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THE RIGHT TO A FIRM IN THE LEGAL DOCTRINE AND JUDICIAL PRACTICE OF THE RUSSIAN EMPIRE

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Abstract: *The article examines scientific, theoretical and practical approaches to the issue of the right to a firm in the law of the Russian Empire in the period from the 1880s to 1917. In pre-revolutionary law, doctrine and practice, the right to a firm was understood as the right of a merchant or industrialist to carry out entrepreneurial activity under a certain designation, called in commercial life "firm". Both legal science and then judicial practice understood a firm as a trade (commercial) name. Unlike many Western countries, as well as the Far East (e.g., Japan), this concept was never codified, although such attempts were repeatedly made. The authors conclude that the doctrine that emerged during this period of time significantly outpaced the adoption of relevant legislation, and sometimes even the judicial practice. The treatises of such researchers as A. Bashilov (1887), G. Shershenevich (1888), A. Hol'msten (1895), Vs. Udintsev (1907), A. Fyodorov (1911), A. Kaminka (1912), and others were used as an analysis of the doctrine; the authors also conducted an analysis of a number of judgments of the 4th (later the Judicial department) of the Governing Senate on the issue of the right to a firm, as well as the judgments of some courts of the European states.*

Key words: *Right to a Firm; Commercial Name; Corporate Law; Competition law*

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1. INTRODUCTION

With the development of commodity-industrial relations, commercial and industrial enterprises appeared, as well as countless individual traders, each of whom offered his goods to the public. However, how to distinguish the goods of one trader from another? This is how the first firms and trademarks appeared. A trade name not only denotes the affiliation of a certain enterprise, store or establishment to a certain merchant or owner – in the minds of the public, that is, the clientele, buyers, the firm is associated with the quality of the goods, as well as the owner of the enterprise or merchant, the origin of the goods, and, without a doubt, with the reputation of the enterprise earned during its work. A trade name (or the "firm", as it is called in the work of pre-revolutionary scholars) is necessary to distinguish an enterprise or establishment from similar, homogeneous businesses. Since the reputation of the enterprise or its owner is embedded in the trade name, there is a practice of unfair competition, when one trader appropriates the name of another firm, or makes his name as similar as possible to the "original", which leads to deception of the public, since by such actions the dishonest entrepreneurs seek to convert the clientele of their rival to themselves. What are the methods of legal protection? In many countries of the world, this is a civil claim for damages, as well as a ban on using someone else's firm (unless the right to use the firm was previously legally granted to the merchant). There are also administrative

methods – for example, a ban on registering similar or identical names. Modern technology, of course, now allows a lot. However, what can be said about the 19th century, when the electronic computers were unavailable, registers existed exclusively in paper form and were cumbersome, and the number of enterprises and sole traders grew exponentially? Thus, legal systems had to answer these questions, regulate the registration of firms, secure the right of the merchant to exclusive use of the firm, and determine the conditions for the assignment (transfer) of the firm. Thus, significant legislative initiatives on the issue of the firm can be traced in German law (German Code of Commerce of 1861 and 1897), as well as in Swiss law (Swiss Code of Obligations of 1881). The French Code of Commerce of 1806 also contained several provisions on firms, and the protection of the right to a firm was secured by a separate law of 1824, the picture was also supplemented by extensive judicial practice. In the Russian Empire, the concept of "firm" was developed in commercial life, and was not regulated by law. The protection of the right to a firm, the registration of firms and their assignment were not regulated in any way by law, leaving the resolution of these issues to commercial life, customs, and judicial practice. We will tell the reader about this in this article.

2. HISTORICAL DEVELOPMENT OF THE CONCEPT OF A FIRM

The historical development of the concept of a firm is rather vague. For example, G. Shershenevich (1888) believed that a firm has a similarity with a noble coat of arms – comparing how in the Middle Ages the nobility hung their coats of arms on a castle, so did medieval merchants, placing a figure above their establishment, most often with an image of an animal, the same also concerned the branding of goods, as a rule, with the same images. Further, the author notes, as with the development of literacy among the nobility, the need arose to indicate aristocratic origin with the help of a signature, so in the commercial life of those times, signs began to recede into the background due to the development of forms of trade legal relations, which began to be expressed in written execution of transactions, where, accordingly, there was a need to formalise the signature of the firm (Shershenevich, 1888, pp. 122-123). E. Danilova (1915) also claims that the concept of a firm originates from the Middle Ages, when there was an active development of urban life, and accordingly, industrial and commercial legal relations. Partnerships engaged in trade sought to distinguish themselves from each other in order to prevent confusion on the part of the public, i.e., clients, which led to these partnerships conducting business under the names of all partners, and the given names were subsequently indicated in written transactions concluded by these partnerships. The signature had subsequently received the name "*firmare*" (Danilova, 1915, p. 72). A. Kaminka in his article "*Trading firm*" (1908) points out that the origin of the concept goes back to medieval practice: since people of that time were mostly illiterate, everyone had their own distinctive sign. In the everyday life of medieval lawyers, as the author pointed out, the term "signa" was used, which was used by both individual traders (merchants) and partnerships; the partnership signs consisted of a mixture of the signs of each of the partners.

Beginning in the 13th century, partnerships also used the sign named "*titulus societatis*", under which various transactions and obligations were concluded. Later, the signature in commercial life was reduced to the designation of the firm that the partnership owned (Kaminka, 1908, pp. 2022-2023). A. Fyodorov (1911) in his book on trade law points out that the emergence of the concept of "*firm*" was facilitated by a medieval custom, which consisted in distinguishing one trading establishment from another with the help of a special sign, which was called "*signum mercatorum*", often

depicting something fantastic. Merchants used this sign both in trade transactions and documents, and in designating their goods – i.e., their origin and affiliation, in essence, they were used as trademarks. After the development of literacy of the population, images were replaced by signatures that more or less corresponded to the civil name of the merchant, the practice of entering the names of these enterprises in special registers began to spread, later being placed in specialised printed publications. According to Fyodorov, some of these customs have survived until very recent times (i.e., until the end of the 19th – beginning of the 20th century), consisting of relative freedom in choosing the name of the firm, as well as the constancy of this name, even despite the fact that the identity of the owner could have already changed by that time (Fyodorov, 1911, pp. 174-175). Continuing with what was said earlier, the German researcher Robert Haab (1888) in his doctoral dissertation points out that the prototype of the firm was drawings, also because before the 14th century in many countries there were no established surnames, and only the addition of a symbol (i.e., a drawing) to the signature could provide sufficient distinction among many identical names.

In the Middle Ages, Haab writes, personal signs were known (which could obviously be considered the prototype of both firms and trademarks), when peasants applied signs to livestock, artisans to their tools, and merchants to the packaging of their goods (Haab, 1888, pp. 6-7). The merchants' marks, as the German researcher Josef Kohler (1884) writes, were not only important from the point of view of distinguishing one manufacturer from another, but also as a kind of proof in the event of a shipwreck (if the goods were transported by sea), or in the event that the goods were lost or stolen. The right of ownership of these goods (i.e., before their sale), as Kohler points out, was recognised precisely by this trademark (*signa mercatorum*), and the presumption of ownership of these goods was in effect, based on it (Kohler, 1884, pp. 24-31). The American lawyer Edward Rogers (1910) considers the origin of the firm to be a phenomenon from Antiquity: in Ancient Greece, inscriptions with the name of the manufacturer were used in pottery – thus, something similar was found on Etruscan vases, which dated back to the 8th – 5th century BC. In Ancient Rome, artifacts with the names of workers, manufacturers, merchants, drawings and chronograms were found; names and trademarks of manufacturers were also found on ancient Roman clay lamps (Rogers, 1910, pp. 30-31). There is also a known imprint of a city on a famous cheese from the Etruscan goddess of the Moon (Diana), which may well be considered a prototype of a trademark or firm name. In the modern sense of the word, trademark law was most likely born in France, where already in the 14th century every worker and trader had to have his own distinctive sign, in order to distinguish who was responsible for this work. Also known is the Declaration of Amiens (1374), which obliged every blacksmith to put a sign on his metal products to distinguish himself from others; subsequently, these rules were extended to textile workers and some other professions (Rogers, 1910, p. 34). Kohler, however, considered the examples of marking goods and indicating the names of manufacturers on ancient artifacts to be only rudiments; in his opinion, this institution began to fully develop only in the Middle Ages (Kohler, 1884, pp. 27-31).

A rather interesting interpretation of the emergence of the right to a firm, i.e., a commercial or trade name (in French: *Nom commercial*) can be found in the doctoral dissertation of the French lawyer Adrien Klotz (1898). Thus, Klotz writes that, on the one hand, the concept of a commercial name (i.e., a firm, as it was called in pre-revolutionary legal literature) is a fairly modern concept, but on the other hand, this does not mean that it was, in principle, unknown in Ancient Rome or in monarchical France (in French: *Ancien Régime*). Thus, in Ancient Rome, the place of production of certain goods was often indicated – for example, wines or textiles. This indication of the place of production

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implied the origin of the goods and their quality – in the classical sense, this is difficult to call a trademark or commercial name of the goods. Klotz gives an example that when one Roman promised to deliver clothes to another, he could not avoid liability if he received the goods from another place – i.e., it would not be what he promised him, and if the supplier succeeded in misleading the buyer about the place of origin of the goods, it would be considered fraud about the nature and quality of these goods. A similar situation existed in monarchical France, where fraud was prevented, which consisted of deception about the quality of the goods supplied. However, at that time, legal protection was not provided to individual merchants or industrialists, but to the production of corporations, which were usually located in large cities. The idea, however, was the same: to suppress deception and fraud about the quality and place of origin of goods. Thus, there were inspectorates that were tasked with checking the quality of goods, and industrial city guilds could prevent fraud by selling goods whose place of production was falsely indicated.

The manufacturers' trademarks were practiced everywhere. Ancient rules prescribed that manufacturers use trademarks that indicated the name of the manufacturer, and even if an individual merchant was "absorbed" by a corporation, each trading house, in addition to its name, had its own seal and signature, and, of course, a name. In addition, royal privileges established the right to transfer a trading house by inheritance, and the establishment "outlived" its founders due to the passage of time, and the successor became the owner of the trade designation, essentially the brand of the manufacturer, in which, in Klotz's opinion, one can find the concept of a firm, i.e., the commercial name of an enterprise (Klotz, 1898, pp. 6-12). Haab (1888) mentions in his dissertation on the dogmatics of firms that in the Middle Ages, at least until the beginning of the 19th century, individual traders conducted their respective business under their civil name, and there are no sources indicating that they conducted business under any other name, or used it when drawing up various transactions and documents. The common old German law did not contain any statutory provisions related to the protection of the right to a firm, and the protection of the owner of the enterprise with respect to his trade name was completely alien to the common law, even to the point that it was allowed to call the enterprise by another name, if it did not contain *dolus* (fraud in Roman law), *falsum* (fraud, forgery in Roman law), or *injuria* (moral damage) (Haab, 1888, pp. 13-15). According to Haab, from a number of provisions of the General State Laws of the Prussian States of 1794 (Part 2, Title 8, Articles 621-622), one can derive the right of the owner to exclusive use in managing his firm (which is what it is called in the text of the General State Laws of 1794) (Haab, 1888, p. 21). Thus, Article 621 suggests that when determining the name of a firm, it should be ensured that it is sufficiently distinctive from those firms that have previously been publicly declared. Article 622 states that if it turns out that another partnership created earlier is already using this firm name, then the newly created partnership will have to change its firm name.[1] In the judgment of the Royal Privy Supreme Tribunal of October 27, 1847, in a dispute concerning the use of the name of a firm that was manufacturing cupronickel products, the court said that no one had the right to choose another person's civil name as the name of a firm without special permission to do so, while recognising that German common law permitted freedom of choice of firm name.[2]

[1] *Allgemeines Landrecht für die Preußischen Staaten* (1794), Th. 2, Tit. 8, § 621-622.

[2] Königliche Geheimer Ober-Tribunal (Preußische Ober-Tribunal), Erkenntniß vom 27. Oktober 1847, Nr. 35. Entscheidungen des Königlichen Geheimen Ober-Tribunals, herausgeben im amtlichen Auftrage von dem Geheimen-Ober-Tribunals-Räthen. Dr. Seligo, Ruhlmeyer und Wilke I. Funfzenter Band. Berlin: Verlag von Carl Heymann, 1848, pp. 329 – 337.

One of the early researchers of German firm law, W. Endemann (1868) calls a firm the name under which a merchant conducts business and signs his name, calling it an independent name of the firm. Apparently, the given point of view came from Art. 15 of the German Commercial Code of 1861 (Endemann, 1868, p. 90-92). In fact, the presented point of view was, in one way or another, shared by the majority of pre-revolutionary scholars.[3] Another French scholar, L. Deshayes de Merville (1883), based on French practice, called a firm to be a type of trademark, indicating that there are two types of trademarks: the first is an emblematic sign, which should be considered a trademark, the second is the name of a merchant or manufacturer, which should be understood as a firm (in French: *Nom commercial*) (Deshayes de Merville, 1883, pp. 92-93). It should be noted, however, that there were other opinions in the doctrine regarding the relationship between a firm and a trademark – for example, A. Hol'msten (1895) believed that a trademark is one of the means of external expression of a firm, along with such attributes as a sign, a firm signature and invoice forms (Hol'msten, 1895, pp. 51-52). Deshayes de Merville also mentions that in France of the *Ancien Régime*, the concept of a trademark or a firm, as such, did not exist – it was a mere signature of the manufacturer or the trader on a certain product, and it was also a certificate of state regulatory authorities, which indicated the quality of the product, its origin, weight, and other characteristics. Government structures established parameters for each type of product, their production conditions, etc., and only after it was determined that the product complied with state standards, a stamp was placed on this product, which corresponded to the state guarantee (Deshayes de Merville, 1883, pp. 92-93).

As P. Kolumbus (1882) notes in his article on trading firms, the regulation of the firm's name was known from provisions of the French Commercial Code (French: *Code de commerce*) of 1808: for example, Article 21 of this Code states that "*The names of partners may be part of the firm's name*" (here the term *raison sociale* is used to designate the firm), which, in the author's opinion, will lead to the fact that the transfer of the firm in a full or limited partnership (a limited partnership) to other persons will be impossible. This same rule assumed that in the above-mentioned types of partnerships, the firm's name should include only the civil surnames of one or more full partners, which is confirmed, as Kolumbus writes, by Article 25, according to which the name of a partial partner cannot be part of the firm's name. These provisions, in his opinion, were made in order to prevent the occurrence of a circumstance in which a certain trading firm, after the withdrawal from it of one of the founders who enjoyed significant respect in the firm, could unlawfully use his name, which would be closely associated with respect and trust in him in the firm (Kolumbus, 1882, pp. 93-94). In 1824, a law was passed in France (French: *Loi du 28 juillet 1824*), which provided protection to the right to a firm under the sanction of criminal prosecution: thus, the provisions of Article 1 established that anyone who adds, or conversely, changes or deletes the name of the manufacturer, different from the one who produced them (the goods), or the trade name of the factory, different from where the goods were produced, or the name of the place, is subject to punishment according to Article 423 of the Criminal Code. The second part of this rule stated that any merchant is subject to criminal prosecution if he or she deliberately puts up for sale

[3] Opinions that differ from the majority opinion (see below) can be found in the works of the two following authors: G. Shershenevich (1888) and V. Rosenberg (1914).

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goods under fictitious or modified names.[4] An early case of the unlawful use of a plaintiff's name in the business dealings of defendants is known from the English court decision of 1847 in *Routh v. Webster*: the directors of a joint-stock company engaged in passenger transportation began to publish advertising brochures indicating the plaintiff's name as a trustee, which he was not: the court sided with the plaintiff, pointing out that his name was at risk due to the defendants' unauthorised use, and imposed an injunction on the use of his name.[5]

There were at least two known attempts to codify the concept of a "firm" in the Russian Empire in 1910-1911, but none of them were ultimately adopted. In the draft law of the Ministry of Trade and Manufacture of 1910, in addition to defining a firm (Article 1), it was also assumed that each firm that was newly established had to be different from other similar firms, and if, when entering a new firm into a trade record, a similar name was found, then an addition had to be made to the name of the newly registered firm that would distinguish it from the already existing firm (Article 6). It was also assumed that the firm could be alienated and could be transferred for use, but not the firm itself separately, but the firm together with the enterprise, and the agreement on the establishment of the firm, or its transfer for use, had to be in writing (Article 7). It is also known that this draft law was based on the German Code of Commerce.[6] In turn, Article 1336 of the draft Restatement of Civil Laws, concerning the right to a firm, assumed that a merchant conducting his business under a firm alone has the right to use his surname to designate it, and if necessary, his first name and patronymic, and also has the right to add other indications to its name, but not such that could lead to the idea that this firm belongs to a partnership. Article 1337 of the draft Restatement of Civil Laws of 1910 assumed the possibility of alienability of a firm (though only together with the enterprise) and its transfer for use to other persons, and the agreement on all the above actions must be executed in writing. The sources indicated in the draft Restatement are the German, Swiss and Hungarian Codes of Commerce, as well as Norwegian, Swedish and Finnish laws on the protection of the right to a firm (Proekt Grazhdanskago Ulozhenija, 1910, pp. 1207-1211). We indicate these definitions of the firm contained in the draft laws:

[4] Loi du 28 juillet 1824 relative aux altérations ou suppositions de noms sur les produits fabriqués. Schmoll, I. (1879) Traité pratique des brevets d'invention: dessins modèles et marques de fabrique, noms commerciaux, enseigenes, et autres designations d'etablissements et produits industriels comprenant la législation ètrangrée et les traités internationaux. Troisiéme édition. Paris: Librairie Polytechnique de J. Baudry, p. 166.
[5] *Routh v. Webster*, 10 Beav. 561, 28 January 1847. Reports of Cases in Chancery, Argued and Determined in the Rolls Court during the time of Lord Langdale, Master of the Rolls. Vol. X. 1846, 1847. Beavan, Ch. (ed.) London: William Benning and Co., 1849, pp. 561–563.
[6] Pravo. Ezhenьdel'naya yuridicheskaya gazeta [Law. Weekly legal newspaper]. 1911 g. № 21, Voskresen'e, 29 maya, pp.1239-1240.

Table 1: The definitions of the firm in the draft laws

Year	Author of the draft law	Article	The definition of the firm
1910	The Supremely approved editorial commission for the drafting of the Restatement of Civil Laws	1336	A firm is a name under which a person conducts his business in trade, industry, or craft[7].
1911	Department of Trade and Manufacture	1	A firm is the name under which a single owner of a commercial or industrial enterprise, or a partnership, or company, conducts its business (Proekt Grazhdanskago Ulozhenija, 1910, pp. 1207-1211).

There are also two known attempts to codify the concept of a firm in the 1880s. In 1883, a preliminary draft of the "*Regulation on Trade Records*" was developed, in Section I of which the norms dealt with the issue of firms (Danilova, 1915, p. 93). Thus, according to Art. 12 of the draft law, "A firm is a name under which a person acts in trade and by which he or she signs." The next, Art. 13 of the draft law assumed that a sole merchant could use only his last name as a firm, with the addition of his first and middle names, if desired, or their initials. Nevertheless, the merchant was prohibited from adding any additions to the firm's name that would indicate the existence of a partnership. According to the commentary to the provision, if a merchant encountered a situation where in another city where he wanted to conduct his trade, there already existed a trading firm with the same name as his, he would have to make an addition to the firm's name, for example, by adding the word "merchant" to it, but the functioning of two firms with the same name was prohibited, and the merchant could not rely on the fact of having such a first and middle name as a natural right (i.e., the right to a name). The Moscow Commercial Court, having become familiar with this project, proposed in such cases to add to the name of the merchant's firm the city in which this merchant had a settlement (Rzhondkovskij, 1883, pp. 446-447).

In 1886, a draft regulation on trade registration for the Prisvilin governorates was developed in the city of Warsaw, and in 1889, on the basis of two drafts from 1883 and 1886, a "*Draft Regulation on Trade Registration and Firms*" was developed, divided into two parts – the first was devoted to trade registration, the second – to the issue of firms. The latter was based on the provisions of Art. 15-27 of the German Trade Code of 1861, most of which were almost completely adapted from it. Art. 43 of the draft Regulation of 1889 provided an expanded definition of a firm: "*A firm is the name under which the sole proprietor of a trading enterprise, or a partnership or company conducts trade and which the owner or representatives of the partnership or a firm sign*." This definition was a borrowing from Art. 15 of the German Code of Commerce and Art. 10 of the Hungarian Code of Commerce, and also took into account the comments and comments on the preliminary draft of 1883 (Danilova, 1915, pp. 93-94). In 1894, the Department of Manufacture and Commerce published the "*Collection of Foreign Legislation on Trade Registration and on Firms*" which was devoted to Western European legislation on this

[7] *Ibid*.

issue; the material indicated that the Ministry of Finance was engaged in collecting preparatory material for the development of regulations on trade registration and on firms.[8]

3. THE RIGHT TO A FIRM

The definition of a firm, or a commercial name, is quite complex. If we proceed from the historical understanding of a firm, then here it is enough, as V. Schreter once noted in his article "*Unfair Competition*" (1915), that the clientele, i.e., the public, which expects to purchase a selected (or perhaps, if the reader pleases, a favourite) product, discovers that the product is sold, most often, not by the manufacturer itself, but by a merchant (who may have nothing to do with this product), and hence, the only way to understand the origin of this product is through external manifestations, such as original packaging, a brand (trademark), as well as the firm and the name of the enterprise (Shreter, 1915, pp. 428-429). Thus, these attributes are signs of the origin of the goods, and the firm is one of the main ones. Let us see how the firm was defined in the pre-revolutionary doctrine of law. Let us say right away that in the 19th-early 20th centuries there were two approaches to defining a firm – one, as a name under which a merchant conducts his business, and the other – as the name of an enterprise; a minority of scholars were inclined to the latter. The first, obviously, was borrowed from the German doctrine of law, for example, from the already mentioned definition of Endemann, based on Article 15 of the German Code of Commerce (Endemann, 1868, pp. 90-92). The same opinion was held by the Austrian author Franz Pollitzer (1895), who also based his definition on Article 15 of the Code of Commerce, indicating that a firm is the name under which a merchant conducts his business and the name used by the merchant as a subordinate in commercial matters (Pollitzer, 1895, p. 73).

Based on the definition of the 4th Department of the Governing Senate No. 191 of February 6, 1892[9] (see commentary on the case below), Vs. Udintsev (1907) also believes that a firm should be understood as the name of a merchant and his affiliation, but it acquires value only in connection with a trading establishment, since it indicates a group of legal relations associated with it. Udintsev finds that a firm should be understood as the name by which the owner of an enterprise signs, fencing the commercial and industrial sphere of his activity from the household, adding that a firm is used wherever it is necessary to distinguish the sphere of activity of an enterprise from any other, and it can be used as a signboard, for signing various business documents, as well as for marking goods (brand) (Udintsev, 1907, pp. 226-227). P. Tsitovich (1891) calls a firm the name under which the entrepreneur-trader conducts his trade, saying that if he conducts trade alone (i.e., a sole trader), then in this case, his civil name will be the firm of his trade, but when trade is conducted under the name of a partnership, the firm name must be different from the civil names of its participants (Tsitovich, 1891, p. 60).

A. Hol'msten (1895) gives a similar definition, adding that under the name of the firm the enterprise becomes known to the public, as well as to those who have business ties with this enterprise, and the firm also makes the individualisation of the trading enterprise, since it is with this that the idea of its type, quality and condition is associated. If there is a positive impression of the enterprise (for example, as a manufacturer of high-

[8] Ocherk postanovlenij zapadno-evropejskih zakonodatel'stv o torgovoj zapisi i o firmah. Vѣstnik finansov, promyshlennosti i torgovli. № 1, Yanvar'-fevral'-mart 1894, pp. 27-32.

[9] Pravitel'stvuyushchij Senat (4 Departament), opredelenie ot 6 fevralya 1891 g. № 191 // Grebner, V. Praktika 4-go Departamenta i Vtorogo Obshchago Sobraniya Pravitel'stvuyushchago Senata po torgovym delam 1889-1896 gg. Chast' II. S.-Peterburg: Tipografiya M. M. Stasyulevicha, 1896., № 35, pp. 71-73.

quality and affordable goods), then the firm acquires economic significance for the owner, since the clientele of the enterprise grows, the volume of income increases, etc., in this case, the enterprise itself comes to the fore, and not the merchant or its owner, and the people, or business partners, will trust this enterprise (Hol'msten, 1895, p. 48). A. Fyodorov's definition is also quite separate, according to which a trading enterprise has its own name, under which it conducts trade, which may not coincide with the civil name of the owner of the enterprise. Fyodorov" also says that when a trader is engaged in entrepreneurial activity alone, then it is permissible to use a civil name as a firm, but when trade is conducted by a partnership, it often turns out that it is quite difficult to include all civil names and surnames in the name of the firm, and necessity forces partners in such cases to choose a more convenient name for the firm, therefore, in a number of Western countries, legislation (e.g., codes of commerce) addressed the issue of both sole traders' firms and partnerships (Fyodorov, 1911, pp. 173-175).

G. Shershenevich (1888) had a different opinion about a firm: he calls a firm the name of an enterprise, explaining this with an example: a merchant, obviously, can have only one civil name, but he can be the owner of several firms, and he could register one as a founder, and he could easily receive another in another way, for example, by inheritance, he could purchase a third, etc., and the name given to an enterprise can be preserved for a long period of time, despite the fact that its owners could have already changed more than once (Shershenevich, 1888, p. 122). Rosenberg (1914) expressed doubts that a trade name could be characterised as a personal name, and believed that it should most likely be attributed to the name of a trade and industrial enterprise. Also, in his opinion, lawyers, economists and industrialists do not understand the term "firm" in the same way, because the latter related the firm to a trade business and identified this term with a trade and industrial enterprise (Rosenberg, 1914, pp. 1-3) (and not with the owner of the enterprise, as is found in the opinions of other scholars). According to the judgment of the St. Petersburg Commercial Court of February 13, 1882, "*a firm is the name under which a merchant conducts his trading enterprise, which he uses on signs, labels, announcements and similar items with which he signs*." The court adds that in the case of sole traders, a firm usually consists of a surname, to which a first name may be added, and a patronymic.[10]

It should be assumed that the right to a firm, or the right to a commercial (or trade name) has a property value for the merchant, who once took this name. Thus, the French lawyer Joséph-Armand Lallier (1890) wrote very well about this in his book on the protection of the right to a name. Thus, he points out that when a merchant takes a fictitious name under which he sells goods, he gives a reputation to his establishment, and thus, he acquires an exclusive right of ownership to it, but only for commercial purposes, i.e., for trade. Hence, a commercial name, i.e., a firm, deserves the same protection as a person's name, and accordingly, its appropriation gives the right to go to court for compensation for damages (Lallier, 1890, p. 409). The Paris Court of Appeal, in its judgment of July 28, 1892, confirms the position of the Seine Civil Court of May 25,

[10] Sankt-Peterburgskij Kommercheskij Sud, opredelenie ot 13 dekabrya 1882 g. // Vil'son, V. Sudebnaya praktika po torgovym dьlam: rьsheniya S. Peterburgskago Kommercheskago Suda i Pravitel'stvuyushchago Senata (4 D-ta i Obshchago Sobraniya). S.-Peterburg: Knizhnyj magazin" yuridicheskoj literatury D. V. Chichinadze, 1896, pp.176-177, D. № 97.

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1891, where the court of first instance clearly stated that a trade name is subject to private property rights, just like a trademark.[11]

The German lawyer and researcher Otto Hahn (1870) in his work on German business law says that by signing the name of the firm, the merchant thereby declares himself as an entrepreneur, and signing the name of the firm obliges the merchant – he thereby acquires rights and obligations, and obliges himself with the signature of the firm, just as someone in civil life obliges himself with the signature of his name (Hahn, 1870, p. 56). A. Hol'msten (1895) agrees with Lallier's position, not only defining the right to exclusive use of a firm, but also developing principles for protecting the right to a firm, which at that time was not defined in any regulatory legal act. Holmsten means by the right to a firm the exclusive right to use a firm name in a certain area (Hol'msten, 1895, p. 49). His last expression (i.e., concerning the trading area) is interesting and is continued by A. Kaminka (1912) in his "*Essays on Commercial Law*", where the author notes the importance of the spatial aspect in the work of a firm: thus, it is impossible to allow an entrepreneur to be granted exclusive use of a firm in the size of the entire country, regardless of the size of the enterprise.

On the other hand, A. Kaminka denotes, the principle of exclusivity of the firm must be observed, i.e., each firm must be different from each other. But what to do when an entrepreneur, for example, uses a surname that is quite popular in the country, and what difficulties can such a position create in the business turnover? Therefore, A. Kaminka suggests relying on the German Code of Commerce of 1896, Article 30 of which provides for the protection of a trade name (firm) only within the administrative-territorial unit where the registration judge is located. However, according to A. Kaminka, it is necessary to distinguish between the trade turnover of enterprises, where one can trade only within the framework of an administrative-territorial unit, and then, for its owner, it will not matter whether a similar firm exists in another city with the same name or not, and another, when a trading enterprise is designed for more than one city, and sometimes, is not even designed for it at all (here A. Kaminka gives the example of winemaking, in which case the sale of products is less designed for the place of their production). The German Code of Commerce, however, did not make such distinctions in corporate law, but in such a case, the manufacturer of goods would be protected by the law on the prevention of unfair competition (Kaminka, 1912, pp. 157-158).

The right of exclusive use of a firm, according to Hol'msten (1895), is expressed in three aspects: it implies, firstly, that its use by another person is prohibited, since this will cause damage to the owner of the enterprise; in such a case, the violation of this right will consist in borrowing someone else's name, or name to designate one's enterprise, which can be of two types – complete, when the entrepreneur uses another name and surname, completely different from his own, and incomplete, when the name and surname coincide only partially, but do not coincide in general; and secondly, this is the right to use the firm name, which also comes in two types: personal – i.e., will coincide with the name and surname of the entrepreneur, and impersonal – i.e., it will be completely removed from the name and surname of the entrepreneur, and can acquire any form that does not contradict the law; how to call the firm is already left to the discretion of the entrepreneur himself. Finally, the third aspect is the right to use the firm, but only in a certain area. A. Hol'msten's position here largely coincides with the opinion of A. Kaminka two decades later, and Hol'msten also adds here that damage to the

[11] Trib. civ. de la Seine (1re Ch.), 25 mai 1891 / Cour d'Appel de Paris, 28 juillet 1892. Annales de la propriété industrielle, artistique et littéraire. Quarante-deuxime annee. Tome XLII. Paris: Chez Arthur M. Rousseau, Editeur, 1896, pp. 314-316, Art. 3885.

entrepreneur can only be real if the firm is "borrowed" (or as they say "usurped" in French[12] and Belgian[13] jurisprudence) only if it happened in the area of the clientele of the enterprise whose firm is "borrowed". Therefore, if a certain entrepreneur trades only within the city or village, he cannot in this case claim the right to exclusive use of the firm throughout the country, but the situation will be quite different if the clientele of this entrepreneur is substantially wider than the place where the enterprise is located (Hol'msten, 1895, pp. 49-51).

According to Vs. Udintsev, exclusive rights to a firm are expressed in two ways – in a ban on the use of someone else's firm, i.e., the commercial name of the enterprise, and in a claim in court for compensation for damages incurred due to the unlawful use of the firm by an outsider. Since the legislation has not provided for provisions on the protection of the right to a firm, it remains to turn only to the general rule, which assumes compensation for damages and harm – Art. 684 of Volume X of the Restatement of Laws, p. 1 (Borovikovskij, 1888, p. 252). This means of protection, according to Vs. Udintsev, is not effective enough, since the calculation of damages itself lies not with the judge, but with the plaintiff, as does the requirement to prove these damages (Udintsev, 1907, pp. 232-233). It should be noted that pre-revolutionary legislation (in Article 684, Volume X of the Restatement of Laws, p. 1), or in other norms, did not define exactly how the concept of "damages" should be understood, and what they included.

The judgment of the Governing Senate's Civil Cassation Department No. 99 of April 2, 1880, comes to the rescue, the essence of which, in brief, was as follows. A merchant (the plaintiff) leased land from the provincial secretary (defendant) for a period of 9 years, paying rent for the entire land, starting in 1874. For reasons beyond his control, in 1876 the plaintiff was unable to use approximately ¼ of the land, since it was given to the peasants as an allotment, because of which he filed a claim for damages against the defendant. According to the judgment of the district court, the plaintiff won the case, but the court chamber (the court of appeals) in its judgment had significantly reduced the amount of damages (approximately in 10 times), citing that the plaintiff had the right to recover only damages for not owning the land, but had no grounds to seek benefits that could have been extracted from the land if he had used it. The Senate did not agree with the interpretation of the court chamber, and interpreted Article 684 as follows: "… *By damage, the law means not only positive material damage to property, but also the deprivation of benefits that could have been obtained from the property*." Further, based on this argument, the Senate overturned the judgment of the court chamber, sending the case for rehearing.[14] Bashilov considered this interpretation to be the influence of commercial law on general civil law, since in commercial law, this type of damage constituted the most predominant of all damages (Bashilov, 1887, pp. 136-137).

By the way, the Hungarian Code of Commerce of 1875, Article 24, protecting a firm name from usurpation, states the following: "*The presence and amount of damages*

[12] See, for instance, the judgment of the Court of Cassation of France: Cour de Cassation (Chambre Criminelle), 18 novembre 1904. Annales de la propriété industrielle, artistique et littéraire. Cinquante et unieme tome. Tome LI. Paris: Chez Arthur M. Rousseau, Editeur, 1905., pp. 181-185, Art. 4524.

[13] See the following cases from the judicature:

(1) Trib. comm. de Bruxelles, 4 avril 1931 // Trib. comm. de Bruxelles, 27 janvier 1932 // Cour d'Appel de Bruxelles, 4 juin 1932 , *La Jurisprudence commerciale de Bruxelles*, 1932, 237.

(2) Cour d'Appel de Bruxelles (1re Chambre), 19 avril 1939. Le Journal des Tribunaux (Belge) (1939), Bruxelles : F. Larcier., № 3573, col. 326-329

[14] Pravitel'stvuyushchij Senat (Grazhdanskij Kassacionnyj Departament), rѣshenie ot 1880 goda 2 aprelya dnya. № 99. Rѣsheniya Grazhdanskago Kassacionnago Departamenta Pravitel'stvuyushchago Senata. 1880. S.-Peterburg. Tipografiya Pravitel'stvuyushchago Senata, 1881, pp. 384-388.

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are resolved by the court at its discretion, based on the circumstances of the case, and possibly after hearing experts".[15] Thus, we can find in the judgment of the Hungarian Royal Curia of 1913 the conclusion that in order to prove damage caused by the unauthorised use of a firm, it will be sufficient that the text of the firm used creates the appearance that the owner of the firm is related to the person whose name he or she uses.[16] A. Nevzorov (1912) also notes that the protection of the right to a firm in pre-revolutionary law is very problematic due to the lack of a clear provision of the law on this right, however, unlike Bashilov, he recommends turning not to Art. 684 of Volume X of the Restatement of Laws, p. 1, but to Art. 685, i.e., "*to destroy what has been arranged*," as Nevzorov writes, and Art. 684, in his opinion, will be very difficult to implement because it will be impossible to accurately prove the amount of damages and lost profits, and criminal prosecution (according to Art. 1353 and 1357 of the Statute of Punishments) is possible only if the unauthorised use of the firm is associated with a trademark (brand) (Nevzorov, 1912, pp. 128-129).

A. Hol'msten had developed a unique system for protecting the right to a firm, which, in his opinion, should include judicial and administrative means. The first case includes a civil suit for a) prohibition of use of the firm; and b) a claim for damages, as well as c) criminal prosecution on a private complaint for illegal use of a trademark (brand) if it is combined with the name of the firm (in other cases, this becomes impossible, unless the court could potentially regard the use of forms, price lists and other papers of the firm as fraud). The claim for injunction should be based on the principles that the use of someone else's firm infringes on the material interests of its true owner, due to which the right to the firm can be restored by the court on the basis of a court ban on the defendant using someone else's firm. At the same time, Hol'msten considers such a means of protection not particularly effective due to the fact that such claims are not provided for by law at all, and where the court is not recognised as having the right to impose a fine or demand a "*cautio de non amplius turbando*" (the so-called agreement on non-disturbance in the exercise of one's right, known from Roman law). Such claims should be classified as claims for the destruction of things on which the plaintiff's firm was illegally reproduced, and things through the production of which damage was caused (Hol'msten, 1895, pp. 58).

A claim for compensation for damages, according to Hol'msten, may be based on Articles 574, 644 and 684 of Volume X of the Restatement of Laws, p. 1., the only drawback of these rules in this matter, in his opinion, is the very broad wording, however, it is not possible to claim that such a remedy is not available. The question is only about the effectiveness of this method of protection, which he also finds very low because the plaintiff must prove the damage exactly, and he must prove the amount of lost profits, which seems difficult for the plaintiff to do. Speaking about administrative means, these preventive measures aim to prevent the use of someone else's firm. As an example, this is the issuance of trade tickets by treasuries of city councils, where a rule had already been developed according to which trade tickets were not issued to those who used someone else's firm. In addition, the structures whose functions include supervision of trade must not allow the imprinting of another firm on the sign of a trading establishment, since such an establishment will not be the enterprise that the trader has the right to open and operate. What is more, the Department of Trade and Manufacture, which had a

[15] Kereskedelmi törvénykönyv (Magyarország). 1875-ik evi orszaggyülesi Törvenyczikkek. Budapest: Kiadja Rath Mor, 1875, p. 223.

[16] A Királyi Curia, 1913 április 29. 734/912. v. sz. a. IV. p.t. Gallia Béla (szerk.): Hiteljogi döntvénytár. (váltó-, csőd-, kereskedelmi és tőzsdei ügyekben) VII. kötet. Budapest: Franklin Társulat Magyar Irod. Intézet és Kőnyvnyomda., 1914., Nr. 178., pp. 291-292.

function to approve trademarks, may refuse to register it if the image of another firm is placed on it, on the grounds that something similar has already been registered (Hol'msten, 1895, pp. 58-63).

A. Bashilov wrote about the right to exclusive use of a firm at one time, and he derived several regularities from this issue. In his opinion, this right in itself indicates that only the person who owns the firm, and only he (she), or, in extreme cases, his (her) legal representative, can trade under it, since this entrepreneur is considered to be the owner of the firm. Firstly, when establishing a new enterprise, the founder is obliged to contact the local registration authority and check whether there is a firm with such a name, since no trading enterprise can be called by the name of another enterprise. If we are talking about a sole trader who conducts business under his (her) real name and surname, then he (she) should make sure that a similar surname does not appear in the registers, and if such a surname already exists, he or she, in this case, should modify the name of the firm so that the name differs from the firm already declared by someone else. Secondly, it is considered that the use of someone else's firm will be considered a violation of the right to exclusive use of the firm, and the injured party will have the right to file a lawsuit in court not only with a demand to prohibit the use of the firm, but also for compensation for damages. The court will also have to establish that the hypothetical plaintiff was in fact the first to register the firm, and whether the plaintiff had actually suffered losses will be decided at the discretion of the court (Bashilov, 1887, pp. 131-133). Thus, the Governing Senate (4th Department) in a decree of December 8, 1883 prohibited the defendant from using the plaintiff's firm, in addition, pointing out the malicious intent of the defendant's actions, who, in the opinion of the court, attempted to mislead the public by actually using his commercial name, and also established that the violation of the exclusive right to use the firm could be restored with the help of judicial protection.[17] Udintsev, briefly mentioning this judgment, says that judicial practice recognises the existence of a firm, relying on trade custom, and thus this legal institution, although not being codified in the law of the Russian Empire, is not subject to doubt in its existence (Udintsev, 1907, p. 231).

Speaking about the protection of the right to a firm, Vs. Udintsev points out that the name (and a firm is, in his opinion, the name of a merchant and the merchant's affiliation) is the affiliation of a person, and therefore is subject to judicial protection from the encroachments of other persons in the event of its unlawful appropriation. The trade name will also need protection, since it will be the reputation of a merchant conducting business activities and the basis for public trust, and Vs. Udintsev calls the right to a firm the regulation of a person's trade name. He also attaches importance to the registration of companies: again, the legislation did not contain any provisions on this account, except for the registration of trading houses, which, as its norms assumed (Article 59 of the Statute of Commerce), could be opened and could receive its name upon the submission of the relevant registration documents to the City Council, and in the cities of St. Petersburg, Moscow and Odessa[18] – to the merchant council; in another case, the registration of joint-stock companies is subject to publication in the Collection of Laws and Orders of the Government (Article 2197 of the Volume X of the Restatement of Laws, p. 1) (Udintsev, 1907, pp. 228-229; Hessen, 1910, pp. 45-47). The same procedure,

[17] Pravitel'stvuyushchij Senat (4 Departament), Ukaz ot 1883 goda 8 dekabrya dnya. // Vil'son V. Sudebnaya praktika po torgovym dьlam: rьsheniya S. Peterburgskago Kommercheskago Suda i Pravitel'stvuyushchago Senata (4 D-ta i Obshchago Sobraniya). S.-Peterburg: Knizhnyj magazin yuridicheskoj literatury D. V. Chichinadze, 1896, pp. 172-175, D. № 96.

[18] Until 1917, the city of Odessa was under the jurisdiction of the Russian Empire.

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according to A. Hol'msten, also took place with firms – in the capitals and in the city of Odessa, a firm was declared upon the establishment of a trading house to the Merchant Board, and in other cities – to the City Administration, which, in turn, transmitted these facts to the Department of Manufacturing and Trade (Hol'msten, 1895, pp. 53-54).

In the case of sole traders, there were no provisions in the legislation on this matter; in trade turnover there was a certain custom, according to which notification of newly created firms was issued in the form of circulars (Udintsev, 1907, p. 229). Fyodorov (1911) mentioned that some Merchant Boards published directories and books with lists of enterprises and some data from them, which submitted documents about themselves for the current year. It is also said that when issuing trade documents, a check was made to determine who owned the firm; traders who did not update documents were excluded from the lists. Information that an enterprise had ceased to exist, or that there had been a change in the composition of the firm, was sent out using circulars (Fyodorov, 1911, pp. 185-186). Bashilov mentioned that in the case of sole proprietorships (i.e., where a merchant is engaged in business alone), the only method of disclosure will be the reference books of merchant boards, and if such books were not kept, then sole proprietorships were not announced at all (Bashilov, 1887, p. 140).

The question of the legal nature of the right to a firm is also highly controversial. For example, A. Kaminka derives the right to a firm from the personal rights of a person, i.e., the right to protect one's own personality – such as the right to life, physical integrity,[19] freedom and honour. Kaminka does not agree with Haab on the issue that the violation of the right to a firm cannot be seen as a violation of personal rights due to the fact that the firm is not closely connected with the individual, and that the right to protect the firm is caused by public interests, in this issue Kaminka is of the opinion that these "public" interests require that the interests of the individual be protected, and the law protects the right to a firm precisely because the individual must be guaranteed the fruits of activity, which, in this case, are expressed in the creation of a certain industrial enterprise (Kaminka, 1912, pp. 161-162). A position similar to Kaminka's can be found in the German jurist Ferdinand Regelsberger (1897) – he argues that although it would not be reasonable to create a special right for each individual manifestation of personality, such individual rights can be created, and already exist – such as the family name, the firm and the industrial hallmark (i.e., trademark) (Regelsberger, 1897, pp. 234-235). Thus, it can be stated that the right to a firm pertains to individual (personal) human rights. Nevertheless, Bashilov" supports the idea that the firm is, in some way, separated from the personality of the merchant, which, in his opinion, was caused by the need to separate trade turnover from private and family matters, as well as to separate the property of the enterprise from, again, the personal property of the merchant. Thus, the merchant will consider his own enterprise as something separate from his personality, and as a partially independent object of trade relations (Bashilov, 1887, pp. 126-127).

Haab, in his doctoral dissertation, notes that without the adoption of a *lex specialis* (special laws) on firm law, the adoption of a trade name by a merchant would qualify as a fact, but not as a subjective right, because not everything that has the

[19] The right to physical inviolability was officially confirmed in the judgment of the Governing Senate (Criminal Cassation Department) in the case of Dr. Modlinskiy (No. 33 of 1902), where the court considered it inadmissible to perform a laparotomy operation on a female minor patient without her consent and the consent of her parents, which led to the death of the patient, despite the fact that no negligence was found on the part of the operating doctor during the operation. Pravitel'stvuyushchij Senat (Ugolovnyj Kassatsionnyj Departament), rѣshenie ot 19 noyabrya 1902 g. (po dѣlu doktora meditsiny P. Modlinskago), № 33. // Rѣsheniya Ugolovnago Kassatsionnago Departamenta Pravitel'stvuyushchago Senata. 1902. S.-Peterburg: Senatskaya tipografiya, 1902., pp. 84-91.

freedom to do or desire something will provide for the existence of some subjective right for it (Haab, 1888, pp. 50-51). However, both Bashilov and Kaminka argued that judicial protection of the right to a firm in pre-revolutionary courts was quite limited – both in the courts of general jurisdiction and in the commercial courts due to the need to prove not only the connection of losses with a specific offense (i.e., appropriation of the name of someone else's firm), but also the need to calculate and prove the amount of losses themselves. For example, Kaminka mentioned that even if we assume that trade turnover has decreased, this does not prove that the turnover has decreased due to someone's unfair competition. Therefore, both authors agree that such lawsuits in the courts would often be doomed to failure (Bashilov, 1887, pp. 133-134; Kaminka, 1912, pp. 163-164).

It should also be noted that in the law of the Russian Empire there was no civil law protection of the right to a name in the form in which, for example, it existed since 1896 in the German General Civil Code (§12)[20], receiving the tentative name "*Namensrecht*"[21] or "*Namensschutz*"[22] in judicial practice. Thus, as the German Supreme Court (Reichsgericht) says in the 1910 case of *Graf Zeppelin*, where the plaintiff was suing for the use of his name and image on tobacco trademarks (the judgment of the final instance, i.e., the Reichsgericht, was upheld in favour of the plaintiff): "*The unauthorized use of a name within the meaning of Art. 12 of the German General Civil Code occurs not only when someone appropriates another's name specifically to designate his own person; cases where someone unlawfully uses another's name for advertising purposes, to designate goods, on signs, etc., also fall under the law on the protection of names*".[23]

In the practice of the German Supreme Court on issues of protecting firm names, it is worth highlighting a judgment from 1904, in which the plaintiff owned a company whose name was completely different from his real name, and he also filed a claim against another company whose firm coincided with one of the surnames indicated in the plaintiff's firm. The Higher Regional Court (in German: *Oberlandesgericht*) rejected the claim on the grounds that the plaintiff had no right to refer to Art. 12 at all, since he did not bear the disputed surname, but only owned a company that was so named. The Supreme Court agreed with this position, and added that the right to a name is granted not only to individuals, but also to legal entities, since they themselves are the bearers of the protected name. But based on Art. 37 of the Commercial Code (recently adopted in 1897),[24] the Supreme Court held that the former Article 27 remains in force and that these provisions were considered sufficient to protect the firm name, and that it is not permissible to apply the statutory provisions on the protection of names in corporate law in a general way. Thus, the Supreme Court concludes that in this situation, the owner of the company (i.e., the plaintiff) has no right to claim the judicial protection provided for in Article 12 of the German General Civil Code in the context of a name that he did not bear himself, but used in the name of the firm he managed. Therefore, the plaintiff's appeal was rejected.[25]

[20] Bürgerliches Gesetzbuch (Deutschland) vom 18. August 1896, RGBl. 1896, Nr. 21, S. 195 – ff.
[21] See, for instance, the following two judgments of the German Supreme Court (Reichsgericht) upon the given subject: Reichsgericht, Urt. v. 26.09.1924, Az. Rep.: II 578/23 (*ERG in Zivilsachen*, Bd. 109, S. 213 – 215); Reichsgericht, Urt. v. 11.06.1926, Az Rep.: II 327/25 (*ERG in Zivilsachen*, Bd. 114, S. 90 – 97).
[22] See the following judgment of the German Supreme Court: Reichsgericht, Urt. v. 03.06.1927, Az.: Rep. II. 346/26 (*ERG in Zivilsachen*, Bd. 117, pp. 215 – 226).
[23] Reichsgericht, Urt. v. 28.10.1910, Az.: Rep. II. 688/09 (*ERG in Zivilsachen*, Bd. 74, S. 308 – 313).
[24] Handelsgesetzbuch (Deutschland), vom 10. Mai 1897, RGBl. 1897, Nr. 23, S. 219 – ff.
[25] *Reichsgericht*, Urt. v. 09.12.1904, Az.: Rep. II. 61/04 (*ERG in Zivilsachen*, Bd. 59, pp. 284 – 287)

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According to the Swiss judicial practice, both the provisions of the Swiss Code of Obligations of 1881[26] and the provisions of the Swiss Civil Code of 1907,[27] in particular Article 28 on the protection of a name,[28] are suitable for the protection of a trade name. The Hungarian Code of Commerce, which we have already mentioned (Article 24), as follows from the judgment of the Royal Curia of 1913 (see the reasons for the judgment of the Second Instance Court – *Budapesti királyi tábla* No. 2025/911 of 25 April 1912), protects not only all firms that were entered in the Commercial Register, but also the right to a name, and thus not only traders or enterprises may suffer damage as a result of the unauthorised use of a trade name, but even non-traders may also suffer such damage if their name is included in the trade name[29]. A similar system was adopted in the Japanese Code of Commerce 1899. Article 20 of the Code provided that one whose trade name has been registered may seek an injunction to prevent the use of the same or a similar trade name for the purpose of unfair competition. This article of the code also provided that a merchant who uses a trade name already registered in the same administrative unit for the same business is already presumed to be using the name for the purpose of unfair competition (Hang, 1911, p. 12). The Supreme Court of Japan in its judgment of June 5, 1914, recognises that the right to protect a firm, or as the court puts it in this case, a trade name, can only arise from the moment of registration of the trade name, and a merchant who uses an unregistered firm name cannot use the firm name of another merchant who operates in this administrative-territorial unit. From this, the court concludes that the right of a merchant to demand that someone has not used a similar trade name for the purpose of unfair competition comes from Articles 19-20 of the Code, which provide for the exclusive right to use a firm because of the registration of this firm.[30] From the given examples of legislation, as well as judicial practice, we see that for the effective implementation of corporate law, it is necessary to enshrine it in law, therefore we agree with the German jurist Haab on this issue (Haab, 1888, pp. 50-51).

As we see from the above, the right to a firm, or a commercial name, also has roots in the right to a name, which did not receive civil-law protection in pre-revolutionary law. For example, V. Katkov (1897) expresses the opinion that a commercial name enjoys more serious legal protection than a civil name due to the fact that abuses in this area are much more frequent than in the case of an ordinary civil name (Katkov, 1897, p. 59). Being a personal right, as M. Agarkov (1915) writes, the right to a name was ignored for a long time not only in legislation, but also in legal science. Personal rights violated the traditional structure of Romano-Germanic civil law, where the rights actually concluded where property interest ended; traditionally, the family law was also included in civil law, and everything else (including personal rights) was alien to it. Agarkov paid specific attention to Article 12 of the German Civil Code, as an example of the codification of the right to a name (Agarkov, 1915, pp. 73-74). Ironically, in pre-revolutionary law, neither the

[26] Bundesgesetz über das Obligationenrecht, vom 14. Juni 1881. Bbl 1881 III 109, Nr. 26, S. 307-310 (Art. 865-876).

[27] Schweizerisches Zivilgesetzbuch vom 10. Dezember 1907, AS 24, 233., §28

[28] See the two following judgment of the Swiss Federal Tribunal: *Bundesgerichtshof Schweiz* (Tribunal Federal Suisse), Urteil der I. Zivilabteilung vom 21. November 1914, Nr. 100. BGE 40 II 601, pp. 601-607; Arrêt de la Ire Section civile du 15 decembre 1926, Nr. 64, BGE 52 II 393, S. 393-400 (the text of the first judgment is provided in German, while the text of the other – in French, so the signature of the case differs).

[29] *A Királyi Curia*, 1913 április 29. 734/912. v. sz. a. IV. p.t. Gallia Béla (szerk.): Hiteljogi döntvénytár. (váltó-, csőd-, kereskedelmi és tőzsdei ügyekben) VII. kötet. Budapest: Franklin Társulat Magyar Irod. Intézet és Kőnyvnyomda., 1914., Nr. 178., pp. 291-292.

[30] **大審院**, **大正四年六月五日第三民事部判決**, **大審院民事判決録**（**民録**）21**輯**898**頁** (Supreme Court of Japan, Judgment of the 3 Civil Division of June 5, 1914, Protocols of the civil judgments of the Supreme Court (Minlu), vol. 21, p. 898).

right to a civil name, nor the right to a firm ever received civil-law protection. Thus, the Governing Senate in its judgment of June 13 / October 31, 1891, indicates that trade "under a firm" is known in commercial life.[31]

In the pre-revolutionary doctrine of law, there was an opinion that the right to a name should be understood as a non-property and inalienable right, and is "non-negotiable" (i.e., *res extra commercium*), and it gave rise to both the right and the obligation to use it, and as for the right, the right to use a name was subject to sufficiently special rules that Katkov called it a "*sui generis*" right (Katkov, 1897, p. 47). The situation with the firm is different: as is the case with the ruling of the Governing Senate No. 191 of February 6, 1891, the right of ownership of the firm may well be recognised.[32] Hol'msten, speaking about the transfer of the right to a firm, mentions that for the owner of the enterprise the firm is a property value, however, it cannot be alienated separately from the enterprise – in such case, if this happened, it would mislead all the clients, as well as all the contractors of the enterprise, and of course, it would look like a fraud. In the case of the transfer of a firm from one owner to another, a note should be made, for example, "former", "successor", "sons", etc (Hol'msten, 1895, pp. 54-55).

In exactly the same way, the Brussels Court of Appeal (Belgium) ruled in its judgment of December 30, 1893, stating that the acquirer of a firm and its attributes must indicate in it, "*successor of such and such…*", or "*former trading house of … and …*", in order to avoid confusion of his identity with the identity of his predecessor.[33] Thus, here we can cite the judgment of the St. Petersburg Commercial Court of December 13, 1882. Once a certain merchant was engaged in trade under a firm that bore his name. This merchant died, and another merchant P. began to conduct his trade (sell books) in the same premises, calling his own firm "*former …*", and indicating the name and surname of the deceased merchant, moreover, not being his successor, and never purchasing his enterprise, but simply conducting trade in the same premises as the deceased merchant. The guardian of the property of the deceased merchant filed a claim with the St. Petersburg Commercial Court. The Commercial Court found that the defendant's conduct of trade in the same premises as the once deceased merchant does not give him the right to call his firm that and to use this name in advertising publications, on the books he sold, and on the sign of his establishment, since such use of the firm's name could be permissible only if the defendant lawfully continued the trading affairs of the deceased merchant. The court noted that the defendant had not provided any evidence of the defendant's right to call his firm "*former*" and that he should be prohibited from using the firm of the deceased merchant. Thus, in this case, the court prohibited the defendant from using the firm of the deceased merchant, prohibiting him from the utilisation the name of someone else's firm in all publications, on books sold and on a sign. The commercial court noted that given the custom of sole traders to conduct their business under a firm consisting of a first and last name (i.e., the civil name of the merchant) and the possibility of acquiring a reputation and trust through such trade, it is

[31] Pravitel'stvuyushchij Senat (4 Departament), opredelenie ot 13 iyunya / 31 oktyabrya 1891 g. № 904/1526 // Grebner, V. Praktika 4-go Departamenta i Vtorogo Obshchago Sobraniya Pravitel'stvuyushchago Senata po torgovym delam 1889-1896 gg. Chast' II. S.-Peterburg: Tipografiya M. M. Stasyulevicha, 1896. № 34, pp.68-71.

[32] Pravitel'stvuyushchij Senat (4 Departament), opredelenie ot 6 fevralya 1891 g. № 191 // Grebner, V. Praktika 4-go Departamenta i Vtorogo Obshchago Sobraniya Pravitel'stvuyushchago Senata po torgovym delam 1889-1896 gg. Chast' II. S.-Peterburg: Tipografiya M. M. Stasyulevicha, 1896., № 35, pp. 71-73.

[33] Cour d'Appel de Bruxelles, 30 décembre 1893 // Journal des Tribunaux (Belge) (1894), 13me année – 1894. Bruxelles: Vve Ferdinand Larcier, Libraire-Éditeur. No. 1026. (21 janvier 1894), Col. 87-89.

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necessary to consider the firm, i.e., the name under which trade is conducted, as property of obvious value.[34]

Thus, it can be concluded that already in the early 1880s the right to a firm was afforded with judicial protection. Let us now consider the ruling of the Governing Senate on a similar case that took place the following year. Both the plaintiff and the defendant were engaged in the trade of tobacco products. The plaintiff's firm was called "*M. Duruncha*" after his last name, and the defendant called his firm "*Durunch" I. I. B.*", after which the plaintiff applied to the St. Petersburg Commercial Court to prohibit the defendant from using the name of the plaintiff's firm; in the first instance, the court satisfied the claim. The defendant, through an attorney, brought a complaint to the Governing Senate (which acted as an appellate court in relation to commercial courts), in which he claimed that the defendant's firm could not be identical to the plaintiff's firm, while the latter's firm was called "*M. Duruncha*", and the defendant's full name of the firm was called "*Trading House under the firm Durunch" I.I.B.*", that there are differences between the names "*Duruncha*" and "*Durunch*" (see below), and that the fact that the defendant had already made announcements about this in newspapers, and this can also be confirmed by the appearance of the sign, sufficiently guarantees against confusion of names.

The Governing Senate did not agree with these arguments of the defendant. Firstly, based on the defendant's statement to the Merchant Board, the name of the defendant's firm should be understood as "*Durunch*". This, in the opinion of the Senate, is also confirmed by the sign, on which the main word "*Durunch"* was written in large font, the "trading house" was not mentioned at all, and the defendant's surname was written in small font. The plaintiff's firm was named "*Duruncha*", and means a kind of oranges and tangerines, as in the case of the defendant, and therefore, the Senate says, there can be no talk of the non-identity of the names. Regarding the defendant's second argument about the warning against mixing up the names of firms made in printed publications, the court also refutes this argument. The sign of the defendant's shop indicated the opposite – it actually read "*Shop for tobacco, cigars and cigarettes "Durunch""*, under which were written in small letters the initials of the defendant, decorated with two gold medals, which enclosed a monogram of the letters I. and B., from which it seems that the tobacco products sold in defendant's shop were produced by the "*Durunch"* factory (which had a certain reputation among the public), which had even been awarded various medals, but in no case, the shop of the owner of a tobacco shop, which sold tobacco from other manufacturers. Therefore, in the opinion of the court, the newspaper advertisements of the defendant regarding the warning against mixing the two names of the companies, in general, cannot have any significance.

The Senate also took into account that the defendant had a trading house in the very place where the main business of the "*Durunch"* factory had previously been located. Moreover, based on the circumstances of the case, the plaintiff had notarised a warning to the defendant about the inadmissibility of using such a firm name, the defendant ignored this, but later nevertheless removed the sign. The court notes that the plaintiff's firm has existed for quite a long time, while the defendant only recently began trading in tobacco products, and, in addition, he had previously had permission from the plaintiff

[34] Sankt-Peterburgskij Kommercheskij Sud, opredelenie ot 13 dekabrya 1882 g. // Vil'son, V. Sudebnaya praktika po torgovym dъlam: rъsheniya S. Peterburgskago Kommercheskago Suda i Pravitel'stvuyushchago Senata (4 D-ta i Obshchago Sobraniya). S.-Peterburg: Knizhnyj magazin yuridicheskoj literatury D. V. Chichinadze, 1896, pp.176-177, D. № 97.

(i.e., in fact, was actually acquainted with him) to trade under his firm, but then lost this privilege, and therefore the court finds that when the defendant requested permission to trade under the firm *"Durunch"* from the Merchant Board, he set himself the goal of attracting a clientele familiar with the products of the plaintiff's factory. The Senate found that the "guarantee" against error and confusion of firm names, which the defendant spoke of, not only does not prevent confusion, but on the contrary is aimed at misleading public. Thus, the Governing Senate recognises the plaintiff's right to exclusive use of the firm as violated, approving the judgment of the St. Petersburg Commercial Court.[35]

4. CESSION AND TRANSFER OF A FIRM

Many questions arise regarding the assignment (cession) of a firm. Can it be considered the same asset as the property of the enterprise? Does the firm pass as an inheritance to the descendants of a deceased merchant or entrepreneur? How should the sale or transfer of a firm for use take place? Pre-revolutionary legislation had never developed a specific answer to these questions, except for unadopted bills (which are discussed below). Difficulties also arose in the doctrine, in which the issues of assignment and transfer of a firm were raised by far from all authors who wrote about trade law and the firm in particular. Well, then, let us consider the theoretical and practical part of this issue in the final section of our article. In French law, as in pre-revolutionary law, there were no special provisions regarding the transfer or assignment of a firm. However, A. Klotz (1898) believed that the transfer of a firm is entirely legally possible, indicating that when such a transfer does not have some illegal motive or will not contribute to unfair competition, then it occurs together with the transfer of business from one person to another. He also emphasises that when a commercial establishment is transferred, it will be natural that the public and clientele will be informed of the change of owner (for example, through the press – Auth.), but the name will remain the same, as will all the customs and traditions of the enterprise that previously constituted its reputation.

At the same time, noting an interesting detail, Klotz is of the opinion that the right of the recipient of the firm is not absolute, and the right of ownership of the firm is not transferred (unless the parties have agreed otherwise) forever. He mentions that there is a custom of commercial turnover, according to which the buyer of a firm can continue to use the old name of the predecessor for some time to "transfer" the clientele, but after such a period the heirs of the seller (if he died, here it is logical to imagine that this could be the seller himself, if he is alive at this time) can demand to stop using the old name of the firm in order to avoid abuses (Klotz, 1898, pp. 79-81). Apparently, it was this postulate that the Governing Senate used in the judgment of 1891, confirming the right of the plaintiff to demand the termination of the use of the firm even after its sale to the defendant (concerning this case, see below).[36]

[35] Pravitel'stvuyushchij Senat (4 Departament), Ukaz ot 1883 goda 8 dekabrya dnya. // Vil'son V. Sudebnaya praktika po torgovym dьlam: rьsheniya S. Peterburgskago Kommercheskago Suda i Pravitel'stvuyushchago Senata (4 D-ta i Obshchago Sobraniya). S.-Peterburg: Knizhnyj magazine yuridicheskoj literatury D. V. Chichinadze, 1896, pp. 172-175, D. № 96

[36] Pravitel'stvuyushchij Senat (4 Departament), opredelenie ot 13 iyunya / 31 oktyabrya 1891 g. № 904/1526 // Grebner, V. Praktika 4-go Departamenta i Vtorogo Obshchago Sobraniya Pravitel'stvuyushchago Senata po torgovym delam 1889-1896 gg. Chast' II. S.-Peterburg: Tipografiya M. M. Stasyulevicha, 1896. № 34, pp. 68-71.

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Another French scholar, Marcel Oudinot (1912), in an article on the transfer of a firm in German law, mentions that the buyer of a firm does not have the right to use it for any other type of business, and can only use it to continue doing business with the enterprise that was intended for him. He also noted that German law has deduced three conditions under which the acquisition of a firm is possible, namely: 1) the affiliation of the assignor and the acquirer to "*Vollkaufmann*", i.e., to the so-called "*full merchants*"; 2) the acquisition of the firm by him of a business managed by the assignor, and 3) the obvious consent to the sale of the firm of the assignor, or his heirs (Oudinot, 1912, pp. 360-362). Thus, on this account Rosenberg (1914) notes that French practice allows the transfer of a firm only between those persons who, according to French Code of Commerce, can be recognised as trade and industrial entrepreneurs. In the realities of the Russian Empire, such a characteristic did not exist exactly: thus, the fact that a certain person was engaged in some trade and industrial activity was confirmed by industrial certificates, and the person's belonging to the merchant class, in turn, was confirmed by the payment of guild fees (in the guild to which the merchant belonged). At the same time, from the point of view of pre-revolutionary law, transactions regarding the right to a firm could be concluded by all the people who, according to the law, had the right to conclude contracts (Rosenberg, 1914, pp. 129; 131).

J.-A. Lallier (1890) discusses the question of whether a legal successor can conduct business under the name of his predecessor. He believes that he can, but not fully: he can use the name of the firm in various business documents, signs, etc., but he must accompany it with his own name – otherwise, he believes, he will present himself as an agent or manager of his predecessor, which he, by definition, cannot be, and thereby mislead the public. At the same time, the legal successor has the right to conclude an agreement with his predecessor, according to which he will have the right to use the name of the firm for a certain period of time. If there is no such agreement, then the firm can be used for as long as it takes to "transfer" the clientele. The heirs, believing that their name was on the sign for a long enough time, will have the right to go to court for protection in order to restore their right to the exclusive use of the name (Lallier, 1890, pp. 411-412). The French scholar A. Auschitzky (1909) in his doctoral dissertation on the commercial name (firm) defends the point of view that it is impossible to transfer a firm separately from the enterprise and all the components of its business, since the enterprise together with all its elements (including the firm) is an inseparable whole, and the firm itself without the enterprise is, in fact, nothing. He suggests imagining three options in which a firm is alienated from an enterprise, and how this situation would look: 1) the owner of the enterprise sells his entire business to one recipient, and sells the firm to someone else; 2) a merchant who left the business, whose business was liquidated, after a few years suddenly decides to sell his (no longer operating) firm to someone else, and 3) a merchant leases out his own firm without a clientele. In such cases, in his opinion, even if such a transaction took place, the acquirer has no right in any way to claim the title of successor of the former owner of the firm, and by acting in this way, the acquirer misleads third parties (i.e., the public) regarding his status (Auschitzky, 1909, pp. 131-132). Auschitzky's position, by the way, is expressed in the German Commercial Code of 1897, Article 23, according to which a firm cannot be sold without the commercial enterprise for which it is used.[37]

The French scholar Roger Lévy (1905) in his doctoral dissertation on the commercial name (and at that time several such dissertations were defended in France at different universities) also mentions the rare practice of leasing a firm. Such an

[37] *Handelsgesetzbuch* (Deutschland), vom 10. Mai 1897, RGBl. 1897, Nr. 23, p. 219 – ff.

operation can occur in two cases – illegal (for fraud and misleading the public), and, on the other hand, completely legal, and then the leasing of a firm can be permitted, but in such a case that the lessee of the firm assumes responsibility for all operations and transactions that take place under his name (Lévy, 1905, pp. 69-71). The Paris Court of Appeal, in its judgment of 18 February 1904, asserts that the assignment of a firm is a commercial act that does not require the parties to the transaction (i.e., the counterparties) to draw up a written act, and can be confirmed by means of witnesses or presumptions of fact.[38] It is interesting that both draft laws on the firm, which existed in the Russian Empire in 1910 and 1911, assumed exclusively written confirmation of the transaction on the transfer of the firm.[39]

Let us consider the judgment of the Governing Senate of June 13/October 31, 1891, No. 904/1526, which is one of the central precedents on the issue of the assignment of a firm in pre-revolutionary law. The case began at the Moscow Commercial Court, which handed down a judgment on the case at the end of 1889. The plaintiff, R.A., sold to the father (already deceased at the time of the trial) of the defendant Yu. F. a coffee shop in Moscow on Tverskaya Street together with the furnishings and all the goods, however, as the plaintiff claimed, not with the firm, and therefore he, the plaintiff, demanded that the sign with the name "R.A." be removed from the store. The defendant, citing the testimony of witnesses, claimed that the firm was also sold along with the store. However, the court ruled in favour of the plaintiff, stating that no written evidence of ownership of the firm was provided, and witnesses were not present at the final transaction for the sale of the store, but were present only at preliminary negotiations. Therefore, the court ordered that the sign with the firm "R.A." to be removed from the store within two weeks, thus satisfying R.A.'s claim (Pustorosleva, 1891, p. 167).

The commercial court's ruling was appealed by the defendant to the Governing Senate, which heard the case in the second (and final) instance. The court, first of all, finds that the plaintiff has every right to use his first and last name (i.e., the court thereby unambiguously recognises the right to a name, which actually was never done in pre-revolutionary legislation), including in commercial life, and the defendant would have the right to trade under the plaintiff's first and last name only under certain circumstances – with his consent, or with the presence of certain acquired rights. Therefore, the court recognises the plaintiff's claim as entirely valid, noting that the outcome of the case would depend on whether the defendant can provide evidence that he has the right to use the plaintiff's firm name on the sign in his store. The defendant based his right to use the plaintiff's name on the sign on the fact that his father had acquired the firm in perpetuity together with the store itself (and, accordingly, the store along with all its accessories had been inherited by him); the defendant, in accordance with his father's testament, was his heir, and hence his right to use the sign with the firm "R.A." on the establishment arose. In this regard, he referred to the testimony of two witnesses, M. and F. (who took part in the proceedings at the court of first instance), as well as the content of the petition to the Moscow Chief of Police, dated April 19, 1889.

The Governing Senate, considering the testimony of witness M., notes that, according to him, in 1882 the plaintiff invited the witness to his place and told him that he was selling him the establishment together with all the furnishings, goods and firm, and since they had not entered into any written agreement on this matter, he stated that

[38] Cour d'Appel de Paris, 18 février 1904, Dalloz. Jurisprudence Générale. Recueil périodique et critique de jurisprudence, de legislation et de doctrine. Année 1907. Paris: Au Bureau de Jurisprudence Générale., II Partie, pp. 201-205 (Dall. Per. 1907 II 201, pp. 201-205.).

[39] See chapter "Historical development of the firm".

he wanted M. to be a witness to the sale. Witness M. also noted that by the word "firm" they understood the commercial name of the establishment (as a firm should be understood according to the overwhelming majority of doctrine and judicial practice), and that the sale was not conditioned by anything, and was not made for any specific period (i.e., during which the defendant could use the plaintiff's firm). Witness F., who worked as a servant in the coffee establishment, reported that the plaintiff, when selling the establishment, asked her to stay, saying that he "*was leaving his last name in the trade*." From this testimony, the Governing Senate concludes that the firm was nevertheless assigned, however, this testimony of witnesses does not provide grounds to say that the defendant thereby acquired an indefinite and unconditional right to use this firm, in the opinion of the court, in the words of the plaintiff, cited by the witnesses, there is no indication of such a right, and the words of the witness M. that this sale of the establishment was not made for a period and did not depend on any conditions, the court regarded as the personal opinion of the witness, rather than the confirmation of something that he actually saw or heard. As for the plaintiff's petition to the Moscow Chief of Police, it also did not prove the defendant's exclusive rights to the plaintiff's firm, but rather the opposite, since it stated that the plaintiff allowed the defendant to use his firm on the sign along with the medal, but until the plaintiff's first demand that it be removed (which is what eventually happened – Auth.). Confirmation of the temporary right to use the plaintiff's firm A. was also confirmed in the defendant's father's letter to the plaintiff in 1886, as well as in the plaintiff's petition to the post office to remove obstacles to receiving correspondence in the store that previously belonged to the plaintiff, moreover, the defendant's father did not refer to the right to the firm acquired by him, but claims that the plaintiff does not trust him enough.

In the plaintiff's petition to the post office, the Governing Senate saw an important detail: the plaintiff asked to transfer correspondence addressed to the store in the name of the defendant's son, but not indefinitely, namely until September 1, 1886, from which the court concludes that if the plaintiff had transferred the right to the firm indefinitely, then he would not have set such time limits, and third parties should have been notified of the change in the owner of the store, which was not at all in the case materials, and which the defendant did not mention at all. Thus, it remains unproven that the defendant's deceased father acquired an unconditional, perpetual right to use the plaintiff's firm, and the Governing Senate notes that there is no reason to enter into an assessment of the evidence of the transfer of the firm to the defendant as an inheritance from his father. The Senate concludes that the plaintiff's permission to the defendant's father to use the firm was temporary, although it did not specify a time limit, and given the plaintiff's expressed reluctance to have the defendant engage in trade in the coffee shop under a sign containing his name and surname, the Senate found the commercial court's ruling to be correct and upheld it, thus dismissing the defendant's complaint.[40] The Governing Senate also spoke about the legal nature of the firm. Here we will briefly indicate its main statements:

- The trade legislation (i.e., the Statute of Commerce and other legislative acts) does not know the concept of trade "*under the firm*" for sole proprietors and merchants, but knows this only in relation to partnerships;

[40] Pravitel'stvuyushchij Senat (4 Departament), opredelenie ot 13 iyunya / 31 oktyabrya 1891 g. № 904/1526 // Grebner, V. Praktika 4-go Departamenta i Vtorogo Obshchago Sobraniya Pravitel'stvuyushchago Senata po torgovym delam 1889-1896 gg. Chast' II. S.-Peterburg: Tipografiya M. M. Stasyulevicha, 1896. № 34, pp. 68-71.

- trade of an individual "*under the firm*" is not prohibited, and it is permitted to the extent that it does not contradict civil and commercial life;
- the acquisition of the right to a firm is a property value, and can be carried out by any means known to the law by which movable property is acquired, including by means of an agreement;
- the right of an individual to trade under a firm may become the subject of a contract between two private individuals, and, moreover, since the law does not provide for the mandatory conclusion of a contract – written or verbal – for the acquisition of movable property, the Senate considers the right of an entrepreneur to trade "*under a firm*" as a "composite" right, providing for certain powers that may not always be possible to "verbally" transfer between counterparties;
- the acquisition of the right of an entrepreneur to trade "*under a firm*" is often associated with obligations towards third parties, which in most cases requires such a transaction (i.e., the sale of a firm) to be in writing;
- the trade reputation, based on credit and personal trust, is very important in the commercial world, therefore, agreements on the transfer of a firm are characterised not only by a property but also a personal element, due to which only that entrepreneur who has acquired the right to a firm untimely and unconditionally can be recognised as the one who already has his own personal right to the firm, independent of the previous owner.
- the Senate concludes that if the transaction for the transfer (assignment) of the right to a firm is concluded not in writing, but in oral form, the evidence of the transfer of the firm and its conditions should be checked with particular caution.[41]

The next case raises two issues: who inherits the firm in the event of the death of the testator who owned it, and whether a perpetual lease agreement can grant ownership of the firm. The answer to these questions was given in the ruling of the St. Petersburg Commercial Court on November 13, 1889, and this judgment was upheld on appeal by the Governing Senate on June 26, 1890. Both of these court judgments have survived to this day thanks to publication in professional literature, so we will consider them both. Thus, the plaintiff Sh.-P., by means of a deed of sale, at the end of 1887 acquired from the city dweller P. two tea shops in St. Petersburg at No. 30-31 on Zerkalnaya Line of Gostiny Dvor, which the citizen P. had received by inheritance from the merchant G.; in 1889, the city dweller P. transferred the firm "I.G." to plaintiff in full ownership, the firm was so called in honour of the first owner of the establishment. Then the merchant M., to whom tea shop No. 30 was leased, himself began to use the firm "I.G." The plaintiff's attorney in the suit against the merchant M. claimed that the term of the lease agreement with the widow of the deceased merchant I.G. expired on April 20, 1889, meanwhile, the merchant M. moved his trade to another premises and continued to use the firm "I.G." and therefore, the plaintiff's attorney demanded that the merchant M. be prohibited from using a firm that did not belong to him.

The court finds that initially under the firm "I.G." was conducted by the deceased merchant I.G. himself, and if during his lifetime the right to use the firm was forever assigned to someone else, then the right of ownership of the firm, as property

[41] *Ibid*.

representing a certain kind of value (verbatim from the court judgment), and being an integral part of the enterprise, passes from the testator to the heirs on the general basis of the Volume X of the Restatement of Laws, p. 1, Articles 1254 and 1258. Based on the fact that the plaintiff acquired the right to the firm together with all the trading premises from the city dweller P., who was the heir of the deceased merchant I.G., then, as the court believed, she should be recognised as having the right to sue the merchant M. for the fact that he uses her firm in the course of his trade. The court considered the defendant's objections and found that back in 1867, the merchant M. and his colleague I. entered into a contract with the merchant I.G. for the lease of the tea shop No. 30 for a period of six years for the trade in tea, sugar and coffee, with the right to receive all customer demands, as well as all correspondence that was addressed to the shop. Along with this, the contract also stipulated the right of M. and I. to use the firm I.G., although we note that this contract did not say anything about the transfer of the right to perpetual use of the firm, or its purchase, etc.

The court, drawing attention to this, asserts that if the contract of 1867 mentioned the transfer of the firm, then such transfer refers to the assignment for the term of the lease agreement, therefore the above-mentioned contract did not give the defendant M. and I. the right to ownership of the firm "I.G." and did not have such a purpose to establish it. The court examined the second contract, between the defendant M. and I., by which I. transferred all his rights under the partnership contract to M. in 1880, and said that the said document was also of no importance from the point of view of proving M.'s right of ownership of the firm, since I. could only transfer in the contract to M. those rights in relation to the trading enterprise which he himself had, and he, as is known, did not in any way own the right to the firm "I.G." M.'s attorney asserted that in the contract concluded with the widow of the merchant I.G. in 1873, M. and I. recognised themselves as the owners of the firm, and the widow of the merchant I.G. signed this agreement, but the court also does not accept this argument in consideration of the fact that the fact that M. and I. mistakenly indicated themselves as the owners of the firm, while having the right to the firm on the basis of a fixed-term lease agreement, could not change their right in any way, and the consent to transfer the use of shop No. 30 to merchant M. (to the defendant, and judging by the text of the agreement, only to him) implied only consent to the transfer of rights and obligations under the lease agreement to M., for the transfer of the firm to I. to M. such an agreement of the widow of the deceased merchant was no longer required. Finally, M.'s attorney claimed that defendant had acquired the firm by prescription, but the court did not agree with this argument either: until 1880 M. and. I. used the firm on the basis of fixed-term lease agreements, from the same year M. began to use the firm alone, and before the claim was filed, 10 years had not passed, as a result of which the court concludes that the defendant M. has no right to use the firm "I.G.".[42]

An appeal was filed against this judgment to the Governing Senate, and without recounting all the circumstances of the case again, which is unnecessary; we will note that the Senate points out that M. obviously did not consider himself the owner of the tea shop. Firstly, in 1881 he again entered into a lease agreement with the widow of the deceased merchant I. G., to whom, according to her husband's will, the tea shop was left for lifelong possession, the defendant managed to wring out for himself the terms of

[42] Sankt-Peterburgskij Kommercheskij Sud, rѣshenie ot 13 noyabrya 1889 g. // Vil'son, V. Sudebnaya praktika po torgovym dѣlam: rѣsheniya S. Peterburgskago Kommercheskago Suda i Pravitel'stvuyushchago Senata (4 D-ta i Obshchago Sobraniya). S.-Peterburg: Knizhnyj magazin yuridicheskoj literatury D. V. Chichinadze, 1896, pp. 177-180 (D. № 98).

lifelong use (not into possession! – *Auth*.), which he would not have had any need to do if the firm belonged to him. The Senate also commented on the agreement between M. and I. from 1880, in which they are designated as the owners of the firm, and the court notes that this cannot have decisive significance, since the following year M. again entered into a lease agreement, from which it follows that he could not in any way be the owner of the firm. The appellant also claimed that I.G. was aware during his lifetime that he had transferred the firm to the defendant as his property, but the court points out that if this were actually the case, he would have mentioned this in his will. The Governing Senate does not consider M.'s argument that he has been using the firm for over 20 years to be valid, since he used the firm on the basis of fixed-term lease agreements, and the right to use the firm each time fell within the term of these lease agreements, and it is obvious that such a right of use cannot give ownership. The Senate thus concludes that M.'s ownership of the firm "I.G." has not been proven, and that he had no right to use the firm "I.G.", having upheld the previously mentioned judgment of the St. Petersburg Commercial Court.[43] Let us briefly outline the main theses regarding the firm law based on this case:

- The firm is a "known value", and obviously is a *property*, and it can be inherited like any other property. Since the courts in this case repeatedly mention property rights to the firm, it is obvious that the right to the firm is a property right. The firm can also be inherited;
- The firm can be leased to another person, and he can use it for as long as stipulated in the lease agreement. However, neither a fixed-term lease agreement, nor even an indefinite one, gives ownership rights to the firm. Only the complete acquisition of the enterprise with the firm gives such a right.
- Obviously, the very fact that the merchant's firm, named after his first and last name, is used by another merchant for a certain period of time on the basis of an agreement, is not contrary to the civil and commercial principles of law and trade customs.

The following case also concerns the question of the assignment of a firm, the right of ownership and the right to use the firm, and was resolved by the Governing Senate in the ruling of February 6, 1892 as the court of appeal in this case. In the deed of February 1, 1878, the plaintiff sold some movable property (shops) to the merchant A., and also allowed him to use the firm "E.O.B." In a receipt dated June 29, 1881, she indicated that she had nothing against the use of the firms by another merchant K., to whom the merchant A. sold these shops. Then these shops passed into the ownership of merchants M. and K., against whom the plaintiff filed a claim in the Moscow Commercial Court with a demand to remove the sign with the firm in one of the shops.

The commercial court rejected this claim, on the grounds that the firm should be recognised as movable property, and the firm can be transferred, just like any movable property, from one person to another; the court referred to the prevailing trade custom that a firm is transferred together with the goods and other accessories, and is also transferred from one person to another, which can often lead to the fact that under a firm with one name and surname, a person with a completely different name and surname is

[43] Pravitel'stvuyushchij Senat (4 Departament), opredelenie ot 7 iyunya 1890 g. № 871 // Grebner, V. Praktika 4-go Departamenta i Vtorogo Obshchago Sobraniya Pravitel'stvuyushchago Senata po torgovym delam 1889-1896 gg. Chast' II. S.-Peterburg: Tipografiya M. M. Stasyulevicha, 1896., № 36, pp. 73-76.

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already trading, and then, that according to the above-mentioned act of appearance, the plaintiff B. had already sold her stores together with the companies to the merchant A., who decided to sell them to the merchant K, and the merchant A., moreover, informed the plaintiff about this. The court also found that the plaintiff had not proven that the stores were sold without the firm, and that she reserved the right to consent to its use when transferred from one owner to another, and finally, the court asserts that at the present time (i.e., at the time of the consideration of the case) the owner of the store is merchant K., and that he acquired the stores together with the firms from merchant A., and that he has the right to sell them (including with the firms) to other persons, or transfer them into temporary possession, which he did in favour of merchants M. and K. on August 31, 1888. Based on these arguments, the court decided to dismiss the claim.[44]

The Governing Senate overturned this judgment of the commercial court and concluded that the court of first instance based the property rights of the defendants M. and K. on a receipt issued by the plaintiff in 1881, which allegedly certified the fact of transfer not only to the stores (which were not in dispute), but also to the disputed firms. Meanwhile, based on the text of the receipt issued to merchant K., who acquired the store from merchant A., it is said only that she granted him the right to use the firms, and also that there were no obstacles on her part in terms of merchant K.'s use of these same firms. However, there was actually no talk of her completely transferring or selling the firms to either merchant A. or merchant K. At the same time, the defendants' attorney argued the opposite: he believed that the meaning of the receipt was that the plaintiff transferred the firm to merchant A. (to whom she first sold the stores) precisely as property, since she did not stipulate her right to dispose of this firm in any way, or the right to express her consent to the transfer of the firm from one merchant to another, and during the period from 1878 to 1891, she allegedly did not exercise her rights to the firm in any way.

But the Senate did not agree with these arguments, considering that the firm is the name and surname of the plaintiff, and by this fact alone it can be considered her property, thus, it is the defendants who must prove that the plaintiff renounced her right to the firm (in their favour, or in favour of their predecessors), and added that the absence of any stipulation in the receipt (or anywhere else in the documents) about how the plaintiff will dispose of her right to the firm is of no importance, and the manifestation of the plaintiff's right of ownership of the firm could well be expressed in the receipt itself. If the firm belonged to merchant A., then the consent of the plaintiff would not be required to transfer the right to use the firm to merchant K., and the fact that merchants A. and K considered it necessary to obtain the consent of the plaintiff to transfer the firm proves that they did not consider the firm to be their property. It follows that the ownership of the firm of merchant A. remained unproven, just as such ownership of his successors, including defendants. Whereupon, the Governing Senate overturned the judgment of the commercial court and ordered the defendants to remove the sign with the firm "E.O.B." from their trading establishment.[45]

There is another well-known case in the practice of the Governing Senate (at that time, the Judicial Department) related to the protection of the right to a firm, the judgment on which (decree) was issued on January 24, 1914. The plaintiff, N. B., filed a lawsuit against the defendant S. for using the name of the firm "Vladimirskoye Bureau of Funeral

[44] Yuridicheskij vѣstnik [Legal messenger]. 1891. Tom VII. Kniga pervaya (yanvar'), p.167.
[45] Pravitel'stvuyushchij Senat (4 Departament), opredelenie ot 6 fevralya 1891 g. № 191 // Grebner, V. Praktika 4-go Departamenta i Vtorogo Obshchago Sobraniya Pravitel'stvuyushchago Senata po torgovym delam 1889-1896 gg. Chast' II. S.-Peterburg: Tipografiya M. M. Stasyulevicha, 1896., № 35, pp. 71-73.

Processions B.", namely, for actions in the form of naming his funeral bureau "Vladimirskoye," "*first in execution*", and indicating the surname "B." both on the establishment's signs and in business documentation. The court, however, refused to satisfy the plaintiff's claim, citing that the plaintiff does not use the firm B., and that the defendant has the right to use the funeral bureau's firm by virtue of an agreement that was concluded in February 1912 with V. B. (maybe, some relative of the plaintiff). The Senate, however, disagreed with this conclusion, considering the issue of evidence that the plaintiff also used this firm. And here is what was found: the plaintiff, N.B., presented invoices in the name of the firm for 1909-1911, which were written in the name of the firm "First Vladimirskoye Bureau of Funeral Processions N.P.B." Then plaintiff presented numbers of local newspapers in which advertisements were published in 1909-1910 on behalf of the same firm, and the Senate further points out that, as is evident from the certificate of the Merchant Council of 1912, the plaintiff continued to conduct his business under the same firm. The defendant relied on the fact that on the sign of the plaintiff's establishment there was a slightly different inscription, namely: "A government-authorised bureau of funeral processions. First Founding N.P.B. Founded 1892".

However, the Governing Senate notes that this fact is not of fundamental importance, since this inscription does not contain the name of the firm, and as is often the case in commercial life, the name of the firm is not always placed on the signs. Thus, the question of whether the plaintiff used his firm is resolved in the affirmative. Now the Senate moves on to the question of whether the defendant has the right to use the bureau with the surname "B.", since this surname is of great importance for the plaintiff's firm, and the court comes to the following conclusions. The defendant bases his right to the firm (i.e., to use it) on the basis of a contract signed with a relative of the plaintiff, to whom he sold him a funeral home with the right to use the firm. The Senate notes that, based on the certificate of the Merchant Board, since September 1910, the funeral home of N.P.B. was located at the address of the enterprise, and since February 1912, another funeral home also existed at the same location, but the contract was signed by the defendant, peasant S., and no other funeral homes were observed in this premises. Meanwhile, in February 1912, the Merchant Board issued an industrial certificate to the V. B., which gave him the right to maintain a funeral home, but before that time, he had never been issued such a certificate.

The Senate thus establishes that despite the fact that the plaintiff's relative chose an industrial certificate for maintaining a funeral home, he did not actually maintain one, which means that the defendant could not have acquired a funeral home from him. The Governing Senate concluded that since the surname "B." is, without a doubt, the most important part of the firm name of the plaintiff's establishment, and the plaintiff used this firm much longer than the defendant, therefore, the defendant, by using the firm B., who in fact did not own this firm, violates the interests of the plaintiff, and therefore has no right to use the plaintiff's firm either on signs or use it in business documentation. The Senate also emphasised that the name of the defendant's firm, which includes "Vladimirskoye", already gives grounds to talk about the confusion of the firm's name with the plaintiff's establishment, and thus, it misleads the public. Thus, the Governing Senate, on the one hand, having recognised the claim as unproven in the part prohibiting the defendant from using the name "*first in execution*", satisfied the claim in another part – in the requirement to prohibit the defendant from using the name of his bureau "Vladimirskoe" and the surname "B." Thus, defendant S. was prohibited from using the

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name of the funeral home he owned, the name "Vladimirskoye" and "B.", both on signs and in documentation.[46]

5. CONCLUSION

With the development of trade and industrial relations, there arose a need for some kind of marking of trade establishments, distinguishing one establishment from another. Thus, in the German Code of Commerce of 1861, from which pre-revolutionary scholars often drew ideas, this name of the establishment was called "firm", which was then interpreted under different names, for example, "trade name" and "commercial name". Both the majority of European and the majority of pre-revolutionary scholars understood the firm as the name of the merchant under which he conducts his business, signs and uses it in documents. This definition was modelled on Art. 15 of the German Code of Commerce and the commentary of W. Endemann; other legislation of that time, most often, did not provide a clear definition of what a firm is and how it should be understood (for example, in France, in commercial life, as well as in judicial practice, the terms "*raison sociale*" and "*nom commercial*" were developed). It was very difficult to determine the history of the emergence of the firm, its main differences from trademarks in earlier times. We can trace the history of the firm in the works of scholars from Europe (Haab, Kohler, Klotz, Deshayes de Merville), as well as from the USA (Rogers), who noted in their works that although the firm is a relatively modern concept, its prototypes appeared both in antiquity and in the Middle Ages.

Pre-revolutionary scholars (Shershenevich, Danilova) linked the emergence of the firm with the practice of merchants in the Middle Ages to mark their establishments with drawings and coats of arms in the manner of coats of arms in aristocratic dynasties, and appearance of written names of firms – with the development of literacy among the population. An analysis of the legal support for the concept of "firm" in the Russian Empire showed, on the one hand, a developed doctrine of this issue, often built on the basis of foreign law, and on the other hand, a complete absence of any legislative regulation (despite four bills in the 1880s and 1910s), the gaps of which were filled by scientific literature and judicial practice. Thus, complex theoretical issues of the functioning of firms are considered by scientists Bashilov, Hol'msten, Udintsev, Fyodorov, Kaminka, Nevzorov, Rosenberg, Danilova. For example, Holm'sten put forward a theory of the exclusive right to use a firm, which was expressed in filing a claim for damages and compensation for damage caused on the basis of Art. 684 of Volume X of the Restatement of Laws, p. 1, Rosenberg in his dogmatic work on firms examined many issues of foreign laws and judicial practice on this topic, and Bashilov was one of the first to raise the issue of firm registration, and was also one of the first to comprehensively present the concept of a firm in pre-revolutionary literature (earlier this topic was touched upon, as far as we know, only by Columbus in an article of 1882. Danilova in her article "Firm and Enterprise Name" (1915) conducted a comprehensive analysis of the firm legislation of the 19th - early 20th centuries in the German, French and Swiss codes of commerce. It should be noted that pre-revolutionary literature was very often built on foreign examples of legislation and sometimes, judicial practice, as well as foreign doctrine of firm law. Such scholars, whose works were cited in this article, include

[46] Pravitel'stvuyushchij Senat (Sudebnyj Departament), ukaz ot 24 yanvarya 1914 g. № 186. Pravo. Ezhenьdel'naya yuridicheskaya gazeta [Law. Weekly legal newspaper]. 1914 g. № 11, Voskresen'e 16 marta., pp. 933-934.

Endemann, Haab, Lallier, Klotz, Oudinot and some other authors. Among the postulates developed in the pre-revolutionary doctrine and judicial practice, we can cite the following:

1. A firm is the name under which a merchant or partnership conducts trade, as well as conducts all business and documentary part of it. Sole merchants, as a rule, conducted their trade under their own name, partnerships chose other names, or indicated in the name the names of all full partners.
2. The exclusive right to own a firm is expressed in not allowing any use of the same names of two or more different firms, since this will lead to deception of the clientele. There were different ways to protect the right to a firm, the effectiveness of each, however, raised questions and doubts among scholars.
3. The right to a firm is a property right that can be inherited, like any other property. In the judgment of 1892, the Governing Senate recognised a firm as movable property.
4. A firm can be assigned or sold in any way, including by concluding an agreement to this effect. At the same time, it is not prohibited to transfer a firm in a lease agreement (i.e., for use). At the same time, the use of a firm does not give property rights to this firm. It is considered that a merchant is the owner of a firm only if there is written evidence of the acquisition of the firm. Otherwise, it will be extremely difficult to prove property rights to the firm.

The concept of a firm in pre-revolutionary law remained within the framework of doctrine, custom and rarely encountered judicial practice. But at the same time, scholars have managed to develop quite complex theoretical structures of the functioning of firms, often based on the best examples of legislation, judicial practice and customs of Western European countries. The authors express the hope that this study will contribute to the study of laws, doctrine and judicial practice of past centuries for a better understanding of the foundations of law in different time periods.

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