the contract of sale.[54] It is not requisite, however, that the complainant, to be protected, should be the manufacturer of the goods, it is sufficient if he attaches his name as vendor.[55]

The court of equity holds the property right in a name to be so valuable that it extends its aid to protect names assumed by corporations organized not for pecuniary profit,[56] and courts have even gone so far as to restrain the use of similar names in non-competitive trades.[57] It is believed, however, that these cases extend the rule to unreasonable proportions, and that the cases limiting the granting of injunctive relief to competitive businesses,[58] represent the better and sounder rule.

LIABILITY OF PACKER, DISTRIBUTOR, AND RETAILER FOR DEFECTS IN GOODS SOLD IN ORIGINAL CONTAINERS.—Because of the fact that canned goods and goods sold in original packages in the ordinary course of business usually pass through the hands of several parties before being put to the use for which they are intended, the courts have had to determine upon whom the liability should rest for injury suffered by reason of the deleterious nature of the product, or the defective condition of the container. In general a person who sells articles of food is under a legal duty to exercise reasonable care to insure their being wholesome and fit for consumption, and is liable in an action ex delicto on the ground of negligence for any injury resulting from their being unwholesome or unfit, if he knew, or by the exercise of reasonable care could have known their defective condition.[1] So too, in the sale of goods for immediate consumption, the weight of author-

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[54] Smith v. Brand & Co., 67 N.J.Eq. 529, 58 Atl. 1029 (Ch. 1904); O'Grady v. McDonald, 72 N.J.Eq. 805, 66 Atl. 175 (Ch. 1907); Corbett Brothers Co. v. Reinhardt-Meding Co.; Charles S. Higgins Co. v. Higgins Soap Co.; Leather Cloth Co. v. American Leather Cloth Co., Ltd., *all supra.*

[55] McLean v. Fleming; Menendez v. Holt, *both supra.*

[56] Schmalz v. Wooley, *supra;* Cape May Yacht Club v. Cape May Yacht & Country Club, 81 N.J.Eq. 454, 86 Atl. 972 (Ch. 1913); Sup. Lodge of World, etc., v. Imp. Benev. etc., 98 N.J.Eq. 598, 131 Atl. 219 (Ch. 1925); Kline v. Knights of the Golden Eagle, 113 N.J.Eq. 513, 167 Atl. 758 (Ch. 1933).

[57] Edison Storage Battery Co. v. Edison Automobile Co., *supra;* Long's Hat Stores v. Long's Clothes, 231 N.Y.S. 107 (1928). In the latter case the court rested its decision upon the fact that the clothing business engaged in by the defendant was so similar to that of the complainant, that the defendant should be enjoined from using the name since the reputation of the complainant company might be injured by the defendants use thereof.

[58] National Grocery Co. v. National Stores Co., 95 N.J.Eq. 588, 123 Atl. 740, *aff'd.* 97 N.J.Eq. 360, 127 Atl. 925 (E. & A. 1924); Leather Cloth Co., Ltd. v. American Leather Cloth Co., Ltd., *supra.* Where the defendant has honestly acquired and used a name similar to that of the complainant in a non-competitive area, he will not be enjoined from using that name upon his entry into competition with the complainant, so long as he takes proper precautions to distinguish his product from that of the plaintiff. Peerless Laundry Co. v. Peerless Service Laundry, 111 N.J.Eq. 221, 161 Atl. 832 (Ch. 1932).

[1] 26 Corpus Juris 783, and cases therein cited.

ity is to the effect that the dealer impliedly warrants the food fit to eat and free from any deleterious or poisonous matter.[2]

As to canned goods, however, the decisions are not all in accord. The liability of the packer or canner to the consumer for defects in goods sold to the latter, not by the canner, but by a retail dealer, has in general been predicated on two different theories, namely, negligence and implied warranty. By far the majority of cases brought against the manufacturer by the consumer have been under the former theory; the cases holding that a manufacturer, packer, or bottler of food sold for human consumption is required to use a high degree of care to render the contents of the container wholesome.[3]

The second theory under which a consumer has been allowed to recover from a manufacturer directly is that of implied warranty,[4] regardless of the lack of privity of contract;[5] one case holding that an implied warranty of food products dispensed in original packages exists in the absence of express warranty in favor of anyone injured by reason of their use in the legitimate channels of trade.[6] However, the cases holding that a consumer may not recover from a manufacturer on an implied warranty in the absence of privity of contract are undoubtedly the more sound.[7] A review of the cases decided in New Jersey will disclose that in no instance was the manufacturer liable to the consumer on an implied warranty of fitness.[8] While the New Jersey courts in these decisions did not deny in express language the manufacturer's liability on implied warranty, it is fairly to be gathered

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[2] Rinaldi v. Mohican Co., 171 App. Div. 814, 157 N.Y.S. 561, *aff'd.* 225 N.Y. 70, 121 N.E. 471 (1918); Maxwell v. Marsh, 173 App. Div. 1003, 159 N.Y.S. 1128 (1916), *aff'd.* 225 N.Y. 637; Catani v. Swift, 251 Pa. 52, 95 Atl. 931 (1915); Craft v. Webb, 96 Mich. 245, 55 N.W. 812, 21 L.R.A. 139 (1893).

[3] Burkhardt v. Armour, 115 Conn. 249, 161 Atl. 385, 90 A.L.R. 1260 (1932); Carbone v. California Pack. Corp., 169 Atl. 866 (Sup. Ct. N. J. 1934); Cassini v. Curtis Candy Co., 113 N.J.L. 91, 172 Atl. 519 (Sup. Ct. 1934); De Groat v. Ward Baking Co., 102 N.J.L. 188, 130 Atl. 540 (E. & A. 1925); Minutilla v. Providence Ice Cream Co., 148 Atl. 884, 63 A.L.R. 334 (1929); Richenbacker v. California Pack. Corp., 250 Mass. 498, 145 N.E. 281 (1924); Rudolph v. Coca Cola Bottl'g Co., 4 N.J.Misc. 318, 132 Atl. 508 (Sup. Ct. 1926); Sheehan v. Menkes, 8 N.J.Misc. 867, 152 Atl. 326 (Sup. Ct. 1930); Tomlinson v. Armour & Co., 75 N.J.L. 748, 70 Atl. 314, 19 L.R.A. (N.S.) 923 (E. & A. 1908).

[4] Davis v. Van Camp Pack. Co., 189 Iowa 775, 176 N.W. 382, 17 A.L.R. 649 (1920); Mazetti v. Armour & Co., 75 Wash. 662, 135 Pac. 633, 48 L.R.A. (N.S.) 213 (1913); Nock v. Coca Cola Bottl'g Works, 102 Pa. Super. Ct. 515, 156 Atl. 537 (1931); Parks v. Yost Pie Co., 93 Kan. 334, 144 Pac. 202, L.R.A. 1915C 179 (1914).

[5] Davis v. Van Camp, *supra* note 4. Holding also that it is improper to compel plaintiff to choose between tort and implied warranty.

[6] Mazetti v. Armour, *supra* note 4, where a restauranteur suffered in loss of business and reputation.

[7] Cohn v. Dugan Bros., 132 Misc. 896, 230 N.Y.Supp. 743 (1928); Minutilla v. Providence Ice Cream Co., *supra* note 3; Pelletier v. Dupont, 124 Me. 269, 128 Atl. 186, 39 A.L.R. 972 (1925).

[8] See Cassini v. Curtis Candy Co., *supra* note 3; and Tomlinson v. Armour, *supra* note 3 for a discussion of the point.

from the opinions that the consumer's recovery against one not in privity with him can be in negligence only.

In New Jersey the consumer's remedy in an action in negligence for injuries received as the result of the defective nature of food sold in original containers has been extended. In the recent case of *Slavin v. Francis H. Leggett & Co.*[9] the defendant sold to a retail dealer canned peas labeled with its own name, followed by the word "Distributor." Plaintiff bought a can at the retailer's store and in eating some of the contents injured his teeth by biting on a peeble which had been mixed in with the peas when canned. The court allowed a recovery. In his opinion, Justice Donges said, "In the instant case the label did state that the defendant was the distributor, so it may be said that it did not represent itself as the manufacturer. But we think it is a question of fact as to whether or not the label was misleading in this respect."[10] Liability is here based on the theory that the defendant might reasonably be supposed to be the manufacturer by a buyer and hence to have made itself responsible for the negligence of an undisclosed packer of its own selection.

The liability of the retailer of canned goods or goods sold in original packages to his immediate vendee on an implied warranty of fitness was not generally recognized before the passing of the Uniform Sales Act. The majority of cases therefore decided in States in which the Sales Act was not in force deny the right of the consumer to recover on an implied warranty on the ground that the purchaser, when he buys food sealed up in a container by the packer must realize that his vendor has no means of knowing the condition of the contents of the container and hence cannot be said to impliedly warrant their quality or fitness.[11] While this contention is not without merit the same reasoning can be applied in favor of the consumer. The doctrine of *caveat emptor* should have no application where the buyer has no means of inspecting or knowing the condition of the goods he is buying. The buyer is in no position to look out for himself but

[9] 114 N.J.L. 421, 177 Atl. 120 (Sup Ct. 1935) affirming 12 N.J.Misc. 549, 173 Atl. 597 (Dist. Ct.).

[10] The court approves Burkhardt v. Armour & Co., *supra* note 3, and the language of Restatement of the Law of Torts, Tentative Draft 270, quoted in that case, "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer. By putting a chattel out as his own product he induces reliance upon his care in making it; therefore, he is liable if, because of some negligence in its fabrication or through lack of proper inspection during the process of manufacture, the article is in a dangerously defective condition which he could not discover after it was delivered to him. The rule applies only where the chattel is so put out as to lead those who use it to believe that it is the product of him who puts it out, but the fact that it is sold under the name of the person selling it may be sufficient to induce such a belief.

[11] Scruggins v. Jones, 207 Ky. 636, 269 S.W. 743 (1925); Bigelow v. Maine Central R. Co., 110 Me. 105, 85 Atl. 396, 43 L.R.A. (N.S.) 627 (1912); Julian v. Laubenberger, 16 Misc. 646, 38 N.Y.Supp. 1052 (1896); Kroger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933).

must rely upon the manufacturer's duty to exercise the proper degree of care in the packing of his product,[12] and upon his vendor's implied warranty as to the fitness of the merchandise.[13]

Under the Uniform Sales Act,[14] the weight of authority holds that the retail dealer impliedly warrants the quality of the canned goods which he sells to the consumer.[15] But when the buyer does not rely upon the dealer's selection but asks for a product by its trade name, or picks out a particular brand of his own choosing, the Act provides that no warranty shall be implied.[16] The implication of a warranty depends of course upon the buyer's making known to the dealer the use for which the goods are required,[17] but as the court said in *Rinaldi v. Mohican Co.*,[18] "We think the mere purchase by a customer from a retail dealer in foods of an article ordinarily used for human consumption does by implication make known to the vendor the purpose for which the article is required. Such a transaction standing by itself permits no contrary inference." Although the subject matter of the suit was a piece of fresh meat, the language used is general and has equal application to food sold in sealed containers.

The Restatement of the Law of Torts[19] presents an interesting discussion of the responsibility of a retailer of goods sold in original packages to the consumer. It is there suggested that even though the buyer asks for goods of a particular brand, the retailer should be charged with a duty to warn the buyer of any defect in the container which may come to his attention or which in the ordinary course should come to his attention in the handling of the product. This is a salutory principle. It fixes liability on the retailer where otherwise there might be none. If he has allowed the goods to stand too long on his shelves or has allowed the heat and cold to spoil the contents of otherwise perfect appearing products, he alone knows of the latent defect and he should be liable to the unsuspecting customer who is injured by reason of his failure to warn the buyer.

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[12] Tomlinson v. Armour, *supra* note 3; Davis v. Van Camp, *supra* note 4; Nock v. Coca Cola, *supra* note 4.

[13] Chapman v. Roggerkamp, 182 Ill. App. 117 (1913) (holding that a general warranty should apply for reasons of public safety).

[14] Section 15, subsec. (1) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

[15] Burkhardt v. Armour, *supra* note 3; Griffin v. James Butler Grocery Co., 108 N.J.L. 92, 156 Atl. 636 (E. & A. 1931); Pelletier v. Dupont, *supra* note 7; Ward v. Great A. & P. Tea Co., 231 Mass. 90, 120 N.E. 225, 5 A.L.R. 242 (1918).

[16] Section 15, subsec. (4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

[17] *Supra* note 14.

[18] 225 N.Y. 70, 121 N.E. 471 (1918).

[19] Sections 401 and 402.