



Hesi Siimets-Gross

Magister iuris, Lecturer of Legal History,
University of Tartu

Scientific Tradition of Roman Law in Dorpat: *usus modernus* or Historical School of Law?

Private law, in the contemporary sense, has its origins in the 19th century, when conceptual changes in law took place all over Europe. However, not everywhere was private law modernised according to the same pattern. It was done by codifying private law into a common code in both France (1804 — *Code civil*) and Austria (1811 — *Allgemeines Bürgerliches Gesetzbuch*), while in Germany, it was mostly achieved through administration of justice and jurisprudence. The 19th century saw the heyday of the historical school of law^{*1} established by Friedrich Carl von Savigny, and its methods and system were also exported elsewhere. The elite in the Baltic provinces of the Russian Empire belonged to the sphere of influence of German language and culture and hence the local jurisprudence was also mainly influenced by developments in Germany. The Baltic provinces also lacked a modern civil code, and it was necessary to ensure legal certainty in them by other means (e.g., through science, like in Germany).

The founder of Baltic provincial jurisprudence is considered to be Friedrich Georg von Bunge, who worked as a professor of provincial law at the University of Tartu from 1831 to 1842 and compiled the Baltic Private Law.^{*2} It is also claimed that it was Bunge who introduced the method of the historical school into the Baltic Sea provinces.^{*3} M. Luts has indicated in her doctoral thesis 'Juhuslik ja isamaaline: F. G. von Bunge provintsiaalõigusteadus' (Contingent and patriotic: the provincial jurisprudence of F. G. von Bunge) that Bunge rather proceeded from an earlier method of *usus modernus pandectarum* which was used in the 18th century.^{*4} Yet it is not possible, based solely on this, to declare that private law was not modernised through scientific approaches in the Baltic provinces. Savigny's method was obviously known here, at least theoretically.^{*5} Nevertheless, it is not clear whether the method of the historical school was also applied when writing research papers.

¹ See F. Wieacker. *Privatrechtsgeschichte der Neuzeit*. 2nd ed. Göttingen 1996, p. 348 et seq.

² See E. Landsberg. *Geschichte der Deutschen Rechtswissenschaft*. Part III. Half-vol. 2. Text. München/Berlin 1910, p. 559; P. Järvelaid. *Bunge sajand (Century of Bunge)*. II. – *Ajalooline Ajakiri (Historical Journal)* 1998 (102) 3, p. 17 et seq. (in Estonian).

³ E.g., P. Järvelaid. *F. G. von Bunge als Professor an der Universität Dorpat/Tartu (1831–1842)*. – *Tundmatu Friedrich Georg von Bunge (Unfamiliar Friedrich Georg von Bunge)*. *Verhandlungen der Gelehrten Estnischen Gesellschaft*. XXXV. Tartu 2006, pp. 70–71.

⁴ See M. Luts. *Juhuslik ja isamaaline: F. G. von Bunge provintsiaalõigusteadus (Contingent and Patriotic: the Provincial Jurisprudence of F. G. von Bunge)*. – *Dissertationes iuridicae universitatis Tartuensis* 3. Tartu 2000, p. 11 et seq., p. 185 et seq. (in Estonian).

⁵ M. Luts. *Die Begründung der Wissenschaft des provinziellen Rechts der baltischen Ostseeprovinzen im 19. Jh.* – *Rechtshistorische Reihe*. Bd. 251. *Geschichte und Perspektiven des Rechts im Ostseeraum*. J. Eckert., K. Å. Modéer (Hrsg.). Frankfurt a. M.: Peter Lang 2002, p. 150 et seq.

Within the historical school, a distinction is made between the so-called Romanists (who studied Roman law and developed a modern private law system on that basis) and Germanists (who studied the law with the so-called German origin, or new branches of law such as commercial law, etc.).⁶ Bunge, as a researcher of provincial law, belonged to the Germanists, while Roman law was also studied and taught at the University of Tartu.

The objective of this article is to examine whether the scientific method of the historical school might have been also used by the Romanists of the University of Tartu. The first professor of Roman law at the University of Tartu⁷, who did not come from elsewhere but had been cultivated at the University of Tartu itself, was Ottomar Meykow (7.01.1823–5.02.1894). Therefore, I will analyse the scientific method taught at the University of Tartu on the basis of one of his works, namely *Die Lehre des römischen Rechts von dem Eigentumserwerb durch Specification* submitted to apply for a degree of a Candidate in the Faculty of Law of University of Dorpat (today Tartu) in 1846.⁸ Together with three other research papers of the same kind it was published in 1849.⁹ His work was not yet a work of a famous scientist, yet this paper by Meykow was widely known: J. Passek writes that Meykow's work has gotten the attention of German scientists.¹⁰ By the time the paper was written, Meykow had not yet studied elsewhere, being consequently 'unspoiled' and most likely not very independent — his research method was such as he had been taught at the university. Thus, when studying his work methods, we can determine according to which method students were instructed to do research at the University of Tartu at the time of Meykow's studies from 1842 to 1847. Was it rather *usus modernus pandectarum*, used by Bunge in his provincial law, or did Meykow apply the methods of the historical school of law?

The theme of Meykow's work — the question of ownership after specification¹¹, that is, when somebody, who is not the owner, has made something out of material belonging to someone else — has been one of the most discussed topics since Roman times. The fate of the reprocessed outcome already elicited different comments from Roman jurists, which shows that it was both disputable and intriguing. At the same time, the problem was also important in practice: when answering the question of who is the owner of the new thing, it also becomes clear whether it is the owner or the deliverer/reprocessor who enjoys more support. Such a choice always includes social, economic and political values and considerations. This article has been founded on the paper written by Meykow, purely out of scientific interest in the method used by him and the Romanists of the University of Tartu, while trying to identify whether the future professor of Roman law at the University of Tartu was inclined to observe the earlier or the later scientific tradition.

This article will first give some key points of the methods of *usus modernus pandectarum* and the historical school. As Meykow deals with specification on the basis of Roman law sources, the context of classical Roman law will then be given, to be followed by an analysis of the statements and structure of the paper on the basis of two problems chosen from the work of Meykow, in order to perceive them in the context of Roman jurisprudence.

⁶ F. Wieacker (Note 1), pp. 377–378.

⁷ With master's thesis 'De duplae stipulationis computatione' he had got the master's degree in 1847 and a doctor's degree with 'Die Diction der römischen Brautgabe' in 1850. J. Passek, O. Meikov. – Biografichesky slovar professorov i prepodavateley Imperatorskogo Yurevskogo Universiteta za sto lety evo sushchestvovaniya (1802–1902). Tom I. (redaktsiy Levitskogo) Yurev: Tipografiya K. Matisena 1902, pp. 604–606.

⁸ O. Meykow. *Die Lehre des römischen Rechts von dem Eigentumserwerb durch Specification* (1846). – Dorpater Juristische Studien. E. Osenbrüggen (Hrsg.). Dorpat: Verlag von E.J. Karow 1849, pp. 149–183.

⁹ E. Osenbrüggen. Vorwort. – Dorpater Juristische Studien. E. Osenbrüggen (Hrsg.). Dorpat: Verlag von E. J. Karow 1849, p. V.

¹⁰ E.g., a reference is made to him in the article 'Die Lehre von der Specification. Ein Beispiel römischer Juristenphilosophie in ihrem Verhältnis zur modernen Gesetzgebung' by P. Sokolowski, a professor of the University of Moscow at the time (who is considered a German scholar). Published: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung 1896 (17), p. 253 et seq. J. Passek also writes that the work by Meykow was well known in Germany: O. Meikov. – Biografichesky slovar professorov i prepodavateley Imperatorskogo Yurevskogo Universiteta za sto lety evo sushchestvovaniya (1802–1902). Tom I. (redaktsiy Levitskogo) Yurev: Tipografiya K. Matisena 1902, p. 605. With a reference to J. Passek, the same is stated by J. Engelmann. See O. M. Meykow. *Allgemeine Deutsche Biographie*. Vol. 55. Nachträge bis 1899. Wandersleb – Zwirner. Historische Kommission bei königlichen Akademie der Wissenschaften (ed.). Leipzig: Duncker & Humblot 1910, p. 841.

H. Elbert still refers to him in the second half of the 20th century. *Die Entwicklung der Spezifikation im Humanismus, Naturrecht und Usus modernus*. Inaugural-Dissertation zur Erlangung der Doktorwürde einer Hohen Rechtswissenschaftlichen Fakultät der Universität zu Köln. Manuscript. Cologne 1969, p. 56 et seq.

¹¹ The term *specificatio* was unknown to Roman lawyers. They did use descriptions such as *cum quis ex aliena materia speciem aliquam suo nomine fecerit* or *Cum ex aliena materia species aliqua facta sit ab aliquo* or did specify the problem: *si ex uvivis meis vinum feceris* [...] As the notion has become popular among Romanists and is also contained in the title of O. Meykow's paper, it also takes a central position in this article.

1. *Usus modernus pandectarum* and the historical school of law

Usus modernus pandectarum (the modern application of pandects) was in fact characterised by very different approaches. They all shared the importance of the practical usage value of provisions. Until that time, the reception of Roman law had mostly consisted of a scientific discussion of and comments on the sources, and it had been legitimised by the so-called universal nature of Roman law provisions. *Usus modernus* came to link the scientific and the practical approaches. The earlier *usus modernus* had attempted to link Roman private law and its principles with local (particular) law and the use of their sources, while actually implementing them in practice, resulting in the Roman-German *ius commune*.¹² A typical example is the title of a work by D. I. A. Hellfeld ‘Iurisprudentia forensis secundum Pandectarum ordinem in usum auditorii proposita’¹³, that is, law for (judicial) practice structured according to pandects. Thus, the title of the work comprises both Roman law principles and practice systematised by the Digests; the text makes use of other authors, while still referring to *Corpus iuris civilis* (CIC). Neither Hellfeld nor any other jurists of *usus modernus* paid attention to the time when the sources of Roman law had been created or to the development of institutes of law over time. The sources of Roman law were considered equally valid and relevant also in the 18th century. Thus, unlike in the German historical school, it was not important to return to the original sources, and Roman law was discussed in the already developed form of *ius commune*.

The later period of *usus modernus* was characterised by the attempt to systematise law according to the structure of ‘Institutions’ by Justinian, as it was much easier to link German law institutes with those of Roman law this way.¹⁴

The founder of the historical school F. C. von Savigny¹⁵ has established that rules with a general content must be created in law, which are not affected by randomness¹⁶, but must express a certain inevitability (an idea of law or internal principle of life).¹⁷ Thus, law is simultaneously both historical (*historisch, in der Zeit*) and philosophical (*überzeitlich*), not only one or another.¹⁸ All sources of law serve merely as the external form of a superior and self-generating true law¹⁹, in or behind which lays the internal idea of law, a certain metaphysical inevitability.²⁰

The discipline dealing with law had to be both historical and systematic at the same time. Historically, it was necessary to reach the roots of a legal phenomenon — for example, the original approach to the problem of specification, the CIC comprising the works of the jurists of the classical period. Since the systematic approach had to be combined with the historical one, by the historical roots of the institute of law, we have to inquire about the systematic position, the nature of the institute. The historical part was necessary for identifying the principle of life for law but the outcome had to be a valid and organised legal system. The internal idea of a legal phenomenon did not have to be clearly inferable from the original sources; rather, it remained hidden behind the letter and the jurist had to trace it there. Unlike in contemporary Science of Roman law, it was not important to, so to say, reconstruct history, but the sources of Roman law had to be studied for their practical contemporary use.²¹ Savigny had described his work method as follows: firstly, one must study the

¹² F. Wieacker (Note 1), pp. 204–215; C. Wollschläger. Savignys Landrechtsvorlesung: ein Beitrag zu wissenschaftlicher Juristenausbildung. – B. Dölemayer, H. Mohnhaupt (Hrsg.). 200 Jahre Allgemeines Landrecht für Preussische Staaten. Frankfurt a.M.: Klostermann 1995, p. 196; H. Coing. Europäisches Privatrecht. Bd. I. Älteres Gemeines Recht (1500–1800). München: Beck 1985, p. 16.

¹³ According to the schedule of lectures of the University of Tartu, the paper was used to teach Roman law in 1803–1818. D. I. A. Hellfeld. Iurisprudentia forensis secundum Pandectarum ordinem in usum auditorii proposita. D. G. E. Oeltze (ed.). Editio Quarta. Jenae: Officina libraria Crockeriana 1806, pp. 794–797.

¹⁴ K. Luig. Die Theorie der Gestaltung eines nationalen Privatrechtssystems aus römisch-deutschem Rechtsstoff. – H. Coing, W. Wilhelm (Hrsg.). Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert. Frankfurt a.M.: Klostermann 1974, pp. 217–221; P. G. Stein. Römisches Recht und Europa. Die Geschichte einer Rechtskultur. – W. Benz. Europäische Geschichte. 3. Aufl. Frankfurt a. M.: Fischer 1999, pp. 160–181.

¹⁵ The later jurists have not reached a consensus concerning the legal method of F. C. von Savigny. As the dispute is not the core subject of this article, I will take as the basis J. Rückert, who has highlighted the different opinions of F. C. von Savigny, and M. Luts, who has studied the legal teaching of Savigny.

¹⁶ J. Rückert. Savignys Konzeption von Jurisprudenz und Recht, ihre Folgen und ihre Bedeutung bis heute. – Tijdschrift voor rechtsgeschiedenis. D. LXI. Antwerpen: Kluwer 1993, p. 72 (with further references).

¹⁷ M. Luts. Das Verhältnis der Rechtsgeschichte zur Rechtsdogmatik im Werk von F. G. von Bunge. – Tundmatu Friedrich Georg von Bunge (Unfamiliar Friedrich Georg von Bunge). Verhandlungen der Gelehrten Estnischen Gesellschaft. XXXV. Tartu 2006, pp. 212–213.

¹⁸ J. Rückert (Note 16), p. 73.

¹⁹ *Ibid.*, p. 79.

²⁰ M. Luts (Note 17), p. 212.

²¹ *Ibid.*, pp. 212–214.

sources of law (particularly those of Roman law), and thereafter everything that has been written about them^{*22} and on that basis identify the true law that would be applicable also today.^{*23}

2. The problem of specification in Roman law

To give an idea about the problem of specification, the descriptions from Roman law sources will be referred to. In Justinian's Institutes, the problem is described as follows:

Inst. 2, 1, 25: *Cum ex aliena materia species aliqua facta sit ab aliquo, quaeri solet, quis eorum naturali ratione dominus sit, utram is qui fecerit, an ille potius qui materiae dominus fuerit: ut ecce si quis ex alienis uvis aut olivis aut spicis vinum aut oleum aut frumentum fecerit [...].*^{*24}

This discussion was particularly evident between the two Roman legal schools: Sabinians and Proculians. A Roman lawyer of the classical period Gaius describes their opinions in his *Institutiones*:

G. 2, 79: [...] *quaeritur, utrum tuum sit id, quod ex meo effeceris, an meum. Quidam materiam et substantiam spectandam esse putant, id est, ut cuius materia sit, illius et res, quae facta sit, uideatur esse, idque maxime placuit Sabino et Cassio; alii uero eius rem esse putant, qui fecerit, idque maxime diuersae scholae auctoribus uisum est [...].*^{*25}

As we can see, the Sabinians considered the owner to be the owner of substance and not the person who made the new thing (*nova species*). The result of the theory of the Sabinians is that if the *nova species* is made of the material of many owners, they all will have part of the ownership and it belongs to all of them as *condominium*.^{*26} The Proculians claimed that the person, who made the new thing, should also be its owner. In the case when the materials of many owners are used the result is still the same.

A solution to this discussion came with *media sententia*, which is described by Gaius in *Rerum cottidianarum* in the 2nd century and taken over by Justinian in the 6th century:

Dig. 41, 1, 7, 7 [...] *est tamen etiam media sententia recte existimantium, si species ad materiam reverti possit, verius esse, quod et sabinus et cassius senserunt, si non possit reverti, verius esse, quod nervae et proculo placuit. ut ecce vas conflatum ad rudem massam auri vel argenti vel aeris reverti potest, vinum uero vel oleum vel frumentum ad uvas et olivas et spicas reverti non potest [...].*^{*27}

As a result of *media sententia*, the viewpoint of Sabinians is applied if the *nova species* could be changed back into the different materials, e.g., as is the case with a vase. If this is not possible, the standpoint of the Proculians is used as it is with wine that cannot be transformed back into grapes.

The varying opinions of Roman jurists in resolving the problem of specification have provided grounds for centuries of discussions up to the present day. One of those intrigued by the topic was also O. Meykow, and I will discuss the issues referred to in his work.

²² A letter of Savigny to W. Erdmann, dated 21.2.1803 (J. Rückert (Note 16), p. 81).

²³ M. Luts (Note 17), p. 213.

²⁴ "Suppose one man makes something out of another's materials. Who is it reasonable to see as the owner, the maker or the owner of the materials? Suppose, for example, that one man makes wine, oil, or grain from another's grapes, olives, or corn; [...]." Justinian's Institutes. P. Birks, G. McLeod (ed.). London 1987.

²⁵ "[...] there is a question, whether what you made from my property is yours or mine. Some people think that one should look to the materials and substance, that is, whoever owns the materials owns what was made from them; this view was taken especially by Sabinus and Cassius. On the other hand, others think the thing belongs to the person who made it, and this appealed especially to the authorities of the other school. [...]" The Institutes of Gaius. Translated with an introduction by W. M. Gordon and O. F. Robinson; with the Latin text of Seckel and Kuebler. London: Duckworth 2001.

²⁶ A. Paret. Die Lehre vom Eigentmserwerb durch Spezifikation in ihrer Entwicklung bis zum Entwurf eines bürgerlichen Gesetzbuches für das deutsche Reich. Leipzig 1892, pp. 39–40.

²⁷ There is however, the intermediate view of those, who correctly hold that if the thing can be returned to its original components, the better view is that propounded by Sabinus and Cassius but if it cannot be so reconstituted, Nerva and Proculus are sounder. Thus a finished vase can be so reduced to a simple mass of gold, silver or copper; but wine, oil or flour cannot again become grapes, olives or ears of corn [...]. The Digest of Justinian. Translation edited by A. Watson. Vol. 2. Philadelphia: University of Pennsylvania Press 1998.

3. Structure and problems of Meykow's work

Meykow starts his work with a historical part where the theories of specification of the Sabinians and Proculians and *media sententia* are discussed. Here the main points of the second, the dogmatical part, are mentioned, but not discussed further.

In the historical part, Meykow focuses on sources of law. When writing the second part of his work, he refers to both the more important contemporary literature on law and earlier authors starting from glossators — hence, studies pursuant to Savigny's method of what has been written about the problem but does this by closely following the sources of Roman law and assessing the statements made by others on that basis. Already such division into the historical and dogmatical is similar to the historical and systematic treatment referred to by Savigny. The work method described by Savigny is also suitable for describing Meykow's accomplishments at least in these two aspects. The approaches of *usus modernus*, however, (such as Hellfeld) lacked such historical part and although the references were included in the footnotes, they were discussed via other authors.

Meykow focuses on four main points in his work. Firstly, the systematic position of specification as a class of *acquisitiones originaria*. Secondly, when and who has invented the *media sententia* which Justinian follows.²⁸ Thirdly, whether the specification *bona* or *mala fide* made any difference in the ownership of the new thing for the Roman lawyers. And fourthly, whether the intention, in German *die Wille* (will), was important for the acquisition of the new thing. The former and the latter have been chosen in this article to study the legal method of Meykow. The former of the discussed problems coincides with one of the subtitles in Meykow's dogmatic part. The remaining ones of the four issues have been analysed within the text and not in subtitles.²⁹ He essentially examines the four issues specified above.

It may be said in advance that in several issues, Meykow appears to have proceeded from the opinions held by K. A. Vangerow in his work 'Leitfaden für Pandecten-Vorlesungen'.³⁰ Taking into account that Meykow was about to graduate from the university at that time, it may be presumed that he was not — and was not supposed to be — very independent in his approach. Yet, he sometimes also objects to Vangerow. However, as the main issues and answers are concerned, Meykow's opinion coincides with that of Vangerow as in the classification of specification. Vangerow has highlighted as disputable in his era and also discussed the time of creation and the author of *media sententia* as well as the necessity of *bona fides* for acquiring the processed thing. Vangerow still does not mention the issue of processor's intention or intention as such.

3.1. Occupation, accession or a special class of acquisitions

According to Meykow, a large number of conflicting opinions have evolved in a relatively limited area such as specification because 'there is not enough research done about the question of the position of specification among other methods of acquisition'.³¹ In fact, as H. Coing notes in 'Europäisches Privatrecht', the question about the position of specification is a relatively old problem and was one of the problems for the lawyers of *usus modernus*.³² At the same time, the question of the systematic position of each institute is also important for Savigny. However, Savigny does not understand the systematic position of a legal institute directly as its location but rather as its nature. It is still possible to reach one through another and Meykow's opinion that conflicts in understanding the topic of specification have arisen, due to lacking research, appears to refer also to the Savignian problem of understanding the nature.

Yet the question about the position of specification among the types of acquisition may already arise due to its position in the sources of Roman law. Especially if we try to look into different sources: into *Institutiones*

²⁸ Meykow prefers the opinion that *media sententia* was invented after Gaius has written his 'Institutiones'. The reason is that G. 2, 79 does not mention the *media sententia* but he does this in 'Rerum cottidianarum' in the Digest. This work was written by Gaius later and Meykow refers to Gaius in that as 'geradezu ein Anhänger von *media sententia*'. O. Meykow (Note 8), p. 156.

²⁹ The subtitles are the following: 'Notion of technical expressions *specificatio* and *specificans*', 'Systematic position of the study of specification', 'Specifier', 'Reprocessed material', 'Legal remedies of the owner of reprocessed material'.

³⁰ Unfortunately, only the edition of 1839 was accessible to me. K. A. Vangerow. Leitfaden für Pandecten-Vorlesungen. Vol. 1. Part 1. Marburg/Leipzig: Elwert Verlag 1839, pp. 494–499. Meykow refers to the 1845 edition.

Since Vangerow discusses specification only on some pages in his book, it is not possible to make serious inferences about their similarity or difference. As only Vangerow highlighted the two problems analysed by Meykow this way, it is most likely that this work was taken as the basis.

³¹ O. Meykow (Note 8), p. 162.

³² H. Coing (Note 12), p. 300. The same way also H. Elbert (Note 10), pp. 66–75.

of Gaius, *Institutiones* of Justinian and also the Digest. The classification made in these sources is not very clear and can be understood in many ways.^{*33}

The list of the authors and their works to which Meykow refers, and who are supporting one or another of the three possibilities, is long. Supporters of the theory that it was a type of *accessio*^{*34} could be found among the representatives of all periods of jurisprudence from glossators to Meykow's contemporaries.^{*35} The list of proponents of the occupation theory^{*36} developed by Meykow began with Donellus and led to the very contemporaries of Meykow^{*37}, while Meykow mentioned only authors of the 19th century as the advocates of specification as an independent type.^{*38} Meykow's own opinion about the theories is not very clear from his work: at first he claims, concerning all three variants, that they are not correct but then notes later that the occupation theory of the Proculians is the right one.

Meykow first claims that the solution of the Proculians — the specification as a class of *occupatio* — is false. This theory is based on the presumption that the transformed materials disappear in reality, or fictitiously, and there is a totally new thing that could be occupied. But 'this theory does not only create interdependence between human will and external circumstances but also comes into a public conflict with the prohibition to prescribe stolen items'. Also the *media sententia* has, in his view, taken over the theory of occupation.^{*39}

On the contrary, Sabinus has, in the system of his *Libri tres iuris civilis*, placed the specification under the accession. In Meykow's view, this is not true either, as it presumes the existence of a principal and accessory thing.

The defenders of this theory have argued that the form is the principal thing and material accessory.

This does not seem very convincing to Meykow.^{*40} However, it is hard to understand why Meykow finds that the Sabinians and the defenders of their theory of *accessio* should consider the form as primary. It has been

³³ *De adquirendo rerum dominio* is in the Digest of Justinian discussed in 41.1 and it begins with occupation. This is followed by *allovio* and other cases where the river is changing its bed; this is followed by specification (Dig. 41, 1, 7, 7), *confusio* and *commixtio* with the same examples as in Justinian's Institutes; and *inaedificatio* — building another's ground (This book of Digest is based mainly on Gaius's *Rerum cottidianarum*).

In Justinian Institutes until Inst. 2, 1, 24, the ways how one can acquire ownership by occupation are specified (Clearly until Inst. 2, 1, 19 — after that it seems to change to the accession — because *allovio* is mostly considered as a class of *accessio*. But in Inst. 2, 1, 22, it is mentioned that '*insula, quae in mari nata est, [...] occupantis fit*' — so it sounds to be occupation again or still). In Inst. 2, 1, 25 we can find the above-referred fragment about specification with *nova species*. To this follows the case with purpur in another's robe and it is said that it belongs to the robe as *accessoire* — consequently accession. In Inst. 2, 1, 27, there are the different materials of different owners mixed (*confusio*) and it is held by Romanists to be a class of *accessio*. On the other hand, it is in the fragment presented in the same example as in the previous Inst. 2, 1, 25. Inst. 2, 1, 27: *sed si diversae materiae sint et ob id propria species facta sit, forte ex vino et melle mulsum [...], idem iuris est: nam et eo case communem esse speciem non dubitatur*. (The same applies where the materials are different and their fusion produces a new substance, for instance mead from wine and honey [...] the result becomes the common property of both.) This fragment is followed up further with the cases of accession.

In the Institutes of Gaius, *acquisitiones originariae* are even less structured. He begins with *occupatio* (G. 2, 66) and continues in G. 2, 70 with *allovio*, which seems to be another class as he cites again: that '*id [...] eodem iure nostrum fit*'. With G. 2, 79, specification which begins again with reference to the natural law: '*In aliis quoque speciebus naturalis ratio requiritur*,' the part of the natural law *acquisitio* ends. So on the basis of the Institutes of Gaius, we could place the specification to the accession or to hold it to be an independent class.

³⁴ As a result of *accessio*, two things merge or are joined, which may also belong to different owners. One may often be considered the principal and the other an accessory thing, and in such case, the accessory thing merges with the principal thing. However, when a distinction cannot be made between the principal and the accessory thing, the joined or merged thing is in the co-ownership of the owners.

³⁵ E.g., Placentinus (1535) and Voetius (1779), but also Hugo (1826), Thibaut (1846), etc.

³⁶ *Occupatio* means the occupation of a thing that does not have an owner. It is presumed in the occupation theory that a processed thing loses its former essence or form and thus the thing itself disappears and a new thing appears — which does not consequently have an owner and can be occupied.

³⁷ Donnellus (16th century), Puchta (1844 — Pandecten), Vangerow (1845), etc.

³⁸ Schilling (1837), Mühlenbruch (1842), Puchta (1842 — *Cursus der Institutionen*) and Christiansen (1843). H. Elbert mentions already earlier authors such as Oldendorp (1544), Duarenus (1584), Haunold (1671), etc., p. 74, although he notes that specification came to be treated as an independent type later than the others. H. Elbert (Note 10), p. 66.

³⁹ O. Meykow (Note 8), p. 158.

⁴⁰ *Ibid.*, pp. 164–165. P. Sokolowski explains the differences between schools by differences in the philosophical foundations. Namely, in his opinion, the Sabinians were influenced by Stoic philosophy, and placed the matter in the foreground instead of the form. P. Sokolowski (Note 10), p. 279. (F. Wieacker et al generally agree with Sokolowski as regards the philosophical influences of both schools. F. Wieacker u.a. *Spezifikation. Schulprobleme und Sachprobleme. – Festschrift für Ernst Rabel. Vol. 2. H. Dölle et al. (ed.). Tübingen: J. C. B. Mohr (Paul Siebeck) 1954, pp. 282–283.*) At the same time, Meykow says that the Sabinians considered the form as more important. According to Sokolowski, preference of form is based on Aristotelean philosophy, pursuant to which the form determines and delimits the matter; matter in itself is nothing, but its significance lies in the fact that it is indispensable for achieving the goal. P. Sokolowski (Note 10), p. 260. The Aristotelean teachings served as the basis for the Proculian opinions that did not presume the existence of main and accessory things, but the disappearance of one and creation of another thing. Meykow does not explain the philosophical foundations of one or another school.

clearly stated in G. 2, 79 that matter was more important for Sabinus and Cassius (the founders of the Sabinian school), to which the form was added but not *vice versa*. Hence, such objection by Meykow — and also, according to him, that of the others — seems pointless. The Sabinians did not find that the form should prevail, to which an accessory thing is added. Yet Meykow never refers to any authors saying so.

Also the third possibility that the specification could be an independent class of *acquisitio originaria* is, according to his opinion, incorrect. He does not substantiate this argument and argues again against the occupation theory.^{*41} Neither does he provide an answer to the problem but just lets it be.

However, when later discussing the issues of *bona fide*, Meykow still finds that ‘some jurists have rightly considered the acquisition through specification as a subclass of occupation’.^{*42} It thus appears that his very position in this issue is not too clear or at least expressed so clearly.^{*43} Vangerow also thinks that specification falls under occupation, thus he agrees with Meykow and his opinion about Justinian’s position.

The opinions of different authors to whom Meykow refers^{*44} can in some cases be interpreted in different ways. Concerning most of the authors, I shared Meykow’s views of the place of specification, but when Meykow, e.g., claimed that in Schweppe’s^{*45} opinion it was an independent class, I understood it as occupation.

Meykow claims about Puchta that in ‘Pandecten’, dating from 1844, he places specification under occupation.^{*46} In ‘Cursus der Institutionen’ (1857), Puchta views specification on the one hand as *accessio*, yet on the other hand as an independent class^{*47}, while Meykow finds that Puchta holds specification to be an independent class.^{*48} So it seems that different interpretations are possible and one author may also change his view.

Savigny, in his *Pandektenvorlesung*, has treated specification as an independent mode of acquisition and has not pinpointed anything besides the differing opinions of Romans.^{*49} The Nordic authors at the end of the 19th century have in their works viewed it as a class of *accessio* or as independent.^{*50}

Hellfeld, in his work, considers specification as a subclass of *accessio*, referring only to the opinion appealing to Justinian, i.e. *media sententia*.^{*51} If we agree with Meykow that *media sententia* had taken up the theory of occupation after the Proculians, then Hellfeld’s approach is contradictory. However, when we presume that the main thing does not change and an accessory thing is added to it as *res nullius*, it is still possible to combine these two theories. The work of Hellfeld does not unfortunately reveal the reasons why it serves as a subclass of *accessio*.

If we ask about the systematic place of the institute and especially in the face of sources of Roman law, where different inferences can be made based on various sources, it is possible to understand why it was a problem both for the jurists of *usus modernus*, and the historical school. In addition, the judgment about the nature of specification was also dependent on its position. Both are important and interrelated, if we wish to have a system of modern law mostly based on the Roman sources.

⁴¹ O. Meykow (Note 8), p. 165–166.

⁴² *Ibid.*, pp. 168.

⁴³ About 15 years later in his ‘Grundriss des Pandektenrechts’ (1866), in a study-book for students, Meykow sees specification more as an independent class. O. Meykow. Grundriss des Pandektenrechts. Dorpat: H. Caakmann 1866, pp. 40–43. The same also O. Meykow. Grundriss der Institutionen des römischen Rechts. Dorpat: Schnakenburg’s Buchdruckerei 1880, pp. 18–20.

⁴⁴ I have tried to have a look myself into different books of authors, to which Meykow has referred — unfortunately, it was these books that were missing in the library of the University of Tartu, so I took others by the same authors, or earlier or later prints.

⁴⁵ A. Schweppe. Römische Rechtsgeschichte und Rechtsaltertümer mit erster vollständiger Rücksicht auf Gajus und die Vaticanischen Fragmente. 3. Aufl. C. A. Gründler (Hrsg.). Göttingen: Vandenhoeck und Ruprecht 1832, p. 494. (Meykow referes to A. Schweppe. Römische Rechtsgeschichte und Rechtsaltertümer mit erster vollständiger Rücksicht auf Gajus und die Vaticanischen Fragmente. 2nd ed. C. A. Gründler (ed.). Göttingen: Vandenhoeck und Ruprecht 1826, p. 399).

⁴⁶ This is also my opinion on the basis of Lehrbuch der Pandecten by G. F. Puchta. Leipzig 1838, p. 121, which I have in my possession.

⁴⁷ G. F. Puchta. Cursus der Institutionen. 2. Bd. 5. Aufl. U. Andorff (Hrsg.). Leipzig: Breitkopf und Härtel 1857, pp. 691–692.

⁴⁸ O. Meykow (Note 8), p. 163.

⁴⁹ F. C. von Savigny. Pandektenvorlesung 1824/25. H. Hammen (Hrsg.). – Ius Commune. Veröffentlichungen des Max-Planck-Instituts für Europäische Rechtsgeschichte Frankfurt am Main. Sonderhefte. Studien zur Europäischen Rechtsgeschichte, 62. Savignyana. Texte und Studien. J. Rückert (Hrsg.). Frankfurt am Main: Klostermann 1993, p. 112.

⁵⁰ In J. Serlachius ‘Lärobok. Sakrätten’, the specification is followed by the classes of *accessio*, so it could be seen as independent class or accession. See J. Serlachius. Lärobok. Sakrätten. Enligt gällande finsk rätt. I. Helsingfors: Akademiska bokhandeln 1899, p. 93. In Wredes ‘Inhemst civilrätt. Sakrätt’ (1899) he says that in Roman law it is one class of *accessio* and regards it as such. See R. A. Wrede. Inhemsk Civilrätt. Sakrätt. I. Ny öfversedd upplaga. Helsingfors: Lindstedts Antikvariska Bokhandel 1899, p. 117 et seq.; the same to the book published in Helsinki in 1946. See R. A. Wrede. Esineoikeuden pääpiirteet. 2nd ed. I. Caselius (ed.). Helsinki: Söderström & Co 1946, p. 235 et seq.

⁵¹ D. I. A. Hellfeld (Note 13), pp. 794–797.

For the modern literature on Roman Law, the place of specification is no longer a problem and generally specification belongs to accession.^{*52} On the one hand, we can explain this by the needs of the time: today, the Romanists do not try to construct a valid and applicable system of law for use but reconstruct the ‘old’ Roman law as far as possible. Meykow instead seems to try to identify the ‘true’ or ‘real’ place of specification and after analysing different positions of the specification in Roman sources he analyses them according to the substance.

3.2. The will of the producer of the new thing

Another issue discussed by Meykow^{*53}, which I would also like to analyse in this article, is the issue of the will of the producer of the new thing.^{*54} The issue of will is also related to classification of specification — *animus rem sibi habendi* (the will to keep the thing in one’s possession) tends to be important in the case of occupation. In the case of *accessio*, the questions of will, its necessity and importance upon classification were more problematic, although not impossible, e.g., in Hellfeld’s treatment.

Meykow argues that the Proculians were the first ones to notice the importance of will (*die Wille*) of the producer of *nova species*. They have made only the mistake of giving him the unlimited power (*schrankenlose Eigenmacht*).^{*55} This is again connected to the first problem we discussed — to the classification. The producer of the new thing needs, in his view, only *animus rem sibi habendi*, as in all cases of occupation. The occupation of reprocessed things has two preconditions: firstly, the new thing must be fully completed and secondly, the reprocessor must decide that he wishes to have the thing, i.e. he must be aware of the wish to acquire the thing. While reprocessing the thing for someone else, he does not acquire it through his will to himself but to another person. Meykow claims that this view is only in the last time seen as *communis opinio* ‘so einfach und unzweifelhaft es auch scheint’.^{*56} Unfortunately, Meykow does not give here any reference.

The theory of will, as Meykow presents it, is not so commonly known in the books of the 19th century that he cites, as he claims. Yet, Coing does not mention it as a problem discussed by *usus modernus*. Hellfeld still says that if one of the things to be added to others does not belong to anyone yet, it will transfer to the owner of the principal thing through the will of acquisition (*animus sibi habendi*) in the same way as in the instances of occupation.^{*57} It is still a general principle applying to all cases of *accessio*. In specification, the problem generally was that reprocessed things had an owner.

Puchta also refers to *animus rem sibi habendi* as regards specification: ‘if someone creates by joining his and a strange thing a new thing that differs by nature from the old one by *animus sibi habendi*, [...] the production and the creation of the new thing add such weight to the will that the producer will become the owner of the entire thing’.^{*58} Mühlenbruch notes in his pandect book that if specification takes place with an underlying will to acquire the thing into one’s ownership, it is so in most cases. ‘Yet it was a subject of dispute for the Sabinians and Proculians, while one party assigned the new form [i.e. the thing] to the owner of the matter, the other party to the reprocessor [...]’.^{*59} Such wording again appears to imply the difference of the, so to say, modern law from Romans, and emphasises will. In the book of institutions, Mühlenbruch calls it *animus domini* (the will to be an owner).^{*60}

Whereas Meykow claims that *animus* is important particularly in the cases of occupation, both Mühlenbruch and Puchta opine in their works discussing *animus* that it is an independent method of acquiring things. Thus, the other authors are not that certain that *animus* is relevant only to *occupatio*.

One of the authors discussing the will, more specifically the will to possess, is F. C. von Savigny. The will to possess (*animus possidendi*) is in his opinion expressed through *animus domini* (the will to be an owner) or

⁵² M. Kaser sees specification as a class of accession for the classical and post-classical period, but mentions that the Roman lawyer did not perceive these cases where different materials would be put together technically as *accessio*. M. Kaser. *Römisches Privatrecht (RPR) I. – Handbuch der Altertumswissenschaften. Part 3. Vol 3. Section 1.* München 1971, pp. 428, 431; *RPR Section II. – Handbuch der Altertumswissenschaften. Part 3. Vol. 3. Section 2.* München 1975, p. 289.

⁵³ K. A. Vangerow does not discuss the issue of will.

⁵⁴ H. Elbert finds that in specification, important problems include the notion and classification of the ‘new thing’, the principle of operation as a basis of acquisition, the issue of *bona fides* and presumption of *suo nomine*. He never refers to the will of the reprocessor, not even within the text. H. Elbert (Note 10), p. 2.

⁵⁵ O. Meykow (Note 8), p. 152.

⁵⁶ ‘[S]o simple and indisputable as it seems’. *Ibid.*, pp. 166–167.

⁵⁷ D. I. A. Hellfeld (Note 13), p. 794.

⁵⁸ G. F. Puchta (Note 47), pp. 691–692.

⁵⁹ S. F. Mühlenbruch. *Lehrbuch des Pandecten-Rechts. Nach der dritten Auflage der Doctrina Pandectarum deutsch bearbeitet. 2. Theil.* Halle: Schwetscke und Sohn 1836, p. 85.

⁶⁰ *Ibid.*, p. 165.

animus sibi habendi (the will to acquire the thing into one's ownership). It did not suffice that the thing was in the factual possession of a person, but he also had to have the will to possess it.^{*61} For Savigny, it is a so-called unavoidable element, a universal principle of law that had to be identified from the sources.^{*62}

I dare not say that Meykow arrived at the universal principle of law exactly as Savigny. Yet in my opinion the sentence 'Aus einer richtigen Auffassung der Stellung unserer Lehre im Rechtssystem ergibt sich mit Evidenz, dass der Specificant für den Erwerb der verarbeiteten Sache wie überall in Fällen der Occupation allein des *animus rem sibi habendi* bedarf'^{*63} indicates that it was his goal. In a word, he tries to find a place for his theory in the legal system — that is, to go beyond structuring that follows pandects or the institution system. This is also indicative of Meykow's will to get through analysing the sources to their underlying principle. According to Meykow, the reprocessor must also be aware of his will to acquire the processed thing, and this is a bottom line theme throughout Meykow's work. This may be seen as a certain parallel to what was expressed by Savigny, or at least as such a pursuit. Considering the age of the author, it need not be and, in fact is not, a mature and integrated concept.

Meykow also gets to the point that in more modern law, attempts have been made to restrict the will of such a reprocessor by the principle of *bona fides*, which has also been derived from the sources of Roman law. Meykow explains it by a subconscious wish to develop Roman law further and 'the only mistake that has been made is that the essentially correct idea has been presented as the position of Roman jurists'.^{*64}

4. Conclusions

To sum up Meykow's method, we may say that he has independently looked into sources but also used the works of earlier researchers to support or oppose his views. The division of the work into a historical and dogmatic part while the latter discusses the systematic position of the institute is similar to Savigny's historical and systematic approach.

If we consider one of the most characteristic features of *usus modernus* to be the association between practice and law as a discipline, then this cannot be found from Meykow's work. Neither has Meykow analysed particular rights along with the sources of Roman law. The discussion of both Baltic and German particular law remains beyond the limits of this work. At the same time, the problem had been sufficiently discussed in Roman law, so that there was no place for local law. The method of handling the sources was similar to that of Savigny rather than Hellfeld. Savigny and also Meykow proceeded from the sources in their analyses, although the opinions of later researchers did not go unnoticed either. Still, on reasoning their statements, both took Roman jurists as the basis. Although the jurists of *usus modernus* referred to the sources in footnotes, specification was mostly analysed through other authors and the tradition developed later was more important.

The guiding principle of Meykow's work seems to be to identify the position of specification in the system of law and its underlying principles — just as Savigny's main principles. Thus, his work method reminds one of the German historical school rather than *usus modernus*. It seems that at least the Romanists of the University of Tartu already modelled their research according to the 19th century methods in the 1840s, and also passed such a working style on to their students.

Already as a very young researcher, Meykow tries to find the 'right answer' on the basis of Roman law sources, and come to his own conclusion and solution for modern times, as it was a habit and method for the lawyers of the German historical school in writing books about 'System des heutigen römischen Rechts'. Doing this, he stumbles over the same block that he himself points out: 'they unconsciously tried to develop Roman law further'.

⁶¹ F. C. von Savigny. *Das Rechts des Besitzes. Eine civilistische Abhandlung. 2. verbesserte Auflage.* Giessen: bei Heyer 1806, p. 92 et seq.

⁶² M. Luts (Note 4), p. 56. See also *ibid.* for the criticism of C. C. Dabelow about Savigny's approach to sources.

⁶³ O. Meykow (Note 8), p. 167.

⁶⁴ *Ibid.*, p. 168. Here Meykow may try to be supportive of C. C. Dabelow's position — when the latter criticised for the same thing Savigny upon creating 'Besitzwille'. For Dabelow's position, see M. Luts (Note 4), p. 56.