



Hesi Siimets-Gross

Magister iuris, Lecturer of Legal History,  
University of Tartu

# *Specificatio* in Baltic Private Law and Production (*Verarbeitung*) in the Baltic Private Law Act — Continuity or Change?

In the second half of the 19<sup>th</sup> century, the private law of the Baltic Sea provinces<sup>\*1</sup>, which were a part of the Russian Empire, took an important turn — in 1864, the codification of Baltic private law<sup>\*2</sup> entered into force in the Baltic Private Law Act (BES). Until then, different laws applied for the Baltic Sea provinces, which included in addition to medieval bylaws also chivalric and regional laws and the norms of Swedish, Russian, and Polish laws, with subsidiary application of Roman laws, and which generally can be called Baltic provincial law. Roman Law was accepted into the system to a greater extent from the 13<sup>th</sup> century. In 18<sup>th</sup>–19<sup>th</sup>-century court practice, Roman Law was allegedly preferred to the local law even if local laws should have been applied as primary sources; a contemporary work<sup>\*3</sup> states (in translation): “Roman Law — to that extent it is glossed — is accepted in its entirety in Germany and also in Livonia and Estonia and is used everywhere where the norms of Roman Law did not derive from the special Roman government or where the principles of Roman Law are not in direct opposition to the principles of the provincial law”<sup>\*4</sup>.

Unlike the laws adopted in Western Europe in the 19<sup>th</sup> century generally, the purpose of the BES was not to create a new, modern private law by means of a legislative reform. On the contrary, the general ideology of the

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<sup>1</sup> The Baltic provinces included Estonia (Estland), Livonia (Livland), and Curonia (Kurland). The province of Estonia consisted of the northern half of present-day Estonia. Livonia comprised the territories of present-day South Estonia and North Latvia. Curonia comprised the western and southern parts of Latvia.

<sup>2</sup> Provincialrecht der Ostseegouvernements. Dritter Theil. Privatrecht. Liv-, Est- und Curlaendisches Privatrecht. Zusammengestellt auf Befehl des Herrn und Kaisers Alexander II. St. Petersburg: Buchdruckerei der Zweiten Abtheilung Seiner Kaiserlichen Majestät Eigener Kanzlei 1864.

<sup>3</sup> G. v. Bunge. Wie kann der Rechtszustand Liv, Esth- und Curlands am zweckmässigsten gestaltet werden? Riga, Dorpat: Lang 1833, p. 32.

<sup>4</sup> F. G. v. Bunge. Das liv- und esthländische Privatrecht. 2. Ausgabe. I Theil. Reval: Kluge Verlag 1847, p. 31. The most comprehensive books on Roman Law in the Baltic Sea provinces are by Hermann Blaese. See H. Blaese. Einflüsse des römischen Rechts in den Baltischen Staaten. IRMAE 1962; H. Blaese. Bedeutung und Geltung des römischen Privatrechts in den baltischen Gebieten. Leipzig: Verlag von T. Weicher 1936.

Russian Empire's codification movement and the intention of Friedrich Georg von Bunge<sup>5</sup> was to compile<sup>6</sup> existing private law and create *nova structura veterum legum*.<sup>7</sup> Bunge claimed in his programmatic essay on the scientific treatment of Baltic private law and its handling in codification that, in drafting of the future law, the principles of Roman Law should be avoided as much as possible.<sup>8</sup> At the same time, he admitted that Roman Law is a common element of all provincial laws and excluding Roman Law from provincial law would mean an incomplete treatment of the local private law. This treatment of local laws had to be "trustworthy and complete".<sup>9</sup> Therefore, the future code had to be a complete compilation of all laws that were to be in force in the various provinces, including Roman Law, where it was in force in a subsidiary role as *ius commune*.

In 1833, Bunge commented also on the earlier private law codification draft of 1831, which was in force in the Baltic provinces at the time. He criticised the fact that "single provisions do not derive from the sources of law in force in the Baltic Sea provinces but are copied word for word from the General National Law for the Prussian States, as has become evident after a closer investigation".<sup>10</sup>

The aim of the present article is to analyse the birth of the norms of an institute in the Baltic provinces that ran counter to general modernisation in the 19<sup>th</sup> century, using one specific legal institution, specification, as an example. This is the institution whose importance was the greatest in pre-industrial society and in cases of production by artisans. The field of use of specification has decreased in modern society, and industrial production relations are not regulated by specification.<sup>11</sup> Nevertheless, it is an institution that still cannot be avoided in present-day society.<sup>12</sup> The turning point in the formation of this institution in the Baltic territories came during the period under investigation in this article.

First, the article gives a general overview of the institution of specification in 19<sup>th</sup>-century Europe. Then the regulation of specification in the Baltic provinces before and after the application of the BES is analysed. The second section addresses both the draft of 1831 and scientific treatments. Next, the article analyses the provisions of the BES on production, comparing both existing regulation and contemporary examples. The subheadings proceed from the especially important features of the concept of specification provided by the BES. Finally, the article analyses the origins of the BES provisions and the models for them, seeking an answer to the question of whether there was only legislative fixation of the earlier law or, by contrast, the codification caused changes in respect of this institution.

## 1. The private law of the 19<sup>th</sup> century: From the specification of Roman Law to modern production

Specification involves a situation wherein one person has made something from material belonging to another person and the question is who has ownership of the new thing — the owner of the material or the producer. This is an institution that derived from Roman Law and was regulated by the norms of *ius commune* in the whole of Europe before the creation of modern private law codification.

Roman lawyers did not agree on the issue of specification at all. The viewpoint of the Sabinians was that the owner of the material — not the producer of the new thing (i.e., of the *nova species*) — was also the owner of the new thing. The Proculians held that the person who had given a new form to the material should be the

<sup>5</sup> Bunge (1802–1897) studied at the University of Tartu (Dorpat at that time). Then, he was a private lecturer there between 1825 and 1830 and at the same time also a municipal syndic. In 1831–1842, he was a professor of provincial law at the University of Tartu. After that, he was a municipal syndic in Tallinn (then Reval) and was mayor and president of the Town Consistory. Between 1856 and 1865, he was a clerk in the Second Section, the codifying department, of His Imperial Majesty's Own Chancellery. After retirement, in the years 1869–1897, he lived in Gotha and Wiesbaden.

<sup>6</sup> See M. Luts. Private Law of the Baltic Provinces as a Patriotic Act. – *Juridica International* 2000 (5), pp. 157–167; N. Reich. Kodifikation und Reform des Russischen Zivilrechts im neunzehnten Jahrhundert bis zum Erlaß des Svod Zakonov (1833). – *Ius commune* 1970 (3), p. 181 ff.

<sup>7</sup> This expression is from H. Küpper. Einführung in die Rechtsgeschichte Osteuropas. Frankfurt/Main *et al.*: Lang 2005, p. 194.

<sup>8</sup> F. G. v. Bunge (Note 3), pp. 25, 33, 36. See M. Luts. Die Begründung der Wissenschaft des provinziellen Rechts der baltischen Ostseeprovinzen im 19. Jh. – J. Eckert, K. Modéer (Hrsg.). Geschichte und Perspektiven des Rechts im Ostseeraum. Erster Rechtshistorikertag im Ostseeraum 8.–12. März 2000. Frankfurt/Main *et al.*: Lang 2002, pp. 161–167.

<sup>9</sup> F. G. v. Bunge (Note 3), pp. 35–36, 39.

<sup>10</sup> [F. G. Bunge.] Geschichte der Entstehung des Provinzialrechts. – Estonian History Museum (EAM), reserve 53, catalogue 1, item 49, [page 3 (*recta*)].

<sup>11</sup> O. Buccisano. Specificazione. Diritto privato. – Enciclopedia del diritto. Kd XLIII. Sospensione-Sviluppo. Varese: Giuffrè 1990, p. 276 ff.

<sup>12</sup> Production is included also to the Draft of the Common Frame of Reference. Book VIII Chapter 5, article 102. Draft of the Common Frame of Reference. TOM working group. Black Letter Text. Athens, 12 June 2008. (manuscript). The author expresses her gratitude to Professor Paul Varul for providing the manuscript for use.

owner of the new thing, also in the case in which materials of several owners were used. Justinian's codification applied (later *Corpus Iuris Civilis*) *media sententia*. If the new thing could be changed back into different materials (e.g., melting of a golden vase to form gold bars), the Sabinians' point of view was applicable. If such conversion was impossible (e.g., olive oil cannot be changed back into olives), the Proculians' point of view was applicable.<sup>\*13</sup>

In the tradition of *ius commune*, attempts were made to expand the provisions of Roman Law on specification, by means of different principles that were needed in practice (e.g., *bona fides*). Still today, researchers of Roman Law debate questions related to whether, according to Roman Law, also *bona fides* and the producer's will to acquire the thing were important. There is no agreement on the issue of whether the owner of the material has to be paid compensation in the case of acquisition of the thing by the producer.

Until the 19<sup>th</sup> century, a general conception, 'specification' (*specificatio*<sup>\*14</sup>), was used to denote this institution. With the attempts to codify private law, also practical needs were considered in relation to specification. To a considerable extent, the regulation of Roman Law provided certain limits and possibilities for interpretation that did not respond to the problems arising in practice (e.g., printing and taking photographs) anymore. Therefore, the compilers of the new bodies of codification wanted to eliminate the Roman opposition between *materia* and *species*. It was claimed that the work done by the producer is more important than that earlier opposition. Thus the principle of work was created, meaning that if the work of the producer is more valuable than the material of the other person, the produced thing should belong to the producer.

August Paret, who studied the development of the specification system up to the genesis of the German Civil Code (BGB), differentiated between the specification theories according to whether the theories consist of the 'principle of substance' or the 'principle of work'. He considered the Sabinians to be the representatives of the former and the Proculians the representatives of the latter.<sup>\*15</sup> Harald Elbert claims that the 'principle of work' was fully acknowledged in the 19<sup>th</sup> century, at the latest, and the historical school aimed to search for and find this principle also in the sources of Roman Law. He states that "[m]any intellectual attempts" were made to pass the formal considerations of Roman *media sententia* forward by retaining the solution of the sources but at the same time interpreting the 'principle of work' as a part of them. Although the sources did not provide the possibility for such interpretation, it was found that Roman practitioners of jurisprudence worked according to this principle but had not yet perceived it as a principle.<sup>\*16</sup>

The codification work of the modern age adopted the principles of Roman Law to a certain extent. The French *Code Civil* (1804) proceeded from the viewpoint of the Sabinians, according to which the owner of the material has the right to the new thing in the event of remuneration (Article 570).<sup>\*17</sup> The Austrian Civil Code (ABGB, 1911) joined the Sabinians' 'principle of substance', *media sententia*, and the 'principle of work' (§§ 414–415).<sup>\*18</sup> From the first codification onward, the General National Law for the Prussian States (1794; ALR)<sup>\*19</sup> applied the modern principles to production and withdrew from application of Roman principles most clearly. Here, in similarity to the conditions under Roman Law, the new thing has to have emerged in such a way that the material being used lost its current form and took a new one. If the producer has produced the thing in *bona fides*, the thing produced from the material belonging to another person remains in the ownership of the producer (Part 1, Chapter 9, § 304). The producer has to compensate the owner of the material for the material (Part 1, Chapter 9, § 302). Unlike in Roman Law, the new thing belonging to the producer does not depend on the ability for the new thing to be changed back into the materials used.

<sup>13</sup> E.g., Inst. (*Corpus Iuris Civilis*' (CIC) part *Institutiones*) 2.1.25., G. (textbook *Institutiones* by Gaius, a Roman jurist of 2<sup>nd</sup> cent.) 2.79., Dig. (part of *CIC Digesta*) 41.1.7.7. See H. Siimets-Gross, *Scientific Tradition of the Roman Law in Dorpat: usus modernus or Historical School of Law? – Juridica International* 2006, pp. 77–78 (with further references). Available at [http://www.juridica.ee/international\\_en.php?document=en/international/2006/1/113248.SUM.php](http://www.juridica.ee/international_en.php?document=en/international/2006/1/113248.SUM.php).

<sup>14</sup> Roman jurists did not know the term *specificatio*. They used descriptions like: *Cum quis ex aliena materia speciem aliquam suo nomine fecerit* (if somebody makes a [new] thing out of the material belonging to somebody else in one's own name) or *Cum ex aliena materia species aliqua facta sit ab aliquo* (Inst. 2.1.25) if somebody makes something [new] out of the material belonging to somebody else) or asked simply a further question: *si ex uvis [...] meis vinum [...] feceris [...]* (G. 2.79) (if you make wine out of my grapes [...]).

<sup>15</sup> A. Paret, *Die Lehre vom Eigentumserwerb durch Spezifikation in ihrer Entwicklung bis zum Entwurf eines bürgerlichen Gesetzbuches für das deutsche Reich*. Leipzig: Besold 1892, p. 6. The fact that the Proculians are the representatives of the principle of work, is not generally considered so natural. At the same time it can be said that the Proculians were the first who acknowledged the possibility to acquire things on the basis of specification, in which there is also a certain element of the principle of work. See H. Elbert, *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. Köln 1969, p. 60.

<sup>16</sup> H. Elbert (Note 15), pp. 61–62.

<sup>17</sup> Here and hereinafter: French Code civil at [http://www.legifrance.gouv.fr/affichCode.do?sessionId=7113D1613ABEF219BAFF1B62ADA0D2F6.tpdjo06v\\_3?idSectionTA=LEGISCTA000006150116&cidTexte=LEGITEXT000006070721&dateTexte=20080507](http://www.legifrance.gouv.fr/affichCode.do?sessionId=7113D1613ABEF219BAFF1B62ADA0D2F6.tpdjo06v_3?idSectionTA=LEGISCTA000006150116&cidTexte=LEGITEXT000006070721&dateTexte=20080507) (7.05.2008). These provisions have been changed with the act No. 60-464 of 17 May 1960, but only with regard to the provisions of remuneration.

<sup>18</sup> Here and hereinafter: Austrian Allgemeines Bürgerliches Gesetzbuch at <http://www.ilibio.org/ais/abgb2.htm#t2h4> (5.05.2008).

<sup>19</sup> Here and hereinafter: Allgemeines Landrecht für die Preussischen Staaten von 1784. Mit einer Einführung von dr. H. Hattenhauer und einer Bibliographie von dr. G. Bernert. 2<sup>nd</sup> expanded edition. Neuwied, Krieffel, Berlin: Luchterhand 1994.

There was desire to communicate the new essence with new concepts, which were brought into use also in scientific literature. In the German cultural space, the ‘principle of work’ was conveyed by means of a new concept, which is demonstrated by the word choice directed to the activity: e.g., *Formgebung* (shaping)<sup>\*20</sup>, *Umformung* (reshaping)<sup>\*21</sup>, *Verfertigung* (producing).<sup>\*22</sup> In the draft of the Baltic private law codification of 1831, both the new and the old concept were used, in parallel: “*Umwandlung* [transformation] *oder Specification*” (§ 982), henceforward also the concepts of *Verfertigung* (§ 984) and *Verarbeitung* (§ 987).<sup>\*23</sup> Finally, the German BGB<sup>\*24</sup> started to use the concept of *Verarbeitung oder Umbildung* (production or reshaping).<sup>\*25</sup> The BES applied the idea of *Verarbeitung* (see Article 794), similarly to the ALR, the ABGB (§ 414), and the Saxon Civil Code (1863), which had done so before the BGB started to use it. The present article attempts to use a similar way of drawing a distinction — in discussion of Roman Law, the concept of specification is used; when the BES is discussed, ‘production’ is used.

## 2. The problem of specification in Baltic provincial law before codification

Before the BES entered into force in 1865, Roman Law was applied to specification in all of the Baltic Sea provinces in the form of *ius commune*.<sup>\*26</sup> Thus, the institution was affected not only by the interpretations of local lawyers but also by scientific literature from all over Europe. Nevertheless, in the present context the most important are the claims about local laws.

### 2.1. The draft of 1831 — retaining the solution of Roman Law

Between 1824 and 1840, Reinhold J. L. Samson von Himmelstiern<sup>\*27</sup> participated in several codification committees whose tasks were to prepare drafts of legislation. In 1831, the draft of the private law of the Baltic Sea provinces<sup>\*28</sup> was completed. Unfortunately, the draft has gone mostly unanalysed, but it was mainly Himmelstiern who compiled it. Although Himmelstiern’s draft never entered into force, it is still the first comprehensive treatise on the local private law, and one that could be relied on — also critically — in further scientific treatment of the local private law.<sup>\*29</sup>

In the draft of 1831, the following principles were important with respect to specification. Firstly, the produced thing does not have to be a completely new thing, but the characteristic shape of the thing or material must have changed (§§ 982, 985). Thus, as according to the Proculians’ viewpoint, the important factor is change of the shape. Secondly, *bona fides* is required, but it is not important with regard to the transfer of ownership. The transfer of ownership occurs also in the case of a *mala fide* producer, but said producer has to compensate for the value of the material to a greater extent (§ 987). The owner of the material has ownership over the material only if the produced material has been stolen (§ 986). Thirdly, the owner of the material has to be compensated in any case (§§ 987, 988).

Thus, the draft of Himmelstiern has not distanced itself from Roman principles, as under *media sententia* the owner does not lose the thing if its shape or form has not changed (§ 985). If the shape changes, the thing

<sup>20</sup> G. Hufeland. Institutionen des gesammten positiven Rechts. 2. Aufl. Jena: Akademische Buchhandlung 1803, p. 299.

<sup>21</sup> C. F. Mühlenbruch. Lehrbuch des Pandektenrechts. Nach der 3. Aufl. der Doctrina Pandectarum deutsch bearbeitet. 2. Theil. Halle: Schwetschke und Sohn 1836, § 248.

<sup>22</sup> F. J. Stahl. Die Philosophie des Rechts. Bd. I. Tübingen: Mohr 1830, p. 300.

<sup>23</sup> [R. J. L. Samson von Himmelstiern] Darstellung des bürgerlichen Rechts der Ostseeprovinzen. 3. Volumes. [St. Petersburg] 1831.

<sup>24</sup> In case of BGB, here and hereinafter, the edition: Palandt Bürgerliches Gesetzbuch. 54. Aufl. München: Beck 1995; the institute of specification has not changed since 1900 when the BGB entered into force.

<sup>25</sup> H. Elbert (Note 15), p. 4.

<sup>26</sup> F. G. v. Bunge. Das liv- und estländische Privatrecht. I Theil. Dorpat: Kluge 1838, p. 228; F. G. v. Bunge. Das curländische Privatrecht. Dorpat: Kluge 1851, p. 241.

<sup>27</sup> Himmelstiern (1778–1858) studied law at Leipzig; after that, he was a student teacher at the chancellery of the Livonian Landratskollegium, notary of the knighthood, assessor of the High Consistory, assessor of the Tartu County Court, member and president of the Livonian Court of Appeal, and land councillor. In 1824–1829, he was the president of the Committee for Livonian Provincial Laws; then, in 1829–1840, he was a clerk of the Imperial Chancellery’s codification department. He also helped to author the draft of a private law code and praised the codification of Roman law from Justinian’s time as something worth following. Source: M. Luts. Die juristischen Zeitschriften der baltischen Ostseeprovinzen Russlands im 19. Jahrhundert: Medien der Verwissenschaftlichung der lokalen deutschen Partikularrechte. – Juristische Zeitschriften in Europa. M. Stolleis, T. Simon (ed.). Frankfurt am Main: Vittorio Klostermann 2006, p. 80 ff.

<sup>28</sup> [R. J. L. Samson von Himmelstiern] (Note 23).

<sup>29</sup> M. Luts (Note 27), p. 93.

belongs to the producer. Thus it can be claimed that the draft was similar to and remained in the same tradition as the earliest codification attempts in German-speaking territories, such as the Bavarian *Codex Maximilianeus* (1756) and the Austrian *Codex Theresianus*, which was completed but remained a draft. Also these drafts proceeded from *media sententia*.<sup>30</sup> The draft of Himmelstiern included the condition of *bona fides*, but this fact did not change anything in the *media sententia* solution to ownership of the thing. The draft was concerned only with the amount of compensation, with the exception of things or materials that had been stolen. In this regard, the draft did not emphasise the ‘principle of morality’, which was very much praised by later lawyers in the BES.<sup>31</sup> Also the ALR proceeded from “‘the principle of morality’, according to which nobody may acquire anything by illegal actions and enrich himself as a consequence of this”.<sup>32</sup> In addition, the existence of the need for a *bona fide* producer (and thus for the obligation of compensation) to acquire a new thing was disputable under Roman Law. Contemporary authorities of Himmelstiern supported both viewpoints, and the earlier tradition supported the opinion that the need for *bona fides* was fundamental also under Roman Law.<sup>33</sup> Thus, the existence of the requirement for *bona fides* in the draft of Himmelstiern was in accordance with the opinions of at least some Romanists. The opinion that ownership of the new thing in the case of stolen materials belonged to the owner of the material was acknowledged even more universally.<sup>34</sup>

Hence, if the draft of Himmelstiern had entered into force, the principles derived or deduced from Roman Law would have remained in force without any major changes. This conclusion is in accordance with previously expressed viewpoints about the draft of Himmelstiern and with his own opinion that the codification of the local private laws should be compiled on the basis of Roman Law.<sup>35</sup> This was exactly the case with specification.

Consequently, Bunge’s claim that Himmelstiern copied his draft from the ALR is not valid, at least with regard to this institution. The draft of 1831 is considerably different from the ALR. The concept of the new thing in the ALR (§ 304) is similar to the concept of the new thing in Roman Law and in the draft of Himmelstiern (§§ 982, 983), but according to the ALR, the producer will acquire the new thing only if having produced it in *bona fides* (I, 9, § 304). If the producer performs the work *mala fide*, he or she has to hand the new thing over to the owner of the material (I, 9, § 299). According to the draft of Himmelstiern, a *bona fide* or *mala fide* producer was not to have any influence on the ownership of the new thing; this factor influenced only the amount of compensation received by the owner of the material. Both Himmelstiern’s draft (§ 987) and the ALR (I, 9, § 302) provide that in the case of *mala fide* production, the owner of the material may demand the greatest possible compensation for the thing. The most important of these clauses concerns the question of who will acquire the new thing after production. With respect to this solution, the ALR and the draft of Himmelstiern differ from each other considerably. The similarity between the ALR and the draft of Himmelstiern with regard to the concept of the new thing derives from the general essence of the institution of specification, and therefore it existed already in Roman Law. The greatest possible compensation for the new thing in cases of *mala fide* production is a logically deductible punitive consequence.

## 2.2. Scientific treatments

Before the BES entered into force, specification had been studied scientifically by three lawyers in the Baltic Sea provinces. Carl Otto von Madai<sup>36</sup>, a Romanist friend of Bunge at the University of Tartu, analysed two cases in his article of 1845. One case involved the following incident related to specification: a *bona fide* person has acquired a silver sheet and has transferred several pictures onto it, using daguerreotype. The former owner of the silver sheet demands the sheet back. In his analysis of this case, Madai asks whether it could

<sup>30</sup> H. Elbert (Note 15), p. 99.

<sup>31</sup> C. Erdmann. System des Privatrechts der Ostseeprovinzen Liv-, Est- und Curland. I. Bd. Riga: S. Roderer Verlag 1889, p. 153; F. Seraphim. Zur Lehre vom Eigenthumserwerbe durch Verbindung und Verarbeitung beweglicher Sachen nach dem Rechte der Ostseeprovinzen mit besonderer Berücksichtigung der einschlägigen Bestimmungen des Preussischen Rechts. Hamburg/Mitau 1881, p. 60.

<sup>32</sup> H. Elbert (Note 15), p. 99.

<sup>33</sup> See, e.g., H. Elbert (Note 15), pp. 136–162.

<sup>34</sup> O. Meykow. Lehre des römischen Rechts von dem Eigenthumserwerb durch Specification (1846). – Dorpater Juristische Studien. E. Osenbrüggen (Hrsg.). Dorpat: Verlag von E. J. Karow 1849, pp. 171–172.

<sup>35</sup> R. J. L. Samson von Himmelstiern. Codex der Livländischen Rechte nach der Römischen Pandekten-Ordnung. In: Jahrbuch für Rechtsgelehrte in Russland. Bd. 2. Riga 1824, p. 196–197. At the same time, Himmelstiern had the obligation to consider Roman Law only subsidiarily. See B. Dölemeyer. Das Privatrecht Liv-, Est- und Kurlands von 1864 (Teil III des Provinzialrechts der Ostseeprovinzen des Russischen Reichs). – Handbuch der Quellen und Literatur der Neueren Europäischen Privatrechtsgeschichte. III Bd. 2. Theilband. H. Coing (Hrsg.). München: Beck 1982, p. 2078. Since in relation to specification only the provisions of Roman Law were applicable, he did not contradict the requirements imposed on him.

<sup>36</sup> Madai (1809–1850) studied law at Halle and Berlin. Between 1832 and 1837, he was a private lecturer and extraordinary professor at Halle; in 1837–1837, he held a professorship in penal power, legal history, and legal literature at the University of Tartu; between 1845 and 1848, he held the title Professor of Roman Law at Kiel; and in 1848–1849 he was a member of the Frankfurt Parliament in the Paulskirche.

involve specification and refers back to the principles of Roman Law and *media sententia* (Inst. 2.1.25.).<sup>\*37</sup> Thus, Madai's analysis demonstrates that in the case of specification, Baltic private law had to proceed from Roman Law.

The other and the more thorough treatise on the specification problem was written by Ottomar Meykow<sup>\*38</sup> in the first half of the 19<sup>th</sup> century. Meykow, who held the title Professor of Roman Law at the University of Tartu, had written his candidate thesis on specification in 1846. Meykow studied the specification problem in Roman Law, which was, as already mentioned, applicable in the Baltic provinces in the form of *ius commune*. The purpose of the thesis was to make suggestions as to how to interpret the applicable law and thereby offer solutions to the situation in the local provinces with regard to this question (he never stated the latter), at the same time remaining within the framework of Roman Law. Bunge, the compiler of the BES, commented on the course of the compilation by saying that the notes of Meykow on Roman Law were especially valuable for him and therefore he took them into consideration.<sup>\*39</sup> The present article attempts to answer the question of whether he did this also in the case of specification.

In the context of the present article, two problems from Meykow's paper 'Die Lehre des römischen Rechts von dem Eigenthumserwerb durch Specification'<sup>\*40</sup> are important. Firstly, did Roman lawyers consider *bona* or *mala fides* important when determining the status of the new thing, according to Meykow? Secondly, Meykow studied the issue of whether, for acquisition of ownership of the new thing, the will (*die Wille*) of the producer was important.<sup>\*41</sup> Meykow paid little attention to whether the thing had to be *nova species* (which was stressed both in Roman Law and in the ALR). He discussed this issue in only one place and again in relation to the will of the producer to acquire the new thing; in this case, the thing has to be *res nullus*. According to *media sententia*, the thing did not belong to anybody in the event that the material that was used to produce the thing could not be changed back.<sup>\*42</sup> Thus, according to Meykow's viewpoint (which follows *media sententia*), a thing can be described as a processed thing only if the material used cannot be changed back and therefore belongs to nobody. The producer can occupy and acquire the thing.

Meykow commented, on *bona fides*, that older practitioners of jurisprudence (from the glossators to the 19<sup>th</sup> century) believed that in Roman Law the necessary condition for acquiring a new, produced thing was a *bona fide* producer. Also modern lawyers wanted to see the principle of *bona fides* in the sources and thus, according to Meykow, wished subconsciously to develop Roman Law: "[T]hey have erred only in presenting the correct idea as a viewpoint of Roman lawyers *per se*. Namely, they felt the need for limiting the will of the producer with the moral power of *bona fides*"<sup>\*43</sup> — which was not actually there. Finally Meykow reached a conclusion that "although [...] *bona fides* of the producer is not necessary for acquiring the produced thing, the modern lawyers have not wished to acknowledge the sentence, with all of the consequences deriving from this". Namely, some modern lawyers acknowledge the particularity of the stolen thing because it cannot be acquired in property via production.<sup>\*44</sup> More than 100 years later, Elbert agreed with Meykow's conclusions about the absence of *bona fides* and interpretation of the current tradition.<sup>\*45</sup> Thus, Meykow found differently from the provisions of the ALR that according to Roman Law *bona fides* was not necessary.

Meykow did not think that the producer should be accountable for the disappearance of the old thing by production — as a *bona fide* owner should not be accountable for the disappearance of the thing owned by him or her. The analogy between a *bona fide* owner and a producer is said to be denied by most lawyers, and, regardless of *bona fides* of the producer, they have found that the producer has to compensate the owner of the produced material in an extent corresponding to the extent to which said producer has enriched him- or herself in consequence of this (Dig. 50.17.206; 6.1.23.5.). Meykow believed that the sources of Roman Law

<sup>37</sup> C. O. v. Madai. Rechtsfälle: II. Das Daguertypbild. – Theoretisch-practische Erörterungen aus den in Liv-, Esth- und Curland geltenden Rechten. IV Band. Dorpat 1845, pp. 94–96.

<sup>38</sup> Meykow (1823–1894) studied in the Faculty of Law at the University of Tartu between 1842 and 1845. In 1846, he wrote his thesis as a candidate for a master's degree; in 1847, he received his MA; and he was granted a PhD degree in 1850, also at Tartu. In 1855–1857, he was an extraordinary professor in Kazan, and between 1858 and 1892 his main work was in the professorship of Roman Law at the University of Tartu.

<sup>39</sup> [F. G. Bunge.] (Note 10), [I. 5]. According to Dölemeyer, Meykow participated in the work of the Second Section, or codifying committee, of His Majesty's Own Chancellery during the final redaction of the draft of the BES. See B. Dölemeyer (Note 35), p. 2080.

<sup>40</sup> O. Meykow (Note 34), pp. 152, 166–167.

<sup>41</sup> H. Siimets-Gross (Note 13), p. 80. Elbert considered important to highlight the four main elements when treating the historical evolution of specification: the concept *nova species*, the principle of work as the basis for acquisition, the demand for *bona fide* and the condition of *suo nomine*. H. Elbert (note 15), p. 2. The condition of *suo nomine* is connected to the Meykow's issue of the will; also Elbert refers repeatedly to Meykow (e.g., p. 56 ff).

<sup>42</sup> O. Meykow (Note 34), p. 173.

<sup>43</sup> *Ibid.*, p. 168.

<sup>44</sup> O. Meykow (Note 34), pp. 171–172.

<sup>45</sup> Referring in his conclusions also to Meykow. H. Elbert (Note 15), p. 137, not for example H. Dernburg, who still found that already in Roman Law *bona fide* was a necessary factor (D. 10.4.12.4). This sufficient and practical idea was included into the ALR. H. Dernburg. Das Sachenrecht des Deutschen Reichs und Preussens. Halle: Verlag der Buchhandlung des Weisenhauses 1898, p. 299.

that are shown as the basis are too general or address *accessio*<sup>\*46</sup> cases and therefore cannot be applied to specification.<sup>\*47</sup> Therefore, according to Meykow, Roman Law does not require any compensation from the *bona fide* producer (differently from the ALR).

According to Meykow, most researchers think that the question of changing back the produced thing may be subject to discussion only if the produced material belonged completely to somebody else. If the producer produced partly his or her own and partly somebody else's material, the thing belongs in every case to the producer (on the basis of Inst. 2.1.25).<sup>\*48</sup> Nevertheless, it was said to disagree with two fragments of digests (Dig. 6.1.5.1 and 41.1.12.1) and the principle of reasonableness, as in this case even a minimal amount of the material belonging to the producer among a large and valuable amount of material can mean that the thing belongs to the producer, without any further argument.<sup>\*49</sup> Meykow believed that these two cases — when the thing is completely of material belonging to somebody else or partly made from material belonging to the producer — cannot be separated from each other (as in the ALR).

Therefore, Meykow's aim was to purge the applicable Baltic private law, or Roman Law, of certain false conclusions on *bona fides* and on compensation for the material used.

The third author of scientific treatises addressed here is Friedrich Georg von Bunge, the author of the BES draft. Bunge notes in his treatises on the applicable laws in Livonia, Estonia, and Curonia that "receiving the right of ownership by using the *accessio* and specification, the provisions of Roman Law are applicable".<sup>\*50</sup> Additionally, Bunge highlighted an exception to the Livonian chivalric law, which allegedly derived from the Saxon law: "[T]he person who ploughs a field that belongs to another in *bona fides* will lose the worth of his work if an action is filed before the seeds are sown; if the seeds are sown before filing of an action, the plougher will get the crop and will pay the compensation to the owner of the field for using it."<sup>\*51</sup>

All lawyers who tackled the problem of specification — Madai, Meykow, and Bunge, who later compiled the BES — have not mentioned that treating *specificatio* according to Roman Law could be outdated or not in compliance with the private law applicable in the Baltic provinces. On the contrary, in the second publication of 'Das liv- und esthländische Privatrecht' ('The Private Law of Livonia and Estonia') of 1851, Bunge clearly noted that Roman Law is applicable.

## 3. Production in the BES

### 3.1. The general concept

The most important norm of the BES related to production is Article 794:

Wenn durch kunst- oder handwerksmässige Verarbeitung fremden Materials im guten Glauben eine neue Sache dergestalt gewonnen worden, dass die dazu verbrauchten Materialien ihre bisherige Form verloren und eine neue Gestalt angenommen haben, so wird die neue Sache, ohne Rücksicht darauf, ob die fremden Materialien daraus abgesondert werden können oder nicht, Eigenthum des Verarbeitenden. Dieser muss aber den Eigenthümer des fremden Materials in der im Art 792 angegebenen Weise entschädigen.<sup>\*52</sup>

The provisions of Articles 791–792 and 795–798 are also applicable to production.

<sup>46</sup> As a result of *accessio* two things, which can belong to different owners, merge or are joined. Often one of the things can be considered an accessory thing and in this case the accessory thing is joined with the principal thing. If the accessory and principal things cannot be separated, the joined thing is in common ownership of the former owners.

<sup>47</sup> O. Meykow (Note 34), pp. 180–182.

<sup>48</sup> *Ibid.*, pp. 175–176.

<sup>49</sup> *Ibid.*, pp. 177, 179.

<sup>50</sup> F. G. v. Bunge, 1838 (Note 26), p. 228; F. G. v. Bunge (Note 4), pp. 281–282; F. G. v. Bunge, 1851 (Note 26), p. 24. With regard to the applicability of specification Bunge referred to Madai's asserting opinion in the second publication of "Privatrecht". See F. G. v. Bunge (Note 4), pp. 281–282.

<sup>51</sup> F. G. v. Bunge, 1838 (Note 26), p. 228; F. G. v. Bunge (Note 4), pp. 281–282. Bunge gives a similar exception of sowing crop also in relation to Curonian law. F. G. v. Bunge, 1851 (Note 26), p. 241.

<sup>52</sup> When a new thing emerges after *bona fide* production of material belonging to somebody else in an artistic way or via handicraft and the materials used for this lose their current form and take a new shape, the new thing will be the possession of the producer, whether materials belonging to somebody else can or cannot be separated. The producer has to compensate the owner of the material in a manner set forth in Article 792.

### 3.2. The new thing

According to Article 749, it is important that the new thing have been produced from material belonging to somebody else in such a manner that the materials being used have lost their former shape and are reshaped. The same is provided by the ALR but not word for word (I., 9, § 304) and is, according to Roman Law and the essence of the institution, the common element of the majority of the norms in need of updating. Carl Eduard Erdmann<sup>53</sup> indicated that in the case of the BES regulation, the origination of the new thing (*nova species*), which was the presupposition in Roman Law, was not important anymore. In decision as to whether a case involves specification or not, the important factor is whether the work is done in an artistic way or by handicraft: “With this, the work is acknowledged as the actual basis for acquisition.”<sup>54</sup> Thus Erdmann did not directly deny the fact that during production a new thing will emerge, but he considered this unimportant to such an extent that it seems he did not consider the existence of a new thing necessary.<sup>55</sup>

Differently from Erdmann, Seraphim stressed the importance of the new thing: “The essence of production is the emergence of a **new** thing that can be denoted with **another concept** and which is a result of work of one person. The provincial law is in accordance with Roman Law when setting conditions according to which *nova species* has to emerge.”<sup>56</sup> This does not change Erdmann’s conclusion according to which the important basis for acquisition in the BES is work. In Article 794 of the BES, the emergence of a new thing is very important by all means, and to it another condition has been added. Namely, this new thing may be only a result of artistic work or handicrafts. If there is no new thing, the provision is not applicable.

According to the BES, differently from Roman Law (see D. 41.7.7), whether the material belonging to another person can be separated or not is unimportant (the possibility of separation matters only in the case of *mala fide* production, according to Article 791).<sup>57</sup> These circumstances expand the concept of production in the BES such that Article 794 can be applied to some cases that did not belong to the specification concept in Roman Law (or to cases that were not acknowledged as specification), like painting, photos, and daguerreotype.<sup>58</sup> Under Roman Law, in the case of the above examples, the former state of the material used could be restored — by washing the canvas or cleaning the silver plate — and thus the material belonging to another person did not change and remained with its former owner, even though the addition could have increased the value of the material substantially.

Meykow believed that according to Roman Law, the cases in which the thing is completely of material belonging to another person or partly of material belonging to the producer cannot be isolated.<sup>59</sup> The BES did not provide for this. The last statement applies not only to the narrow regulation on production in the BES but also to acquisition of the new thing that has emerged without artistic work or handicraft and which is regulated by Article 792. In Roman Law, this case was also regulated by provisions applying to specification. In the BES, the case described was regulated on the basis of joining and mixing, and therefore the provisions on production did not apply to it. Perhaps one can consider the indirect influence of Meykow here in the fact that the most important reproof by Meykow is prevented. According to Meykow’s reproof, the interpretation can be that also a minimal amount of material belonging to the producer among a large and valuable amount of the produced material can mean that the thing belongs to the producer, without any further argument.<sup>60</sup> It may be because of this that Article 792 of the BES stresses that the new thing that has emerged is property of the person who has produced it only if this person has undoubtedly added most of the material as judged by value.<sup>61</sup>

<sup>53</sup> Erdmann (1841–1898) began his studies at the University of Tartu in 1858, at first in philosophy and then in law. Then he started his studies at Heidelberg University. Between 1864 and 1869, he was an assistant secretary and the secretary of the Mitau (the present Jelgava in Latvia) town council. In 1869–1873, he was a solicitor for the University of Tartu. Partway through that time, in 1870, he defended his MA thesis. In 1870–1872, he was a private lecturer at the University of Tartu. Then, in 1872, he received his PhD; in the same year he became an extraordinary professor. A year later he became an ordinary professor. In 1893, he was dismissed and retired.

<sup>54</sup> C. Erdmann (Note 31), p. 154.

<sup>55</sup> Still, the demand for the new thing exists and thus important both in the BGB and Estonian Law of Property Act (*Asjaõigusseadus*. – RT I 1993, 39, 590 (in Estonian)).

<sup>56</sup> The text shows Seraphim’s spacing. F. Seraphim (Note 31), pp. 43–44.

<sup>57</sup> Both C. Erdmann (Note 31), p. 154 and F. Seraphim (Note 31), p. 41. According to the ABGB, the materials have to be changed back if possible, similarly to Roman Law. Also Ursula Flossmann thinks that by regulation specification in the ABGB the principles of *ius commune* have been followed. U. Flossmann. *Österreichische Privatrechtsgeschichte*. Wien–New York: Springer 1983, pp. 163–164.

<sup>58</sup> F. Seraphim (Note 31), pp. 50–51. Compare C. O. v. Madai (Note 37), pp. 94–96.

<sup>59</sup> O. Meykow (Note 34), pp. 175–179.

<sup>60</sup> *Ibid.*, pp. 177, 179.

<sup>61</sup> Deciding on the value of the thing in this way is usual in the codifications of the 19<sup>th</sup> century, also in *Code Civil* (Articles 568, 569), ALR I, 9, § 307, BGB § 950.

### 3.3. Production in an artistic way or by handicraft

According to the BES, the new thing has to emerge in an artistic way or by handicraft (being so in clear opposition to the cases regulated by Article 792). According to Erdmann, production in such a way presumes that the producer has special technical knowledge (thus the possibility of accidental emergence of a new thing is excluded). Whether the new thing has emerged in an artistic way or by handicraft is a decision of the judge of a single case. Erdmann gave an example of a herdsboy with a willow whistle. Here the question is to what extent artistic production can be confirmed.<sup>62</sup> Seraphim noted that also it is unimportant that the result of the work is in compliance with all ‘rules’ of the craft concerned or the corresponding art field, and these concepts in this context should be interpreted in the broadest sense. One definitely cannot proceed from the status of the producer with respect to being a professional artist or artisan.<sup>63</sup>

Also this condition highlighted by the BES commentators derives indirectly from the ALR. Roman Law had no such condition. Still, the condition in the ALR was not a part of the production concept, but it explained the concepts of joining and mixing: “Hat jemand ohne kunst- oder handwerksmässige Verarbeitung, fremde Materialien mit den seinigen, jedoch nicht betrüglicher Weise, verbunden, vermengt oder vermischt [...]”<sup>64</sup> However, the BES presents this condition as one part of the general concept of production. The present study cannot answer the question of whether production in an artistic way or by handicraft could (although not mentioned in the ALR) fall under the idea of the ALR provision (I., 9., § 304) or a wider interpretation given to the provision later and added to the BES on the basis of the theory of law. When answering the question “what does it mean — reshaping?”, F. Förster noted that “this is not a legal but an economic question; this should be answered by industry, and the answer should be that the product emerging as a result of the work has to have a different value”.<sup>65</sup> With the condition of production in an artistic way or by handicraft, the BES has given production a completely different content when compared to all other contemporary legislation. Neither the ALR nor other legislation that preceded the BES included such a condition (for example, the ABGB and the French Code Civil). Also legislation contemporaneous with the BES does not include the condition.<sup>66</sup>

Because of this specific addition — the emergence of a new thing only through production in an artistic way or by handicraft — several typical cases, like crushing grapes or joining melted metals without any artistic or handicraft knowledge, which according to Roman Law involved specification, are excluded. Thus, the concept of production in the BES is much narrower than it was in Roman Law. In the case of melted metals, Article 792 (if the new thing is more valuable than the material, which is unlikely in the above-mentioned example cases) or Article 793 (for cases wherein the owner has the right to choose whether to acquire the thing or demand compensation) of the BES is applicable. At the same time, the condition of these two articles is that different materials have been joined (*Verbindung*), mixed (*Vermengung*), or melted (*Vermischung*). It is my belief that, for example, extracting juice from apples does not belong to any of these classes. On the other hand, there is a new thing that is not apples anymore and that cannot be changed back into apples. At the same time, extracting juice from apples does not require special knowledge.

### 3.4. The condition of *bona fides*

According to Article 794, the existence of *bona fides* is necessary. According to Article 791, in the case of *mala fide* production, the owner of the material has the right to demand ownership of the new thing (thus excluding the possibility of acquiring the thing through specification) without any compensation for the work and the material belonging to the producer or demand compensation for the highest value of his or her material in addition to loss of profit and other loss. Thus we can agree with Erdmann’s viewpoint, according to which, pursuant to the BES, acquisition of the thing through specification is possible only in the case of *bona fide* production.<sup>67</sup> Seraphim stressed the principle of *bona fides* even more: “Provincial law differs from Roman Law fundamentally because the most important factor in it is **the principle of morality** and the result of the work can be **acquired only by a *bona fide* producer**.”<sup>68</sup>

<sup>62</sup> C. Erdmann (Note 31), pp. 154–155.

<sup>63</sup> F. Seraphim (Note 31), pp. 48–49.

<sup>64</sup> ALR Part I, Chapter 9, § 307: “If somebody has merged, mixed or combined the materials belonging to somebody else without production in an artistic way or by handicraft but not in *mala fide*...”.

<sup>65</sup> F. Förster. *Theorie und Praxis des heutigen gemeinen preussischen Privatrechts auf der Grundlage des gemeinen deutschen Rechts*. 4. Aufl. III Bd. Berlin: Reimer 1883, p. 229.

<sup>66</sup> E. g., Saxon ABGB. Article 468 of *Codice civile del Regno d’Italia* of 1865 noted that “if an artisan or other person makes...”, but it actually means that it was not important if the maker was an artisan. In addition, the article did not mention anything about the way of production. See A. Paret (Note 15), pp. 43, 62.

<sup>67</sup> C. Erdmann (Note 31), p. 153.

<sup>68</sup> Spacing by Seraphim. F. Seraphim (Note 31), p. 50. In addition to Seraphim’s spacing, the expression “the most important factor” has to be stressed. Namely, Seraphim finds that although in Roman Law the producer had to work also in *bona fide*, this is not so important there as it is in the provincial law.

The question of whether the producer had to be *bona fide* also in Roman Law is arguable<sup>\*69</sup> and it was subject to debate also in the 19<sup>th</sup> century. As Seraphim followed in this respect those who believed that the producer had to be *bona fide* also in Roman Law<sup>\*70</sup>, then Erdmann found that, according to prevailing opinion, the necessity of a *bona fide* producer was not fundamental in Roman Law.<sup>\*71</sup> The existence of *bona fides* in Roman Law was addressed also by Meykow, who believed that Roman Law did not require *bona fides*. This belief is commonplace also today. Still, the solicitors of the first half of the 19<sup>th</sup> century held the opinion that the producer has to compensate the owner of the material used to the extent to which he or she was enriched<sup>\*72</sup> and at least in this respect the principle of *bona fides* was issued from.

On the occasion on which responsibility obtains, the BES proceeded from the opinion of those lawyers with whom Meykow did not agree. According to this opinion, the producer has to compensate the owner for the material he or she has used (see Articles 792, 793, 794, etc.). Thus the BES did not apply the analogy between the *bona fide* producer and the owner, which was preferred by Meykow; it instead proceeded from the general principle of Roman Law — “*iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletioem*” (Dig. 50.17.206), which Meykow held to be so general that no conclusions can be drawn.

The requirement of a *bona fide* producer is set forth by the ALR similarly to the BES (I, 9, § 304) — a *mala fide* producer will not gain ownership of the thing. In this respect, the ALR and BES differ from the draft of 1831, the ABGB, and the French Code Civil.<sup>\*73</sup>

Paret categorised the BES as a codification that “follows the principle of work but [in which] the acquirement of the thing by the processor is dependent on the *bona fide* conditions”.<sup>\*74</sup> Here, Paret noted that the BES has the same standpoint as the Prussian ALR: “Also the Prussian ALR assigns ownership of the new thing to the producer on the condition that the producer is *bona fide* and regardless of whether the thing can be changed back or not.”<sup>\*75</sup> For Paret, the most important concepts of the BES were *nova species*, *bona fide*, compensation for the value [of the material used], and whether the thing can be changed back.<sup>\*76</sup>

At the same time, he did not comment on the change of the concept of specification in the BES — namely, that the term ‘production’ in the BES means only production in an artistic way or by handicraft.

In his treatise on the BES, Seraphim highlighted an additional feature — only at the beginning, when discussing the concept of production, without contemplating it later — that the producer, who produces the material belonging to somebody else, has to have the will to acquire the new thing.<sup>\*77</sup> This factor is not derived from the formulation of Article 794 directly (in co-effect with Article 792). We deal instead with the problems of the producer’s will as treated by Meykow (differently from some contemporary authors<sup>\*78</sup>) in relation to the case of Roman lawyers. Meykow also found this factor to be important.<sup>\*79</sup> Only Seraphim himself could have answered the question of whether he followed Meykow, pandect books, or Dernburg<sup>\*80</sup> when considering will important. The condition of production in one’s name has been set forth by earlier legal codes (the *Codex*

<sup>69</sup> See, e.g., H. Elbert (Note 15), p. 138 *ff.*

<sup>70</sup> F. Seraphim (Note 31), pp. 49–50.

<sup>71</sup> C. Erdmann (Note 31), p. 153.

<sup>72</sup> O. Meykow (Note 34), pp. 180–181.

<sup>73</sup> The need for *bona fide* is not clear also today. The BGB does not include the requirement for *bona fide* (§ 950) and since the ZGB includes it (Article 726), there have been many arguments about including or excluding the condition of *bona fide*. See further references H. Elbert (Note 15), pp. 136–137. Also, the Estonian Law of Property Act provides the principle of *bona fide*: “If someone processes a movable of another in good faith, the new thing belongs to the processor if the work is more valuable than the original thing, but otherwise to the owner of the original thing.”

<sup>74</sup> According to Paret, also the Bavarian Law and ALR belonged to these codifications, the same is said to be in effect in Württemberg. See A. Paret (Note 15), p. 47–51.

<sup>75</sup> A. Paret (Note 15), p. 49.

<sup>76</sup> *Ibid.*, pp. 49–51.

<sup>77</sup> F. Seraphim (Note 31), p. 37. C. Erdmann does not mention the will of the producer.

<sup>78</sup> E.g., D. I. A. Hellfeld. *Iurisprudentia forensis secundum Pandectarum ordinem in usum auditorii proposita*. D. G. E. Oeltze (ed.). Editio Quarta. Jenae: Officina libraria Croekeriana 1806, pp. 794–797; G. F. Puchta. *Cursus der Institutionen*. 2. Bd. 5. Aufl. U. Andorff (Hrsg.). Leipzig: Breitkopf und Härtel 1857, pp. 691–692. Differently, e.g., K. A. Vangerow. *Leitfaden für Pandecten*. Vorlesungen. Vol. 1. Part 1. Marburg/Leipzig: Elwert Verlag 1839, pp. 494–499. See H. Siimets-Gross (Note 13), p. 83–84. H. Elbert treats the condition of production in one’s name (*suo nomine*). See H. Elbert (Note 15), p. 163 *ff.*

<sup>79</sup> O. Meykow (see Note 34), pp. 152, 166–167. Although Meykow does not mention the condition of *suo nomine*, he could have derived the need for the producer’s will from the fact that the producer has to have the will to produce the thing in his or her name. If he or she produces the thing with the will to hand that thing over to somebody else, the owner of the thing will be someone else. The same applies in the interpretation of § 950 of the BGB. See BGB/Palandt (as cited in Note 24), p. 1144.

<sup>80</sup> Dernburg treats the case when the producer makes a thing to somebody else then the owner of the thing will be the employer. Also this situation is connected to the issue of the producer’s will, more specifically to make a thing for somebody else’s property. See H. Dernburg (Note 45), p. 300.

*Maximilianeus* and *Codex Thesianus*). The ALR, Code Civil, ABGB, BGB, and ZGB have abandoned this condition.<sup>\*81</sup>

It is surprising that two well-known lawyers interpreted specification under the BES, which actually is conveyed in only two articles, differently in several very important respects (namely, concerning the new thing and the will of the producer). At the same time, Erdmann, whose *System des Privatrechts der Ostseeprovinzen Liv-, Est- und Curland* was published later, did not give any further explanations of his viewpoint, different from Seraphim's<sup>\*82</sup>, although in the given situation this would have been not only reasonable but also essential in view of local legal practices.

Vladimir Bukovskij, who commented on the BES in 1914, mentioned neither of them. In addition to the text of the BES's Article 794, he highlighted only the aspect reflecting Erdmann's point of view — the importance of production in an artistic way or via handicraft by which the accidental emergence of a thing is excluded. Secondly, he highlighted the basis for differentiation of specification from merging and mixing<sup>\*83</sup>. The BES remained in force also after the First World War and until the Second World War. Contrarily to all previous jurisprudence, the civil law notes of 1939, which in their treatment of the emergence of a new thing follow the BES, do not mention the condition of production in an artistic way or by handicraft. Additionally, the *bona fide* condition and the obligation of compensation for the material are mentioned.<sup>\*84</sup>

## 4. The actual origin of the BES production institution and its model

Production was at variance from the principles of Roman Law as applied at the time already in the draft of the BES<sup>\*85</sup>, wherein articles 1025–1034 referred to a 'special memorandum' (*Besonderes Memoire*). On this, Bunge wrote the following: "B[unge] compiled about 20 memoranda on specific issues of private law that had to be decided on by legislators, and the majority of these were introduced to His Majesty the Emperor through the State Council to receive the Highest approval by the Highest."<sup>\*86</sup> On 2 July 1862, the emperor did approve several opinions he received through the State Council, among which was the 'special memorandum' (although with the wrong number), which was referred to in the treatment of specification in the draft BES. The reasoning provided for the opinion mentioned that in the compilation of the BES several changes were made, which were approved by the opinion.<sup>\*87</sup>

Therefore Bunge contributed also to departure from specification as it was under Roman Law for the rewriting of the BES. As mentioned above, the Roman variant of the BES was not codified. Yet still Bunge asserted the applicability of Roman Law in 1851, nine years before publishing the BES draft. In his paper of 1831, he stated that the pandect of local private law had to codify all applicable law "trustworthily and completely". Contrarily to the aim of gathering applicable law, in this case Bunge was personally the initiator of a fundamental change.

In his studies of the origins of rewriting the BES and the possibilities for its interpretation, Ferdinand Seraphim found that this material was adapted from the ALR<sup>\*88</sup>, which, in turn, gave a new form to Roman specification.<sup>\*89</sup> Seraphim's assertion that the BES rewriting provisions are very similar to the ALR is supported by the findings of the present paper. The solution of the BES is still quite different from the Roman handling of specification. Therefore, Bunge has achieved what he criticised Himmelstiern's draft of 1831 for — sometimes he did not compile existing local law but copied articles from the ALR (although not word for word).

<sup>81</sup> E.g., *Code Civil* regulates working in somebody else's name in other provision. H. Elbert (Note 15), pp. 172–173.

<sup>82</sup> Erdmann refers to Seraphim at the beginning of his specification treatment. However, he seems to reduce all the differences between their viewpoints to Seraphim's assumption that the ALR could be used as subsidiary source when interpreting the BES regulation. See C. Erdmann (Note 31), p. 153, Note 5.

<sup>83</sup> Bukovskij refers to Erdmann (Note 31), p. 154. V. Bukovskij. *Svod grazhdanskikh zakononij gubernij pribaltiskikh s prodolzheniem 1912–1914 g. I s razyasneniyami v 2 tomakh. Tom I. Riga: G. Gempell 1914, p. 334.*

<sup>84</sup> Civil Law. Notes under copyright. Compiled by A. Rammul according to the lectures by E. Ilus, Mag. iur. Tartu: Reta 1939, p. 212.

<sup>85</sup> Entwurf des Liv-, Est- und Curländischen Privatrechts. Provinzialrecht der Ostseegouvernements. 3. Theil. St Petersburg 1860.

<sup>86</sup> [F. G. Bunge.] (Note 10), [I. 3 (*versa*).]

<sup>87</sup> No. 38437. (Ijulja 2 = 2nd of July). Vysotshaishe utverzdennoje mnenie Gosudarstennavo Soveta. – Polnoje sobranie zakonov Rossiiskoi imperii. XXXVII vol. I. Section, 1862. No 37827-28621. Sankt-Petersburg 1865, pp. 599–600. By doing so, it was prevented the assessment of the BES as whole by the State Council in the question if it is in compliance with the general principles of the legislation of the Russian Empire (as the first and the second part of the provincial law were assessed). See B. Dölemeyer (Note 35), p. 2082.

<sup>88</sup> F. Seraphim (Note 31), p. 42.

<sup>89</sup> H. Dernburg (Note 45), p. 299.

## 5. Conclusions

The conclusions of this paper can be stated as follows. Firstly, in the case of specification, Roman Law was applicable in the Baltic provinces until 1865. The principles of Roman Law were followed also in the compilation of the draft of 1831. With respect to specification, Bunge's statement that Himmelstiern often based his codification on the ALR was not proved. It turned out that Himmelstiern remained true to his principles, according to which Roman Law should be the example in codification of local private law.

The second important conclusion is that the regulation of the BES as rewritten is not in compliance with the principles according to which the BES itself was required to be compiled. The law in use at the time (Roman Law) was not codified (as was done by Himmelstiern); instead, Roman Law was bypassed. Thus Bunge tried to prevent the influence of Roman Law and did so extremely successfully. He did not base his regulation of specification on the scientific papers of local lawyers or even on his own scientific treatises. In respect of this institution, Meykow's influence has not been proved; rather, the opposite is true. Bunge based his rewriting of the BES on the ALR (and not on the Code Civil or ABGB); i.e., he did what he criticised Himmelstiern for doing. The wording of the ALR was changed in the BES provisions, and substantial changes were made (e.g., with regard to production in an artistic way or by handicraft). Thus it was a conscious and active process in which the law applicable at the time was changed considerably.

One important conclusion that can be drawn from the present paper is this: no generalisations can be stated in response to the BES or the draft of 1831 — i.e., one may not claim that it was codifying only existing law. In relation to every single institution and regulation, one must ascertain what it is and whether it was used to curb the influence of Roman Law.<sup>\*90</sup>

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<sup>90</sup> See also H. Siimets-Gross *Roman Law in the Baltic Private Law Act — Triumph of the Roman Law in the Baltic Sea Provinces? On the declining influence of Roman Law* – *Juridica International* 2007, pp. 180–189 (Available at [http://www.juridica.ee/international\\_en.php?document=en/international/2007/1/131661.SUM.php](http://www.juridica.ee/international_en.php?document=en/international/2007/1/131661.SUM.php)). It highlights the general viewpoints of the 20<sup>th</sup> century according to which the BES is mainly based on Roman Law.