules of English law. That ruling and its Roman background became of interest for Lord Hope in his judgement in DPP v. Jones. The Scottish law lord noticed that granting an uncontrolled right for the public to acquire the jus spatiandi causes a high risk. In his opinion "these are no rights which the public can acquire by user or by dedication. If rights of this kind can be acquired at all they can be acquired only by express grant".[54]

In his further deliberations, law lord discussed the difference of the right of passage and the right of walkabout. It is again an interesting discussion from the perspective of the civilian. The law lord noticed for example that "the margin between what is and what is not a nuisance is an imprecise

[53] Biondi, B., *Istituzioni di diritto romano*, 4th ed., (Milano, 1972), pp. 295-300; du Plessis, P., *Borkowski's Textbook of Roman Law*, 5th ed., (Oxford, 2015), pp. 164-165.

[54] *DPP v. Jones* [1999] 2 A.C. 240, 275.

one" and "the test of reasonable use of the highway as such is consistent with the rule that the public's right of way is essentially a right of passage".[55] Both quoted opinions resemble the problems that were described in Roman law by the maxim servitutibus civiliter utendum est, i.e. the servitude should be exercised reasonably.[56]

At the end, the Appellate Committee allowed the appeal and confirmed that a public highway is a public place that the public might enjoy for any reasonable purpose.

4. **Conclusions**

The cases presented here differ greatly in the scope of their legal reasoning as well as their influence. Nevertheless, the element which joins them is the impossibility to give a straightforward decision due to the lack of legal grounding. For this reason, all of them can be attributed as the idea of the cases of first impression.

The use of Roman law and its legal tradition was also divergent. While in the first case the elaborate civilian argumentation was presented in the Court of Appeal, the House of Lords rejected it on the basis of its impracticality. In the Greek bonds case, it is possible to observe an openness of the judges to refer to the civilian tradition and its utilisation. Frankly speaking, however, the judges were forced to be open

[55] *DPP v. Jones* [1999] 2 A.C. 240, 276.

[56] See D. 8, 1, 9 (*Celsus libro quinto digestorum*).

about the concept of universal succession, without which the decision would be unable to achieve. Finally, in the "Stonehenge" case it is possible to observe how the Roman-based rule was gradually discussed in the earlier cases and it eventually influenced the final precedent. It is hard to speak, however, about the direct use of the Roman law, because there was no right to roam in the Roman law itself. The reference has regard rather to the general concepts.

In addition, it is worth mentioning that the key role in all three case was played by the Scottish law lords. Lord Robertson's, Lord Keith's and Lord Hope's Roman knowledge constituted the primary source of the civilian borrowings in the cases.

Although the differences are numerous, it is true that the Roman law was always in these three cases used as an authoritative source of the plausible solution. It seems pivotally important that the Roman law was treated by the judges as well as the lawyers as a solid ground of reference.

Raphael Powell was assuming that the Roman law would not be used in the English courts unless three principles will be fulfilled. In all three discussed cases, the common law was silent (in every case to a different extent), the Roman law was capable of fitting the conditions of the epoch, and finally, the implementation of the civilian solutions definitely did not cause an adaptation of the whole Roman doctrine of particular

institutions into the English law. In such case, although Powell's concept might look odd at first glance, it seems to be working in practice.