

MCCULLOH *v.* SMITH.

*Circuit Court, S. D. New York.*

October 1, 1890.

SALE—FAILURE TO ACCEPT—REMEDIES SELLER.

Where a corporation wrongfully refused to accept and pay for certain watch movements made for it, the maker may himself sell them, though the name of the corporation was, by its direction, inscribed on each movement.

On Motion for Preliminary Injunction.

*Briesen, Steele & Knauth*, for complainant.

*Robertsons & Harmon*, for defendant.

LACOMBE, Circuit Judge. Defendant by his affidavit admits that he has sold about a dozen watch movements bearing upon them the name of the Non-Magnetic Watch Company of America, as to which he offers rip explanation or excuse. Small though this violation of his rights may be, it is sufficient to entitle the complainant to a preliminary injunction. The order, however, should except from its operation those movements which were made by Aeby & Co., at its request, for the corporation, represented by the complainant, as receiver, upon which its name was inscribed by its own directions, which were tendered to it and refused, without any other expressed ground than its inability to pay for them, and as to which Aeby & Co. have not rescinded the contract of purchase because of such failure to accept. As to those movements, the equities of the case, so far as the papers show, seem to be with Aeby & Co., and the defendant is their agent. That the inscription upon these particular movements would seem to imply that they are the goods of the Non-Magnetic Watch Company of America is immaterial. They are in fact the goods of that company; goods of which the law makes Aeby & Co. the selling agents, and as to, the proceeds of which they must account when their claim upon the corporation for the agreed price of such movements comes up for adjustment. Nor is the public in any way deceived. The movements are made by the same makers, and, for all that appears, are identically the same in character and quality with those which complainant is selling. In order to avoid embarrassment in the future, the order should, if possible, describe the excepted movements by number.