

The Concept of Possession in Roman Law and Common Law

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Abstract:

This article examines the legal regulation of possession in Roman law and in contemporary common law. Its objective is to identify and assess the key similarities and differences between these two legal traditions and to demonstrate that, despite their fundamental systematic distinctions, the influence of Roman law on the development of common law has been more substantial than often assumed. The analysis shows that, notwithstanding divergent historical developments and systematic characteristics, both systems articulate conceptually comparable understandings of possession. The findings further confirm that Roman law contributed, at least to some degree, to the shaping of common law, underscoring the enduring reach of Roman law not only within continental legal systems but also within modern common law jurisdictions.

Keywords: Roman law; common law; possession

DOI: 10.14712/2464689X.2026.559

Introduction

Roman law is the oldest European legal system, which, due to its systematic and comprehensive nature, became the foundation of continental legal culture. Although it originally applied only to the territory of ancient Rome, its high degree of sophistication enabled it to become the basis of continental legal culture.¹ Its influence was not limited solely to continental Europe. Anglo-American legal culture, known as common law, which formed in medieval England,² was not entirely immune to the influence of Roman law. Although

¹ SKŘEJPEK, M. *Římské soukromé právo. Systém a instituce*. 2. vyd. Plzeň: Aleš Čeněk, 2016, p. 9.

² GERLOCH, A. *Teorie práva*. 7. vyd. Plzeň: Aleš Čeněk, 2017, p. 117.

England initially sought to reject Roman law entirely, which also led to the emergence of the Anglo-American legal system, it was only partially successful in its approach.³

The Anglo-American type of legal culture spread primarily in Great Britain, the United States of America, Canada, Australia and New Zealand. Despite its common basis, it exhibits considerable internal differences due to the historical development and constitutional arrangements of individual states. A typical example is the United States of America, where the legal system developed independently after the declaration of independence and is now significantly influenced by the federal principle, which distinguishes between federal law and the law of individual states of the Union.⁴

Nevertheless, a number of Roman legal institutions and ideas penetrated into common law. One of these institutions is the legal concept of possession, which holds fundamental importance in both Roman law,⁵ and Anglo-American law.⁶ It was Roman law that laid the foundations for the theoretical concept of possession, which became the starting point for the further development of this legal institution and also significantly influenced later legal developments outside continental Europe.⁷

The aim of this study is to use a comparative method to analyse the concept of possession in Roman law and in the common law system and to show the extent to which Roman legal ideas have been reflected in contemporary Anglo-American doctrine. The study does not aim to provide a complete interpretation of both legal systems, but aims to offer a systematic comparison and identification of their basic conceptual similarities and differences.

1. The concept of possession

The very concept of the legal institution of possession, as understood in Roman law, differed fundamentally from its conception in the Anglo-American legal system. Whilst Roman law constructed possession (*possessio*) as an independent legal institution distinct from ownership (*dominium*), in the early period of the development of common law, an analogous concept in the precise sense did not exist. Its functional equivalent was the institution of “seisin”, which combined both possession and ownership.⁸

This distinction stemmed from the feudal nature of the early English legal system, in which absolute ownership in the Roman sense did not exist.⁹ All land was formally owned by the Crown, and individuals held it only in “tenure”, that is, on the basis of personal feudal grants. However, the actual factual control over this granted land itself was called “seisin”.¹⁰ The historian J. H. Baker himself stated: “The fact of being in possession as

³ BLAHO, P. *Držba v dejinách práva: Rímskoprávna náuka o držbe a jej vyústenie v terajšom čase*. Trnava: TYPI UNIVERSITATIS TYRNAVIENSIS, 2015, p. 17.

⁴ GERLOCH, *op. cit.*, pp. 116–117.

⁵ BLAHO, *op. cit.*, p. 28.

⁶ POLLOCK, F. – WRIGHT, R. S. W. *Essay on Possession in the Common Law*. Reprint. Buffalo: Fred B. Rothman & Company, 1985, p. 1.

⁷ BLAHO, *op. cit.*, p. 23.

⁸ GRAZIADEI, M. – SMITH, L. *Comparative property law: global perspectives*. Cheltenham: Edward Elgar Publishing, 2017, p. 173.

⁹ *Ibid.*, p. 173.

¹⁰ VAN ERP, S. – AKKERMANS, B. – DE GEEST, G. Property Rights: A Comparative View. In: *Encyclopedia of Law and Economics*. Volume V. Cheltenham, UK: Edward Elgar Publishing, 2010, p. 35.

a feudal tenant was called 'seisin'.¹¹ From this fact it may be deduced that the institution of seisin at the time represented the highest available form of proprietary entitlement within the feudal hierarchy.

In this context, common law did not strictly distinguish between possession and ownership, as the protection of both institutions was ensured by identical legal remedies, namely the action of ejectment. Possession as such was rather understood as a weaker form of proprietary right, and not as an entirely independent legal relationship.¹²

However, historical development, particularly in connection with the retreat of feudal structures and the growing importance of individual ownership, led to a gradual differentiation of the two concepts. Common law began to converge with the Roman law concept in the sense that it began to distinguish between possession and ownership.¹³ The former tenure gradually evolved into transferable property rights designated as "estates", which remain valid to this day.¹⁴ The type of estate closest to the continental concept of ownership, which is functionally comparable to proprietary right, is designated as "freehold" and represents the most extensive land title in English law.¹⁵ At the same time, the Crown remains the ultimate feudal overlord of the entire kingdom and all land continues to be owned by the Crown.¹⁶ Thus, in England today, a person owns an estate, but the Crown continues to own the land to which that estate relates.¹⁷

In the contemporary conception of common law, a distinction is made between possession and ownership, with possession being understood as a set of factual circumstances and manifestations of will, whilst ownership represents a set of legal rights relating to a thing. Although a certain conceptual interconnection between the two categories persists, possession still establishes a certain degree of legal protection and presumes the existence of proprietary rights. It can be stated that current common law doctrine has in its basic features converged with the Roman conception of possession as a state distinct from ownership.¹⁸

2. The nature of possession

One of the key differences between Roman law and the common law system is the way in which both legal orders understand the very nature of possession. In Roman law, possession, or *possessio*, was conceived as factual general power over a thing – that is, a factual state which manifested itself through external control of the thing accompanied by the will to control it for oneself.¹⁹ In contrast, common law perceives possession as a right, namely a right of a proprietary nature, which is effective against all persons who are unable to prove a stronger legal title to the thing in question.²⁰

¹¹ BAKER, J. H. *An Introduction to English Legal History*. 2nd ed. London: Butterworths, 1979, p. 199.

¹² GRAZIADEI – SMITH, *op. cit.*, p. 173.

¹³ *Ibid.*, p. 174.

¹⁴ VAN ERP – AKKERMANS – DE GEEST, *op. cit.*, p. 35.

¹⁵ *Ibid.*, pp. 35–36.

¹⁶ WONNACOTT, M. *Possession of Land*. New York: Cambridge University Press, 2006, p. 38.

¹⁷ TEE, L. *Land Law*. Cullompton, Devon, UK: Willan Publishing, 2002, p. 10.

¹⁸ GRAZIADEI – SMITH, *op. cit.*, p. 174.

¹⁹ KINCL, J. – URFUS, V. – SKŘEJPEK, M. *Římské právo*. Praha: C. H. Beck, 1995, pp. 161–162.

²⁰ CLARKE, A. – KOHLER, P. *Property Law: Commentary and Materials*. New York: Cambridge University Press, 2005, p. 261.

3. Subject of possession

In terms of the subject matter of possession, Roman law and the common law system display a remarkable degree of conceptual similarity, even though they are based on different legal traditions. Roman legal doctrine was based on the principle that possession “se připouští jenom tam, kde jest možné vlastnictví”.²¹ The subject of possession could therefore consist only of things that, by their nature, were capable of being the subject of ownership,²² whereas things classified as *res extra commercium*, that is, things excluded from legal commerce, were not capable of being possessed.²³ Roman law initially allowed possession only of tangible things, as evidenced by a fragment from the Roman jurist Paul: “Possideri autem possunt, quae sunt corporalia.”²⁴ However, during the Justinian period, this concept was extended to include the so-called possession of rights (*iuris possessio*). This represented the exercise of a certain right in rem to another’s property, primarily easements and usufruct, whereby protection was granted only if the right in question allowed for repeated exercise.²⁵

A similar approach can be observed in the Anglo-American common law system, which is essentially based on the Roman law concept. Here, too, the general principle applies that only those things or rights that may be owned may simultaneously be the subject of possession. Anglo-American literature states: “Whatever may be owned may be possessed, and whatever may be possessed may be owned.”²⁶ However, Anglo-American legal doctrine also distinguishes certain rights that can be owned but are not capable of being the subject of possession. These are mainly so-called transitory rights, the exercise of which is one-off and whose realisation leads to their extinction. A typical example is the fulfilment of a claim. Such rights therefore cannot be possessed, as their nature does not allow for continuous or repeated control. On the other hand, rights in rem to foreign property, such as easements or tenancy rights, are subject to possession, as in Roman law, as they require continuous or repeated exercise.²⁷

4. Types of possession

Roman law had a systematically developed classification of types of possession.²⁸ Possession in Roman law was divided into three basic types – civil possession, *possessio ad interdicta* and *possessio vitiosa*.

Civil possession (*possessio civilis*) was possession based on a legally recognised title (*iusta causa possessionis*), that is, on one of the methods of acquiring ownership approved by civil law, such as purchase, donation, inheritance or fulfilment of an obligation arising

²¹ SOMMER, O. *Učebnice soukromého práva římského. Díl I. Obecné nauky*. Praha, 1946, p. 195. Translation by the author of this work: “is only permitted where ownership is possible”.

²² KINCL – URFUS – SKŘEJPEK, *op. cit.*, p. 164.

²³ SOMMER, *op. cit.*, p. 195.

²⁴ *Corpus Iuris Civilis: Institutiones, Digesta. Volumen primum*. KRUEGER, P. – MOMMSEN, T. Berlin: Apud Weidmannos, 1889. From that: D. 41, 2, 3 pr. (Paul. 54 ad ed.): “We may possess what is material (physical).” – Translation by the author of this work.

²⁵ KINCL – URFUS – SKŘEJPEK, *op. cit.*, p. 164.

²⁶ SALMOND, S. J. W. – FITZGERALD, P. J. *Salmond on Jurisprudence*. 12th ed. London: Sweet & Maxwell, 1966, p. 293.

²⁷ SALMOND, *op. cit.*, p. 293.

²⁸ BLAHO, *op. cit.*, p. 23.

from a commitment.²⁹ As with other types of possession, it involved the actual control of an item combined with the intention to keep it for oneself, but in this case, the intention was based on a legally recognised title. Civil possession was closely linked to ownership, as it could lead to its acquisition by *usucapio*, if certain conditions were met. For this reason, in literature, it is also referred to as *possessio ad usucapionem*.³⁰

Possessio ad interdicta was a form of possession in Roman law that enjoyed protection through praetorian interdicts. For practical reasons, the praetor granted it to any possessor, regardless of the legal title on the basis of which the thing was possessed. The protection thus applied both to just possession (*possessio iusta*), based on a legally recognised reason for possession, and to unjust possession (*possessio iniusta*), acquired by force, secretly or by permission (*vi, clam, precario*).³¹ An exception to this rule was that an unjust possessor could not claim protection against the previous possessor. The aim of this broad protection was to maintain the stability of property relations and social order, as it was presumed that the factual state of possession corresponded to the legal state, i.e., that the possessor of the thing was also its owner. However, this presumption could be rebutted by the actual owner or a person with a better legal title by filing a lawsuit to protect their better right to the thing.³² During the period of Justinian law, civil possession and *possessio ad interdicta* gradually merged.³³

Possessio vitiosa, on the other hand, referred to situations where the possessor acquired the thing by force, secretly or by permission (*vi, clam, precario*).³⁴

An important part of Roman law was the distinction between possession in good faith and in bad faith, which was based on the subjective belief of the possessor in the legitimacy of their physical control over the thing.³⁵

While Roman law defined types of possession very precisely, with an emphasis on conceptual accuracy and systematic structure, common law does not have such a comprehensive and theoretically constructed classification. Instead of strict conceptual distinctions, it works with practical categories that have developed from case law and are used to resolve specific disputes over possession. Despite this difference, some types of possession show striking parallels with Roman law.

One possible pair of types of possession under common law is actual possession and constructive possession. Actual possession requires actual physical control of the thing and the possessor's awareness that they are doing so. Constructive possession allows one of these elements to be presumed³⁶ – for example, in a situation where the thing is under the control of a servant.³⁷ In this concept, where the servant merely exercises physical control over the thing, an analogy may be found with the Roman concept of detention (*detentio*). However, common law considers even this situation to be a form of possession. Among

²⁹ *Ibid.*, p. 24.

³⁰ SKŘEJPEK, *op. cit.*, p. 124.

³¹ SOMMER, *op. cit.*, p. 198.

³² *Ibid.*, p. 198.

³³ *Ibid.*, p. 197.

³⁴ *Ibid.*, p. 198.

³⁵ KINCL – URFUS – SKŘEJPEK, *op. cit.*, p. 164.

³⁶ CLARKE – KOHLER, *op. cit.*, p. 270.

³⁷ POLLOCK – WRIGHT, *op. cit.*, p. 27.

other things, the court distinguished between these types of possession in its decision *R. v. Cavendish* from 1961.³⁸

Another recognised pair is lawful possession and unlawful possession.³⁹ Both types resemble the Roman law distinction between just and unjust possession, as common law, similarly to praetorian protection in Roman law, grants legal protection even to an unauthorised possessor against all persons except those who have a better right to possession.⁴⁰

The distinction between immediate possession and mediate possession also plays an important role. As can be inferred directly from the name, immediate possession corresponds to the direct exercise of power over a thing, while mediate possession includes situations where the thing is controlled through another person, such as an agent or tenant.⁴¹ Although mediate possession is somewhat similar to the Roman concept of possession, such possession under Roman law was only possible through persons subordinate to the possessor (typically sons or slaves). Common law does not require this subordination and allows mediate possession even for independent persons.⁴² However, over time, the original strictness of Roman law was mitigated in this regard,⁴³ bringing the two concepts closer together.

A specific type of possession found in common law is adverse possession, which allows the acquisition of ownership rights only to immovable property on the basis of long-term, exclusive, public and continuous possession without the consent of the owner.⁴⁴ This institution functionally corresponds to a combination of Roman law *usucapio* and *praescriptio longi temporis*, which Anglo-American law unfortunately does not recognise. *Usucapio* is similar to adverse possession in that it is constitutive in nature, i.e. after the expiry of the period specified by law, it leads to the acquisition of ownership.⁴⁵ Under Roman law, this institution was additionally conditioned primarily upon the existence of a recognized legal title (*iustus titulus*) and good faith (*bona fides*) of the possessor.⁴⁶ In contrast, in the case of adverse possession, the approach is much more lenient, and neither a recognised legal title nor good faith were conditions for the acquisition of ownership.⁴⁷ In this respect, common law also allows for possession in bad faith, provided that it is sufficiently long-term and public. Another difference is that *usucapio* represents an original method of acquiring ownership,⁴⁸ whereas adverse possession represents a derivative method.⁴⁹ On the other hand, adverse possession also contains a certain element of another Roman law institution, namely *praescriptio longi temporis*, or “objection of long prescription”.⁵⁰ It was a procedural

³⁸ COURT OF CRIMINAL APPEAL. *R. v. Cavendish*, Decision from 1961, [1961] 1 WLR 1083, CCA. In: *Cambridge.org*. [online] Available at: https://www.cambridge.org/ch/files/3613/6690/0358/3024_2545_Ch7Exts.doc [cit. 2025-06-05].

³⁹ POLLOCK – WRIGHT, *op. cit.*, p. 28.

⁴⁰ SOMMER, *op. cit.*, p. 198.

⁴¹ SALMOND, *op. cit.*, pp. 282–284.

⁴² *Ibid.*, p. 282.

⁴³ SOMMER, *op. cit.*, p. 204.

⁴⁴ GRAZIADEI – SMITH, *op. cit.*, p. 182.

⁴⁵ CLARKE – KOHLER, *op. cit.*, pp. 406–407.

⁴⁶ SKŘEJPEK, *op. cit.*, p. 111.

⁴⁷ CLARKE – KOHLER, *op. cit.*, p. 406.

⁴⁸ KINCL – URFUS – SKŘEJPEK, *op. cit.*, p. 175.

⁴⁹ CLARKE – KOHLER, *op. cit.*, p. 409.

⁵⁰ SKŘEJPEK, *op. cit.*, p. 111.

defence by which the current possessor of an item, who was not protected by civil law, could defend himself against a claim by the original owner by referring to the lapse of a long period of time. Originally, this Roman law institution served only possessors of provincial land, but later it was extended to movable property as well.⁵¹ Similar to adverse possession, the use of *praescriptio longi temporis* required a valid reason for acquiring possession, good faith, and the lapse of a long period of time as stipulated by law.⁵² In the case of adverse possession, long-term possessors could also defend themselves against the actual owner who had filed a lawsuit against them on the grounds that they were using his property – they used the defence of adverse possession.⁵³ Both defences, *praescriptio longi temporis* and adverse possession, thus simply prevent the actual owner from enforcing their rights after a long period of time has elapsed, i.e. the action to protect the right of ownership becomes subject to a statute of limitations. However, unlike adverse possession, *praescriptio longi temporis* did not in itself constitute ownership.⁵⁴ As regards *adverse possession*, the legal regulation differs according to the type of land. For unregistered land, the acquisition process is governed by the Limitation Act 1980⁵⁵ and for registered land by the Land Registration Act 2002.⁵⁶ It may nevertheless be concluded that all three institutions are based on the principle that long-term, continuous and actual possession of a thing may, after a certain period of time, strengthen the legal position of the possessor against the original owner.

Another type is exclusive possession, typical of tenancy relationships, where the tenant has the right to use the property with the exclusion of the owner and third parties.⁵⁷ This concept differs fundamentally from Roman law, as in Roman law the tenant was merely a detentor and the owner retained possession.⁵⁸

From the above, it follows that the Roman law regulation of possession is conceptually and systematically much stricter than regulation in the common law system, as common law also considers situations that Roman law qualifies as mere detention. It may therefore be concluded that the approach of the two legal systems to the definition and distinction of types of possession is fundamentally different, with Roman law maintaining a far more formalised and systematic concept of this legal institution.

5. Constitutive elements of possession

It must also be noted that in Roman law, the existence of possession was conditional upon the simultaneous fulfilment of the two aforementioned elements, namely *corporalis*

⁵¹ KINCL – URFUS – SKŘEJPEK, *op. cit.*, p. 178.

⁵² SKŘEJPEK, *op. cit.*, p. 111.

⁵³ CLARKE – KOHLER, *op. cit.*, p. 406.

⁵⁴ KINCL – URFUS – SKŘEJPEK, *op. cit.*, p. 178.

⁵⁵ UNITED KINGDOM. Limitation Act, 1980. In: *Legislation.gov.uk. The National Archives* [online] Available at: <https://www.legislation.gov.uk/ukpga/1980/58/contents> [cit. 2025-02-22].

⁵⁶ UNITED KINGDOM. Land Registration Act, 2002. In: *Legislation.gov.uk. The National Archives*. [online] Available at: <https://www.legislation.gov.uk/ukpga/2002/9/contents> [cit. 2025-06-03].

⁵⁷ HIGH COURT OF AUSTRALIA. *Radaich v. Smith*, Decision from 1959, [1959] HCA 45; 101 CLR 209. In: *Australasian Legal Information Institute*. [online] Available at: https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1959/45.html?context=1;query=Radaich%20%20v%20%20Smith;mask_path= [cit. 2025-05-19].

⁵⁸ SKŘEJPEK, *op. cit.*, p. 124.

possessio and *animus possidendi*.⁵⁹ *Corpus possessionis*, or *corpus*, represents physical control of a thing, and *animus possidendi* represents the will to hold that thing for oneself as its owner.⁶⁰ A similar legal institution was detention (*detentio*, or *naturalis possessio*), but it differed from possession in that it represented only physical control of a thing without the will to have it for oneself.⁶¹ In this respect, a parallel may be found with common law, as common law also required these constituent elements to be fulfilled for possession to arise and exist. Although their basic concepts were similar, they differed in the way they were understood. In common law, the physical element was assessed more strictly, especially in the case of immovable property, where it was required that the thing be dealt with in a manner comparable to that of an owner.⁶² The intentional element in common law evolved from the Roman concept of *animus possidendi* to the concept of *animus excludendi*, that is, the intention to exclude others from possession. Over time, however, the two approaches merged.⁶³

The relationship between the constitutive elements of possession was elaborated in detail in the nineteenth century by the eminent German legal theorists Friedrich von Savigny and Rudolf von Jhering.⁶⁴ Savigny formulated a subjective theory of possession, according to which the creation and continuance of possession require not only factual control of a thing but, above all, the internal intention to hold the thing for oneself as owner (*animus domini*).⁶⁵ This approach allows for a strict distinction between possession and detention, whereby the detentor has only physical control over the thing, but not the will to control it as his own.⁶⁶ In contrast, Jhering introduced an objective theory of possession, which places the main emphasis on the actual conduct of the possessor with the thing as if he were the owner (*corpus*), while the intentional element represents the will to exercise *corpus* in this specific manner. In practical application, the subjective theory became the foundation of the Roman law concept of possession,⁶⁷ while the objective theory found broader application in the Anglo-American legal system.⁶⁸ However, it would be too simplistic to claim that the Anglo-American system has adopted a purely objective approach to possession, as it itself retains the requirement of a mental element in a certain form, albeit different from that of Roman law.⁶⁹

In short, it can be concluded that both legal systems recognise the necessity of both physical and mental elements of possession, but their specific content and interpretation differ to a certain extent.

⁵⁹ KINCL – URFUS – SKŘEJPEK, *op. cit.*, p. 162.

⁶⁰ *Ibid.*, p. 162.

⁶¹ *Ibid.*, p. 163.

⁶² GRAZIADEI – SMITH, *op. cit.*, pp. 174–176.

⁶³ *Ibid.*, p. 178.

⁶⁴ *Ibid.*, p. 172.

⁶⁵ SAVIGNY, F. C. *Von Savigny's treatise on possession, or, The jus possessionis of civil law*. 6th ed. Clark: Lawbook Exchange, 2003, p. 177.

⁶⁶ SOMMER, *op. cit.*, p. 198.

⁶⁷ *Ibid.*, p. 177.

⁶⁸ GRAZIADEI – SMITH, *op. cit.*, p. 172.

⁶⁹ *Ibid.*, p. 172.

6. Acquisition of possession

In Roman law, possession was understood as a factual state, not a legal institution.⁷⁰ The fundamental principle of “POSSESSIO NON EST IURIS SED FACTI”⁷¹ applied here, according to which it was not possible to legally transfer possession, but it always had to be factually reacquired.⁷² Possession simply could not be the subject of legal succession.⁷³ In contrast, common law understands possession in a broader sense as a set of legal relationships that may exist in parallel between multiple subjects. Common law therefore distinguishes between immediate possession and mediate possession,⁷⁴ thereby allowing possession to be split between two persons – a concept that was completely unacceptable in Roman law.⁷⁵

Similar to Roman law, common law distinguishes between two basic modes of acquiring possession, which differ depending on whether the acquisition of possession is based on the existing consent of the previous possessor or not.⁷⁶

Acquisition of possession without the consent of the previous possessor corresponds to a method of acquisition of possession in Roman law called *occupatio*, which represents unilateral physical seizure of a thing without the consent of the previous possessor.⁷⁷ Occupation could also lead to original acquisition of ownership, provided that a sufficiently intense will to control the thing was expressed, for example by enclosing land with a fence or catching an animal in a cage.⁷⁸

An analogous method of acquiring possession in the common law system is taking, that is, simply “taking” a thing into one’s possession without the consent of its previous possessor.⁷⁹ A common feature of both institutions is the factual nature of the act and the absence of legal title.

In contrast, the acquisition of possession with the consent of the previous possessor was a method known in Roman law as *traditio*, that is, the physical transfer of a thing.⁸⁰ The Romans further distinguished several special forms of *traditio*, namely *traditio longa manu*, *traditio brevi manu* and *constitutum possessorium*.⁸¹ A common feature of all these forms was that they always resulted in the creation of a new factual state of possession. The method of acquiring possession by *traditio* depended on the nature of the thing being acquired.⁸² In the case of movable property, possession was usually acquired by physically taking hold of it, while in the case of immovable property, which logically could not be taken hold of and handed over, the aforementioned method of *traditio longa manu* was

⁷⁰ KINCL – URFUS – SKŘEJPEK, *op. cit.*, p. 167.

⁷¹ *Corpus Iuris Civilis*, *op. cit.*, viz D. 47. 4. 1. 15 (*Ulp. 38 ad ed.*): “Possession is not a legal, but a factual relationship.” – Translation by the author of this work.

⁷² KINCL – URFUS – SKŘEJPEK, *op. cit.*, p. 167.

⁷³ SOMMER, *op. cit.*, p. 203.

⁷⁴ SALMOND, *op. cit.*, p. 282.

⁷⁵ KINCL – URFUS – SKŘEJPEK, *op. cit.*, p. 169.

⁷⁶ SALMOND, *op. cit.*, p. 287.

⁷⁷ SKŘEJPEK, *op. cit.*, p. 124.

⁷⁸ KINCL – URFUS – SKŘEJPEK, *op. cit.*, p. 167.

⁷⁹ SALMOND, *op. cit.*, p. 287.

⁸⁰ SOMMER, *op. cit.*, p. 203.

⁸¹ SKŘEJPEK, *op. cit.*, pp. 124–125.

⁸² HEYROVSKÝ, L. *Instituce římského práva*. 2. vyd. Praha: J. Otto, 1894, p. 190.

used, and it was sufficient, for example, to simply enter the land in question or symbolically define its boundaries, for example by pointing them out from a distance from a tower “ex torre”.⁸³

In common law, this category corresponds to a method of acquiring possession called delivery, which is further divided into actual delivery and constructive delivery. Actual delivery represents the physical transfer of a thing, which is conceptually similar to the classical Roman *traditio*, as it consists of the direct transfer of a thing from the possession of one person to the possession of another. However, unlike Roman law, common law allows the previous possessor to retain mediate possession, after the transfer of the thing. This method of acquisition of possession is known as constructive delivery, and it is something that would have been excluded under the Roman law conception. Constructive delivery is further divided into other subtypes, in which the transfer of possession takes place without physical handling of the thing, but only through a change in the legal relationship or the will of the parties.⁸⁴ The first is a method known from Roman law, namely *traditio brevi manu*, whereby a person who already physically controls the thing becomes its possessor by a mere change of will (e.g. a loan converted into a purchase).⁸⁵ The second is the so-called “possessory agreement”, or *constitutum possessorium*, also taken directly from Roman law, whereby the current possessor, who is also the owner of the thing, transfers ownership of the thing to someone else but keeps the thing with them and now possesses it on behalf of the new owner of the thing.⁸⁶ The third and final subtype of constructive delivery is attornment, which consists of the transfer of mediate possession between two persons, with immediate possession being exercised by a third person. This occurs, for example, in a situation where an owner, who has his goods stored with a warehouse keeper, transfers ownership of these goods to a new owner, while the goods remain in the warehouse with the warehouse keeper, who is still in immediate possession of them. Such construction did not exist in Roman law, as under Roman law the warehouse keeper would have the goods in detention and not in immediate possession.⁸⁷

From a theoretical standpoint, the two systems differ fundamentally in this area. Roman law considered possession to be a purely factual state, while common law perceived the concept of possession as a right,⁸⁸ i.e. relative legal relationship which can be stratified into several levels according to the degree of control over the thing.⁸⁹ These different approaches led to different conceptions of the legal institution of possession. The Roman tradition emphasises the unity of the factual and intentional components of possession and its single factual creation. In contrast, common law attaches key importance to the distinction between immediate and mediate possession and allows for their parallel existence.⁹⁰ This difference has fundamental consequences not only for the process of acquiring possession, but also for its legal protection and for the construction of proprietary relations in general.

⁸³ SKŘEJPEK, *op. cit.*, p. 124.

⁸⁴ SALMOND, *op. cit.*, p. 287.

⁸⁵ SKŘEJPEK, *op. cit.*, p. 124.

⁸⁶ SALMOND, *op. cit.*, p. 288.

⁸⁷ *Ibid.*, p. 288.

⁸⁸ GRAZIADEI – SMITH, *op. cit.*, p. 173.

⁸⁹ *Ibid.*, p. 186.

⁹⁰ SALMOND, *op. cit.*, p. 282.

As regards the legal regulation of subjects who could acquire possession, Roman law laid down very strict rules on who could acquire possession. Only those capable of expressing their own will were eligible, which originally excluded children, the mentally ill and legal persons.⁹¹ Over time, however, this formalism became more relaxed and children who understood the act of acquiring possession could also acquire it, and later even without the consent of their guardian. At the same time, Roman law allowed for the acquisition of possession through third parties, such as slaves, sons under *patria potestas*, and later also guardians or administrators.⁹² Roman law thus consistently distinguished between the personal will to hold and the physical act of acquisition, which could be mediated. Common law, on the other hand, is based on a more practical and less formalised concept. In common law, the capacity to possess is not limited by age or mental state – what matters is the actual ability to express one’s will and control the thing. Common law therefore allows anyone to acquire possession, including children and the mentally ill, provided that they meet the above-mentioned requirements. At the same time, common law allows not only natural persons but also legal entities, the state or entire communities to acquire possession, with legal entities doing so through their “human” representatives, most often their employees.⁹³ Similar to Roman law, common law allowed for the acquisition of possession through another person, with common law referring to these persons as “agents” or “servants”.⁹⁴

7. Protection of possession

The approach of both legal systems to the protection of possession differs fundamentally from one another. In Roman law, possession was completely distinguished from ownership and constituted a separate legal institution that could be protected independently, regardless of who owned the thing. In contrast, common law does not make such a strict distinction between the protection of possession and ownership as Roman law does.⁹⁵ Anglo-American law protects property rights primarily through the protection of possession.⁹⁶ The Romans emphasised the rightfulness of possession, i.e. that it should not be acquired by force, secretly or by permission (*vi, clam, precario*). It was mainly the last peaceful state that was protected.⁹⁷ In common law, on the other hand, protection is provided to anyone who has a stronger right to possession than another person, thereby applying the so-called principle of relativity.⁹⁸

Another significant difference between the two legal systems is the degree to which the protection of possession is interconnected with tort law. Roman law protected possession and ownership separately from tort law, with possessory interdicts being purely civil in nature.⁹⁹ In contrast, common law combines the protection of property rights with the

⁹¹ KINCL – URFUS – SKŘEJPEK, *op. cit.*, p. 168.

⁹² *Ibid.*, p. 168.

⁹³ CLARKE – KOHLER, *op. cit.*, p. 35.

⁹⁴ SALMOND, *op. cit.*, pp. 282–283.

⁹⁵ GRAZIADEI – SMITH, *op. cit.*, p. 186.

⁹⁶ CLARKE – KOHLER, *op. cit.*, p. 282.

⁹⁷ KINCL – URFUS – SKŘEJPEK, *op. cit.*, p. 165.

⁹⁸ GRAZIADEI – SMITH, *op. cit.*, p. 186.

⁹⁹ KINCL – URFUS – SKŘEJPEK, *op. cit.*, p. 165.

instruments of tort law.¹⁰⁰ Torts such as trespass, conversion or nuisance are the basic means of protecting possession, both in the case of interference with immovable property and movable property.¹⁰¹

As regards the legal instruments used by each legal system to protect possession, Roman law provided protection for possession through praetorian interdicts, which were administrative orders issued by the praetor. These interdicts were intended either to preserve the last peaceful state (*interdicta retinendae possessionis*) or to restore possession that had been unlawfully taken away (*interdicta recuperandae possessionis*). They were primarily procedural in nature and tended to protect *possessio ad interdicta*.¹⁰² In contrast, common law ensures the protection of possession primarily through legal actions, which vary according to the nature of the case. In the case of immovable property, these are mainly action for trespass to land, action of nuisance or action for possession,¹⁰³ while in the case of movable property, they are action for trespass to goods and action for conversion of goods (*trover*).¹⁰⁴ These actions make it possible to claim, for example, damages, an injunction or even the return of the property.¹⁰⁵ In addition to these specific remedies, another common law remedy was the general remedy of tort of negligence.¹⁰⁶ Similarly to Roman law,¹⁰⁷ common law also allows for another means of protecting possession without the need for court intervention, namely self-help, provided that it is carried out peacefully and in accordance with the law.¹⁰⁸

A difference can also be found in the time limits for applying instruments for the protection of possession. While Roman law set time limits for filing applications for interdicts only in the case of *interdictum de vi* within one year, or *interdictum de precario* within thirty years,¹⁰⁹ common law unifies the six-year limitation period for property claims under the Limitation Act of 1980.¹¹⁰

8. Termination of possession

In Roman law, the extinction of possession was closely linked to its essence, which was understood as a factual state based on the union of the two elements mentioned above, namely physical control of the thing (*corpus possessionis*) and the will to control it for oneself (*animus possidendi*). The loss of at least one of these elements meant the termination of possession.¹¹¹ However, for this to actually occur, the loss had to be permanent and unambiguous. A mere temporary interruption of physical control over the thing, such as abandoning seasonally cultivated land when it was not required to be cultivated, did

¹⁰⁰ GRAZIADEI – SMITH, *op. cit.*, p. 186.

¹⁰¹ *Ibid.*, pp. 186–187.

¹⁰² KINCL – URFUS – SKŘEJPEK, *op. cit.*, p. 165.

¹⁰³ WONNACOTT, *op. cit.*, p. 19.

¹⁰⁴ CLARKE – KOHLER, *op. cit.*, pp. 284–285.

¹⁰⁵ *Ibid.*, p. 285.

¹⁰⁶ GRAZIADEI – SMITH, *op. cit.*, p. 186.

¹⁰⁷ KINCL – URFUS – SKŘEJPEK, *op. cit.*, p. 319.

¹⁰⁸ CLARKE – KOHLER, *op. cit.*, p. 286.

¹⁰⁹ SKŘEJPEK, *op. cit.*, p. 126.

¹¹⁰ UNITED KINGDOM, Limitation Act, Part 1. Sec. 2.

¹¹¹ KINCL – URFUS – SKŘEJPEK, *op. cit.*, p. 168.

not interrupt possession as long as the will to continue to control the thing persisted.¹¹² On the contrary, possession was terminated at the moment when the possessor knowingly abandoned the thing, lost the will to own it, or transferred it to another person by means of *traditio*.¹¹³ Possession also terminated as a result of the death of the possessor, as it could not be inherited and had to be acquired again by the heir in a natural way, i.e. by fulfilling both conceptual characteristics of possession.¹¹⁴ Similarly, possession terminated if the object of possession ceased to exist, became a matter excluded from legal transactions (*res extra commercium*), or the possessor lost legal personality, for example by falling into captivity.¹¹⁵ It is clear from the above that the Roman law concept of possession was based on its factual nature, as possession was understood as a factual, not a legal, status, and its termination was a natural consequence of the loss of factual power or will to control the thing.¹¹⁶

In the common law system, the approach to the institution of possession is different, as this system understands possession as a legal rather than a factual state.¹¹⁷ This concept also determines the ways in which possession can be lost, which are divided according to the will of the possessor – i.e. voluntary dispossession and involuntary dispossession.¹¹⁸ In the first case, possession is lost if the possessor knowingly relinquishes control over the thing, either by transferring it to another person (the aforementioned delivery),¹¹⁹ by temporary assignment (lease in the case of immovable property, or bailment in the case of movable property),¹²⁰ or by abandonment of the thing.¹²¹ Unlike Roman law, common law also allows for temporary termination of possession when the thing is transferred to another person while the owner retains ownership.¹²² Termination of possession without the possessor's consent occurs when another person takes physical control of the thing with the intention of keeping it for themselves (taking, see above).¹²³ This method can be encountered, for example, in the case of theft. In such a case, the perpetrator is considered the new possessor until the original possessor takes legal action to recover the thing.¹²⁴ This immediate transfer of possession, regardless of the will of the original possessor, represents a fundamental difference from Roman law, in which loss of possession occurred only when the possessor was aware of the interference with his possession and did not take any action against it.¹²⁵

Another significant difference is the issue of inheritance of possession. While Roman law considered possession to be a non-transferable factual state that could not be the

¹¹² *Ibid.*, p. 169.

¹¹³ SOMMER, *op. cit.*, p. 206.

¹¹⁴ *Ibid.*, p. 196.

¹¹⁵ KINCL – URFUS – SKŘEJPEK, *op. cit.*, p. 169.

¹¹⁶ *Ibid.*, p. 168.

¹¹⁷ GRAZIADEI – SMITH, *op. cit.*, p. 171.

¹¹⁸ POLLOCK – WRIGHT, *op. cit.*, pp. 43–44.

¹¹⁹ *Ibid.*, pp. 43–44.

¹²⁰ CLARKE – KOHLER, *op. cit.*, p. 609.

¹²¹ POLLOCK – WRIGHT, *op. cit.*, p. 43.

¹²² CLARKE – KOHLER, *op. cit.*, p. 609.

¹²³ POLLOCK – WRIGHT, *op. cit.*, p. 43.

¹²⁴ CLARKE – KOHLER, *op. cit.*, p. 259.

¹²⁵ KINCL – URFUS – SKŘEJPEK, *op. cit.*, p. 169.

subject of any singular or universal succession,¹²⁶ common law perceives possession as a legal institution closely linked to ownership.¹²⁷ For this reason, it allows possession to be inheritable and transferable in the same way as ownership. This approach is justified by the practical need to maintain continuity in property relations, as the absence of inheritance of possession could lead to legal uncertainty.¹²⁸

From the above mentioned, it can be inferred that the fundamental difference between the Roman and Anglo-American regulation of the termination of possession stems from their different understanding of the institution of possession itself. In Roman law, possession, as a factual state, terminated naturally, through the loss of factual or mental elements, whereas in common law, which perceived possession as a right, the termination of possession was a legal consequence of a change in the control relationship to the thing.

Conclusion

A comparative analysis of the institution of possession in Roman law and the common law system shows that, despite their different historical and conceptual developments, significant parallels can be found between them. The fundamental difference is that Roman law understood possession as a factual state separate from ownership, while common law understood it as a legal institution of proprietary nature. Other differences between the two legal systems are naturally closely related to this fundamental difference. Nevertheless, both are based on the same fundamental constitutive elements of possession, namely *corpus possessionis* and *animus possidendi*, and to a certain extent share similar principles of acquisition and loss of possession. Significant differences remain, particularly in the areas of protection and inheritance of possession. However, it may be concluded that the influence of the Roman law tradition on common law is undeniable. The analysis thus confirms that the Roman law tradition represents a permanent and structurally significant foundation for modern Anglo-American legal culture, which, albeit indirectly, continues to draw upon it to this day.

¹²⁶ SOMMER, *op. cit.*, p. 196.

¹²⁷ CLARKE – KOHLER, *op. cit.*, p. 261.

¹²⁸ POLLOCK – WRIGHT, *op. cit.*, p. 22.