

Index.

	Pages
Notice of appeal and grounds	1 to 3
Complaint	3 to 8
Answer and counterclaim	9 to 14
Reply and answer to Defendant's Counter- claim	15 to 17
Judgment	17
Testimony	18 to 66
Motions	66 to 71

WITNESSES FOR PLAINTIFF:

Thomas A. Mellon:

Direct	20 to 24
Cross	24 to 28
Re-direct	28 to 29
Re-cross	29

Recalled:

Direct	46 to 47
--------------	----------

Adolphus F. Gibboney:

Direct	30 to 40
Special Cross	36 to 37
Cross	40 to 45
Re-direct	45 to 46

WITNESSES FOR DEFENDANT:

Marion M. Bennette:

Direct	48 to 51
Cross	52 to 61
Re-direct	61 to 63

John A. Raymond:

Direct	63 to 65
Cross	65 to 66

Motion for direction verdict	66 to 71
------------------------------------	----------

EXHIBITS.

	Admitted page	Printed page
P1. Agreement	19	72
P2. Typewritten statement	20	74
P3. Correspondence and statements ..	23	85
P4. Order No. 1361	38	138
P5. Order No. 595	38	139
P6. Order No. 648	40	141
D1. Letter	51	142
D2. Letter	51	144
D3. Statement	63	145

Notice of Appeal and Grounds.

NEW JERSEY SUPREME COURT

THE KUEBLER FOUNDRIES, Inc., a
corporation.

Plaintiff,

v.

H. J. KOEHLER MOTORS CORPORA-
TION, a corporation,

Defendant.

Action at
Law.

10

To W. Eugene Turton,
Attorney Defendant.

20

Take notice that the plaintiff appeals to the Court of Errors and Appeals of New Jersey, from the whole of the Judgment entered in this cause in favor of the Defendant and against the Plaintiff on the Plaintiff's case and from the whole of the Judgment entered in favor of the Defendant and against the Plaintiff on the Defendant's counterclaim, on the following grounds:

1. The counterclaim of the Defendant discloses no cause of action in that the overpayment to the Plaintiff therein set forth appears to have been voluntary and not to have been induced by fraud or a mistake.

30

2. The Trial Court granted the Defendant's motion for the direction of a verdict in favor of the Defendant and against the Plaintiff, whereas said Court

40

Notice of Appeal and Grounds

should have denied said motion and submitted to the Jury for its verdict, the questions involved in the issues.

10 3. The Trial Court directed a verdict in favor of the Defendant and against the Plaintiff on the Defendant's counterclaim, whereas the Court should have refrained from said action and have submitted to the Jury for decision, questions involved in the issues.

20 4. The Trial Court refused to grant the motion of the Plaintiff for the dismissal of the counterclaim of the Defendant, whereas such motion should have been granted, the overpayments therein claimed by Defendant according to the evidence produced having been voluntary.

5. The Trial Court refused to submit the evidence in said cause to the Jury for its verdict, whereas there was evidence supporting Plaintiff's case which should have been submitted.

30 6. The Trial Court refused to submit the evidence taken on the counterclaim of the Defendant to the Jury there being questions of fact involved which should have been left to the Jury for its decision.

7. The Trial Court, over the objection of the Plaintiff, permitted counsel for the Defendant to read to the Jury, letter marked "Exhibit D2" for identification and before the same was offered in evidence.

40 8. The Trial Court erroneously admitted in evidence the letter dated December 29, 1919, and marked "Exhibit D1."

Complaint

9. The Trial Court refused to permit the witness, Adolphus F. Gibboney to answer the question: "Were these castings, while they were in your possession, ever given such attention as would be necessary to make them produce at a minimum cost?"

10. The Trial Court erroneously refused to strike out the answer of the witness, Marion M. Bennette: "I did not have to" made to the question: "Is it a fact that you made no inquiry?" 10

Dated August 23, 1923.

SIDNEY W. ELDRIDGE,
Attorney of Plaintiff-Appellant.

Complaint.

20

(Filed, September , 1922.)

The Kuebler Foundries, Inc., a corporation having its principal place of business in the City of Easton, County of Northhampton and State of Pennsylvania, says that:

FIRST COUNT.

30

1. It sues for the reasonable price and value of labor done and performed and materials for the same provided, employed in the manufacture of automobile radiator parts, alterations and repairs to patterns therefor, at the times, in the quantities, and for the price set forth in the statement of account thereof hereto annexed, designated Schedule "A" and made a part of this complaint. 40

Complaint

2. The total amount due plaintiff for said labor and materials is as set forth in Schedule "A," the sum of \$4,171.45, upon which, as set forth in said Schedule, the defendant has paid the sum of \$2,673.80, leaving a balance of \$1,497.65 now due and owing to the plaintiff.

10

SECOND COUNT.

1. It sues for the price and value of goods sold and delivered and labor done and performed to and for the defendant upon a book account, of which a copy is attached hereto and designated Schedule "A."

2. No part of the balance of \$1,497.65 has been paid and said sum is now due and owing to the plaintiff.

20

THIRD COUNT.

1. On the 9th day of March, 1920, and for a long time previous thereto and ever since, the plaintiff has conducted a foundry and engaged in the business of manufacturing castings from patterns, and on or about said date agreed to manufacture automobile radiator parts for the defendant at a price of 22¢ per pound, which price the defendant agreed to pay.

30

2. Pursuant to said agreement the plaintiff manufactured such radiator parts, an account of which is set forth in Schedule "A" hereto annexed.

3. At the special instance and request of the defendant and in order that the patterns of the defendant might be used for the manufacture of the radiator parts aforesaid, on or about the 20th day of July,

40

Complaint

1920, the plaintiff altered, repaired and added to said patterns of the defendant, as per a detailed statement of such alterations, repairs and additions appearing in Schedule "A" aforesaid, for which alterations, repairs and additions the defendant agreed to pay the reasonable price and value thereof, which is \$483.03.

4. There is due the plaintiff for such automobile radiator parts, alterations, repairs and additions to patterns as will appear from the statement of account thereof contained in Schedule "A," the sum of \$1,497.65, no part of which has been paid.

The plaintiff demands as damages the sum of \$1,497.65, with interest from October 19, 1920.

SIDNEY W. ELDRIDGE,
Attorney of Plaintiff.

10

20

Schedule "A."

C. O. Nos.	Castings.	Pieces	Pattern No.	Weight	Price	Amount	Net Amount
Invoice dated June 10, 1920.							
595	Grey Iron	52	K 15 3	821			
"		53	K 15 4	852			
"		44	M 15 3	782			
"		42	M 15 4	700			
"		2	K 15 9	80			
"		11	M 15 9	473			
"		2	M 15 10	40			
				3,748	.22	824.56	
Freight allowance					.155	5.81	\$818.75
							40

30

40

Complaint

Invoice dated June 18, 1920.

595	Grey Iron	4	M 15 10	88			
"		4	M 15 9	165			
"		4	M 15 9	135			
				<u>388</u>	.22	85.36	
10			Freight allowance		.155	.60	84.76
						<u> </u>	

Invoice dated July 8, 1920.

595	Grey Iron	1	K 15 3	16			
"		1	K 15 4	16			
				<u> </u>			
				32	.22	7.04	
20			Freight allowance		.155	.05	
						<u> </u>	
			Parcel post charges			6.99	
						.46	7.45
						<u> </u>	

Invoice dated July 23, 1920.

595	Grey Iron	153	M 15 9	6,029			
"		141	M 15 10	2,711			
"		15	K 15 10	274			
30	"	62	K 15 9	2,048			
"	"	2	K 15 4	33	.22	2,440.90	
				<u>11,095</u>			
			Freight allowance		.155	17.20	2,423.70

Complaint

Invoice dated July 31, 1920.

July 20, To alterations and making new pattern equipment of the following patterns to suit their requirements as per their order #1361 of March 20, 1920:

To alterations and repairs to patterns, 11¾ hrs. @ 2.25	K 15 9,	\$ 26.44	10
To alterations and repairs to patterns 9½ hrs. @ 2.25	K 15 10,	21.38	
To alterations and repairs to core box 7½ hrs. @ 2.25	K 15 9,	16.88	
To alterations and repairs to core box 6½ hrs. @ 2.25	K 15 10,	14.63	
To making new core box for pattern 14¾ hrs. @ 2.25	K 15 9,	33.19	
To making new core box for pattern 14 hrs. @ 2.25	K 15 10,	31.50	20
To making new master pattern for 23¾ hrs. @ 2.25	K 15 3,	53.44	
To making new master pattern for 24 hrs. @ 2.25	K 15 4,	54.00	
To making new metal pattern off master 47¾ hrs. @ 2.25	K 15 3,	107.44	
To making new metal pattern off master 48½ hrs. @ 2.25	K 15 4,	109.13	30
To 12 pounds aluminum metal for above, @ 1.00		12.00	
To 20 feet 1" White Pine, @ .15		3.00	
		<hr/>	483.03

Invoice dated Oct. 19, 1920.

C. O. No.				
595 Grey Iron	25	K 15 9	850	
"	26	K 15 10	520	
"	5	K 15 3	85	
"	9	K 15 4	153	40
			<hr/>	
			1,608 .22	
				<hr/>
				353.76

Complaint

NOTE: The above castings made up on your order are held in stock by us as per your request, subject to your disposition. We hereby bill them on our regular terms of 30 days, net cash \$4,171.45

	Sept. 25, 1920,	Credit by cash,	\$100.00	
	Sept. 30,	“ memorandum,	633.80	
	Nov. 10,	“ by cash,	200.00	
10	Nov. 23,	“ “ “	100.00	
	Dec. 18,	“ “ “	75.00	
	Jan. 10, 1921,	“ “ “	75.00	
	Jan. 31,	“ “ “	100.00	
	Feb. 18,	“ “ “	150.00	
	Mar. 16,	“ “ “	150.00	
	Apr. 7,	“ “ “	150.00	
	Apr. 30,	“ “ “	100.00	
20	May 31,	“ “ “	100.00	
	June 23,	“ “ “	75.00	
	July 13,	“ “ “	65.00	
	Aug. 16,	“ “ “	75.00	
	Sept. 12,	“ “ “	75.00	
	Oct. 8,	“ “ “	75.00	
	Nov. 28,	“ “ “	75.00	2,373.80
				<hr/>
				\$1,797.65
30	Dec. 13,	Credit by cash,	75.00	
	Jan. 10, 1922,	“ “ “	75.00	150.00
				<hr/>
				\$1,647.65
	Mar. 17,	Credit by cash,	75.00	
	Apr. 10,	“ “ “	75.00	150.00
				<hr/>
				\$1,497.65

Answer.

(Filed September 30, 1922.)

The defendant, H. J. Koehler Motors Corporation, answering plaintiff's complaint, says:

ANSWER TO FIRST COUNT.

1. It admits paragraph one, insofar as it relates to labor done and performed and materials provided but denies that the prices set forth in Schedule "A" were the agreed prices for the labor done and performed and the materials provided and employed in the manufacture of automobile radiator parts, alterations and repairs to patterns, as set forth in plaintiff's complaint. 10

2. It denies paragraph two.

ANSWER TO SECOND COUNT. 20

1. It repeats paragraph one of its answer to the first count.

2. It denies paragraph two.

ANSWER TO THIRD COUNT.

1. It admits paragraph one insofar as it relates to the conduct of a foundry and business of manufacturing castings from patterns, by the plaintiff, but denies that on or about the 9th day of March, 1920, defendant and plaintiff entered into an agreement, whereby plaintiff agreed to manufacture automobile radiator parts for the defendant at a price of 22¢ per pound. 30

2. It denies paragraph two, but states that plaintiff did manufacture radiator parts for the defendant, but not at the prices alleged to have been agreed upon, as contained in Schedule "A" of the complaint. 40

3. It denies paragraph three.

4. It denies paragraph four.

Answer

Defendant denies that there is due the plaintiff the sum of \$1,497.65, with interest from October 19, 1920, or that any sum whatsoever is due plaintiff from defendant.

10 BY WAY OF COUNTERCLAIM, THE DEFENDANT, H. J. KOEHLER MOTORS CORPORATION, SAYS:

1. That on or about the 3rd day of January, 1920, the plaintiff and defendant entered into a written agreement whereby the plaintiff agreed, among other things, that the price of all labor and material to be upon the basis set forth in said agreement, to wit, first fifty sets at cost plus; balance at seven cents, and seven and five-eighths cents. That pursuant to said
20 agreement plaintiff furnished defendant with parts as set forth in Schedule "A" attached hereto and made part of this counterclaim.

2. That the said plaintiff billed to the defendant the parts furnished to the defendant at a price of 22¢ per pound, disregarding the terms of said agreement, thereby overcharging the defendant in the sum of \$879.09.

30 3. That attached hereto and made part of this counterclaim is a complete record of the transactions between the plaintiff and defendant; that Schedule "A" represents the billings by the plaintiff to the defendant, and Schedule "B," the correct billings, in accordance with the terms of the agreement of January 3, 1920.

40 4. The defendant claims judgment for the sum of Eight Hundred and Seventy-nine Dollars and Nine Cents (\$879.09).

W. EUGENE TURTON,
Attorney for Defendant.

Answer

Established 1895.

H. J. KOEHLER MOTORS CORPORATION.

Manufacturers of KOEHLER Trucks and Tractors

Bloomfield, New Jersey, U. S. A.

Cable Address "Kolatruck, Bloomfield, N. J." 10

W. U. Code.

June 1, 1922.

The Kuebler Foundries Inc.,
Easton, Pa.Overcharge on castings our Order #595 and your
acknowledgment G9832—Jan 5, 1920.

Castings as billed by you— 20

(see attached sheet 'A' \$5,903.20

Castings correctly billed first

50 at cost plus balance at

7c and 7 5/8c (see attached

sheet 'B' 3,526.46

\$2,378.74

CREDIT 30

Balance due Kuebler Foundries

Inc. on account, as per statement 1,497.65

Amount due Koehler Motors Corporation \$879.09

Answer.

Established 1895.

H. J. KOEHLER MOTOR CORPORATION
 Manufacturers of KOEHLER Trucks and Tractors,
 Bloomfield, New Jersey, U. S. A.

10 Cable Address "Kolatruck, Bloomfield, N. J."
 W. U. Code.

	'A'				'A'
	Invoices	Quantity	Price	Weight	Amount
	K 15-3	13	\$.174 per lb.	204 lbs.	\$ 35.50
		95	.22 " "	1,504 "	330.88
	K 15-4	16	.174 " "	239 "	41.59
		101	.22 " "	1,622 "	356.84
20	K 15-9	30	.174 " "	1,130 "	196.62
		118	.22 " "	4,097 "	901.34
	K 15-10	41	.174 " "	814 "	141.64
		95	.22 " "	1,886 "	414.92
	M 15-3	97	.174 " "	1,696 "	295.10
		100	.22 " "	1,739 "	382.58
	M 15-4	93	.174 " "	1,569 "	273.00
		108	.22 " "	1,793 "	394.46
	M 15-9	22	.174 " "	958 "	166.69
		201	.22 " "	8,062 "	1,773.64
30	M 15-10	12	.174 " "	226 "	39.32
		187	.22 " "	3,604 "	792.88
		<hr/>		<hr/>	<hr/>
		1,329		31,143 "	\$6,637.00

Answer

Credits

Castings returned—

1,606 lbs. @ .0152 per lb. (scrap value)	\$24.41	
2,906 lbs. @ .2097 per lb. (average selling price)	609.39	10
	<hr/>	
	633.80	

Kuebler Foundries, Inc. total billing of castings	\$5,903.20	
	<hr/> <hr/>	

20

Established 1895.

H. J. KOEHLER MOTOR CORPORATION
Manufacturers of KOEHLER Trucks and Tractors,
Bloomfield, New Jersey, U. S. A.

Cable Address "Kolatruck, Bloomfield, N. J."
W. U. Code.

30

'B'

'B'

Correct billing of castings as per our order and as
per acknowledgment of Kuebler Foundries, Inc.

Invoices	Quantity	Price	Weight	Amount
K 15-3	50 (13	\$.174 per lb.	204 lbs.	\$ 35.50
	(17	.22 " "	586 "	128.92
	58	.07 " "	918 "	64.26

40

Answer

	K 15-4	(16				
	50	(34	.174	" "	239	" 41.59
		67	.22	" "	546	" 120.12
			.07	" "	1,076	" 75.32
	K 15-9	50 (30	.174		1,130	196.62
		(20	.22		694	152.68
10		98	.07 $\frac{5}{8}$	" "	3,403	" 259.50
	K 15-10	50 (41	.174		814	141.64
		(9	.22		178	39.16
		86	.07 $\frac{5}{8}$	" "	1,708	" 130.23
	M 15-3	50	.174	" "	874	" 152.08
		147	.07	" "	2,561	" 179.27
	M 15-4	50	.174	" "	844	" 146.86
		151	.07	" "	2,518	" 176.26
	M 15-9	(22	.174	" "	958	" 166.69
20		50 (28	.22	" "	1,123	" 247.06
		173	.07 $\frac{5}{8}$	" "	6,939	" 529.12
	M 15-10	50 (12	.174		226	" 393.24
		(38	.22		723	" 161.26
		749	.07 $\frac{5}{8}$	" "	2,871	" 216.91
		1,329			31,143	" \$3,754.29

Credits

30

Castings returned—

1,606 lbs. @ .0152 per lb.

(scrap value)

\$24.41

2,906 lbs. @ .07 per lb.

(lowest selling price)

203.42

227.83

40

\$3,526.46

Correct billing of castings.

A true copy.

ENOCH L. JOHNSTON,
Clerk.

**Answer of Plaintiff to Defendant's Counter-
claim.**

(Filed December 19, 1922.)

The plaintiff answering the counterclaim of the defendant, says that:

FIRST DEFENSE. 10

It denies the matters and things contained in the defendant's counterclaim.

SECOND DEFENSE.

1. It admits that on or about the 3d day of January, 1920, plaintiff and defendant entered into a written agreement whereby plaintiff agreed among other things, that the price of all labor and material to be upon the basis set forth in said agreement, to wit: fifty sets at cost plus, the balance at seven cents and seven and five-eighths cents, as set forth in paragraph 1 of the defendant's counterclaim, but denies the balance of said paragraph. 20

2. It denies the second paragraph, but says that it billed the defendant as set forth in schedule "A" of the complaint. 30

3. It denies paragraph 3.

4. The agreement alleged in paragraph 1 provided among other things, that the defendant was to furnish the plaintiff with satisfactory pattern equipment from which to produce castings at the minimum cost, and that after making up 50 sets of the radiator parts from patterns as they then were, the patterns would be given proper attention, to produce said castings at a minimum cost. 40

Answer of Plaintiff to Defendants Counterclaim

5. Notwithstanding its agreement aforesaid, the pattern supplied by the defendant for said castings were unsatisfactory, defective and unfit to produce castings at the minimum cost, and the defendant did not at any time repair or improve said patterns nor were they given proper attention to produce castings
10 at such minimum cost, and said patterns were not repaired, improved and rendered of more practical use until after the completion of the castings forming the basis of the plaintiff's claim herein, when repairs were made thereto by this plaintiff, as set forth in the complaint.

6. The charge of 22¢ per pound made against the defendant for the castings made from the patterns above referred to, is the reasonable and fair value
20 thereof, estimated upon a cost plus basis, which said price the defendant agreed to pay the plaintiff, as set forth in the complaint, and pursuant to which said agreement the radiator parts set forth in schedule "A" of the complaint, were manufactured.

OBJECTIONS TO COUNTERCLAIM IN POINT OF LAW.

30 The plaintiff at the trial of this cause will move to strike out the defendant's counterclaim on the ground that the same discloses no cause of action or claim against the plaintiff.

SIDNEY W. ELDRIDGE,
Attorney of Plaintiff.

Judgment Against Plaintiff on Complaint and Counterclaim.

NEW JERSEY SUPREME COURT.

H. J. KOEHLER MOTORS CORPORATION, Defendant, vs. THE KUEBLER FOUNDRIES, Inc., Plaintiff.	}	Action at Law. On <i>Postea</i> .	10
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\$396.06	It is ordered that judgment be and hereby is entered in favor of defendant and against the plaintiff on the plaintiff's complaint, and in favor of defendant and against the plaintiff on the defendant's counterclaim for the sum of three hundred and ninety-six dollars and six cents besides costs to be taxed <i>nisi</i> .	20
39.10		
\$435.16		

Entered November 2, 1923, as of May 23, 1923.

On motion of W. EUGENE TURTON,
 Attorney.

A true copy.

EDWARD J. KELLEHER,
 Clerk. 30

Case.

NEW JERSEY SUPREME COURT,

UNION COUNTY CIRCUIT.

January Term, 1923.

10

THE KUEBLER FOUNDRIES, Inc., a
 Corp.,
 vs.
 H. J. KOEHLER MOTORS CORP., a
 Corp.

20 Transcript of stenographer's notes of evidence in
 the above-entitled cause, taken before Hon. Peter F.
 Daly, Circuit Court Judge, and a jury, at the Union
 County Court House in the City of Elizabeth, New
 Jersey, on the eleventh day of April, A. D. 1923, at
 10:50 A. M.

Appearances:

30 Sidney W. Eldridge, Esq., Counsel for the Plain-
 tiff.

W. Eugene Turton, Esq., Counsel for the Defend-
 ant.

A jury being empanelled and found satisfactory,
 they were sworn.

Mr. Eldridge opens the case for the plaintiff.

Mr. Turton opens the case for the defendant.

40

Case

Mr. Eldridge: In the course of the case a copy of the contract alleged by the plaintiff was demanded, and this paper produced. By agreement with counsel I offer it in evidence as a correct statement of the original agreement between the parties.

Agreement entered in evidence and marked Exhibit P1.

10

Mr. Eldridge: It is also agreed that the typewritten statement of account, beginning January 12th, 1920, and ending with the last credit of April 10th, 1922, is a correct statement of the parts manufactured under the arrangement between the parties, and the times of delivery, and also is a correct statement of the various payments made on account of the indebtedness existing in favor of the plaintiff.

Mr. Turton: I understand, Mr. Eldridge, that you are offering this as a copy of the book account?

20

Mr. Eldridge: Yes.

Mr. Turton: Not as the prices agreed upon. Of course, we do not admit that.

Mr. Eldridge: No. My idea is that it shall stand as proof of manufacture and delivery, but not as proof as to prices.

The Court: That, as I understand it, and so the jury may understand it, represents the volume of the work, the time the work was done or delivered, and the transactions that have already taken place between the parties. Is that right?

30

Mr. Eldridge: Yes.

Mr. Turton: That is right.

The Court: So that the only question for the jury to pass upon is as to what the price should be.

Mr. Eldridge: That seems to be the only issue in the case.

40

Plaintiff's Witness, Thomas A. Mellon, Direct

Mr. Turton: It seems to come right down to that. Typewritten statement entered in evidence and marked Exhibit P2.

Mr. Eldridge: I have a batch of correspondence which I think places the whole thing before the Court and jury. Do you want to look at these before I offer them?

10 Mr. Turton: I do not know what is in that correspondence at all.

THOMAS A. MELLON, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith:

Direct-examination by Mr. Eldridge:

20 Q. Where do you live, Mr. Mellon? A. Easton, Pennsylvania.

Q. You are connected with the plaintiff company? A. Yes.

Q. In what capacity? A. Secretary and treasurer.

Q. And the records and accounts are under your supervision? A. General supervision.

Q. You had some correspondence with the defendant, H. J. Koehler Motor Corporation, in connection with this work? A. Yes.

30 Q. I show you a batch of letters, the first one is March 6th, 1920, and the last one seems to be November 29th, 1921, and ask you if these are letters, or copies of letters that you wrote to the Koehler Company, and letters that you received from the company concerning this matter in controversy? A. Why, no, they are not. All those that are marked with my initials are. I think you will find that some of these are stamped with Mr. Gibboney's initials.

40

Plaintiff's Witness, Thomas A. Mellon, Direct

Q. Were they copies of records in your custody and in your charge? A. Yes, I can say that.

Q. They came out of your files? A. Yes.

Q. You have been all over this file, haven't you? A. Yes.

Q. Are these copies that are in carbon, and on the thin yellow paper, correct transcripts of the originals? 10
A. Yes.

Q. I notice among these papers some slips in lead pencil, headed up as follows: Remittance statement, H. J. Koehler Motors Corporation, Kuebler Foundries, Inc., Easton, Pennsylvania, and ask you if that is a paper received from the Koehler Company? A. Yes.

Q. And at the same time what else, if anything, was received along with that paper? A. A check.

Q. A check for how much? A. In this particular 20
instance \$433.73.

Q. I ask you to consult this statement Exhibit P2 and ask you whether that payment appears as a credit on that account? A. I don't believe that is here. I think there is some mistake here. I think that is not on the paper because these were cancelled. I think these were open invoices.

Q. Will you refer to the statement that accompanied the first payment listed on this account? A. There is 30
another list there.

Q. Do you refer to this one? A. No. Those don't show the invoices, because these invoices were paid in full and are not shown in the open account. This is only a statement of the open account.

Q. If you refer to that you will see that the first invoice is dated January 12th, 1920. A. Yes.

Q. Is that the date of your first shipment in this matter? A. I think it is, Mr. Eldridge. 40

Plaintiff's Witness, Thomas A. Mellon, Direct

Mr. Turton: Doesn't that statement we have admitted show all that, Mr. Eldridge? We have admitted that. I think it shows everything there. Of course, I don't want to interfere with your examination at all.

10 A. I was wrong in that. You are right. It does show in this statement. \$433.73, that is right.

Q. It is on that statement? A. It is.

Q. Have you made an analysis of the number of parts made, and the time when they were made, and the shipments, and so forth? A. Yes.

Q. Is this the analysis that you made, which is headed up "Detail record of shipments by Kuebler Foundries, Inc., to H. J. Koehler Motors Corporation"? A. Yes.

20 Q. Up to March 9th, 1920, how many of the various parts had been delivered? A. March 9th, 1920—do you mean the various patterns?

Q. Yes. A. Do you want the numbers of each shipment?

Q. Yes. A. 97 of the M 15-3. 93 of the M 15-4. 22 of the M 15-9. 12 of the M 15-10. 13 of the K 15-3. 16 of the K 15-4. 30 of the K 15-9. 41 of the K 15-10.

30 Q. Up to and including March 27th, 1920, how many of each of the parts had been shipped? A. 153 M 15-3. 159 M 15-4. 55 M 15-9. 52 M 15-10. 50 K 15-3. 52 K 15-4. 55 K 15-9. 95 K 15-10.

Q. You are using these descriptive words, you refer to these parts as M 15-3, and so forth. What do you mean to indicate? A. They are pattern numbers as mentioned on their order.

40 Q. That is a pattern number? A. Yes.

Plaintiff's Witness, Thomas A. Mellon, Direct

Q. There were apparently eight patterns, is that so?
A. Yes, that is right.

Q. I wish you would refer to some more of these remittance statements that you have. You have another one? A. Yes.

Q. Under what date is that? A. August 10th, 1920.

Q. And that is for how much? A. \$1,051.33. 10

Q. In each case, when a payment was made on this account was it accompanied by a similar statement?
A. Yes, a similar statement.

Q. And are those statements included in this file which you have in your hand? A. Yes.

Mr. Eldridge: I offer this correspondence and these statements in evidence.

Mr. Turton: I have no objection to them. 20
There is nothing there but just evidently acknowledgments of remittances.

The Court: They are admitted.

Correspondence and statements entered in evidence and marked Exhibit P3.

Q. Is there any indebtedness existing against the defendant, in favor of the Kuebler Company? A. Yes, sir.

Q. What is the amount due? A. \$1,497.65. 30

Q. And when was that due, Mr. Mellon? A. Well, it was due at various times. Our invoices were thirty days net.

Q. When was the last item due? A. The last actual shipment was made July 23rd, 1920; that would be due actually August 23rd, 1920.

Q. That is not the last item in your account, is it?
A. Oh, no.

Q. What is the last item in your account? A. Last 40
item is an invoice dated October 19th, 1920, for

Plaintiff's Witness, Thomas A. Mellon, Cross

\$353.76. That is for castings which we held in stock, subject to their disposition, which they requested us to do.

Q. Is that still in your possession? A. I think so. I don't know. I think so.

Q. That item was what date? A. That was October 19th, 1920.

CROSS-EXAMINATION by Mr. Turton:

Q. Your name is what? A. Mellon.

Q. What is your position with the Kuebler Company? A. Secretary and treasurer.

Q. You are familiar with all of this transaction, are you? A. All of the financial part of it.

20 Q. Well, and all of the correspondence too, you must be, because you recognize all of the— A. I am not very familiar with the practical end, the manufacturing end.

Q. Well, not the actual manufacture of these castings, I don't mean that. A. No.

Q. In this correspondence you have there, are you familiar with what is in that correspondence? A. Oh, yes.

30 Q. All of it? A. Yes.

Q. Are you familiar with the details of the making of this contract with Koehler? A. No, sir.

Q. You are not familiar with that at all? A. No, sir.

Q. Don't you know what terms were made with Koehler? A. Generally speaking, as the records were handed in to the department, yes.

Q. As the records were handed in? A. Yes.

40 Q. Well, do you accept orders in your company, and acknowledge them, usually? A. Oh, yes.

Plaintiff's Witness, Thomas A. Mellon, Cross

Q. I show you what is said to be an acknowledgment of the Kuebler Foundries, Inc., our order number G 9832, customer's order number 595, Easton, Pennsylvania, January 3rd, 1920, customer, H. J. Koehler Motors Corporation. Is that a copy of an acknowledgment which you used when the Koehler Motors Corporation placed their order with you? A. Yes, I would say so; without checking the details I would say it was, yes. 10

Q. I call your attention to the item "price" at the bottom of the copy, which states, "First 50 sets F. O. B. Easton, at cost plus; balance at 7¢ and 7 5/8¢, tariff rate, freight allowed"; is that part of that agreement? A. It is on that acknowledgment.

Q. That is when the original order was placed, isn't it? A. Yes. 20

Q. And that is what you started ahead to manufacture on the order that was given by Koehler, and this is your acknowledgment of their order, stating the terms? A. Yes.

Q. You know that after the shipments were started under this that the price was changed, don't you? A. Yes.

Q. Why was it changed? A. I would say because they couldn't manufacture at the price originally mentioned in the order. 30

Q. Why did you bill castings to the Koehler Motors Corporation at 22¢, when you have definite terms in this agreement? A. On account of a subsequent agreement to that effect, we were allowed to bill at that price.

Q. Where is that agreement? A. That was a verbal agreement with Mr. Raymond, their representative, I understood. 40

Plaintiff's Witness, Thomas A. Mellon, Cross

Q. There was no agreement in writing? A. Not from the Koehler people direct.

Q. From whom? A. I say not from the Koehler people direct, there was none. It was merely a verbal agreement with their representative, Mr. Raymond.

10 Q. You have no letter, or no writing of any kind, which shows that that arrangement was made? A. None except our own manager's notation, that is all.

Q. On some of your own stationery? A. On our own orders.

Q. It was not sent to the Koehler Motors Corporation? A. No.

Q. These payments that you referred to, a lot of these payments received were on account, weren't they? A. Subsequent payments were, yes.

20 Q. And from time to time they sent in checks payments on account? A. Yes.

Q. Are there any letters in this correspondence which refer to the overcharge, any letters that you know of? A. Yes. There are letters, I believe, later on, after the dispute arose, and later referring to the price overcharge.

30 Q. And you know that the Koehler Motors Corporation protested against these charges, you knew that? A. After we held up shipments, yes, I do.

Q. After you held up shipments? A. After they held up shipments.

Q. What do you mean? A. They stopped all shipments, and then afterwards objected to the price.

Q. Were they making shipments to you? A. No. I say, they held up our shipments to them. They requested us to cease all further shipments, and then afterwards took up the question of overcharge.

40 Q. With whom did you take up the question of

Plaintiff's Witness, Thomas A. Mellon, Cross

overcharge when shipments were stopped? A. We didn't take it up with them. They took it up with us.

Q. By whom? A. By the Koehler people. I presume Mr. Koehler, I think signed the letters.

Q. Don't you know? A. I don't recall definitely.

Q. Did you have the negotiations? A. I wrote letters to the Koehler people in reference to that. I don't recall who signed the letters definitely. I think Mr. Koehler signed most of them. 10

Q. But there were no shipments made after that, were there? A. No shipments after they requested them to be held up.

Q. And that was when the dispute over the price started? A. Not at that time, no.

Q. Well, it was just before that it was started, and then there were no more shipments made? A. It was after that time. 20

Q. After— A. After they requested shipments to be withheld.

Q. According to your invoice, or according to your acknowledgment there, do you know how the price of these castings would be figured? A. I didn't figure the cost, no; I had nothing to do with the cost at that time.

Q. You don't know what that would mean then, when it says "cost plus for the first fifty"? A. I know what it means, generally speaking, yes. 30

Q. What does it mean in your company? A. It means the manufacturing cost, plus the overhead charge of the plant.

Q. That is the price which the H. J. Koehler Company was to pay for the first fifty which you delivered, isn't that right? A. Yes.

Q. And the cost plus would be the average—for instance, if you billed one hundred at a certain price, 40

Plaintiff's Witness, Thomas A. Mellon, Re-direct

you would have to strike an average for that first fifty wouldn't you? A. No, not in that sense.

Q. How would you determine it? A. Why, simply a direct manufacturing cost. We have to determine the cost of our operation on that particular work; add our fixed overhead to the price, and determine the
10 price.

Q. Did you manufacture fifty of these sets and then determine what it would cost to make them? A. I don't know whether—I don't think we waited until the fifty were actually produced. The cost would be evident before that time.

Q. You never billed them fifty at a cost price, did you, not that you know of? A. We billed it at 17.4, which was agreed on, we determined as the cost price
20 at that time.

Q. And that is what Mr. Koehler paid? A. At that time, yes.

RE-DIRECT EXAMINATION by Mr. Eldridge:

Q. Mr. Mellon, I call your attention to a letter dated October 29th, 1920, directed to Kuebler Foundries, Inc., and ask you if that is the first complaint that you
30 received about the prices? A. Yes, I would say that is the first.

Q. I call your attention to a letter of the H. J. Koehler Motors Corporation, under date of August 30th, 1920, and ask you whether that relates to a cessation of shipments? A. Yes.

Q. And will you consult those letters that are in your hand now and tell me if that was the first request you had for stopping shipments on these parts? A. There
40 was evidently a telegram they refer to in this letter.

Q. Just look at your file. A. Oh, yes.

Plaintiff's Witness, Thomas A. Mellon, Re-cross

Q. Is there a telegram there? A. Yes. A telegram of August 30th.

Q. I understood you to testify on your direct-examination that less than fifty of some of these parts had been made at the 17.4 price? A. Yes, sir.

Q. The price was changed before you had completed the first fifty? A. Yes. 10

Mr. Eldridge: That is all.

RE-CROSS EXAMINATION by Mr. Turton:

Q. Is that a letter from your company? A. Yes.

By Mr. Eldridge:

Q. What is the date? A. December 29th, 1919. 20

Mr. Turton: Letter dated December 29th, 1919, addressed to H. J. Koehler Motors Corporation, Fourth Avenue and Ogden Street, Newark, New Jersey, attention of Mr. Dunt-ham, I ask be marked for identification.

Two-page letter marked D1 for identification.

Q. I show you letter of the Kuebler Foundaries, Inc., dated March 4th, 1920, addressed to Koehler Motors Corporation, Newark, New Jersey, signed by Mr. Gibboney. Is that one of your letters? A. Yes, that is one of our letters. 30

Mr. Turton: I ask that be marked for identification.

Letter marked D2 for identification.

Mr. Turton: I think that is all.

Mr. Eldridge: That is all.

Plaintiff's Witness, Adolphus F. Gibboney, Direct

ADOLPHUS F. GIBBONEY, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith:

Direct-examination by Mr. Eldridge:

10 Q. Mr. Gibboney, where do you live? A. I live at Bellville, Pennsylvania.

Q. Were you at one time connected with the Kuebler Foundries, Incorporated? A. I was.

Q. In what capacity? A. As general manager of the iron and steel foundry.

Q. Were you thus employed in 1920? A. I was.

Q. How much experience have you had in foundry work? A. About thirty-two years.

20 Q. Are you familiar with the manufacture of these radiator parts for the defendant Koehler Motors Corporation? A. I am.

Q. Was that work done under your charge? A. It was.

Q. Were you familiar with the condition of the patterns? A. I was.

30 Q. What was the condition of the patterns used in this work? A. The casting from which the pattern was made was a very light section casting, and the patterns which we received to make these castings were wooden patterns; a wooden pattern in the light sections in the wet sand and warps very readily, and it is very difficult to make a casting from a very light section wooden pattern, when it extends over a considerable surface, as these did.

40 Q. Well, what was the condition of these patterns? A. Well, they weren't in good condition. The patterns that were new were all right, but the ones that were older were not right. That is, they had to be taken out of the sand frequently and repaired.

Plaintiff's Witness, Adolphus F. Gibboney, Direct

Q. Repaired? A. Repaired, yes.

Q. Where was that done? A. At the Kuebler Foundries.

Q. How did these work in practice? Were they satisfactory? A. No, sir.

Q. Well, what was the trouble? A. The trouble was as I stated, they would swell from the dampness in the sand, and in drawing the casting out, the pattern would move, one part in relation to another, and thus make a deformed casting, a casting that apparently seemed warped, but instead of being warped it was due to the light structure of the wooden pattern that bent in the withdrawing of it from the sand. 10

Q. Did you see the patterns when they first came in there? A. Yes, sir.

Q. Were they all of the same character? A. Practically so, yes. 20

Q. Were they in good, or in poor condition? A. They were not what we call in good condition, not from a foundryman's standpoint.

Q. Did you have anything to do with fixing the original cost of these castings? A. Yes, sir; I think I had.

Q. Was that before the actual operation with these patterns had begun? A. Before we saw the patterns. 30

Q. Before you saw the patterns? A. Yes, sir.

Q. In your opinion was that a reasonable and fair price at the time? A. Yes, sir.

Q. Did you afterwards alter your opinion? A. Yes, sir.

Q. For what reason? A. For the reason that the patterns were made of wood. Those patterns should all be of metal, rigid, and will not bend and warp.

Q. Have you had any experience in making radiator parts? A. I have. 40

Plaintiff's Witness, Adolphus F. Gibboney, Direct

Q. For other automobile companies? A. Yes, sir.

Q. What kind of pattern is generally employed?

A. Aluminum.

Q. What percentage of your castings were good when using these patterns? A. Well, I couldn't tell you what percentage of the whole amount was good; 10 but at one time I looked it over, and it ran over sixty per cent bad castings, due to warpage, or what we called warpage.

Q. Was it profitable to operate at 17.4 per pound?

A. We didn't make any money at that price.

Q. Now, do you know Mr. Raymond? A. I have seen the gentleman, but I don't know that I would recognize him again.

Q. Was he connected with the defendant company?

20 A. Yes, sir.

Q. Did he come down to Easton? A. He did.

Q. Did you discuss with him the situation with respect to the manufacture of these castings?

Mr. Turton: I object.

A. My superintendent did, and brought him in.

The Court: What has that to do with the issue here?

30

Mr. Eldridge: Aside from the reasonableness of the charge, worked out on a cost plus basis, this man made a definite agreement for the company, or intended to make it for the company, and he fixed a price which was afterwards recognized as proper by the company, by payments on account.

The Court: What is the point of your objection?

40

Mr. Turton: I object, that no conversation

Plaintiff's Witness, Adolphus F. Gibboney, Direct

between a man named Raymond, and this company, or a representative of this company, can bind the defendant. There is nothing at all shown here that Mr. Raymond had any authority whatever to talk to this company about this contract.

The Court: I think the objection is well 10
founded. Objection sustained.

Mr. Eldridge: The Court has ruled on this, but the situation is this: It has not been made clear to the Court, nor to the jury, that after all this work was done—

Mr. Turton: I want to extend every courtesy to Mr. Eldridge, but I do not want him to go into this thing, to explain what he is going to try to prove by Mr. Raymond. I object to the testi- 20
mony. I do not think it is quite fair to my client to let him explain what he wants to prove.

Mr. Eldridge: No, but I want to put the Court in possession of the record, as it is indicated by the exhibits that have already been offered in evidence. This ruling cannot be made on this question, in my idea, without taking into account what the record now shows, namely, that we have billed at a rate which Mr. Ray- 30
mond agreed upon, and we have been paid on account of our statements. Now, I say that there is an element for consideration by the jury, as to whether, if this man had no authority, his authority had not been ratified, and there is already in the case evidence that the company, with a change of the charges, has recognized it.

The Court: You say that the company has 40

Plaintiff's Witness, Adolphus F. Gibboney, Direct

recognized it. What company has recognized it?

Mr. Eldridge: The defendant company.
(Further argument and discussion.)

The Court: I have sustained the objection.

10 Mr. Eldridge: I ask an objection be noted on the record.

The Court: Certainly.

Q. Mr. Gibboney, were these patterns that were furnished for making these radiator parts satisfactory for the production of castings at a minimum cost? A. No, sir.

20 Q. Were these castings, while they were in your possession, ever given such attention as would be necessary to make them produce at a minimum cost?

Mr. Turton: I object to that. What difference does it make in this case whether they were or not? We have a contract.

The Court: Objection sustained.
(Argument by counsel.)

Adjourned until 1:20 P. M.

30

Afternoon session, 1:20 P. M.

The Court: Is there anything in the contract—I have not read it—that allows the plaintiff to terminate the contract on its own motion?

Mr. Eldridge: No.

Mr. Turton: No.

40 (Argument of counsel.)

The Court: I will allow the evidence.

Mr. Turton prays exception.

Plaintiff's Witness, Adolphus F. Gibboney, Direct

Q. Mr. Gibboney, will you tell us about that transaction with Mr. Raymond? A. Mr. Raymond came to us as a representative of the Koehler Motors Company, for the purpose of hurrying up castings, and getting them shipped, and we had had letters to that effect, and telephone messages, and I had hurried up our shop foreman on the work. I turned, or somebody turned Mr. Raymond over to Mr. Shotz, who was shop foreman, and they discussed the matter; and we had been into the cost of this affair a day or two before this and decided that we were losing considerable money. 10

Mr. Turton: This witness cannot testify to what Mr. Shotz and Mr. Raymond discussed. That is what he is trying to do now.

By the Court: 20

Q. Were you there? A. Yes, sir.

By Mr. Eldridge:

Q. Continue, Mr. Gibboney? A. And after they had talked the price over they brought Mr. Raymond in, and Shotz said we would have to have 22¢ for the balance of these castings. I said that was all right if it was satisfactory. He said it was.

Q. Mr. Raymond said that? A. Yes, sir. 30

Q. Did you discuss with Mr. Raymond the condition of these patterns? A. Yes, sir; both I and Mr. Shotz did.

Q. What did you tell him about them? A. Told him that the patterns were in bad shape for making castings at a reasonable figure. We had to work them all by hand, and couldn't get any production on them.

Q. What had Mr. Raymond to say about that, if anything? A. I don't remember Mr. Raymond's re- 40

Plaintiff's Witness, Adolphus F. Gibboney, Cross

marks. It has been a good while ago. I think he agreed with us, however, that they were in bad shape.

Q. Was it necessary to make any repairs to these patterns that you were working with, from time to time? A. Constantly.

10 Q. For what reason? A. For the reason that the wet sand in which they were worked warped the patterns and loosened the glue in the joints, and they had to be taken to the pattern shop to be fixed up.

Q. In your opinion, Mr. Gibboney, were these patterns satisfactory equipment for the production of castings at the minimum cost?

Mr. Turton: I object to the cost.

The Court: You may qualify him, if you wish.

20 Mr. Eldridge: I think he said he has been in this business thirty-two years.

SPECIAL CROSS-EXAMINATION by Mr. Turton:

Q. What are your duties in the company? A. I am not with the company at the present time.

30 Q. What were they at that time? A. I was general manager of the iron and steel foundry.

Q. In the office? A. No, sir. In the shops.

Q. Have you had any experience in casting? A. Yes, sir.

Q. You have had experience in doing that sort of work? A. Yes, sir.

Q. In what capacity? A. In what plant?

Q. In what capacity? What did you do in casting?
A. In every capacity.

40 Q. In every capacity? A. Yes, sir.

Plaintiff's Witness, Adolphus F. Gibboney, Direct

Q. You examined these patterns personally, did you?

A. I did, after they came to the shop, yes.

Q. You mean after they were complained about? A.

No. After they came into the shop, when they first came into the shop.

Q. You mean when they came from Koehler's? A. Yes, sir.

10

Q. You immediately examined them? A. Yes, within a day or two.

DIRECT-EXAMINATION (continued) by Mr. Eldridge:

Q. (Repeated.) "In your opinion, Mr. Gibboney, were these patterns satisfactory equipment for the production of castings at the minimum cost?" A. They were not.

20

Q. I think you said that you had experience in moulding radiator castings before? A. Not before I went to Kuebler's, but before I moulded Koehler's.

Q. What kind of patterns are used? A. Aluminum.

Q. And if you had aluminum patterns to make these castings could they have been made profitably at 07¢ a pound? A. They could have.

Q. While you were turning out these castings did you receive any orders for changes in the patterns? A. Yes, sir.

30

Q. I show you a paper dated March 20th, 1920, headed up, "H. J. Koehler Motors Corporation," and ask if that is the paper that was received? A. Yes, sir.

Q. Was that brought to your attention? A. Yes, sir; my signature is there.

Q. Is there anything to indicate the date it came in? A. How is that?

40

Plaintiff's Witness, Adolphus F. Gibboney, Direct

Q. Is there anything on the paper to indicate when it was received? A. Yes, sir. It was received on March 22nd, 1920.

Mr. Eldridge: I ask this paper be received in evidence.

10 Mr. Turton: I have no objection.

The Court: It is admitted.

Order number 1361 entered in evidence and marked Exhibit P4.

Q. When was Mr. Raymond at the plant? A. About March 9th, 1920.

Q. I show you another paper bearing date December 31st, 1919, headed up "H. J. Koehler Motors Corporation," and ask you what that is? A. This is an order
20 for radiator castings.

Q. I notice at the foot of this order a notation in lead pencil. In whose handwriting is that notation? A. A part of it is mine.

Q. What part of it is yours? A. "Cost plus for first fifty sets; patterns received in bad condition."

Q. Are these figures "22¢" in your handwriting? A. Yes, sir.

Q. When did you put that on this paper, can you
30 tell? A. March 9th, 1920.

Q. Was that before or after Raymond had been there? A. That was the date he was there.

Mr. Eldridge: I ask this paper be received.

Mr. Turton: I have no objection to it. Of course, note my general objection.

The Court: Certainly.

Order number 595 entered in evidence and marked Exhibit P5.

40

Plaintiff's Witness, Adolphus F. Gibboney, Direct

Q. Referring to Exhibit P4, I note that there is a direction to make metal patterns K15—3 R. H. radiator side, and K15—4 L. H. radiator side. Was that done? A. It was started. I can't say whether it was completed or not.

Q. Do you know when it was started? A. I couldn't give you the date, no. 10

Q. Could you identify the date by examining the account of charges? A. I think so.

Q. I call your attention now to Exhibit P2 and ask you if you can, by examining that statement on next to the last page, tell us about when this work was begun? A. According to this statement the last pattern for the metal patterns was made previous to July 20th.

Q. Well, do you know when the work was started? 20
A. No, I couldn't say when it was started.

Q. Well, I note on this paper Exhibit P4 in red ink the words "Order completed July 20th, 1920," what does that signify? A. That means that the order was completed at that date, that the patterns were made complete.

Q. Now, do you know whether these metal patterns for these two parts were actually used? A. I couldn't say that they were. My impression is that 30
they were.

The Court: Strike out the impression.

Q. This order covers only two of the eight parts?
A. Yes, sir.

Q. Was Mr. Raymond the only man who came to the plant? A. No, sir.

Q. Do you know anybody else who came concerning these radiators? A. I don't recall their names, 40
but there were several men there.

Plaintiff's Witness, Adolphus F. Gibboney, Cross

Q. Different people? A. Different ones; yes, sir.

Q. What did they say? What was their business?

A. Their business was to hurry up the castings, get as many of them as they could get.

10 Q. I call your attention to a paper dated January 6th, 1920, headed "H. J. Koehler Motors Corporation," and ask you what that is? That is an order to make repairs, isn't it? A. Make repairs necessary for our castings for radiator patterns.

Q. To pour castings, is it not? A. To pour casts for radiator patterns.

Q. Was that order acted upon? A. Yes, sir.

Q. What were the character of the repairs, do you know? A. I don't recall what they were. There were so many patterns that I can't recall.

20

Mr. Eldridge: I offer this order in evidence.

Order number 648 entered in evidence and marked Exhibit P6.

CROSS-EXAMINATION by Mr. Turton:

Q. What was your business, Mr. Gibboney, general manager? A. General manager.

30

Q. You recall quite distinctly that a Mr. Raymond was to see you? A. Yes, sir.

Q. And talked over these prices? A. Well, he came there ostensibly for the purpose of hurrying up the castings, and that brought up the price.

Q. He didn't come there purposely to talk to you about price, he went there to hurry up some castings? A. Yes, sir.

40

Q. Had Mr. Raymond been there before? A. I don't think so. Not that I know of.

Plaintiff's Witness, Adolphus F. Gibboney, Cross

Q. You had never seen Mr. Raymond before? A. No, sir. Nor since.

Q. What did he do when he got there? Did he take some castings from your place? A. I don't recall whether he did or not. I don't think he did. He wouldn't carry them along with him.

Q. You don't think he would carry them home? 10
A. No.

Q. But you do know that he was there? A. Yes, sir.

Q. And you know the date that he was there when this was changed? A. Yes, sir.

Q. What date was it? A. March ninth.

Q. You are just as sure of that date as you are that you had the conversation about prices, are you?
A. Yes, sir. 20

Q. Just as certain? A. Yes, sir.

Q. Did you write this letter to the Koehler Motors Corporation? Is that your signature? A. That is my signature.

Q. This is letter dated March 4th, 1920, marked D2 for identification, and in this letter you state: "Koehler Motors Corporation: With reference to the recent visit of your Mr. Raymond, when you ask us"—

Mr. Eldridge: That has not been offered in evidence yet. I do not think you should read it until it has been offered in evidence. 30

Mr. Turton: I am asking the witness if he wrote this. I have a right to do that, after he identifies the letter.

Mr. Eldridge: I object to counsel reading it until it is received in evidence.

The Court: I will allow it.

Mr. Eldridge: I ask an objection be noted 40
on the record.

Plaintiff's Witness, Adolphus F. Gibboney, Cross

Q. "With reference to the recent visit of your Mr. Raymond, when you asked us to expedite delivery of several items, wish to advise we are enclosing packing list of this material which was shipped today by express. The balance of the material which Mr. Raymond asked for will be shipped on Saturday morning by express." That was after Mr. Raymond's visit, wasn't it? It would naturally be, wouldn't it?
 10 A. Evidently, yes.

Q. So that Mr. Raymond was not there on March 9th, he was there before March 4th, wasn't he? A. He may have been.

Q. Well, now, which was it? You are stating definite things here. You have stated a definite conversation, and you have stated a definite time when it happened. Now, when did it happen? A. These records, where I have gotten my data from, show March
 20 9th. There seems to have been some mistake.

Q. Might have been a mistake about the conversation on prices, too? A. No, sir; there was no mistake concerning prices.

Q. Why didn't you, when you wrote this letter to the Koehler Company, why didn't you say, and we also agree to ship castings at the price agreed to by Mr. Raymond? Didn't you think that was important
 30 enough to write to the company about?

Mr. Eldridge: I object to that question. It is argumentative.

The Court: It is proper cross-examination.

A. Did I think it was not important enough?

Q. Didn't you think it was important enough to bring to the company's attention the fact that you had increased the price to Mr. Raymond? Didn't you
 40 think that was important enough to include in your

Plaintiff's Witness, Adolphus F. Gibboney, Cross

letter? A. Had I thought of it at the time I possibly would have.

Q. Why wasn't that a bigger item than getting out castings? Wasn't that a bigger item in your mind then? You were suffering from these prices? A. I am not prepared to say which was the bigger; the question of getting out castings was a very vital one at that time. 10

Q. And the price was very vital to you, too, wasn't it? A. Yes.

Q. Did you ever write a letter to the H. J. Koehler Motors Corporation saying that the price had been increased? A. I don't remember having done so.

Q. You never did, did you? A. I don't remember that.

Q. The only thing that you ever did to make any arrangement at all with the H. J. Koehler Motors Corporation was to tell Mr. Raymond that you were going to increase the price of those castings, that is all, isn't it? A. That is all. 20

Q. This order that has been put in evidence, to repair the patterns, that was an order sent by the Koehler Motors Corporation, wasn't it? A. Yes, sir.

Q. And you did repair them, didn't you? A. Constantly. 30

Q. And charged the motor company for them, didn't you? A. Yes, sir.

Q. And they were satisfied that you should repair them? A. Yes, sir.

Q. Did you ever tell them that you could not any longer make castings from those patterns? A. No, sir.

Q. You never did that, did you? A. No. Because we could. 40

Plaintiff's Witness, Adolphus F. Gibboney, Cross

Q. You could, and you were doing it? A. Yes, but you couldn't make them cheap.

Q. That was your fault? A. No, it wasn't.

Q. Now, Mr. Gibboney, wasn't there a representative of your factory examined these patterns before you started to turn out the castings? A. I don't
10 know.

Q. Didn't you say yourself, a few minutes ago, to me, that you examined them two days after they came in your place? A. A few days.

Q. Two days? A. Well, one or two days.

Q. And you examined them, didn't you? A. Yes, sir.

Q. Did you send them back to Koehler and say you couldn't use them? A. No.

20 Q. Why? A. Because we could use them.

Q. You did use them, too, didn't you? A. Yes.

Q. And you based your price on them, too, didn't you? A. No. The price was based before we received the patterns.

Q. Did you write back right away then and say, we can't conform with those prices? A. We made complaint about the patterns.

30 Q. Didn't you continue, didn't you make them from those very patterns that you examined, and didn't you bill goods up to over fifty sets at the agreed price? A. 17 1/4 cents, 17.4 cents.

Q. At the agreed price? A. Yes, sir.

Q. Why didn't you stop right then when you saw those patterns, if they didn't suit you? A. We didn't know what could be done with them until we tried.

40 Q. Why, you, an experienced pattern maker, knowing all about castings, didn't know what you could do with those patterns when you examined them? Do you mean to say that? A. Yes, sir; I do.

Plaintiff's Witness, Adolphus F. Gibboney, Re-direct

Q. How long did you try before you found out that you couldn't do it? A. Only a few days.

Q. How many patterns do you think you turned out during that time? A. Well, very few.

Q. But you did turn out over fifty sets, didn't you? A. No, sir.

Q. You didn't? A. Eventually. 10

Q. Were those patterns you turned out at that lower price? A. Yes, sir.

Q. So you knew it then? A. Yes. Before that.

Q. And you used them, too, right along, didn't you? A. Yes.

Q. That is all you know about any change in the prices with the Koehler Company? A. Yes, sir.

Q. Just the conversation you had with Mr. Raymond, which may have been on the 9th, or it may have been before that? A. Yes, sir. 20

RE-DIRECT EXAMINATION by Mr. Eldridge:

Q. You say Mr. Raymond was only there once, so far as you know? A. As far as I recall; yes, sir.

Q. Referring to Exhibit P5, after the figures 22 cents I see "3/9/20," is that in your handwriting? A. Yes, sir. 30

Q. When was it put on there? A. The date the 22 cents was put on, 3/9/20.

Q. I show you another paper and ask you if you have seen that before? A. Yes, sir; I have seen that.

Q. What is that? A. This is a note from Mr. Schatz, the shop foreman, to Mr. Apple, who was in charge of the billing, the billing clerk.

Q. Was Mr. Schatz under you? A. Yes, sir.

Q. Was that direction made at your command? A. Yes, sir. 40

Q. Is that dated? A. Yes, sir.

Plaintiff's Witness, Thomas A. Mellon, Direct

Mr. Turton: I object to anything of this kind going in.

The Court: Objection sustained.

Q. Mr. Gibboney, do you know how many parts were made before March 9th? A. No. I couldn't tell that. Not without referring to data.

10

Q. I understood you to tell counsel for the defendant that fifty were manufactured before this change of price, is that so? A. I think—yes, my recollection is that fifty were manufactured prior to that time.

Q. Did you hear Mr. Mellon's testimony? A. Yes, sir.

Q. I call your attention to the fact that Mr. Mellon testified that the following parts were made: M 15-3 97; M 15-4 93; M 15-9 22; M 15-10 12; K 15-3 13; K 15-4 16; K 15-9 30; K 15-10 41. Do you say that that is incorrect?

20

Mr. Turton: I object to the question.

The Court: Objection sustained.

Mr. Eldridge: Well, the account shows. It is merely a matter of mathematics.

The Court: There should not be any comment about it.

30

Mr. Eldridge: That is all.

Mr. Turton: That is all.

THOMAS A. MELLON recalled.

Direct-examination by Mr. Eldridge:

Q. Mr. Mellon, what was your practice in business with respect to sending out invoices with shipments of these parts?

40

Plaintiff's Witness, Thomas A. Mellon, Direct

Mr. Turton: I object to that.

Q. What did you do with respect to the sending of statements with shipments, if anything? A. Do you mean invoices?

Q. Yes. A. They were invoiced as shipped, on the date of shipment.

Q. By that you mean what, just what did you do? A. As the castings were accumulated, possibly for a week's production, they were accumulated and got together by the shipping clerk, and shipped out, and billed under that date. 10

Q. And a statement mailed to the defendant? A. An invoice, yes, showing the pounds and price.

Q. In this exhibit, this statement P2, where it says invoice dated January 12th, 1920, that indicates that goods that had accumulated were shipped on that day? A. Yes, sir. 20

Q. And so all the way through the account? A. Yes, sir.

Q. The time of shipment has no relation to the time that they were actually manufactured? A. Oh, no.

Mr. Eldridge: That is all. Plaintiff rests. 30

Motion for Nonsuit.

Mr. Turton: I make an application for a nonsuit on the ground that this is an action which is brought upon a written contract, the order and the acceptance forming that contract; that in that contract there are definite terms stated; that the plaintiff had the right, if they thought the defendant did not comply with the contract, to break the contract; instead of that 40

Defendant's Witness, Marion M. Bennette, Direct

10 they continued; and we have no other way of treating this contract, except as the writing calls for; that that is the only contract that this plaintiff can place before the Court today, and that they have not proved in any way at all that there was a new contract entered into; that

20 suing for an increase in price is unfounded, because they have not produced any evidence to the satisfaction of this Court that there was any acceptance of a new contract by the defendant, or that there was any actual new contract made with anybody who had authority to represent the defendant corporation. And on that ground I ask that there be a nonsuit.

The Court: The motion is denied at this time. You may take an exception.

Mr. Turton: I ask an exception.

Defendant's Case.

30 MARION M. BENNETTE, a witness produced on behalf of the defendant, being duly sworn according to law on her oath, saith:

Direct-examination by Mr. Turton:

Q. Miss Bennette, you are associated with the Koehler Motors Corporation, are you? A. Yes, sir.

Q. Do you have charge of the books? A. I do.

Q. The correspondence also? A. I receive the correspondence.

40 Q. You receive the correspondence, do you? A. Yes.

Q. And you keep the accounts? A. I do.

Defendant's Witness, Marion M. Bennette, Direct

Q. Send out the checks? A. Yes.

Q. You are, to a certain extent, familiar with this account with the Kuebler Company, are you not? A. Yes.

Q. At the times that you paid the bills—there has some question come up here with reference to the payment of bills after March, 1920. Can you explain why those payments were made, after bills had been received at an increase in price? A. There were several bills dated March, 1920, at the increased price 22 cents. Our order said that the first fifty sets were to be billed at cost plus, which the Kuebler Foundry Company determined; no matter what price they set, we had to pay. During March the fifty sets were completed, but as they had been shipped in various small amounts, two, three, five, eight, at a time, I didn't realize, when I paid those several bills, that I was going beyond the fifty sets. 10
20

Q. Did you at that time discover that you had paid? A. During March—not during March, but at the time I paid those March bills, I found out a few days after that I had gone beyond the fifty sets, and thereafter my payments were made on account, and I stated on the remittance statement which went with the check that the amount was to be on account of what we owed, because I knew that sometime in the future this question would come up. 30

Mr. Eldridge: I object to all this testimony of records. If she testifies to a record, I should think she should produce it.

Mr. Turton: She kept the records.

Mr. Eldridge: She cannot testify to the whole defense in this case. I object to the answer. The answer is not responsive to the 40

Defendant's Witness, Marion M. Bennette, Direct

question, and I move so much of it as is not responsive be stricken out.

The Court: That is very indefinite. If there is anything in it that is not responsive, it is stricken out, but I do not know anything that is not responsive.

10

Q. Have you a record of your account with the Kuebler Company? A. I have.

Q. Have you a copy of it? A. I have, yes.

Q. Have you it with you? A. I have all my bills with me. I haven't the books.

Q. You haven't the books? A. No.

Q. Have you a copy which shows what you received from the Kuebler Company at different times?

20

A. I have a statement of their account before me, which I have copied from their statement, showing everything that they billed, and I have—is that what you mean?

Q. Yes. You have that? A. Yes.

Q. Can you say from your records when did you pay the bills for the shipments which were made in March? A. Why, I paid some June, July and August, during the months of June, July and August, as I remember.

30

Q. Your records show that, do they? A. Yes, sir.

Q. And show that you paid the bills of shipments which were made before March 4th, or March 9th, by payments on account of the running bills, payments on account? A. Yes. On account of what we owed.

Q. So that your statement—each time is that what you placed on your statement? A. Yes.

40

Q. Did you receive that letter with the Koehler Motors Company? A. I did.

Defendant's Witness, Marion M. Bennette, Direct

Q. You received that? A. Yes, sir.

Q. Addressed to the H. J. Koehler Motors Corporation? A. Yes, sir.

Q. This letter is dated March 4th, 1920, addressed to the Koehler Motors Corporation, marked for identification D2.

10

Mr. Turton: I offer this letter in evidence. Letter heretofore marked D2 for identification entered in evidence and marked Exhibit D2.

(Letter read to the jury by Mr. Turton.)

Q. Did you receive this letter? A. Yes, sir.

Q. That was received by you? A. Yes, sir.

Mr. Turton: Letter dated December 29th, 1919. I offer this in evidence. 20

Mr. Eldridge: I object to this letter. It antedates the contract.

Mr. Turton: It has reference to it.

Mr. Eldridge: And it has no bearing upon the situation at all.

The Court: Let me look at it. I will admit it.

Mr. Eldridge: I ask it be noted on the record that this letter is dated December 29th, 1919, and that the contract is dated January 3rd, 1920; and that this paper can have no effect upon this written contract one way or the other. I ask an objection be noted. 30

Letter heretofore marked D1 for identification entered in evidence and marked Exhibit D1.

(Letter read to the jury by Mr. Turton.)

40

Defendant's Witness, Marion M. Bennette, Cross

CROSS-EXAMINATION by Mr. Eldridge:

Q. Miss Bennette, did I understand you to say that this check covering the March invoices was simply sent on account? A. Which check?

10 Q. The check for \$561.26? A. No, sir; I didn't say that. I don't mean to say that that was sent on account. I didn't say that.

Q. That was sent in payment of that invoice? A. That was sent in payment of that invoice.

Q. And you noted, did you not, that there was a charge of 22 cents a pound for the castings? A. There was a charge of 22 cents a pound.

Q. Did you consult your records to determine how many parts had been delivered? A. I had not.

20 Q. Who is your immediate superior? A. Mr. Koehler.

Q. Was he at that time? A. He is the president of the company, and he is the one higher than I am.

Q. Who told you to pay this statement? A. Well, I paid it, because I paid the bills.

Q. Who told you or instructed you to send a check in payment of this invoice? A. Why, it is my business to pay the bills without anybody telling me.

30 Q. You are under no obligation to determine whether it is a proper obligation or not? A. I knew that the first fifty sets were to be billed at cost plus, and it was due to my error, not realizing we had gone just beyond the fifty sets.

Q. Did you make any investigation to determine why it was that from 17.4 cents a pound the price went up to 22 cents?

40 The Court: Hasn't she explained that?
Mr. Eldridge: I don't think she has.

Defendant's Witness, Marion M. Bennette, Cross

A. We had to accept the Kuebler Foundries' figures because—

Q. I didn't ask that question.

The Court: Do not interrupt her. Then you can strike out her answer, if it is not a proper one.

10

A. The order for the first fifty sets were to be billed at cost plus. Some were billed at 17, and some at 22. We had to accept the Kuebler Foundries' figures for the first fifty sets, no matter what the price was.

Mr. Eldridge: I ask the answer be stricken out because it is not responsive to the question.

20

The Court: The application is denied.

Q. Did you make any inquiry of anyone as to why the price had been increased from 17.4 cents a pound to 22 cents a pound? A. It was not necessary, as I was familiar with the order.

Mr. Eldridge: I move that be stricken out. It admits of an answer yes or no. She either made the inquiry, or she did not.

30

The Court: She does not have to limit her answer to yes or no. It depends altogether upon the nature of the question. She has practically told you that she did not think it was necessary to make an investigation. She said the first fifty were to be paid for at cost, and she said when this bill came in, it was the actual cost of the first fifty.

Q. Is it a fact that you made no inquiry? A. I 40
didn't have to.

Defendant's Witness, Marion M. Bennette, Cross

Mr. Eldridge: I ask for an answer yes or no. That is susceptible of an answer.

10 The Court: No, it is not; I do not think so. What inquiry was there to make? She says she had the knowledge that the first fifty were to be paid for at their actual cost. They had nothing to say about the cost of the first fifty. That was up to the other party. She supposed that all this was within the first fifty, and knowing that they had to pay at what figure the other party put it in, she paid the bill. She said if there was anything beyond the first fifty, it was error on her part.

20 Mr. Eldridge: I ask that an exception be noted to the Court's ruling on my motion to strike out these answers.

The Court: You have already had your exception.

Mr. Eldridge: I also object to the discussion, or the argument on this point. I do not think it is—I think it is a matter that is within the province of counsel in summing up to the jury.

30 The Court: Do you charge the Court with summing up to the jury?

Mr. Eldridge: I am making my objections on the record.

The Court: The Court is giving reasons why he regards the answer of the witness relevant and responsive. If I have said anything that the witness has not said, let me know, and I will strike it out.

40 Q. Now, that March payment was made—the July payment was made, and it was made on account of

Defendant's Witness, Marion M. Bennette, Cross

that invoice, and you say that you made no investigation of your records to determine how many parts you had already received, is that so? A. Yes, sir.

Q. Now, the next payment, when did you make that? A. I can't remember just the date the next payment was made.

Q. Well, was it your custom to make out a remittance statement? A. Yes, it was. 10

Q. And pass that along with your check? A. Yes, sir.

Q. How did you qualify this next payment, when you made it, what qualification did you make? What did you say about it? A. Well, I don't know just when the next payment was, or what it covered, I can't tell you that from memory. If you tell me the date of the next payment, and the amount, I can quickly tell you whether it was in payment of any bill. 20

Q. The next credit on the Exhibit P2 is August 11th, 1920, \$1,051.33. A. Yes.

Q. Will you tell us about that payment? A. That was one of the several bills that I paid at the 22 cents price.

Q. Did you tell the Kuebler people that that was on account? A. I did not. That paid a certain bill at 22 cents. 30

Q. And still you hadn't consulted your record to determine whether— A. No. That is one of the several bills that I paid.

Q. Is this the remittance statement dated August 11th, 1920? A. Yes, sir.

Q. Now, you were in receipt of frequent letters asking for payment of the Kuebler Company's account, were you not?

Mr. Turton: I object to that. It has nothing to do with this contract. 40

Defendant's Witness, Marion M. Bennette, Cross

A. Yes, sir.

Q. I will ask you to look at this letter of July 12th, 1920, which has been received in evidence, and ask if that is one that you received from the Kuebler Company? A. Yes, that is a copy of a letter we received.

10 Q. And when this letter was received you had received your last invoice for castings, hadn't you? A. I couldn't say.

Q. Well, it was nearly the last invoice, down toward the end? A. It may have been. I believe the last invoice was dated July 31st.

Q. I call your attention to Exhibit P2, on next to the last page is an invoice dated July 8th, 1920, \$7.45; that was received, was it not, before this letter of July 12th? A. I couldn't say that.

20 Q. You don't know? A. I do not know.

(Letter read to the jury by Mr. Eldridge.)

Q. I show you a letter of July 24th, which seems to be signed by M. M. Bennette, is that your signature? A. Yes, sir.

Q. That is the letter you wrote to the Kuebler people? A. Yes, sir.

30 (Letter read to the jury by Mr. Eldridge.)

Q. You were then the treasurer of the company? A. Yes, sir.

Q. You are now the treasurer of the company? A. Yes, sir.

Q. It was pursuant to your promise contained in this letter that you sent the remittance of \$1,051.33, wasn't it, on August 10th? A. Yes.

40 Q. I call your attention to a letter of September 14th, 1920, and ask you if you received that letter? A. Yes.

Defendant's Witness, Marion M. Bennette, Cross

Q. That letter was received after the last of the billings to you, wasn't it? A. Yes.

Q. That is, the last of the items of charge, items on this account, that letter was received? A. I didn't know at the time that that was the last item. Our order had not been completed.

Q. Well, you knew, did you not, that your order had been—you had told them to discontinue shipping and manufacturing? A. I didn't. That is not my department. 10

Q. Did you not know that in August they had instructed Kuebler Foundries not to ship any more? A. I didn't know that.

Q. Did you know that they had demanded their patterns back, or asked that they be shipped back? A. No. 20

Q. Did you, when this letter was received, know that the patterns had come back to your plant? A. I don't believe I did.

Q. Well, as a matter of fact, that is after the last item on the account? A. That is, yes, the last item on the account is in July, and this letter is dated the 14th of September.

Q. You had then received the final invoice of their work, hadn't you? A. We had, but I didn't know it was. 30

Mr. Eldridge: I will read this letter.

(Letter read to the jury by Mr. Eldridge.)

Q. You wrote an answer to that letter, did you not? A. That is not my signature.

Q. There is a letter of September 14th, 1920, that came out of your office? A. September 14th?

Q. September 23rd, 1920? A. That came out of our office. 40

Defendant's Witness, Marion M. Bennette, Cross

(Letter read to the jury by Mr. Eldridge.)

Q. Was Mr. Koehler the president at that time?

A. Yes, sir.

Q. That letter was September 23rd, and is that a remittance statement that came from your office? A.

10 Yes, sir.

Q. And another one under date of November 9th, 1920, for \$200, did that come from your office? A.

Yes, sir.

Q. I note on that in ink, "Will reply fully to your last letter before end of the week, J. J. Koehler Motor Corporation, M. M. Bennette, Treasurer"; did you put that notation on there? A. Yes, sir.

Q. I show you another statement of November 22nd, 1920, for \$100. Did that come out of your office? A. Yes, sir.

20

Q. And there is one of December? A. Yes.

Q. And there is one of January? A. Yes.

Q. February 17th, 1921; March 15th, 1921; April 6th, 1921; April 30th, 1921; May 27th, 1921; June 22nd, 1921; July 12th, 1921; August 15th, 1921; September 10th, 1921; October 7th, 1921; November 22nd, 1921; December 10th, 1921; January 31st, 1922; March 16th, 1922; April 7th, 1922; January 7th, 1922, and there is one of 1920, and one of July 6th, 1920, of which you first told us. Were all these made out by you, Miss Bennette? A. Yes, sir.

30

Q. Did you know that there had been a counter-claim filed in this suit for eight hundred and some odd dollars, for over payments? A. Recently?

Q. In this suit now? A. Yes.

Q. You did know that? A. Yes.

Q. How was it that you continued paying on account of these charges, when it was not due? Whose

40

Defendant's Witness, Marion M. Bennette, Cross

fault was that? A. Well, the issue hadn't come up. We simply paid on account.

Q. Are you sure it hadn't come up? A. Yes. I feel sure.

Q. I refer you to letter of October 29th, 1920, directed to Kuebler Foundries, and ask if that came out of your office? A. Yes, it did. 10

Q. And that is signed by Mr. Peterson? A. Yes.

Q. What was his position with your company? A. He was the chief engineer.

Mr. Eldridge: I will read this letter.

(Letter read to the jury by Mr. Eldridge.)

Q. Is that a letter of November 2nd that was received at your office? A. I just don't remember the letter. I think very likely it was. 20

(Letter read to the jury by Mr. Eldridge.)

Q. Now, Miss Bennette, isn't it true that frequent payments were made after this discussion? A. Yes, sir; on account of what we owed.

Q. And some were made without any particular comment as to— A. I think you will find about two to say on account, and that the rest say to apply on account of what we owe. 30

Q. Did you owe anything at that time? A. Oh, yes, we thought we owed. I didn't find out, I didn't realize how much it was until I had checked it out and put it down on paper.

Q. Then you discovered that you were \$879 overpaid? A. Yes.

Q. When did you first check up the account? A. I couldn't tell you that, because I don't remember the date. 40

Q. Was it after this suit was started? A. I rather think it was just before.

Defendant's Witness, Marion M. Bennette, Cross

Q. Just before the suit was started. And that is the first checking up you did on this account? A. Yes, sir.

Q. You didn't know that you had been over paying? A. No.

10 Q. Were there any other letters exchanged between your company and the Kuebler Company on the subject of this account, after this discussion? A. Well, I had no correspondence with the Kuebler Company about this.

Q. Beg pardon. A. The purchasing department corresponded with the Kuebler Company about this matter.

20 Q. I call your attention to a letter of November 15th. That is one from your office, isn't it, Mr. Peterson's letter? A. Mr. Peterson, yes.

(Letter read to the jury by Mr. Eldridge.)

Q. Is this letter of November 30th one that was received at your office from the Kuebler Company? A. Well, I don't know. I can't say for sure.

Mr. Eldridge: I will read it.

(Letter read to the jury by Mr. Eldridge.)

30 Q. I call your attention to copy of that letter, Miss Bennette, and ask you whether you recall having received that one, dated December 22nd, 1920? A. I don't recall.

(Letter read to the jury by Mr. Eldridge.)

Q. That letter of January 4th is from your office, Mr. Peterson? A. Yes.

(Letter read to the jury by Mr. Eldridge.)

40 Q. Payments were made after that letter was writ-

Defendant's Witness, Marion M. Bennette, Re-direct

ten, weren't they? A. When was that letter written?

Q. January 4th, 1921. A. I think so.

Q. Then those payments were made, were they not, after all this discussion was up as to the propriety?

A. While the discussion was on, yes.

Q. Well, after it had arisen? A. After it had arisen, yes. 10

Mr. Eldridge: That is all.

RE-DIRECT EXAMINATION by Mr. Turton:

Q. Miss Bennette, is that a copy of the account, which you have made up, with the Kuebler Company? A. Yes, sir.

Q. And in that you have compared the figures as billed at cost plus, and the contract price, on one sheet, have you? A. Yes. 20

Q. And on the other sheet what you claim was paid according to the figures of the Kuebler Company? A. As billed, yes.

Q. This summary shows what amount you claim is overpaid? A. Yes.

Q. How much is that? A. \$879.09.

Mr. Turton: I will offer this in evidence. 30

The Court: Why do you ask her if this shows the excess above the cost plus price?

Mr. Turton: Miss Bennette had to figure exactly what the cost price was.

The Court: How could she figure what the cost price was?

A. I took their figures for the cost.

Q. That shows that, does it? A. Yes. 40

Defendant's Witness, Marion M. Bennette, Re-direct

The Court: How could your contention be the difference between the cost plus price and the 22 cents? You claim that you were entitled to it at 7 5/8 cents, weren't you?

Mr. Turton: For the fifty sets, yes.

10 The Court: The fifty sets were long since paid for, weren't they?

Mr. Turton: Well, they came along in small amounts, and were all in this one account. Nobody seems to have known exactly when these fifty sets arrived. They came along, but there was no definite figure set by the Kuebler Company. They merely sent them in and figured them at a certain price. We had to accept those prices, to base our cost price on.

20 The Court: I do not know enough about it, but if there is any difference between the fifty sets, and the other material.

Mr. Turton: There would be a difference.

The Court: I mean in the nature of the material, or the nature of the work.

Mr. Turton: No. Only the difference in the price.

30 Q. Miss Bennette, will you take that first and explain how you figured those prices? A. On one sheet I have the account.

Mr. Eldridge: I have no objection to giving this in a brief way.

By Mr. Eldridge:

40 Q. What you did was to figure at 17.4 cents and 22 cents for the first fifty sets, did you not? A. As they were billed I figured them.

Q. You figured that was what the company owed,

Defendant's Witness, John A. Raymond, Direct

17.4 cents, up to the time of the increase to 22 cents; then 22 cents on until fifty sets were made? A. Yes.

Q. And after fifty sets were made, then 7 cents?

A. Well, some 7 cents, and some 7 5/8 cents, according to the contract. I have made a copy of that showing what the figure should be, and then I have another statement showing how they were billed. 10

Q. When you figured that way you found you had paid us \$879, was it, too much? A. Yes.

Mr. Turton: I will offer that in evidence. Statement entered in evidence and marked Exhibit D3.

Q. Miss Bennette, do you know where Mr. Peterson is? A. I don't. The last I heard of him he was in Buffalo. 20

Q. That is the last you have heard of him? A. Yes.

JOHN A. RAYMOND, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

Direct-examination by Mr. Turton: 30

Q. Mr. Raymond, in March, 1920, were you employed by the H. J. Koehlers Motor Corporation? A. I was.

Q. How long were you with them altogether? A. Approximately a year.

Q. Do you recall going to the Kuebler Foundry in Easton, Pennsylvania? A. I do.

Q. Do you recall the date, about? A. No, I don't recall it. 40

Defendant's Witness, John A. Raymond, Direct

Q. Was it in March, 1920? A. Approximately.

Q. That was the only time you were there, that once, was it? A. One visit.

Q. Do you recall talking to Mr. Gibboney? A. I believe I do.

10 Q. Did you talk to anybody else there? A. Yes.

Q. Whom? A. Mr. Schatz.

Q. Did you know who Mr. Schatz was? A. I knew he was connected with the factory.

Q. What was your purpose in going to the Kuebler Company?

Mr. Eldridge: I object to that question.

The Court: Why?

Mr. Eldridge: He can tell what he did.

20 The Court: Yes.

Mr. Turton: All right. I will withdraw it.

Q. What was your position with the Koehler Company? A. I was in the sales department.

Q. Did you have any authority to make any price on anything?

Mr. Eldridge: I object to that, what authority he had. He may tell what he did.

30 Q. Did you make any price on things? A. Not with Kuebler Foundry.

Q. Was that part of your duties? A. No.

Q. What did you do at the Kuebler Company? A. I brought back some castings.

Q. Is that what you went for? A. I went to get castings, and carried them back.

Q. Went to get some castings. And did you bring them back yourself? A. I brought five.

40 Q. Did you, while you were having any conversation with Mr. Gibboney, have any price on future cast-

Defendant's Witness, John A. Raymond, Cross

ings for the Koehler Company? A. I had nothing to do with price.

Q. Did you have any conversation with him increasing any price? A. I don't remember.

Q. You don't remember having anything like that? A. No.

Q. Did you arrange, or did you say that the Koehler Company would pay 22 cents for castings? A. I was not familiar with prices, and had no reason to state any figure. 10

Mr. Eldridge: I move that answer be stricken out.

Mr. Turton: All right.

Q. Did you state it? A. No. 20

CROSS-EXAMINATION by Mr. Eldridge:

Q. Was the subject of price discussed at all, Mr. Raymond? A. I don't remember.

Q. Did you urge the Kuebler people to hurry along their production? A. Yes.

Q. There was need for these castings in a hurry, was there not? A. That is what I went there for.

Q. You went there for that purpose. Did they discuss with you the condition of your patterns? A. They made mention of it. 30

Q. Did you see the patterns? A. Yes.

Q. Did you see any defects in them? A. I know nothing about patterns.

Q. Well, did they point out where the trouble lay with these patterns? A. They spoke of patterns.

Q. They said that they were not fit for the manufacture of these parts, didn't they? A. They spoke about the patterns, but it was my first visit to a foundry, and I knew nothing about them. 40

Defendant's Witness, John A. Raymond, Cross

Q. Didn't they tell you they would have to get more money if they were to continue the work? A. I don't remember that.

Q. Well, would you deny that that was discussed? A. I don't remember price mentioned at all.

10 Q. Did you hear Mr. Gibboney testify? A. Yes, sir.

Q. Is it true, as he says, that he told you that the price would have to be 22 cents a pound on this work from that time on? A. I remember nothing about price, because I didn't know what the castings were ordered, what figure they were ordered. I went there particularly to get certain castings and to return as quickly as possible.

20 Q. Did Mr. Gibboney tell you that the price would have to be increased? A. I don't remember anything about price.

Mr. Eldridge: That is all.

Mr. Turton: That is all. That is our case.

Mr. Eldridge: I have nothing more to offer.

30

Motion for Direction of a Verdict.

Mr. Turton: I renew my application, and I ask that there be a direction of a verdict for the defendant. I do not think that the plaintiff has proved his case, or proved that there has been any different contract created here, especially in the face of the denial by Mr. Raymond that he ever said anything about price, or ever had anything said to him. And also
40 especially in view of the fact it shows Mr. Raymond would never have had any authority whatever, by the corporation, to make the price.

Motions

The Court: What have you to say, Mr. Eldridge?
(Argument by Mr. Eldridge.)

The Court: What is the evidence as to the work done on the patterns, by the plaintiff corporation?

Mr. Turton: The bills were introduced by Mr. Eldridge himself, that the work was done on the patterns. Here is one bill here, which he turned in, which was an order \$483.03. That was a bill introduced by Mr. Eldridge, put in evidence by him. 10

The Court: Was this paid for?

Mr. Turton: Yes, sir. That is part of this very payment we are claiming. We are claiming our account is paid, and that is part of our account.

The Court: In this case the plaintiff sues upon a contract, which the plaintiff claims was made on March 9th, 1920, on or about that day, by which the defendant corporation agreed to pay them 22 cents a pound for the making of certain castings, and we are limited to considering whether or not an actual contract was made on that day. This is not a suit for damages; it is not a claim for breach of contract; it is a claim for a debt under an alleged contract. Was there such a contract made on the ninth of March, 1920, and such a contract as would bind this defendant corporation? On January 3rd, 1920, there was an order for the making of these castings, which was accepted by the defendant, and that order stated that unless otherwise especially agreed, the defendant was to furnish the plaintiff with satisfactory pattern equipment with which to produce the castings at the minimum cost, and under the terms of that order they were to get cost plus for the first fifty sets, and after that at 7 cents and 7 5/8 cents a pound; so it is claimed that after that order had been entered into, there was a new agreement on March 9th, as stated, 20 30 40

Motions

providing for a jump from the 7 cents and 7 5/8 cents to 22 cents, on the ground that a man by the name of Raymond, representing himself as a representative of the defendant corporation, went to the plant of the plaintiffs, and was there told that they could no longer continue the making of those castings at the price of 7 cents and 7 5/8 cents, because the patterns which they had received were not satisfactory to produce the castings at a minimum cost.

10 Mr. Eldridge: May I interrupt your Honor to say that I think the Court is misinformed. The operation at first was 17.4 cents a pound, on a cost plus basis. That was estimated, before the patterns were put into practical use. After they were put into use, and they had some experience with them, they said, we cannot stand that rate, there will have to be an increase to 20 22 cents, and they continued to bill at that figure. That is the testimony in the case.

The Court: I am taking the written agreement: The first fifty sets f. o. b. Easton, at cost plus; the balance at 7 cents, and 7 5/8 cents.

Mr. Eldridge: At that time there hadn't been fifty sets made.

30 The Court: That was the agreement, and it was claimed afterward, on March 9th, 1920, Raymond made a new agreement with them, and made this in the name of the company, or presuming to have authority to bind the company that he then represented. Now, the question is, did they have a right to terminate that first order. Within the contemplation of that order, they had a right to terminate it, but the question of whether they had a right to terminate that contract, and whether a new contract was 40 made through Raymond, is an entirely different proposition. This defendant company is a corporation.

Motions

Did Raymond have any authority to make a contract for them? Raymond himself says he had no authority; he says he does not remember anything about prices; and there is absolutely nothing in the evidence to show that Raymond had any authority whatever to make a contract that would bind this defendant corporation. It is claimed that he did make such representations as constituted a new agreement, because of the fact that the representations which he made to the plaintiffs were ratified by the defendant, and the way the defendant ratified what Raymond did was through the payment for the goods that were subsequently furnished, at the price that they claim Raymond had made, 22 cents. The bookkeeper and treasurer of this defendant corporation admits the payments, and the records show that payments were made. She claims that those payments were made in error; that under the original order they were bound to pay for the first fifty sets at whatever the actual cost was, and that she had assumed that she was paying at this actual cost price, under that order, which provided that the first fifty sets should be at cost plus price, and gives that as a reason for making those payments; but even she would not have a right to make a new contract for the corporation. The question that concerns me is whether such a new agreement was made as binds the defendant corporation, and I am constrained to the conclusion that no new legal agreement was made and, therefore, I will have to grant this motion for a directed verdict, so far as the plaintiff has made the motion.

Now, so far as the counterclaim is concerned, what is the proposition: If there was no new agreement made, and if the old agreement was still binding, then all excess of payment they are entitled to have re-

Motions

turned to them; they claim that the records show, and those records are not disputed, that they amount to something like \$879.09.

Mr. Eldridge: I have not made any motion concerning this counterclaim. I have not had an opportunity. I would like to move its dismissal.

10 The Court: On what ground?

Mr. Eldridge: On the ground that it is a voluntary payment, and that they are not entitled to recover. I have made that point, that it has no legal foundation, in my pleadings. It is a voluntary payment to the plaintiff, and under the cases they are not now permitted to recover back. The Court may conclude that that is a jury question, as to whether it is a voluntary payment, or whether it is not a voluntary
20 payment. If that is so, of course, the matter should go to the jury. But I contend that it is plainly a voluntary payment, and under the cases cannot be recovered and, therefore, there should be a dismissal.

The Court: As to the counterclaim, the only evidence in the case that we have is to the effect that this was a payment through error, and it amounts to \$879.09, but included in that \$879.09 is a payment for patterns made by the plaintiff, which I think, from
30 the evidence, the plaintiff had a right to charge for, amounting to \$483.03; the amount of the payments being undisputed, a verdict for the defendant for \$396.06 is directed.

Mr. Eldridge: I desire to note an exception to your Honor's ruling with respect to the direction of a verdict for the defendant, on the plaintiff's case. And on the counterclaim on the ground, as stated in my argument to the Court, that there was ample testimony
40 in the case to make it clearly a jury question as to whether the plaintiff was not entitled to succeed in

Motions

its contention. That there was ample evidence to go to the jury that the man Raymond had actually made an agreement with the Kuebler Company to produce these castings at 22 cents a pound, and that if he could be held to have lacked authority at the time, the subsequent billing of the defendant company at 22 cents a pound, and their continued honoring of those invoices and bills for a long period of time, even long after all of the work was finished, and having further honored the invoices which from time to time were submitted, even after they had gotten into an argument, long after this contract was made, as to just this point, as to whether the charges were justified, even after that time they made payments as late as 1922, a year or more after this thing was supposed to have been concluded, I say that there was ample evidence for the jury to consider, and to found a verdict upon in favor of the plaintiff for the full amount claimed.

Now, with respect to the counterclaim, contention is now made that the payments made, after the discussion as to whether we were entitled to receive the money, were voluntary, if no other payments were voluntary, and I claim that all the payments were voluntary; and furthermore, that if it cannot be passed upon as a law question, if it cannot be held by this Court that these payments are voluntary, at least it is a question for the jury to say whether these witnesses who were sworn here for the defendant were telling the truth, whether the business of a large manufacturing company can be conducted under such principles as will permit of an overpayment of \$879 on a four or five thousand dollar business proposition. I suggest it tests the credibility of any man, that such a thing could have happened, unless there was an intent to honor the invoices as submitted, and pay the price agreed upon.

Exhibit P1.

To Sidney W. Eldridge, Esqs.,
 Attorney of Plaintiff,
 286 North Broad Street,
 Elizabeth, N. J.

Dear Sir:

10 Attached hereto and served upon you herewith is
 a true copy of the written agreement mentioned in the
 defendant's counterclaim.

Respectfully yours,
 W. EUGENE TURTON,
 Attorney for Defendant.

Dated: October 6, 1922.

20

ACKNOWLEDGEMENT.

THE KUEBLER FOUNDRIES Inc.

Easton, Pa. Jan. 3, 1920.

Our Order No. G 9832
 Cust. Order No. 595
 Requisition No.

30

Customer H. J. Koehler Motors Corporation.

Ship to H. J. Koehler Motors Corporation, Fourth
 Ave. & Ogden Sts., Newark, N. J.

Via Freight—Erie R. R. delivery.

Delivery
 Remarks

40 Quantity Pattern Material Grey Iron Castings.
 200 M15-3 * Radiator Sides—left.
 200 M15-4 * Radiator Sides—right.

Exhibit P1

- 200 M15-9 Top Tanks.
- 200 M-15-10 Lower Tanks.
- 300 K15-3 Radiator Sides—right.
- 300 K15-4 R Radiator Sides— left.
- 300 K15-9 Radiator Top Tanks.
- 300 K15-10 Radiator Lower Tanks.

10

NOTE: Make up fifty (50) Sets of the above at once from patterns as they are; after which patterns will be given the proper attention to produce castings as required.

THIS ORDER ACCEPTED AND ENTERED BY US UNDER THE FOLLOWING CONDITIONS:

1. Unless otherwise especially agreed, you are to furnish us with satisfactory patterns equipment from which to produce the castings at the minimum cost. 20
2. Subject to possible delay from strikes, accidents or other causes, or delays in transit, unavoidably delaying manufacture or delivery.
3. Defective castings may be returned to us and credit will be given at the invoice price but no other claim of any nature whatsoever in connection with them will be allowed. 30
4. Our responsibility ceases when goods are delivered to transportation company in good order and receipt taken therefor.

PRICE First 50 sets F. O. B. Easton—at cost—plus. Balance at 7¢ and 7-5/8¢ Tariff Rate Frt. allowed.

TERMS: 30 days net from date of invoice.

40

THIS IS AN EXACT COPY OF YOUR ORDER AS WE HAVE ENTERED IT. IF ANY ERRORS EXIST NOTIFY US AT ONCE.

THE KUEBLER FOUNDRIES INC.

Exhibit P2.

Any claim against this shipment must be made within 5 days after receipt thereof. Defective castings replaced, but no claim allowed for labor or machine work.

THE KUEBLER FOUNDRIES INC.

TERMS—Due Net 30 Days from date of Invoice.
No Discount allowed for Prepayment.

Our responsibility ceases when goods are delivered to transportation company in good order and receipt taken therefor.

Sheet No. 1.

Sold to H. J. Koehler Motors Corporation,
Bloomfield, New Jersey.

Car No.		Via				F. O. B. Easton	
C. O. No.	Castings	Pieces	Pattern No.	Weight	Price	Amount	Net Amount
			Invoice dated Jan. 12, 1920				
595	Grey Iron	1	M 15-3	16	.174	2.78	
			To charges via Parcels Post			.31	
				Tax		.02	\$ 3.11
			Invoice dated Jan. 14, 1920				
595	"	1	M 15-3	13	.174	2.26	
			Freight allowance		.18	.02	
						2.24	
			To charges via Parcels Post			.35	
				Tax		.02	2.61

Exhibit P2

595	"	Invoice dated Jan. 23, 1920			
		6	K 15-19	123	
		1	M 15-10	22	
		10	K 15-9	363	
		7	M 15-9	298	
		9	M 15-3	137	
		7	M 15-4	93	
				<hr/>	
				1,036	.174 180.26
		Freight allowance			.18 1.86 178.40
					<hr/>
595	"	Invoice dated Jan. 29, 1920			
		3	K 15-10	60	
		6	M 15-9	261	
		6	K 15-9	212	
				<hr/>	
				533	.174 92.74
		Freight allowance			.18 .96 91.78
					<hr/>
595	"	Invoice dated Jan. 30, 1920			
		1	K 15-3	18	
		1	K 15-4	17	
				<hr/>	
				35	.174 6.09
		Freight allowance			.18 .06 30
					<hr/>
		Charges via parcels post & tax, .46 & .02		.48	6.51
					<hr/>
		Amount carried forward			282.41

Exhibit P2

		Invoice dated Feb. 19, 1920		
595	"	2	K 15-3	32
		2	K 15-4	33
				65
				.174
				11.31
		Freight allowance		.18
				.12
				11.19
		Parcels post charges		1.03
				12.22
		Invoice dated Feb. 25, 1920		
595	"	31	M 15-3	574
		32	M 15-4	588
		14	K 15-10	273
		2	K 15-3	32
		2	K 15-4	32
				1,499
				.174
				260.83
		Freight allowance		.18
				2.70
				258.13
		Amount carried forward		509.89

Sheet No. 3.

Car No.	Via		F. O. B. Easton			
Castings	Pieces	Pattern No.	Weight	Price	Amount	Net Amount
						509.89
						Amount brought forward
						509.89
						Invoice dated Feb. 28, 1920
Feb. 25	Charges paid on pattern K-19-17 returned to you.					
				Parcels Postage	.12	
				Special delivery	.10	.22
						510.11
				May 26, 1920,	Credit by cash	510.11
						.00

Exhibit P2

C. O. No.		Invoice dated Mar. 3, 1920					
595	Grey Iron	2	K 15-3	31			
		2	K 15-4	31			
				<hr/>			
				62	.174	10.79	
			Freight allowance		.18	.11	10.68
						<hr/>	
		Invoice dated Mar. 4, 1920					
595	Grey Iron	8	K 15-10	155			
		10	M 15-10	180			
		3	K 15-3	46			
		5	K 15-4	62			
				<hr/>			
				443	.174	77.08	
			Freight allowance		.18	.80	
						<hr/>	
						76.28	
			To drayage to express office			2.50	78.78
						<hr/>	
		Invoice dated Mar. 6, 1920					
595	Grey Iron	33	M 15-4	556			
		5	K 15-9	200			
		34	M 15-3	628			
		5	M 15-9	227			
		3	K 15-4	48			
		3	K 15-3	45			
				<hr/>			
				1,704	.174	296.50	
			Freight allowance		.18	3.07	293.43
						<hr/>	
		Invoice dated Mar. 11, 1920					
595	"	6	K 15-3	95			
		4	K 15-4	62			
		3	M 15-10	56			
		1	K 15-10	20			
				<hr/>			
				233	.22	51.26	
			Freight allowance		.18	.42	50.84
						<hr/>	
			Amount carried forward				433.73

Exhibit P2

Sheet No. 4.

Car No. Via F. O. B. Easton

C. O. No. Castings Pieces Pattern No. Weight Price Amount Net Amount

	Amount brought forward				433.73
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	June 16, 1920,		Credit by cash		433.73
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	.00
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Invoice dated Mar. 12, 1922

595	Grey Iron	12	M 15-3	211
		3	K 15-3	48
		14	M 15-4	247
		9	K 15-9	354
		26	M 15-10	495
		4	M 15-9	169
		38	K 15-10	772
		2	K 15-4	33

	2,329	.22		512.38
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Freight allowance		.18		4.19
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	508.19
--	--------

	17.94
--	-------

	526.13
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To labor & Material Boxing

Invoice dated Mar. 19, 1922

595	“	3	K 15-3	48
		7	K 15-4	113

	161	.22		35.42
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Freight allowance		.18		.29
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	35.13
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July 7, 1920,

Credit by cash

	561.26
--	--------

	561.26
--	--------

	.00
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Exhibit P2

		Invoice dated Mar. 27, 1920		
595	"	29	M 15-9	1,226
		25	K 15-3	391
		16	K 15-9	630
		44	M 15-3	746
		11	M 15-10	214
		52	M 15-4	846
		15	K 15-10	300
		23	K 15-4	360
				4,713
				.22
				1,036.86
		Freight allowance		.155
				7.31
				1,029.55
				1,029.55
		Amount carried forward		1,029.55

Sheet No. 5.

Car No.	Via		F. O. B. Easton	
C. O. No.	Castings	Pieces	Pattern No.	Weight
				Price
				Amount
				Net Amount
				Amount brought forward
				1,029.55
				Invoice dated Mar. 25, 1920
648,	Letter Jan. 6		To repairs to patterns K-15-3	
			and -4, due to condition	
			when received, as broken	
			in transit:	
			8 hours Labor	2.63
				21.04
				Invoice dated Mar. 31, 1920
Mar. 22			Expressage paid on your pat-	
			terns as per original ex-	
			press receipt herewith	.74
				1,051.33
			August 11, 1920,	Credit by cash
				1,051.33
				.00

Exhibit P2

(Billhead of The Kuebler Foundries, Inc.)

Sheet No. 1.

C. O. Nos.	Castings	Pieces	Pattern No.	Weight	Price	Amount	Net Amount
Invoice dated June 10, 1920							
595	Grey Iron	52	K 15 3	821			
"		53	K 15 4	852			
"		44	M 15 3	782			
"		42	M 15 4	700			
"		2	K 15 9	80			
"		11	M 15 9	473			
"		2	M 15 10	40			
				3,748	.155	5.81	\$818.75
					.22	824.56	
			Freight allowance			824.56	
Invoice dated June 18, 1920							
595	Grey Iron	4	M 15 10	88			
"		4	M 15 9	165			
"		4	K 15 9	135			
				388	.22	85.36	
			Freight allowance		.155	.60	84.76
						85.96	
Invoice dated July 8, 1920							
595	Grey Iron	1	K 15 3	16			
"		1	K 15 4	16			
				32	.22	7.04	
			Freight allowance		.155	.05	
						7.09	
			Parcels Post charges			.46	7.45
						7.55	

Exhibit P2

Invoice dated July 23, 1920				
595	Grey Iron	153	M 15 9	6,029
"		141	M 15 10	2,711
"		15	K 15 10	274
"		62	K 15 9	2,048
"		2	K 15 4	33
				11,095
Freight allowance				.22 2,440.90
				.155 17.20
Amount carried forward				3,334.66

Sheet No. 2.

Castings	Pieces	Pattern No.	Weight	Price	Amount	Net Amount
Invoice dated July 31, 1920						3,334.66
Invoice dated July 31, 1910						
July 20	To alterations and making new pattern equipment of the following patterns to suit their requirements as per their order #1361 of March 20, 1920:					
	To alterations and repairs to patterns, K 15 9, 11¾ hrs. @ 2.25				26.44	
	To alterations and repairs to patterns, K 15 10, 9½ hrs. @ 2.25				21.38	
	To alterations and repairs to core box, K 15 9, 7½ hrs. @ 2.25				16.88	
	To alterations and repairs to core box, K 15 10, 6½ hrs. @ 2.25				14.63	
	To making new core box for pattern, K 15 9 14¾ hrs. @ 2.25				33.19	
	To making new core box for pattern, K 15 10, 14 hrs. at 2.25				31.50	

Exhibit P2

To making new master pattern for K 15 3, 23 $\frac{3}{4}$ hrs. at 2.25	53.44	
To making new master pattern for K 15 4, 24 hrs. at 2.25	54.00	
To making new metal pattern off master, K 15 3, 47 $\frac{3}{4}$ hrs. at 2.25	107.44	
To making new metal pattern off master K 15 4, 48 $\frac{1}{2}$ hrs. at 2.25	109.13	
To 12 pounds aluminum metal for above @ 1.00	12.00	
To 20 feet 1" White Pine @ .15	3.00	483.03

C. O. No.	Invoice dated Oct. 19, 1920				
595	Grey Iron	1	M-15-3	16	
595	Grey Iron	25	K 15 9	850	
"		26	K 15 10	520	
"		5	K 15 3	85	
"		9	K 15 4	153	
				<u>1,608</u>	.22
					353.76

NOTE: The above castings made up on your order are held in stock by us as per your request, subject to your disposition. We hereby bill them on our regular terms of 30 days, net cash.

Amount carried forward

4,171.45

Exhibit P2

Sheet No. 3.

Amount brought forward 100.00

	Sept. 25, 1920	Credit by cash		4,171.45
	Sept. 30,	" memorandum	633.80	
0	Nov. 10,	" by cash	200.00	
	Nov. 23,	" " "	100.00	
	Dec. 18,	" " "	75.00	
	Jan. 10, 1921	" " "	75.00	
	Jan. 31,	" " "	100.00	
	Feb. 18,	" " "	150.00	
	Mar. 16,	" " "	150.00	
	Apr. 7,	" " "	150.00	
	Apr. 30,	" " "	100.00	
0	May 31,	" " "	100.00	
	June 23,	" " "	75.00	
	July 13,	" " "	65.00	
	Aug. 16,	" " "	75.00	
	Sept. 12,	" " "	75.00	
	Oct. 8,	" " "	75.00	
	Nov. 28	" " "	75.00	2,373.80
				<hr/>
				\$1,797.65
30	Dec. 13,	Credit by cash	75.00	
	Jan. 10, 1922	" " "	75.00	150.00
				<hr/>
				\$1,647.65
	Mar. 17,	Credit by cash	75.00	
	Apr. 10	" " "	75.00	150.00
				<hr/>
				1,497.65

Exhibit P3.

March 6, 1920.

H. J. Koehler Motors Corp.,
Newark, N. J.

Gentlemen:

Herewith statement of your account to March 1st. 10
We take the liberty of calling your attention to
January balance, amount \$289.13, as shown thereon.
If you find it convenient, won't you please arrange
to favor us with check for this portion of your ac-
count during the coming week, and much oblige,

Yours very truly,

Enclo.

TAM.HS

20

March 12, 1920.

H. J. Koehler Motors Corp.,
Newark, New Jersey.

Gentlemen:

If you find it convenient at this time, we would
much appreciate settlement covering your February 30
account, amounting to \$510.11.

Thanking you in advance, we remain,

Yours very truly,

TAM.HS

40

Exhibit P3

May 3rd, 1920.

H. J. Koehler Motor Corp.,
Newark, N. J.

Gentlemen:

10 Won't you kindly favor us with settlement covering your February account amounting to \$510.11.

We would appreciate very much receiving your remittance during the present week.

Yours very truly,

TAM.R

May 20, 1920.

20 H. J. Koehler Motors Corporation,
Newark, New Jersey.

Gentlemen:

30 We have not been favored as yet with a response to our letter of the 3d instant regarding your February account, amounting to \$510.11, and we would call your attention also to your March account, amounting to \$2046.32. Your entire account is now somewhat past due and the matter of settlement should receive your attention.

We will expect to hear from you by return mail regarding the matter and if you are not prepared to make full settlement in cash at this time, we could arrange to take a short term note for part of the account with interest added. We make this suggestion to facilitate prompt settlement which we are compelled to expect at this time.

40 Awaiting the kindness of your response, we remain,

Yours very truly,

TAM.HS

Exhibit P3

June 10, 1920.

H. J. Koehler Motors Corporation,
Newark, N. J.

Gentlemen :

Our records show that your March account, amounting to \$2046.32, remains unpaid. As this portion of your account is considerably past due, we trust that you will arrange to give the matter of settlement your prompt attention and favor us with remittance by the 15th instant, and oblige,

Yours very truly,

TAM.HS

10

20

Remittance Statement

H. J. KOEHLER MOTORS CORPORATION
Newark, N. J.

Date
Month Year

1920

Kuebler Foundries, Inc.,
Easton, Pa.

30

Date	Item	Amount	Date	Item	Amount
------	------	--------	------	------	--------

3/ 3/21		\$ 10.68			
---------	--	----------	--	--	--

3/11		50.84			
------	--	-------	--	--	--

3/ 4		78.78			
------	--	-------	--	--	--

3/ 6		293.43			
------	--	--------	--	--	--

Total		\$433.73			
-------	--	----------	--	--	--

40

Deductions

Date	Item	Amount
------	------	--------

Exhibit P3

June 22, 1920.

H. J. Koehler Motors Corp.,
Newark, N. J.

Gentlemen:

10 On the 15th instant, you favored us with a remittance covering four invoices dated the 3d, 4th, 6th and 11th of March, amounting to \$433.73, leaving a balance due for March of \$1612.59.

Inasmuch as this portion of your account is considerably past due, we trust that you will kindly arrange to favor us with remittance in full by the 26th instant as we will have considerable use for funds at that time.

20 We trust you will give this matter your special attention.

Yours very truly,

TAM.HS

(Letterhead of H. J. Koehler Motors Corporation.)

June 23, 1920.

30

Kuebler Foundries,
Easton, Pa.

Gentlemen:

40 Replying to yours of June 22d, we regret exceedingly that your account has not been paid long since. We started to move into our new plant about the middle of April and even yet this building is not completed. On Monday of this week the gas was installed which allows us to begin manufacturing. The

Exhibit P3

contractors were held up until only about two weeks ago by the steamfitters and plumbers who were on strike, and all this has re-acted on us, for it was a case of everything going out and nothing coming in, in the way of money, for us.

However, we have again begun manufacturing and will positively send you a good sized check the end of next week, and have every reason to believe that we can clean up the account in full during the month of July. 10

Thanking you for your kind indulgence, we are,
Yours very truly,

H. J. KOEHLER MOTORS CORPORATION,
per W. M. Keleb,
President. 20

July 2, 1920.

H. J. Koehler Motors Corporation,
Bloomfield, N. J.

Gentlemen:

Referring to your President's letter of June 23d explaining to us your reasons for not being able to make prompt settlement of your account, beg to say that we appreciate the difficulties that you have been up against, in fact, we have been up against the same proposition ourselves. 30

We were hoping that your remittance would have been in our hands by this time in order to assist us in taking care of our payroll to-day. However, in order to assist us in meeting other heavy payments the first of the week, we would suggest that you arrange 40

Exhibit P3

to send us your check for as large amount as you can and a short term note for the balance so as to reach us by Tuesday, the 6th inst.

As this matter is very important to us, we trust that it will receive your careful attention.

Yours very truly,

10 TAM.HS

Remittance Statement

H. J. KOEHLER MOTORS CORPORATION
Bloomfield, N. J.

20

Date	
Month	Year
July 6	1920

Kuebler Foundries, Inc.,
Easton, Pa.

Date	Item	Amount	Date	Item	Amount
3/12/20		\$526.13		Bro't forward	
3/19		35.13			
30				Total	\$561.26

July 12, 1920.

H. J. Koehler Motors Corp.,
Bloomfield, N. J.

Gentlemen:

40 Referring to our letter of July 2 regarding your past due account, beg to advise that we received your

Exhibit P3

check on the 7th inst for \$561.26 covering March 12th and 19th bills, but we did not receive your note for the balance of your account as requested, nor did we receive any indication from you as to when we could expect settlement.

We explained to you in our letter that we needed your account to assist us in meeting our payroll and we will ask that you make a special effort to see that your remittance reaches us not later than the 16th instant. 10

Yours very truly,

TAM.HS

July 23, 1920. 20

H. J. Koehler Motors Corp.,
Bloomfield, N. J.

Gentlemen:

We have not been favored with your reply to our letter of the 12th instant, requesting remittance covering the over due balance of your account

We must insist upon immediate attention to our request as we are not in a position to extend payment beyond the 28th instant. 30

Yours very truly,

TAM.HS

Exhibit P3

(Letterhead of H. J. Koehler Motors Corporation.)

July 24, 1920.

Kuebler Foundries,
Easton, Pa.

10 Gentlemen:

Replying to yours of July 12th, we regret exceedingly not being able to make you a larger payment than we did, but having had three months cut out of our production through moving into a new incompleated plant, caused by strikes etc., we have simply bumped up against conditions that we could not foresee and are obliged to ask your kind indulgence until we can get under real headway.

20 Conditions are improving with us very nicely and we will make another remittance to you on or before August 10th. Will say that we have never given out a note for merchandise in our business experience, so will request that you excuse us from starting this practice.

Thanking you for your kind co-operation with us, we are,

30 Yours very truly,
H. J. KOEHLER MOTORS CORPORATION,
per M. M. Bennette,
Treas.

Exhibit P3

(Letterhead of H. J. Koehler Motors Corporation.)

July 31, 1920.

Kuebler Foundries,
Easton, Pa.

Gentlemen: *Attention Mr. Gibboney.*

10

Confining our telephone conversation of even date, it will be satisfactory for you to pour the 22 K15-9 for which you have cores made.

You are also requested to retain the castings now in your possession until further advised by us, and to forward us patterns soon as possible.

Very truly yours,

H. J. KOEHLER MOTORS CORPORATION,
C. B. Bierweiler,
Purchasing Agent

20

Noted.

Supplement issued

August 2nd, 1920

CGB.BFS

30

40

Exhibit P3

Remittance Statement

H. J. KOEHLER MOTORS CORPORATION
Bloomfield, N. J.

		Date	
		Month	Year
10		Aug. 10,	1920
	Kuebler Foundries, Inc., Easton, Pa.		

	Date	Item	Amount	Date	Item	Amount
	3/27/10		\$1,029.55		Bro't forward	
	3/31		.74			
	3/25		21.04			
20			Total			\$1,051.33

August 10, 1920.

H. J. Koehler Motors Corporation,
Bloomfield, N. J.

30 Gentlemen:

We frankly admit that we are somewhat disappointed in not receiving a remittance from you as promised in your letter of July 24th.

We suggested in our letter of July 2 that you arrange to send us a short term note if you were not able to send us a check at that time. We note your explanation in your of July 24 that you have never given out a note for merchandise which is certainly
40 a very desirable record, but you don't seem to realize

Exhibit P3

that in holding up settlement of your account you are compelling the other fellow to do just what you are able to keep from doing.

Your account to June 30th averages considerably past due. The amount of this portion of your account is 1,954.84. Now, if you are not able to send us a check for this amount by return mail, we do not think that it would do your credit any serious damage to favor us with a short term note so that we can secure the use of your account in meeting our payrolls and maturing obligations. 10

We trust that you appreciate our position in the matter and favor us with a settlement not later than the 14th instant.

Yours very truly,

TAM.HS

20

(Letterhead of H. J. Koehler Motors Corporation.)

Aug. 17th, 1920.

The Kuebler Foundries Inc.,
Easton, Pa.

Gentlemen:

30

This is to acknowledge receipt of your invoice of July 31st., covering charges on our pattern equipment.

Immediately upon receipt of patterns, we shall be glad to pass your invoice for payment.

Would appreciate it if you would advise, when you expect to make shipment of same.

Very respectfully,

H. J. KOEHLER MOTORS CORPORATION,
C. B. Bierweiler
Purchasing Agent.

40

CGB/EM

Exhibit P3

August 19th, 1920.

H. J. Koehler Motors Corporation,
Bloomfield, New Jersey.

Gentlemen:

Attention Mr. Bierweiler

10

We are in receipt of your letter of August 17th., and in reply would say we have your patterns ready for shipment today, and also the balance of castings which have been made up. We will ship your patterns at once and the balance of your castings towards the end of the month.

Hoping this is satisfactory, we are

Very truly yours,

20

THE KUEBLER FOUNDRIES Inc.

Per

AFG/RD

(Letterhead of H. J. Koehler Motors Corporation.)

August 30, 1920.

30

The Kuebler Foundries Inc.,
Easton, Pa.

Gentlemen:

Owing to some unforeseen changes that we will be obliged to make in our Stock Department, we kindly ask that you comply with our request as per the enclosed confirmation.

Soon as these conditions are settled, we shall be pleased to advise you regarding shipment.

40

Very truly yours,

H. J. KOEHLER MOTORS CORPORATION,

C. B. Bierweiler

Purchasing Agent

CGB/BFS

Exhibit P3

WESTERN UNION TELEGRAM.

Dated August 30, 1920.

To Kuebler Foundries Inc.,
Easton, Pa.

Do not ship any castings whatsoever until further
advised by us. 10

H. J. KOEHLER MOTORS CORPORATION
Confirmation

August 30th 1920.

Koehler Motors Corporation, 20
Bloomfield, New Jersey.

Gentlemen:

Your telegram of August 30th, to hand and in
reply would say we will comply with your request with
reference to shipment of Grey Iron castings due on
your orders, and will hold castings here at your risk
and will bill you for same at the end of the month.

Hoping this is satisfactory, we are 30

Very truly yours,
THE KUEBLER FOUNDRIES INC.
Per

AFG/RD

Exhibit P3

(Letterhead of H. J. Koehler Motors Corporation.)

Sept. 8. 1920.

Kuebler Foundries, Inc.,
Easton, Pa.

10 Gentlemen:

Under date of September 7th, we returned to you via freight prepaid, 237 pieces of malleable iron radiator castings.

This action has been necessary on our part as we feel that you should see these castings to fully appreciate our reasons for returning same, which are for blow holes, and warping.

20 Our Inspection Department has carefully marked every casting, so as to permit you to see the cause of returning same very readily.

We feel that you will agree with us that these castings are absolutely of no use to us, owing to the condition of same. We therefore request that you credit us for same.

B/L and itemized shipping ticket of shipment are enclosed herein.

30

Very truly yours,
H. J. KOEHLER MOTORS CORPORATION,
C. B. Berwile
Purchasing Agent

CGB/BFS

40

Exhibit P3

September 10, 1920.

Koehler Motor Corporation,
Bloomfield, New Jersey.

Gentlemen:

We are in receipt of your letter of September 8th, 10
with reference to the return of certain castings, which
you say are defective.

It is all right to return castings that are defective
due to workmanship, and any castings that leak in the
pressure in radiators. Any that have been returned on
account of so called warpage is due to the flimsiness
of the patterns, and warpage is unavoidable by us with
the character of the pattern equipment which we were
obliged to work with. 20

However, we will look over these castings when
they come and report to you later.

Very truly yours,

THE KUEBLER FOUNDRIES INC.

Per

AFG/RD

September 14, 1920. 30

H. J. Koehler Motors Corporation,
Bloomfield, N. J.

Gentlemen:

Referring to statement mailed you under date of
September 1st showing the items which make up your
account, amounting to \$3817.69, beg to advise that
in looking over our books we find that the invoices 40
date back to June 10 and are all within June and
July.

Exhibit P3

We have some large payments to meet during the coming week and we will have to expect you to arrange a settlement of your account so as to reach us not later than the 21st or the 22d instant.

10 We prefer a cash settlement, but if you find it inconvenient to send us the cash, we can arrange to handle your short term note.

As stated, under the circumstances we will have to expect your settlement by the above mentioned time without fail.

Yours very truly,

TAM.HS

20

September 22nd 1920.

Koehler Motor Corporation
Bloomfield, New Jersey.

Gentlemen:

Attention Mr. Beirweiler

30 We have on hand a number of your castings, made on several different orders, about which we wrote you on August 30th, stating we would bill these castings to you at the end of this present month.

These castings are somewhat in our way at the present time, and we would ask you to have them ordered forward, otherwise we will be compelled to charge you storage for same.

Please let us hear from you at once in this matter, and oblige

40

Very truly yours,
THE KUEBLER FOUNDRIES INC.
Per

AFG/RD

Exhibit P3

(Letterhead of H. J. Koehler Motors Corporation.)

September 23, 1920.

Kuebler Foundries,
Easton, Pa.

Gentlemen:

10

Replying to yours of Sept. 14th, we regret exceedingly the delay in the payment of your account and that it has been necessary to return to you quite a large number of castings which were defective. By this time you have undoubtedly received these castings and as soon as you forward us complete credit, we will send you another check.

It is indeed unfortunate that you delayed us so unreasonably on so many occasions, on shipments, which caused us to lose much business and in addition we were placed to much expense by reason of your non delivery in sending our representatives to your plant, all of which should not have been necessary, and these circumstances have been a big factor in making money tight with us at this time.

20

We are enclosing you our check for \$100 on account of what we owe you and assuring you of our sincerity in this matter, we are,

30

Yours very truly,
H. J. KOEHLER MOTORS CORPORATION,
per H. J. Koehler,
Pres.

40

Exhibit P3

Remittance Statement

H. J. KOEHLER MOTORS CORPORATION
Bloomfield, N. J.

		Date	
		Month	Year
10		Sept. 23,	1920
	Kuebler Foundries, Easton, P. A.		

Date	Item	Amount	Date	Item	Amount
	To apply on a/c	\$100		Bro't forward	
				Total	\$100

20

(Letterhead of H. J. Koehler Motors Corporation.)

Sept. 24, 1920.

The Kuebler Foundries, Inc.,
Easton, Pa.

Attention Mr. A. F. Gibboney

30

Gentlemen:

This is in reply to your letter of Sept. 22nd.

The writer is obliged to go out of town for several days on a business trip, and would thank you to hold this matter in abeyance until his return, at which time you will hear from him.

Very truly yours,

H. J. KOEHLER MOTORS CORPORATION

40

C. G. Bierweiler

B. F. S.

Purchasing Agent

BFS

Exhibit P3

September 29th 1920.

Koehler Motor Company,
Bloomfield,
New Jersey.

Attention Mr. Koehler, Prest.

Gentlemen:

10

In reply to your letter of the 23rd, in which you claim our delay in furnishing you with castings has been a large factor in making money tight with you, in as much as it decreased your business, would say that we think you are rather late in advancing this argument, besides when your proposition was put up to us, we were not at all keen for it, as your patterns were in bad shape and the Radiator business at its best is a very hard proposition for the iron foundry. 20

We complained of these patterns to your people at the time, but they insisted on us making the castings up from them. Would state right here that the trouble we had in making your castings and the money we lost, was quite sufficient without being held up for nonpayment of bills, and we draw your attention to the fact that these castings were made on the time and material basis and on this basis we are not responsible for scrap. In this case however, and in as much as those castings were purely defective ones, we will accept 2906 pounds as being our scrap, and the balance of castings which were doubtless returned on account of being crooked, amount to 1,606 pounds, consisting of 20 pieces M15-4, 6 pieces M15-3, 21 pieces K15-38 and 15-39, and 49 pieces K15-4, we will allow you scrap value for. 30

We absolutely know that the trouble with these castings was due to the patterns which we used to make 40

Exhibit P3

them and we cannot possibly be held responsible for them as we called your attention to them at the time. Furthermore the number of these scrap castings we sold to you at the rate of 17.4 cents and those at .22 cannot be determined. Any concern that holds their scrap back for eight or nine months, and then ships
 10 it back in one bunch, does not deserve to have any consideration from the foundry. It is neither right to the foundry, nor is it helping yourselves. Had this scrap been returned to us when it was found to be defective, we would never have gone ahead and made
 20 4,500 pounds of scrap.

We have decided to give you credit for 2,906 pounds, at a price in proportion to the weight of castings we shipped you at 17.4 cents and .22 cents respectively.
 20

I would further call your attention to the fact that our terms are not cash in thirty days, which fact you have entirely overlooked. We are very much in need of this money at the present time, and would ask that you see that we are paid at the earliest possible moment, in order to avoid any further trouble. We are

Very truly yours,

THE KUEBLER FOUNDRIES, INC.

30

Per

AFG/RD

October 19, 1920.

H. J. Koehler Motors Corp.,
 Bloomfield, N. J.

Gentlemen:

Referring to our letter of September 29 and your
 40 letter of September 30 regarding your unpaid account and the castings that we have on hand which were

Exhibit P3

made up account of your orders, beg to advise that we have gone over this matter carefully and feel that the position you have taken is very unreasonable.

We explained to you in our correspondence that from the very start your work was undesirable owing to the fact that your pattern equipment was in very bad shape, but you insisted upon us going ahead in spite of this fact on a cost plus basis which we did at considerable loss to ourselves for the reason that we were not able to anticipate in our cost what your rejections would be which turned out to be unusually large owing to your poor equipment. Furthermore, had your pattern equipment been in first-class shape, we could have made delivery much prompter and more satisfactorily, for there were times when our moulders produced a larger number of bad castings than they did good ones, simply from the fact that your patterns were in such bad shape. 10 20

The position you have taken at this late date with reference to our failure to make prompter delivery in view of the above circumstances, is entirely without reason, not only on account of your unsatisfactory pattern equipment but you must bear in mind that your orders did not specify any special delivery, it being understood that we were to do the best that we could under the circumstances. 30

Your account as it stands on our records to October first, after deducting our credit memorandum dated September 30 of \$633.80, amounts to \$3,083.89. We are enclosing herewith our invoice covering the castings we have in stock made up on your orders which amounts to \$353.76, making a total amount of \$3,437.65 due us.

We will have to expect you to arrange a settlement of your account in full, either in cash or part cash and 40

Exhibit P3

note settlement, on or before the 30th instant and we will have to also expect your advice by return mail indicating that we can count on your settlement by that date, for, in view of the heavy loss that we have already incurred, we cannot extend the matter beyond the date mentioned.

10 Yours very truly,

Enclo.
TAM.HS

(Letterhead of H. J. Koehler Motors Corporation.)

20 Oct. 29, 1920.

The Kuebler Foundries, Inc.,
Easton, Pa.

Attention—Mr. T. A. Mellon

Gentlemen:

Referring to your letter of October 19th, and your invoice to the amount of \$353.76.

30 We are at a loss to understand why you are charging 22¢ per pound for grey iron radiator castings that you have made from time to time for us.

In your letter of December 29, 1919, you quoted 7¢, 7-5/8¢, and 7-7/8¢ for radiator sides, radiator bottom, and radiator tops respectively, which quotation was accepted by ourselves by placing our purchase order #595 dated December 31, 1919. This order was for a larger quantity than quoted upon by yourselves, which should work to your advantage from your standpoint of production. Reference to this order was made in
40 our letter of Dec. 31, 1919.

Exhibit P3

Assuring you that we will appreciate hearing from you at your convenience, regarding the discrepancy mentioned, we are

Very truly yours,

H. J. KOEHLER MOTORS CORPORATION

JAMES PETERSON

Chief Engineer 10

CDP/BFS

(Written in pencil.)

Mar. 9, 1920

Price advanced to 22¢ by Poyer signed by Shotts.
Authority given Shotts verbally by Mr. Raymond
of H. J. Kohler Motors Corp.

20

November 2, 1920.

H. J. Koehler Motors Corp.,
Bloomfield, N. J.

Gentlemen:

Referring to your letter of October 29 regarding our invoice of October 19, amount \$353.76, beg to advise that the matter of price you refer to as charged on this invoice for the Radiator Sides, Radiator Bottoms and Radiator Tops, respectively, would say that this price was taken up with your Mr. Raymond personally at our plant on March 9 and he gave us authority to charge 22¢ for all of these castings and we so noted this authority on your orders. 30

This price was brought about by the fact that, as previously stated, your pattern equipment was in very bad shape, particularly from a moulding standpoint. 40

Exhibit P3

This was thoroughly explained to your Mr. Raymond and he fully appreciated the conditions we were up against and that we were suffering a severe loss at the price we were charging you not only on account of the condition of your patterns, but our inability to get moulders to make your castings which, at the best, are
10 very difficult and our loss on account of bad castings was therefore very heavy. Even at the price of 22¢ per pound our profit was extremely small.

We wrote you under date of October 19 regarding your account and advised that we would have to expect settlement on or before October 30, but nothing was said in your letter regarding the question of settlement and we have no advice otherwise from you. We feel that we have not been unreasonable in this matter and
20 that we have given you every consideration within our power. We cannot therefore be expected to delay this matter indefinitely and unless your settlement reaches us on or before the 10th instant, we will be compelled to consider taking such measures as within our judgment will bring about a settlement.

Yours very truly,

TAM.HS

30

40

Exhibit P3

Remittance Statement

H. J. KOEHLER MOTORS CORPORATION
Bloomfield, N. J.

Date
Month Year
Nov. 9 1920 10

Kuebler Foundries
Easton, Pa.

Date	item	Amount	Date	Item	Amount
	To apply on what we owe	\$200		Bro't forward	
			Total	\$300	20

Deductions		
Date	Item	Amount

Will reply fully to your
last letter before end of
this week. H. J. Kuebler
Motors Corp. M. M.
Bunnette, Treas.

30

Exhibit P3

Remittance Statement

H. J. KOEHLER MOTORS CORPORATION
Bloomfield, N. J.

Date
Month Year
Nov. 22 1920 10

Kuebler Foundries
Easton, Pa.

Date	item	Amount	Date	Item	Amount
	To apply on a/c of what we owe	\$100		Bro't forward	20
				Total	\$100

November 30, 1920.

H. J. Koehler Motors Corporation,
Bloomfield, N. J.

Gentlemen:

Referring to your letter of November 15 regarding the price charged you for your Radiator Castings, beg to advise that we have made a thorough investigation of this matter and have also taken the matter up with our former superintendent who fully corroborates our statement regarding the authority given us by your Mr. Raymond to change the price from 17¢ to 22¢ per pound.

Notwithstanding Mr. Raymond's statement to the contrary, we had no reason whatever to question his

30

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Exhibit P3

authority for establishing this price, for he well knew our reasons for requesting the change which he knew and could see was absolutely justifiable under the circumstances and we have absolute proof to this effect.

Acting upon Mr. Raymond's authority for changing the price from 17.4¢ to 22¢ per pound on March 9th,
10 we shipped and billed you on March 11 at this price and you paid all invoices from March 11 to March 31 and made further payments on account on this basis without raising any question whatever which indicated to us that Mr. Raymond's instructions were fully understood and acceptable to all parties concerned.

May we ask you to kindly advise us promptly how soon we can expect a substantial remittance.

Yours very truly,

20

TAM.HS

December 14, 1920.

H. J. Koehler Motors Corp.,
Bloomfield, N. J.

Gentlemen:

30 Referring to our letter of November 30 regarding your unpaid account, we are as yet without your remittance as requested.

In view of the fact that this work has already been a loss to us, we are in no position to carry the matter along indefinitely. We must therefore expect you to arrange a settlement within the coming week, either in the form of a check or a note, so that we can obtain the use of the money in our business.

40

Yours very truly,

TAM.HS

Exhibit P3

Remittance Statement

H. J. KOEHLER MOTORS CORPORATION
Bloomfield, N. J.

		Date	
		Month	Year
		Dec. 17,	1920
			10

Kuebler Foundries, Inc.,
Easton, Pa.

Date	Item	Amount	Date	Item	Amount
	To apply			Bro't forward	
	on account				
	of what				
	we owe	\$75			20
				Total	\$75

(Letterhead of H. J. Koehler Motors Corporation.)

	December 20th, 1920.	
The Kuebler Foundries Inc.,		30
Easton,		
Pennsylvania.		

Attention: Mr. Mellon.

Dear Sir:

We wish to apologize for our delay in replying to your letter of November 30th, which delay was occasioned by the writer being away from the office considerable. We note particularly the first paragraph of

40

Exhibit P3

your letter regarding the statement which you credit to your former Superintendent as regards contradicting what Mr. Raymond has given us in writing.

We would respectively refer you to your acknowledgment of our purchase order #595 covering your order #G9832 which acknowledgment is dated January 10 3rd, 1920. You will note upon referring to your acknowledgment that the first 50 sets of castings was to be billed to us on a cost plus basis which fully explains why we paid the invoices referred to in your letter of November 30th, without questioning prices mentioned therein. Your acknowledgment states that the balance of the castings on our order #595 would be at 7¢ and at 7-5/8¢ tarriff rate frt. allowed.

It seems to us that there is so much information in 20 both our files, bearing on our purchase order #595 that it is only fair for all parties concerned to abide by such data and eliminate from consideration any verbal instructions.

Very truly yours,

H. J. KOEHLER MOTORS CORPORATION

JAMES PETERSON

Chief Engineer.

CDP:FF

30

December 22, 1920.

H. J. Koehler Motors Corporation,
Bloomfield,
New Jersey.

Gentlemen:

40 We have your letter of the 20th instant regarding your account, in which you have taken exception to the explanation given in our letter of November 30.

Exhibit P3

We regret that it would not be consistent for us to eliminate from this matter any verbal instructions for the reason that while we were doing our very best in our efforts to turn out satisfactory castings with your unsatisfactory pattern equipment, we were compelled to work, as it were, from hand to mouth in our efforts to keep the cost down as much as possible although we could not hope to keep it within reasonable limits. Those who are fortunate enough in not being compelled to operate a foundry under the circumstances and conditions that we were compelled to face at the time we were attempting to make your castings, cannot appreciate just what trouble we had in handling your work and the only opportunity that was given us to explain these conditions, was to your representative verbally at which time he appeared to appreciate our difficulties and authorized the change in price referred to in our letter. 10 20

In the second paragraph of your letter, you state that you did not question the price we billed you at for the reason that we were to make the first fifty sets of castings on a cost plus basis. Apparently you are mistaken in this statement for the reason that we billed you from March 11 to March 31 at the rate of 22¢ per pound which invoices were paid by you as stated in our letter of November 30 and if you will refer to your records you will find that these shipments were considerably in excess of the first fifty sets. 30

If we had made a large profit on your work at the prices charged, we might be willing to consider the question of meeting you half way, but owing to the condition of your pattern equipment and other conditions that were beyond our control, we can easily show that we actually lost money even at the price of 22¢ per pound. Therefore, we will have to expect you to ar- 40

Exhibit P3

range without further delay satisfactory settlement of your account as we cannot possibly afford to drift the matter out into an indefinite period.

We will look for a definite reply from you on or before the 28th instant, enclosing a settlement.

Yours very truly,

10

TAM.HS

January 3, 1921.

H. J. Koehler Motors Corp.,
Bloomfield, N. J.

Gentlemen:

20 Notwithstanding the fact that we requested a settlement from you in our letter of Dec. 22 to reach us by the 28th ultimo, we find that you have apparently failed to give the matter your attention.

30 As explained in our letter, we are not in a position to drift this settlement out to an indefinite period. We were put to considerable expense in labor and material on your castings from which we derived no profit and by delaying your settlement you are subjecting us to a further loss, and we must now insist that you send us a remittance either in the shape of a check or part cash and part note settlement, or we can accommodate you to the extent of taking the entire account in a short term note in order to give us the use of the money in our business which we very much need at this particular time.

It is absolutely necessary that your settlement reaches us before the 10th instant as we cannot possibly delay the matter beyond that date.

40

Yours very truly,

TAM.HS

Exhibit P3

(Letterhead of H. J. Koehler Motors Corporation.)

January 4, 1921.

The Kuebler Foundries Inc.,
Easton,
Pa.

10

Attention: Mr. Mellon.

Dear Sir:

We have your letters of December 22nd, and January 3rd, and must apologize for not answering your letter of December 22nd sooner. The delay was not caused intentionally, but was due to the fact that the writer was away for over a week, and did not get back to his desk until yesterday. We have read with much interest your letters, particularly your letter of December 22nd. 20

Your good Company has billed us with a substantial amount, covering repairs and alterations to pattern equipment, which seems to us was more than ample to put our pattern equipment in such a condition that it would not be very hard for good castings being turned out, with such equipment, that you refer to as unsatisfactory pattern equipment, which you lay stress on, as being the cause for you asking, what we consider an exorbitant price for castings turned out by you, over and above, the first fifty sets, which our records show were to be done on a cost plus basis. 30

With reference to the third paragraph of your letter of December 22nd. The remittances that we have made from time to time, have been given you to apply on our account, and not with a view of paying for castings covered by any particular invoices and these remittances we have made as often and of amounts as our ability permits us to do. 40

Exhibit P3

Our Treasurer has informed the writer that another check is being sent your Company this week.

Assuring you that it is our desire to co-operate with you, as far as we can consistently, we are,

Very truly yours,

H. J. KOEHLER MOTORS CORPORATION.

10

JAMES PETERSON
Chief Engineer.

Remittance Statement

H. J. KOEHLER MOTORS CORPORATION
Bloomfield, N. J.

20

Date
Month Year
Jan. 8, 1921

The Koebler Foundries, Inc.,
Easton, Pa.

Date	Item	Amount	Date	Item	Amount
------	------	--------	------	------	--------

30

	To apply on a/c	\$75		Bro't forward	
--	--------------------	------	--	---------------	--

	Total	\$75			
--	-------	------	--	--	--

Deductions

Date	Item	Amount
------	------	--------

40

Another check will positively be mailed Jan. 31st

Exhibit P3

January 14, 1921.

H. J. Koehler Motors Corporation,
Bloomfield, N. J.

Gentlemen:

We have delayed answering your letter of the 4th instant, owing to the absence of our manager. Since his return, we have investigated thoroughly the question that you have raised regarding the condition of your pattern equipment and find that there were certain necessary alterations and repairs made to your patterns and core boxes from time to time for the reason that some of them were received by us in a broken condition and practically all of them required a general overhauling so as to permit us to use the patterns, otherwise, it would have been absolutely impossible for us to have made any good castings from your patterns. All the repairs and alterations to your pattern equipment were made so as to put them in condition to finish your orders and not to put them in permanent working condition. In other words, if we were to have put your patterns in proper condition to produce good castings at the lowest possible cost, it would have been necessary for us to make entirely new sets of metal patterns.

We find, however, that there was just one instance where we had to make an exception to the above alterations and repairs. Your patterns K-15-3 and K-15-4 had to be made up new in order to enable us to produce castings, but we find that 89 pieces of pattern K-15-3 were made from the old pattern equipment and 45 pieces from the new pattern equipment and 56 pieces of K-15-4 from the old pattern equipment and 65 pieces of this pattern from the new pattern equipment. This matter was gone over thoroughly with your representative and he gave us permission to make the new patterns, and this was taken into consideration at the time.

Referring to the third paragraph of your letter in

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20

30

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Exhibit P3

which you state that the remittances you made from time to time were given to apply on your account but not with the view of paying any particular invoices, would say that you are wrong in this statement, for if you will refer to your records you will find that your remittance of \$561.26 received by us on July 7,
10 paid our invoices of March 12th and 19th, and your remittance of \$1,051.33 received by us on August 11, paid our invoices of March 27th and 31st. The remittances on account that you refer to were received by us subsequent to the above mentioned remittances. We feel that this explanation should now straighten you out regarding this question.

Your last remittance, amounting to \$75.00, received by us on January 10, was accompanied by your Remittance Statement on which you made the notation "Another check will positively be mailed January 31."
20 While we appreciate the fact that business conditions are in bad shape throughout the country and you feel that you are doing the best you can under the circumstances in regard to the payment of your account, it is entirely beyond reason for you to expect us to continue along in this indefinite manner on such small reductions of your account. We have been compelled to
30 face undoubtedly worse conditions than you have which has forced us to issue our note settlements which we have never made it a practice to do heretofore in order to give our creditors the use of the money, and unless you are prepared to make us a substantial payment on account in your next remittance, we will have to insist upon your arranging some other plan of settlement so as to give us the use of your account in our
40 business. We are justly entitled to this and we must therefore insist upon it being carried out without further delay.

We will expect to hear from you definitely on or before the 20th instant.

Yours very truly,

TAM.HS

Exhibit P3

Remittance Statement

H. J. KOEHLER MOTORS CORPORATION
Bloomfield, N. J.

Date
Month Year
Jan. 31, 1921 10

Kuebler Foundries
Easton, Pa.

Date	Item	Amount	Date	Item	Amount
------	------	--------	------	------	--------

	To apply		Bro't forward		
	on a/c	\$100			
	of what				20
	we owe				

Total			\$100		
-------	--	--	-------	--	--

Deductions

Date	Item	Amount
------	------	--------

	Another check will be mailed on Feb. 17th				30
--	--	--	--	--	----

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Exhibit P3

Remittance Statement

H. J. KOEHLER MOTORS CORPORATION
Bloomfield, N. J.

		Date	
		Month	Year
10		Feb. 17,	1921
	Kuebler Foundries Easton, Pa.		

Date	Item	Amount	Date	Item	Amount
	To apply on a/c of what we owe you	\$150		Bro't forward	
20				Total	\$150

Another check will be
paid 3/15/21.

March 8th, 1921.

30 H. J. Koehler Motor Corporation,
Bloomfield, N. J.

Gentlemen:

We regret that it is again necessary for us to call your attention to the fact that your account is drifting along without any apparent attention on your part regarding payment.

40 You will note by the enclosed statement that your account still amounts to \$2,737.65 all of which has been outstanding for several months.

Exhibit P3

We have endeavored to be as lenient as possible with you on account of existing conditions, which you apparently do not appreciate, and the matter has now reached a point where we must insist upon a substantial remittance or we will be compelled to place the account in the hands of our attorney for collection, which action we trust you will not force us to do. 10

We must hear from you definitely on or before the 15th instant.

Yours very truly,

TAM.R

Remittance Statement 20

H. J. KOEHLER MOTORS CORPORATION
Bloomfield, N. J.

Date
Month Year
March 15, 1921

The Kuebler Foundries
Easton, Pa.

Date	Item	Amount	Date	Item	Amount
------	------	--------	------	------	--------

30

To apply	Bro't forward
on a/c of	
what we	
owe	\$150

Total \$150

Another check will positively be mailed on April 6th 40

Exhibit P3

(Letterhead of H. J. Koehler Motors Corporation.)

March 15, 1921.

The Kuebler Foundries,
Easton, Pa.

10 Gentlemen:

Without rehearsing details of former correspondence with you by our Mr. Peterson, the writer knows that what we owe you is considerably overdue.

We thoroughly appreciate this fact, but the drastic business conditions which are affecting practically all manufacturers alike, makes it necessary for all of them under the circumstances to work with each other until the situation is materially relieved.

20 Although there is much money owed us, this is no time to force any claim and we have found it necessary to be contented to receive comparatively small payments on account, much along the same lines as we have been paying you. As business improves these payments of course will be increased very radically and at the same time the banks will probably begin to loosen up and business men will be receiving assistance from that source.

30 We thoroughly appreciate the co-operation you have already shown and you can rest assured that you will lose nothing through continuing with us along the lines above indicated.

Again thanking you and assuring you of our sincerity in this matter, we are,

Yours very truly,

M. M. BENNETTE

Treas.,

40

H. J. Koehler Motors Corporation.

Exhibit P3

Remittance Statement

H. J. KOEHLER MOTORS CORPORATION
Bloomfield, N. J.

	Date	
	Month	Year
The Kuebler Foundries, Inc., Easton, Pa.	April 6,	1921
		10

Date	Item	Amount	Date	Item	Amount
------	------	--------	------	------	--------

	To apply on a/c of what we owe	\$150	Bro't forward		
			Total	\$150	20

Another check will be
mailed on April 30th

Remittance Statement

H. J. KOEHLER MOTORS CORPORATION
Bloomfield, N. J.

	Date	
	Month	Year
The Kuebler Foundries, Inc., Easton, Pa.	April 30,	1921
		30

Date	Item	Amount	Date	Item	Amount
------	------	--------	------	------	--------

	To apply on a/c	\$100	Bro't forward		
			Total	\$100	40

Another Check will be
mailed 5/27/21

Exhibit P3

Remittance Statement

H. J. KOEHLER MOTORS CORPORATION
Bloomfield, N. J.

Kuebler Foundries, Inc.,
Easton, Pa.

Date 10
Month Year
July 12, 1921

Date	Item	Amount	Date	Item	Amount
	To apply on a/c of what we owe	\$65		Bro't forward	
				Total	\$65

20

Another check will positively be mailed on Aug. 15th.

August 9, 1921.

H. J. Koehler Motors Corp.,
Bloomfield, N. J.

Gentlemen:

30

Upon examination of our books, we find that you still owe us a balance of \$2,097.65. It is unnecessary for us to remind you of the fact that your account is considerably past due, we feel, however, that you should at least make a special effort to make larger settlements than you have been in the habit of sending us.

We feel that we have been unusually lenient with you which fact we are afraid you do not fully ap-

40

Exhibit P3

preciate, for when you consider that we originally lost money on the work and then have been carrying almost the full amount of your account for over a year, we believe you will realize that we have already gone beyond all reasonable limits.

In spite of the above facts, we are still willing to
 10 act patiently in the matter provided that you co-operate with us to the fullest extent of your ability, therefore, in view of the size of your account and its overdue condition, we will have to expect your next payment to be a considerably larger amount.

Yours very truly,

TAM.HS

20

Remittance Statement

H. J. KOEHLER MOTORS CORPORATION
 Bloomfield, N. J.

Date

Month Year

30

Aug. 15, 1921

The Kuebler Foundries, Inc.,
 Easton, Pa.

Date	Item	Amount	Date	Item	Amount
------	------	--------	------	------	--------

40

To apply
 on % \$75
 of what
 we owe
 you

Bro't forward

Total \$75

Another check will be
 mailed 9/10/21

Exhibit P3

(Letterhead of H. J. Koehler Motors Corporation.)

August 15, 1921.

The Kuebler Foundries, Inc.,
Easton, Pa.

Gentlemen:

10

Replying to yours of Aug. 9th, we are enclosing check herewith as per remittance statement attached. You can rest assured that we are co-operating with you to the fullest extent of our ability.

Very fortunately for you, your business does not depend upon the motor truck industry. That industry was hit harder than any other through not only the worst business depression the country has ever seen but through the unloading in this country of thousands of motor trucks built for war purposes. The motor truck industry is positively flat but we do expect that after next month a revival will begin which will gain headway as time goes on.

20

You may rest positively assured that just as soon as things brighten even a little we will get our indebtedness to you cleaned up by materially increasing the size of our payments.

Thanking you for your kind co-operation which is much appreciated, we are

30

Yours very truly,

H. J. KOEHLER,

President, H. J. KOEHLER MOTORS CORPORATION.

(Stamped): Received Aug. 16, 1921.

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Exhibit P3

Remittance Statement

H. J. KOEHLER MOTORS CORPORATION
Bloomfield, N. J.

		Date	
		Month	Year
10	The Kuebler Foundries, Inc., Easton, Pa.	Sept. 10	1921

Date	Item	Amount	Date	Item	Amount
	To apply			Bro't forward	
	on %	\$75			
	of what				
	we owe				
20			Total		\$75

Another check will positively be mailed Oct. 7th.

Remittance Statement

H. J. KOEHLER MOTORS CORPORATION
Bloomfield, N. J.

		Date	
		Month	Year
30	Kuebler Foundries, Easton, Pa.	Oct. 7,	1921

Date	Item	Amount	Date	Item	Amount
	To apply			Bro't forward	
	on %				
	what we				
	owe	\$75			
40			Total		\$75

Exhibit P3

November 19, 1921.

H. J. Koehler Motors Corp.,
Bloomfield, N. J.

Gentlemen:

In looking over your account, we find that you
have not sent us a remittance since October 7th. We 10
are very much at a loss to understand your apparent
indifference to the settlement of your account, es-
pecially in view of the fact that you have promised
to make more substantial settlements than you have
been doing of late. Based on your promises, we
have been inclined to be more lenient with you than
we should have been under good business methods
which does not appear to have received your ap- 20
preciation. 20

The matter has now reached the point where we
must insist on your immediate attention to the ques-
tion of settlement and unless we receive a substantial
remittance from you on or before the 25th instant,
we will have to take such measures as within our
judgment will bring about a settlement.

Yours very truly,

30

TAM.HS

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Exhibit P3

Remittance Statement

H. J. KOEHLER MOTORS CORPORATION
Bloomfield, N. J.

Date
Month Year
Nov. 22, 1921

10 The Kuebler Foundries,
 Easton, Pa.

Date	Item	Amount	Date	Item	Amount
	To apply			Bro't forward	
	on %	\$75		Total	\$75

20 Another pay't will be
 made 12/16/21

(Letterhead of H. J. Koehler Motors Corporation.)

November 22, 1921.

30 The Kuebler Foundries, Inc.,
 Easton, Pa.

Gentlemen:

40 Replying to yours of November 19th, we are enclosing you check as per remittance statement herewith. We thoroughly appreciate your leniency but want to say that we are treating others who owe us money in exactly the same way. The motor truck industry was hit harder than any other industry and if you are doing business with other truck manufacturers you undoubtedly have found out that their

Exhibit P3

business is coming back very slowly. In our case, before this depression came on we were shipping from fifteen to twenty trucks per month for export alone. You probably know what has happened to the export business with the rate of exchange as it has been. Our connections in this country have been giving us very little business for many months but although we are not closed down and have no expectancy of closing we have cut our overhead to the minimum and are hobbling along much the same as are other manufacturers of high grade motor trucks. 10

We have absolute confidence in the future of our business and have most excellent prospects for a real improvement in the next few months. You need have no worry concerning this account and you can rest absolutely assured that just as soon as a moderate improvement in general business is shown we will increase our payments and get this matter out of the way. It was purely an oversight on our part in not mailing you a check earlier this month and you can depend on regular payments being made. 20

Again thanking you and assuring you of our sincerity in this matter, we are

Yours very truly, 30

H. J. KOEHLER,
President, H. J. KOEHLER MOTORS CORPORATION.

(Stamped): Received Nov. 28 1921.

Exhibit P3

November 29, 1921.

H. J. Koehler Motors Corp.,
Bloomfield, N. J.

Gentlemen:

10 We have your letter of the 22d instant enclosing your check for \$75.00 for payment on account. We appreciate your explanation as to why your remittance was delayed, however, we cannot admit that your method of handling your account under the circumstances is based on justice to us.

20 We manufacture a great many castings for the various plants of the International Motor Company and the Maccar Truck Company of Scranton, Pa., and of course the International Motor Company are in a position to pay promptly in accordance with terms, but the Maccar Truck people were placed in a position we presume similar to yours, but instead of compelling us to carry their account along for an indefinite period and accepting little dribs of \$50.00 or \$75.00 a month on account, they were glad to give us the use of the money in our business by giving us their notes which they have reduced from time to time as they could afford to do so. We have been very glad to accommodate them in this way which has made it easy for them and, as stated, has given us use of the funds in our business.

30 Now, you may think that you are in a very bad way owing to adverse business conditions, but we are absolutely certain that you cannot need funds any worse than we do in the carrying on of your business and, as stated, we do not understand why we should be required to drift along in such an indefinite manner and accept the small dribs which you tender

40

Exhibit P3

on account from time to time as you see fit. Therefore, we will expect you to make a substantial payment of at least one-half of your account by the 10th of December or send us your note or notes covering the balance of your account in full. We feel fully justified in making this demand and will expect you to make either one of the settlements requested, otherwise, we will be compelled to take such steps in the matter as we deem advisable. 10

Yours very truly,

TAM.HS

Remittance Statement 20

H. J. KOEHLER MOTORS CORPORATION
Bloomfield, N. J.

Date
Month Year
Dec. 10, 1921

Kuebler Foundries,
Easton, Pa. 30

Date	Item	Amount	Date	Item	Amount
	To apply on %	\$75		Bro't forward	
				Total	\$75

Exhibit P3

Remittance Statement

H. J. KOEHLER MOTORS CORPORATION
Bloomfield, N. J.

Date
Month Year
Jan. 7, 1922

10 Kuebler Foundries,
 Easton, Pa.

Date	Item	Amount	Date	Item	Amount
	To apply			Bro't forward	
	on %	\$75		Total	\$75

20

Remittance Statement

H. J. KOEHLER MOTORS CORPORATION
Bloomfield, N. J.

Date
Month Year
Mar. 16, 1922

30 Kuebler Foundries,
 Easton, Pa.

Date	Item	Amount	Date	Item	Amount
	To apply			Bro't forward	
	on %	\$75		Total	\$75

40 Another pay't will be
 made 4/7/22

Exhibit P3

Remittance Statement

H. J. KOEHLER MOTORS CORPORATION
Bloomfield, N. J.

		Date		
		Month	Year	
Kuebler Foundries, Easton, Pa.		April 7,	1922	10

Date	Item	Amount	Date	Item	Amount
	To apply on %	\$75		Bro't forward	
				Total	\$75
	Another pay't will be made 5/				20

30

40

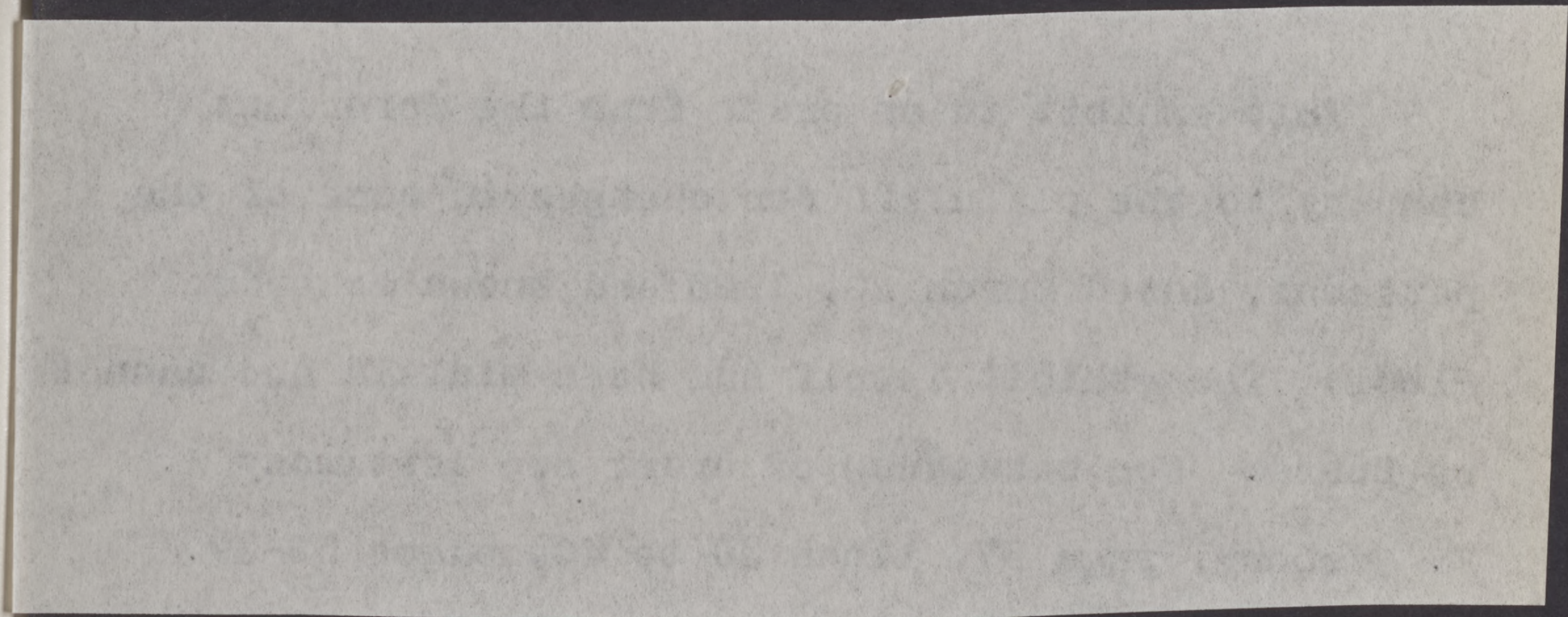
Exhibit P4.

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This exhibit is an order from the defendant company to the plaintiff for changes in some of the patterns, dated March 20, 1920 and known as order #1361. The exhibit itself has been mislaid and cannot be found. For substance of order see testimony A. F. Gibbony, page 37, lines 30 to 40, pages 38-39.

Exhibit P5.

No. 595

G9832

This Number Must Appear
On Each Invoice and
Package

H. J. KOEHLER MOTORS CORPORATION

Fourth Avenue and Ogden Street 10

NEWARK, N. J.

Date December 31st, 1919

To Kuebler Foundries Inc.,
Easton, Pa.

Important

Acknowledge order and advise shipping date. 20
Do not fill at price in excess of that shown.
Boxing or cartage charge not allowed.
Render invoice on date of shipment.
Invoice and packing slip to show our symbol.

Ship for our account, to above address, the following:

Via: Freight Erie

F. O. B. Easton—frt. allowed Terms: 30 days net

Grey Iron Castings 30

200	M15-3	Radiator sides—left	per lb.	.07	
200	M15-4	“ “ —right	“ “	.07	
200	M15-9	“ Top tanks	“ “	.07 7/8	
200	M15-10	“ lower tanks	“ “	.07 5/8	
300	K15-3	“ sides—right	“ “	.07	
300	K15-4	“ “ —left	“ “	.07	
300	K15-9	“ Top Tanks	“ “	.07 7/8	
300	K15-10	“ Lower Tanks	“ “	.07 5/8	40

Exhibit P5

First 50 sets at Cost—Plus; Balance
at Prices given.

10 See
Third
Supplement
Dated
August 2, 1920
Attached.

Authority S.S. 112
Charge Mdse.

H. J. KOEHLER MOTORS CORPORATION,
C. M. Dunthorn, Purchasing Agent.

20 (Stamped): Rec'd Jan. 2 1920 Paid ✓ Approved A.
F. G. Ent'd Jan 2 1920 Ans'd Jan 22 1920

(Written in Pencil): Cost Plus for 1st 50 sets Pats.
rec'd in bad cond. See cost slip attached. 22¢

30

40

Exhibit P6.

No. 648

#101

This Number Must Appear
On Each Invoice and
Package

H. J. KOEHLER MOTORS CORPORATION

Fourth Avenue and Ogden Street

10

NEWARK, N. J.

Date January 6th, 1920

To The Kuebler Foundries Inc.,
Easton, Pa.

Important

Acknowledge order and advise shipping date.

Do not fill at price in excess of that shown.

Boxing or cartage charge not allowed. 20

Render invoice on date of shipment.

Invoice and packing slip to show our symbol.

Ship for our account, to above address, the following:

Via:

F. O. B.

Terms:

Make repairs necessary to pour castings from
radiators patterns

Pattern Shop Order No. 101 issued Jan. 8th,
1919 30

The above also confirmed by Letter under date
of January 6th, 1920, in which they desire
Invoice for Repairs that they may sur-
charge the Transportation Company for
damages in transit.

Authority 3852

Charge Amer. R. R. Express 40

H. J. KOEHLER MOTORS CORPORATION,
C. M. Dunthorn, Purchasing Agent.

(Stamped): Received Jan 7 1920 Order Completed
Mar. 24 1920.

Exhibit D1.

Easton, Pennsylvania

December 29, 1919.

Received Dec. 30, 1919

H. J. Koehler Motors Corporation,
4th Ave. & Ogden Street,
10 Newark, New Jersey.

Attention Mr. Dunthorn.

Gentlemen:

In reference to the writer's visit to your plant last week, we are enclosing you herewith sketch showing our requirements as to the proper style pattern to be used in your radiator tops and bottoms.

20 You will notice we do not use any cope, but core sets flush with top of drag. Instead of Cope we use flat plates to hold the core down, same is clamped fast to drag.

By this method we can use our turn-over machines, and will increase the production to a very considerable extent. We therefor propose to manufacture:

30 Sides of radiators, of high grade grey iron,
thoroughly cleaned, with the proper allowance for machining in lots of 200 at .07 lb.

Tops of radiators, of high grade grey iron,
thoroughly cleaned with the proper allowance for machining, in lots of 200 .7 7/8 lb.

Bottoms of radiators, of high grade grey iron, thoroughly cleaned, with the proper allowance for machining in lots of 200 .7 5/8 lb.

40 We think we can produce the radiator sides from the patterns as you may have them, but at the present

Exhibit D1

time we have not decided on what alterations we may require.

Terms net cash in thirty days, f. o. b. CRR of N. J. our works at Easton, with published freight rate allowed to Newark.

In the event of you placing this business with us we can make delivery on approximately 50 to 75 of each in ten days or two weeks, the balance of the order to go forward at the rate of twenty to thirty a day until order is completed. 10

Hoping to secure this business, and assuring you if you place this business with us, we will endeavor to give same our best attention as to material, workmanship and delivery,

Wishing you a Prosperous New Year, we remain

Very truly yours,

THE KUEBLER FOUNDRIES, INC.

Per GEO. H. ADAMS R.

20

GA/RD

30

40

Exhibit D2.

Easton, Pennsylvania
March 4 1920.

Received Mar. 5, 1920.

Koehler Motors Corporation,
Newark, New Jersey.

10 Gentlemen:

With reference to the recent visit of your Mr. Raymond, when you asked us to expedite delivery of several items, wish to advise we are enclosing packing list of this material, which was shipped today by Express.

The balance of the material which Mr. Raymond asked for will be shipped on Saturday morning by
20 express.

Very truly yours,
THE KUEBLER FOUNDRIES, INC.
Per A. F. GIBBONEY

RP/RD

THE KUEBLER FOUNDRIES, INC.

30 PACKING LIST

3/4/20

Shipped to Koehler Motors Corp.
Via Express Newark, N. J.

Package	Pieces	Pattern	Weight
	8	K 15-10	155
	10	K 15-10	180
40	3	K 15-3	46
	5	K 15-4	62

Exhibit D3.

June 1, 1922.

The Kuebler Foundries Inc.,
Easton, Pa.

Overcharge on castings our Order #595 and your
acknowledgment G9832—Jan. 5, 1920.

Castings as billed by you— 10

(see attached sheet 'A') \$5,903.20

Castings correctly billed first

50 at cost plus balance at

7c. and 7 5/8c. (see at-

tached sheet 'B') \$3,526.46

\$2,376.74

Credit

Balance due Kuebler Foundries, Inc. on account, as 20

per statement

1,497.65

Amount due Koehler Motors Corporation \$879.09

30

40

Exhibit D3

Castings as billed to us by The Kuebler Foundries, Inc.

Invoices	'A' Quantity	Price	Weight	'A' Amount
K 15-3	13	\$.174	per lb.	204 lbs. \$ 35.50
	95	.22	" "	1,504 " 330.88
10 K 15-4	16	.174	" "	239 " 41.59
	101	.22	" "	1,622 " 356.84
K 15-9	30	.174	" "	1,130 " 196.62
	118	.22	" "	4,097 " 901.34
K 15-10	41	.174	" "	814 " 141.64
	95	.22	" "	1,886 " 414.92
M 15-3	97	.174	" "	1,696 " 295.10
	100	.22	" "	1,739 " 382.58
M 15-4	93	.174	" "	1,569 " 273.00
20	108	.22	" "	1,793 " 394.46
M 15-9	22	.174	" "	958 " 166.69
	201	.22	" "	8,062 " 1,773.64
M 15-10	12	.174	" "	226 " 39.32
	187	.22	" "	3,604 " 792.88
	<u>1329</u>		<u>31,143</u> "	<u>\$6,537.00</u>
Credits				
30	Castings returned—			
	1606 lbs. @ .0152 per lb. (scrap value)			\$ 24.41
	2906 " " .2097 " " (average selling price)			609.39
				<u>633.80</u>
Kuebler Foundries, Inc., total billing of castings				<u><u>\$5,903.20</u></u>

Exhibit D3

Correct billing of castings as per our order and as per
acknowledgement of Kuebler Foundries, Inc.

Invoices	'B' Quantity	Price	Weight	'B' Amount
K 15-3	(13	\$.174	per lb.	204 lbs. \$ 35.50
	50 (37	.22	" "	586 " 128.92
	58	.07	" "	918 " 64.26
K 15-4	(16	.174	" "	239 " 41.59
	50 (34	.22	" "	546 " 120.12
	67	.07	" "	1,076 " 75.32
K 15-9	(30	.174	" "	1,130 " 196.62
	50 (20	.22	" "	694 " 152.68
	98	.07 5/8	" "	3,403 " 259.50
K 15-10	(41	.174	" "	814 " 141.64
	50 (9	.22	" "	178 " 39.16
	86	.07 5/8	" "	1,708 " 130.23
M 15-3	50	.174	" "	874 " 152.08
	147	.07	" "	2,561 " 179.27
M 15-4	50	.174	" "	844 " 146.86
	151	.07	" "	2,518 " 176.26
M 15-9	(22	.174	" "	958 " 166.69
	50 (28	.22	" "	1,123 " 247.06
	173	.07 5/8	" "	6,939 " 529.12
M 15-10	12	.174	" "	226 " 393.24
	50 (38	.22	" "	733 " 161.26
	149	.07 5/8	" "	2,871 " 216.91
	<hr/>			
	1329		31,143 "	\$3,754.29

Credits

Castings returned—

1606 lbs. @ .0152 per lb. (scrap value)	\$ 24.41
2906 " " .07 " " (lowest selling price)	203.42
	<hr/>

Correct billing of castings

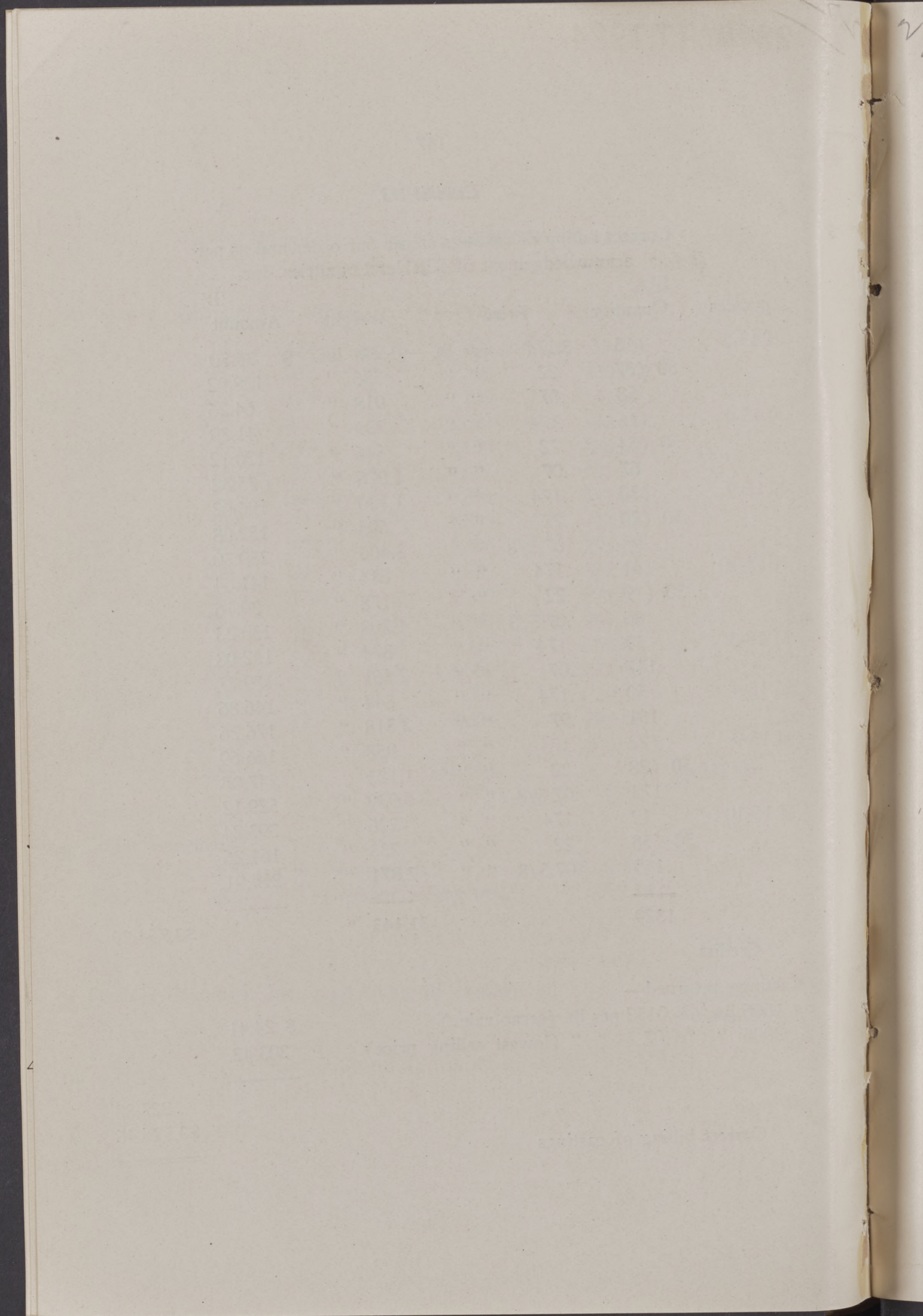
227.83
\$3,526.46

10

20

30

40



**New Jersey Court of Errors
and Appeals**

KUEBLER FOUNDRIES, INC., a corporation,
Plaintiff-Appellant,

vs.

H. J. KOEHLER MOTORS CORPORATION, a corporation,
Defendant-Respondent.

On Appeal
from
Supreme
Court.

APPELLANT'S BRIEF.

A verdict was directed for the defendant both on the plaintiff's case and on the defendant's counter claim.

Plaintiff is engaged in operating a foundry, and the defendant is a manufacturer of automobiles. They entered in a contract (Exhibit P-1, Case, page 72) dated January 3, 1920, by which the plaintiff agreed to manufacture automobile radiator parts from patterns to be furnished by the defendant. There were eight different parts, and the first fifty sets were to be manufactured on a cost plus basis, the balance at \$.07 and \$.07⁵/₈ per pound. (Case, pages 72-73). The first fifty sets were to be manufactured "from patterns as they are, after which patterns will be given the proper attention to produce castings as required".

The contract also provided as follows: "Unless otherwise especially agreed, you are to furnish us (plaintiff) with satisfactory pattern equipment from which to produce the castings at the minimum cost".

The pattern equipment was shipped to the plaintiff by the defendant and was injured in transit (141, lines 32-38).

Before manufacture was begun with the use of this pattern equipment, it was estimated that the cost of manufacture would be \$.17 4/10 per pound (31-32). The character and condition of this equipment is described by Adolphus A. Gibbony, the general manager of the plaintiff company with experience of 32 years, as follows (page 30):

"The casting from which the patterns was made was a very light section casting, and the patterns which we received to make these castings were wooden patterns. A wooden pattern in the light sections in the wet sand warps very readily, and it is very difficult to make a casting from a very light section wooden pattern when it extends over a considerable surface as these did."

Gibbony says that these patterns were not satisfactory, stating the difficulty as follows:

"The trouble was as I stated, they would swell from the dampness in the sand, and in drawing the casting out the pattern would move, one part in relation to another, and thus make a deformed casting, a casting that apparently seemed warped, but instead of being warped it was due to the light structure of the wooden pattern that bent in the withdrawing of it from the sand" (page 3).

This witness fixed the cost before he saw the patterns at \$.17 4/10 per pound, which he then

considered was reasonable and fair, but afterwards altered his opinion because the patterns were made of wood, and they should have been of metal, rigid, so that they would not bend and warp (page 31) and that aluminum patterns are generally employed for work of that character (32); that at one time he looked over the work and found that over sixty per cent. of the castings were bad, due to the warpage, or what was called warpage, occasioned by the character and condition of the patterns (32).

This witness also states that the patterns furnished were not satisfactory for the production of castings at a minimum cost (34, lines 13 to 17).

After manufacture was begun several persons were sent to the plaintiff's plant to hurry along production (39, ll. 39-41, 40, ll. 1-7) among them was John A. Raymond, who, on March 9, 1920 came for some castings that were wanted in a hurry. At the time of Raymond's visit the plaintiff had already manufactured, shipped and billed to the defendant 97 of the part known as M-15-13, 93 of M-15-4, 22 of M-15-9, 12 of M-15-10, 13 of K-15-3, 16 of K-15-4, 30 of K-15-9 and 41 of K-15-10 (page 22). See also Invoices, pages 74 to 78. The total number of parts at that time delivered was 324, but not 50 full sets, although more than 50 of one or more of the single parts had been made and delivered. All had been invoiced at \$.17 $\frac{4}{10}$ per lb. Plaintiff had already complained about patterns (44, ll. 26-35).

Mr. Gibbony, plaintiff's manager as aforesaid, exhibited the pattern equipment to Mr. Raymond, explained its defects and the difficulty of manufacturing with it, and told Mr. Raymond that if

manufacture was to continue with that equipment it would be necessary to increase the price to \$.22 per pound for the balance of the castings, and Raymond stated it was satisfactory, he agreeing that the equipment was in bad shape (page 35-36).

After the agreement with Raymond, and on March 11, 1920, the plaintiff shipped to the defendant the following parts: 6 of K-15-3, 4 of K-15-4, 3 of M-15-10 and 1 of K-15-10. The next day, March 12th, it shipped 108 parts. Each shipment, and in fact all earlier and subsequent shipments were accompanied by an invoice giving detail as to the number of pieces of each part shipped, the weight, price per pound and total charge.

On June 22, 1920 the plaintiff by letter acknowledges receipt of payments covering some of the March invoices, the last including parts invoiced at \$.22 per pound, and calls attention to a balance of \$1,612.59. Payment is requested (88). This letter is answered by the president of the defendant company in which he expresses regret that the account has not long since been paid. He explains the delay and says that during the month of July the defendant has every reason to believe that it can clean up the full account (88-89).

On July 6, 1920 the defendant paid the plaintiff \$561.20 covering invoices for the two shipments last mentioned and shipments made earlier in March (76-79), the earlier ones at \$.17 4/10 per pound and the last two \$.22 per pound for the castings. The check was accompanied by a remittance statement (90).

On March 27, 1920 plaintiff shipped and invoiced at \$.22 per pound, 215 of the parts (80),

giving in each invoice the details as to the number of each part shipped, and on August 10, 1920 the defendant paid an invoice including the last mentioned, amounting in all to \$1,051.33. This payment was accompanied by a remittance statement (94).

By letter of July 31, 1920 the defendant requested a return of its patterns (93).

By letter of August 19, 1920, the plaintiff advised the defendant that patterns were ready for shipment that day, and that they would be shipped at once. It does not appear directly that the patterns were returned, but there is a strong inference to that effect, because nothing more is said about them in the correspondence, and payments on account of plaintiff's bill were made after the receipt of defendant's letter of August 15, 1910 (95), promising to pass invoice of July 31st (82) for payment on receipt of patterns, although the full invoice was not met at one time.

In its letter requesting a return of the patterns (93), reference is made to a telephone conversation and confirmation is given of instruction to pour 22 of parts K-15-9, for which cores had been made. It would seem that the parts just referred to were the last manufactured by the plaintiff for the defendant. There were no shipments made after July 31st.

On August 19, 1920 the plaintiff advised that it would ship balance of castings toward the end of the month (96). The defendant, however, requested the plaintiff to hold these castings until the receipt of further advices (letter Aug. 30, 1920, telegram same day, pages 96-97). These parts are still in the possession of the plaintiff

subject to the defendant's order (24, ll. 5-6, 105, ll. 35-39). These parts were invoiced to the defendant October 19, 1920 (83).

From a review of the correspondence it is apparent that the plaintiff was having a great deal of difficulty in securing payment of its account; about 75% of the letters required payment.

In September defendant returned 237 pieces of castings as defective (letter Sept. 8, 1920, page 98). For these defective parts a credit of \$633.80 was ultimately given the defendant (84). Concerning these parts, however, there was considerable correspondence. In its letter of September 10 (99), plaintiff agrees that it is all right for the defendant to return castings defective because of workmanship, etc., but "any that have been returned on account of so-called warpage is due to the flimsiness of the patterns, and warpage is unavoidable by us with the character of the pattern equipment which we were obliged to work with".

On September 14th plaintiff wrote the defendant for payment, stating the amount due as \$3,817.69, but apparently excluding the final invoice of October 19th to which reference has already been made (99).

On September 23rd this letter was answered by H. J. Koehler, president of the defendant company (101). He speaks of the returned castings, and assures the plaintiff that as soon as a complete credit is given the defendant it will send another check. Complaint is made of unreasonable delays in shipments. Accompanying this letter was a check for \$100.00 and a remittance statement (102).

Mr. Koehler's letter was answered by the plaintiff company September 29, 1920 (103). His

attention was called to the fact that complaint was made concerning the defendant's patterns "but they insisted on us making the castings up from them". The credit for returned castings is also discussed, the plaintiff saying "We absolutely know that the trouble with these castings was due to the patterns which we used to make them, and we cannot possibly be held responsible for them as we called your attention to them at the time. Furthermore the number of these scrap castings we sold to you at the rate of \$.17 4/10 and those at \$.22 cannot be determined * * *. Had this scrap been returned to us when it was found to be defective we would never have gone ahead and made 4,500 pounds of scrap".

"We have decided to give you credit for 2,906 pounds at a price in proportion to the weight of castings we shipped you at 17.4 and .22 respectively."

On October 19th another demand for payment was made by the plaintiff (104-105). It calls attention to the balance of \$3,437.65 due. Accompanying it was an invoice covering unshipped parts amounting to \$353.76.

On October 29th James Peterson, chief engineer of the defendant company wrote the plaintiff questioning the right to charge \$.22 per pound for castings, and calling attention to contract provisions for \$.07 and \$.07⁵/₈ per pound.

This is the first complaint received by the plaintiff concerning the charge of \$.22 per pound, which charge was first made in connection with the shipment of March 11, 1920. No complaint for over seven months, although payments were made covering certain definite invoices, and many others generally on account. The discus-

sion of this subject was opened by the Peterson letter and was apparently closed with the plaintiff's letter of January 14, 1921 (119), in which the necessity for alterations and repairs to the pattern equipment was set forth, and it was explained that to put the defendant's patterns in shape for producing good castings it would have been necessary to make entire new sets of metal patterns. Reference is also made to the use of the new metal patterns for parts K-15-3 and K-15-4, the plaintiff stating that 45 pieces were made from new pattern equipment for K-15-3 and 65 pieces from K-15-4 (119). Just what is meant by the concluding sentence in the second paragraph of this letter is not known, except that consideration was given to the existence of new metal patterns for these parts in connection with the price fixed, or allowance made for parts returned.

After the correspondence with Peterson was concluded and after the plaintiff wrote the defendant on March 8, 1921 (122) calling attention to the defendant's account amounting to \$2,737.65 and asking for payment, Miss Bennette, the treasurer of this company on March 15, 1921 wrote the plaintiff (124). This letter recognizes that the defendant's account is considerably overdue, and explains the financial difficulties the defendant is then experiencing, and promises when business improves that payments to the plaintiff will be radically increased. It concludes with an expression of appreciation of the co-operation shown by the plaintiff and an assurance that it will lose nothing through carrying the account on instalment payments. The letter was accompanied by a check for \$150.00 and a remittance statement (123).

In the month of April, 1921, two payments aggregating \$250.00 were made (125). In the month of May, 1921 a payment of \$100.00, in June \$75.00 and in July \$65.00 (126-127).

On August 9, 1921, the plaintiff again wrote the defendant demanding payment of a balance of \$2,097.65. This letter is answered by the letter of the president of the defendant company, dated August 15, 1921 (129) in which he says:

“You may rest positively assured that just as soon as things brighten even a little, we will get our indebtedness to you cleaned up by materially increasing the size of our payments.”

A payment of \$75.00 accompanied this letter (128).

On November 19, 1921, the plaintiff again wrote the defendant for payment. This letter was answered by a letter of the president of the defendant company dated November 22, 1921 (132).

“You need have no worry concerning this account for you can rest absolutely assured that just as soon as a moderate improvement in general business is shown we will increase our payments and get this matter out of the way.”

A check for \$75.00 accompanied this letter (132). Subsequent payments were made December, 1921, January, March and April, 1922 (135, 136, 137).

This suit was started in September 1922, at which time there was a balance due on the account of \$1,497.65.

The complaint (3-5) contains three counts, the first on a *quantum meruit* for the reasonable

price and value of the castings made for the defendant, the second on a book account for goods sold and delivered, and the third on the special agreement made with Raymond on March 9, 1920 for \$.22 a pound for these castings.

The defendant in its answer (9-10) denies that the castings were to cost \$.22 per pound. It filed a counter claim alleging the existence of a contract under which all sets in excess of 50 were to be manufactured at \$.07 and \$.07⁵/₈ per pound. Attached is a schedule of parts manufactured corresponding as to weight and number with the statements of the plaintiff. The second paragraph of the counter claim reads as follows:

“That the said plaintiff billed to the defendant the parts furnished to the defendant at a price of \$.22 per pound, disregarding the terms of said agreement, thereby overcharging the defendant in the sum of \$879.09.”

For the latter amount judgment is claimed.

The plaintiff as a first defense denies the counter claim, and as a second defense admits the agreement of January 3rd and says in substance that the defendant defaulted in supplying patterns to produce castings at a minimum cost as required after the completion of the first fifty sets of castings, and that the defendant agreed to pay \$.22 per pound for said castings, which was the reasonable and fair value thereof. The answer also contains an objection in point of law to the counter claim on the ground that it discloses no cause of action (15-16).

The defendant made no reply to this pleading.

At the conclusion of the plaintiff's case a motion to non-suit was made and denied.

The only issue raised by the defendant was as to the price at which these radiator parts were to be manufactured. To overcome the effect of frequent remittances to the plaintiff on account of invoices at \$.22 per pound for castings, the defendant produced as a witness Miss Bennette, the treasurer and bookkeeper of the defendant company, whose duty it was to pay bills, who testified that payments were made in error. John A. Raymond was also produced as a witness for the purpose of showing that he did not make an agreement with the plaintiff as alleged and that he had no authority to do so.

Miss Bennette endeavored to explain the payment of bills at the increased price after March, 1920 as follows:

“There were several bills dated ^{MARCH} 1920 at the increased price of \$.22. Our order said that the first fifty sets were to be billed at cost plus, which the Kuebler Foundry Company determined; no matter what price they stated we had to pay. During March the fifty sets were completed, but as they had been shipped in various small amounts, two, three, five, eight at a time, I did not realize when I paid those several bills, that I was going beyond the fifty sets” (49).

Miss Bennette admits that a few days after she paid the March bills (July 6, 1920) she discovered that she had gone beyond the fifty sets, and says that thereafter her payments were made on account (49).

The records of the defendant company were not produced (50, ll. 10-23). On cross examination Miss Bennette admits that the check for \$561.26 given July 6, 1920 was sent in payment of a particular invoice (52, ll. 13-18) and noted

that there was a charge of \$.22 per pound for the casting; that she made no investigation to determine why the price had jumped from \$.17 4/10 per pound to \$.22 per pound, explaining by saying:

“The order for the first fifty sets were to be billed at cost plus, some were billed at 17 and some at 22. We had to accept the Kuebler Foundry figures for the first fifty sets no matter what the price was” (50, ll. 11-15).

This witness says that she received a letter from the plaintiff under date of Sept. 14, 1920, and at that time had received the final invoice of the plaintiff's work (57). After calling the attention of this witness to the various payments made on account of plaintiff's bill (58, lines 20 to 41), by her, she was asked, “How was it that you continued paying on account of these charges when it was not due. Whose fault was that?” Answered: “Well the issue had not come up, we simply paid on account” (58, ll. 39-40). Her attention was then called to the letter of the defendant under date of October 29, 1920, which the witness identifies as having come out of the defendant's office (59). When asked if it was not true that frequent payments were made after the discussion between Peterson and the plaintiff, answered: “Yes, sir; on account of what we owed” (59, ll. 25-27). She admits that some remittance statements were sent without any particular notation as to how the money was to be applied (59, ll. 28-30 and remittance statements 102, 118, 125, 126, 132, 135, 138) and although the various payments made covered a period from August 1920 to April 1922, when asked the

question, "Did you owe anything at that time?" (Nov. 1920.) Answered: "Oh, yes; we thought we owed. I did not find out, I did not realize how much it was until I had checked it out and put it down on paper" (59, ll. 31-35), when she discovered that the overpayment was \$879.00. She says that the first checking up she did was just before suit was started (60).

The witness Raymond merely testified that he had gone to the plaintiff's foundry to hurry production, and to bring back some castings, and that he was in the sales department and had nothing to do with the price; that he did not remember having any conversation with Mr. Gibbony on the subject of increasing the price, and denied that he had arranged or said that the defendant would pay \$.22 for castings (65). On cross examination this witness said he did not remember whether the subject of price was discussed at all, but admitted that the plaintiff made mention of the patterns and he saw them (65, ll. 25-42). He did not remember whether he was told that the plaintiff would have to get more money if it was to continue the work (66, ll. 1-5).

It does not affirmatively appear from his testimony that he was without authority to make the agreement testified to by Mr. Gibbony, and upon the basis of which charges were made against the defendant. He seems first to deny having made any such agreement, and then on cross examination to say that he has no recollection of any such agreement. He was sent to hurry along production. Production could not be hurried if new pattern equipment had to be made, which it was the duty of the defendant to supply

if these parts were to be furnished at a minimum cost.

By the contract of January 3, 1920, the original agreement between the parties, the plaintiff was to make 200 pieces of parts M-15-4 and M-15-9. It actually manufactured 201 of the former and 223 of the latter. The excess, over 200 pieces, was not covered by this contract, even assuming it to have continued in effect.

The total number of parts manufactured up to the time when at the defendant's request manufacturing was stopped, and its patterns returned, was 1329.

There is no question in the case but that the invoices of the plaintiff were received by the defendant (47). The poor and unsatisfactory condition of the patterns for the manufacturing of these parts is not disputed.

At the close of the case the defendant moved the direction of a verdict on the ground that the plaintiff had not proved any different contract (from that of January 3, 1920) especially as Mr. Raymond had denied that anything was said to him about price, and in view of the fact that Mr. Raymond never had authority to make the price (66).

The trial court took the view that it was limited to considering whether or not an actual contract was made on March 9, 1920 (67, lines 18 to 25).

“Now the question is would they (plaintiff) have a right to terminate that first order. Within the contemplation of that order they had a right to terminate it, but the question of whether they had a right to terminate that contract, and whether a new contract was made through Raymond, is an entirely different proposition” (68).

Here the trial court very properly recognized the plaintiff's right to rescind, terminate or abandon the contract, which will be mentioned later in this brief.

Later the court states in effect that Raymond said he had no authority to make the price, and that there was nothing in the evidence to show that Raymond had any authority to bind the defendant. In disposing of the contention that Raymond's contract has been ratified, the trial court assumes as a fact that the treasurer of the company made payment of invoices in error, and that "even she would not have a right to make a new contract for the company" (69).

The defendant made no motion with respect to the counter claim, but the court of its own motion proceeded to dispose of it, when counsel for the plaintiff interrupted with a motion to dismiss it on the ground that the over-payments claimed by the defendant were merely voluntary and that the claim had no foundation in the pleadings. It was contended that if the court considered that it was a jury question as to whether the payments were voluntary, then it should go to the jury (70).

The court ruled that the only evidence in the case was to the effect that the payment was through error, and therefore directed a verdict for the defendant against the plaintiff for the difference between the over-payment claimed \$879.09, and the charges for making new patterns and repairs to old, amounting to \$483.03, concerning which no dispute existed (70, ll. 25-35, p. 95).

The case should have been submitted to the jury.

The evidence in the case may be summarized as follows:

The only point disputed by the witnesses was whether Raymond had in fact made an agreement for \$.22 per pound. Assuming that he did actually deny the making of such agreement, and it is contended that his testimony only goes to the length of saying that he does not remember any discussion of price, and taking all the testimony in the case, and any other disputed point that may have been overlooked, the jury might have found the facts to be as follows:

The original contract of January 3, 1920 required that after the manufacture of the first fifty sets, the patterns to be used for further manufacture were to be such as to permit of the manufacture of parts at a minimum cost. The defendant was in a hurry to have its castings, and did not wish to encounter the delay incident to the manufacture of metal patterns, which would be necessary in order to produce the castings on an economical basis, and enable the plaintiff to supply the excess of fifty sets at \$.07 and \$.07⁵/₈ per pound. The defendant sent Raymond to the plaintiff's plant to hurry production, and with power to make such arrangement with the plaintiff as might be necessary for that purpose. Before Raymond's visit, notwithstanding the fact that the original agreement called for the lower rate of \$.07 and \$.07⁵/₈ per pound, the defendant recognizing the poor condition of its pattern equipment, had paid invoices at \$.17 ⁴/₁₀ per pound for parts in excess of fifty, immediately after Raymond's visit were billed for

castings at \$.22 per pound, the president of the company promised to pay the bill at that rate on June 23, 1920 (88), and actually paid such invoices. Manufacturing ceased at the request of the defendant and before the completion of the original contract, about the early part of August 1920, and before then, and notwithstanding the receipt of invoices beginning March 11, 1920 at \$.22 per pound, defendant never protested the price, promised to pay, and in fact paid the sum of such invoices, thereby permitting and inducing the plaintiff to continue the manufacture of such castings with the original equipment at great expense, notwithstanding the right of the plaintiff to cease manufacture until suitable pattern equipment was furnished. Protests concerning prices were not made until approximately three months after manufacturing ceased, and after frequent promises to pay bills submitted were made by the defendant, which protests were over-ruled by the president and the treasurer of the company by subsequent promises to pay, and frequent payments, until such over-payments, according to the claim of the defendant, notwithstanding the poor financial condition of the company as will appear from all of its letters, aggregated in amount \$879.00, but no one of which exceeded \$150.00.

From the foregoing facts the jury might have concluded that:

1. Raymond had authority, if not express, at least implied to make the agreement to pay \$.22 per pound for castings.

Keim v. Dudley, 54 N. J. Eq. 418.

2. Raymond's contract was ratified by the defendant.

The defendant appears not to have made any inquiry concerning, nor protest against the increase in the price from \$.17 4/10 per pound to \$.22 per pound which took place immediately after Raymond's visit to the plaintiff's plant. This circumstance, coupled with a consideration of the course of dealing already referred to, the defendant's promises to pay and payments, give rise to a strong inference that the defendant was acquainted with the advance in price and the reason therefore, by Raymond himself, and thereafter ratified his act by promises of payment and payments on account. (R. C. L., Vol. 21, sec. 106; *Keim v. Dudley*, 54 Eq. 418.)

3. The defendant is estopped to assert the original contract on January 3, 1920.

It appears from the undisputed evidence that the patterns were not in condition to be used for the economical manufacture of these parts; that the plaintiff knew of such condition; that it knew that the plaintiff was manufacturing with such equipment and billing the defendant at \$.22 per pound, and by its acquiescence in the price fixed in failing to protest and by the affirmative acts of promising and making payments, it led the plaintiff to assume that the price was satisfactory and to continue manufacturing, whereas if a protest had been made against such price, and the original contract price had been insisted upon, plaintiff might have ceased manufacture until the equipment was placed in such condition as to enable it to manufacture such parts at the

prices specified in such contract. Having misled the plaintiff by its course of dealing aforesaid, the defendant should not be permitted at this late date to successfully assert the original contract as a defense to this suit, and thus occasion substantial damage and injury to the plaintiff.

4. The original contract of January 3, 1920 was abandoned for a new contract which contemplated the use of the pattern equipment supplied by the defendant and the payment to the plaintiff of the reasonable price and value of the labor and materials employed by it in the manufacture of castings therefrom.

From the course of dealings between the parties which has already been referred to at some length, it is obvious that they considered the original contract at an end. In addition to the matters already pointed out specifically, the fact that more than the required number of certain parts were manufactured, and that manufacture ceased long before the total number of parts had been made may be considered.

Troth v. Millville Bottle Works, 89 N. J. L. 219.

Keadley v. Cavileer, 82 Id. 635.

McDowell v. Henning Mfg. Co., 91 N. J. L. 209.

Cramp Co. v. Doughty, 89 N. J. L. 288.

Church v. Florence Iron Works, 45 Id. 129.

Rue v. Rue, 21 Id. 369.

Doughty v. Camden Bldg. Assn., 41 N. J. Eq. 556.

N. J. Trust Co. v. Nat. Gas Co., 71 N. J. L. 29.

Colloty v. Schuman, 76 Id. 502.

The situation may be deemed a rescission of the contract by mutual consent.

“Generally a contract can be made only by the consent of all. But this consent need not be expressed as an agreement. If either party without right claims to rescind the contract, the other need not object, and if he permit it to be rescinded it may be done by mutual consent, nor need this purpose of rescinding be expressly declared by the one party in order to give to the other the right of consenting, and so rescinding. There may be many acts from which the opposite party has a right to infer that the party doing them would rescind, and generally when one fails to perform his part of the contract, or disables himself from performing it, the other party may treat the contract as rescinded, but not if he has been guilty of a default in his agreement, and he cannot take advantage of his own wrong to defeat the contract.” *Parsons on Contracts*, Vol. 2, pages 678-679.

“Mutual assent to abandon a contract like mutual assent to form one, may be inferred from circumstances.” *Williston on Contracts*, Vol. 3, Sec. 1826.

5. There was an account stated.

Bills were rendered and accepted without protest for a long period of time, payments were made on account, and promises of payment were repeatedly made by the defendant. The effect of an account stated may be overcome by proof of fraud or mistake. The defendant evidently relies on mistake as a defense. On the subject of mistake we have only the testimony of the treasurer of the company. Promises of payment were made by the president of the company, who may not in the least have been in doubt, for

all we know, of the number of parts made by the plaintiff, when by letter of June 20, 1920 he promised payment. Furthermore there could not have been any doubt in the minds of anyone connected with the company as to the number of parts furnished after manufacturing had ceased and after the Chief Engineer Peterson had entered a protest (October 29, 1920) against the charges, and when, not only Mr. Koehler, but the treasurer herself promised payment. It is conceded even by the treasurer that she had the invoices covering shipments before she paid the invoices at \$.22 per pound, and could by reference to her accounts have discovered the number of each part shipped. Under such circumstances it is difficult to see how her faulty memory could operate to give rise to a mistake such as is recognized by the law as a basis for overcoming the effect of the payments made on account.

Weigel v. Hartman Steel Co., 51 N. J. L. 446.

Brown v. Vandyke,⁸ N. J. Eq. 795.

Wilbur v. Win, 89 Id. 278.

Weir v. Allen, 89 N. J. L. 597.

Vandivere v. Statsir, 39 Id. 593.

Williston on Contracts, Vol. 1, Sec. 94.

6. There was an implied agreement to pay the price charged.

What has already been said concerning the evidence and the course of dealings between the parties to this suit might well lead to the conclusion that the long acquiescence by the defendant in the charges made by the plaintiff for these parts, promises of payment, and payments actually made, that there was a tacit or implied

agreement between the parties, that such prices should control notwithstanding the earlier agreement to the contrary. (*Williston on Contracts*, Vol. 1, Sections 3, 90, Vol. 3, Section 1826.)

The plaintiff is entitled to have this court direct a judgment against the defendant for the full amount claimed by it.

This the court has power to do.

Lehigh Valley R. R. Co. v. McFarland,
44 N. J. L. 674.

Hoxsey v. Paterson, 40 Id. 186.

Frank v. Dailey, 93 Id. 16.

Mackintosh v. Gibbs, 79 Id. 40.

If we eliminate the Raymond contract entirely from consideration, the undisputed evidence in the case, plaintiff contends, gives rise to the existence of an account stated, an implied promise to pay the reasonable cost and value of the parts manufactured, or an implied contract to pay the price charged, and on any of said grounds plaintiff is entitled to a judgment.

The whole case was laid before the trial court, and if a motion had been made by the plaintiff for the direction of a verdict, in its favor the trial court should have granted it.

If for any reason the pleadings are deemed inadequate upon which to base the relief last above requested, or if they be insufficient to sustain the plaintiff's case on a new trial based on evidence already submitted, plaintiff asks leave to amend such pleadings so that the real merits of the case may be determined and a just and fair disposition of the case may be had. Per-

mission to make such amendments may be granted by this court.

Ray Estate Corporation v. Steelman, 90 N. J. L. 184.

Levenson Wrecking Co. v. Gatti-McQuade Co., 93 Id. 184.

Van Houten v. Van Houten, 89 Id. 301.

Giardini v. McAdoo, 93 Id. 138.

Counter claim discloses no cause of action, and should have been dismissed.

With respect to the counter claim appellant says that it should have been dismissed because it does not set forth a cause of action, in that it fails to allege that the over-payments claimed were induced by fraud or mistake.

Koewing v. West Orange, 89 N. J. L., 539.

Shoemaker & Co. v. Board of Health, 83 Id., 425.

Camden v. Varney, 63 Id., 325.

Behring v. Somerville, 63 Id., 568.

Camden v. Green, 54 Id., 591.

New Jersey Brick Co. v. Krantz, 109 Atl. 350.

Mee v. Mountclair, 86 Atl. 261.

Turner v. Barber, 66 N. J. L. 496.

It is also contended that the trial court erred in directing a verdict for the defendant on said counter claim on the ground that:

1. It clearly appears from the testimony that all of the payments sought to be recovered were voluntary. Every shipment of parts was accompanied by an invoice showing the number of

parts shipped, and the defendant had knowledge of such number. Payments were none the less voluntary because of the faulty memory of the responsible agents of the defendant or their failure to consult its available records. Further, it appears that after the discussion arose with respect to the charges, promises of payment were made, accompanied by payments on account, so that when such promises and payments were made, the defendant was fully informed as to the basis of the charges and as a matter of law the plaintiff is entitled to judgment.

2. If any question of fact exists as to the character of such payments, the question as to whether they were or were not voluntary was one for the jury.

The foregoing argument covers grounds of appeal from 1 to 6 inclusive, all of which the plaintiff insists upon.

The 7th and 9th grounds are abandoned, the former because it is without merit, and the latter because it sufficiently appears elsewhere in the case what the answer to this question would have tended to prove.

The 10th ground is abandoned.

The Court erroneously admitted Exhibit D-1 (142). This letter forms no part of the contract between the parties. It preceded it in point of time, is immaterial and should have been excluded.

Respectfully submitted,

SIDNEY W. ELDRIDGE,
Attorney and of Counsel with Appellant.

22 MAR 1924

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

KUEBLER FOUNDRIES, INC., a corporation,

Plaintiff-Appellant,

vs.

H. J. KOEHLER MOTORS CORPORATION,
a corporation,

Defendant-Respondent.

*On Appeal
from
Supreme Court.*

RESPONDENT'S BRIEF.

The action by the plaintiff is practically founded on a contract which said plaintiff, the Kuebler Foundries, Inc., claim was made on March 9, 1920, with one John A. Raymond, who plaintiff contends, was a representative of the defendant with authority to make such contracts.

On December 29, 1919, defendant placed an order with the plaintiff for certain castings and on January 3, 1920, a contract was entered into (Exhibit P. 1, Case, p. 72) and operations under said contract were begun and continued along until the early part of March, 1920, plaintiff billing said castings to defendant upon a cost plus basis. Castings were made from patterns which defendant furnished to the plaintiff, said patterns having been accepted and examined by the plaintiff's general manager, Mr. Gibbony (Case, p. 44, ll. 12 to 20).

The patterns were repaired from time to time by the plaintiff, the expense of which was charged to and paid by the defendant.

The contract of January 3, 1920, consisted of an order for the making of these castings, for which plaintiff was to receive cost plus for the first 50 sets and after that 7 cents and 7 5/8 cents per pound. There seems to be no particular controversy about the operation of the con-

tract up to this point, but on March 9, 1920, or thereabouts, plaintiff is rather uncertain as to the date, it is claimed that a new agreement was entered into providing for a jump from the 7 cents and 7 5/8 cents to 22 cents per pound, on the ground that a man named Raymond who was in defendant's employ, as a laborer, and who had called at plaintiff's foundry for castings, was told that plaintiff could no longer continue the making of those eastings at the price of 7 cents and 7 5/8 cents per pound, because the patterns were not satisfactory.

The defendant company is a corporation and Raymond, the man it is claimed accepted the new agreement, was merely an employee, with no authority whatever to bind his employer, and there was no evidence produced which would indicate any such authority. In the face of this, it is claimed by the plaintiff, that Raymond did make representations to plaintiff which would bind defendant, and it is for this reason that they claim that there was a new agreement which bound defendant. Furthermore, that the defendant, without being bound in the first instance, ratified what Raymond did by the payment of invoices for goods that were subsequently furnished, at the price that they claim Raymond had made, 22 cents. The treasurer, who is also the bookkeeper of the defendant corporation, admits the payments and the records show that the payments were made. She testified that those payments were made in error; that under the original order they were bound to pay for the first 50 sets upon the cost plus basis, and that she had assumed that she was paying at this price, under that order, which provided that the first fifty sets should be at cost plus price, and gives that as a reason for making those payments; but even she would not have the right to make a new contract for the corporation. Is there anything, therefore, upon which plaintiff can predicate a new agreement which would bind the defendant?

As to defendant's counter-claim, if there was no new agreement made and if the old agreement was still binding, then all excess of payment they are entitled to have

returned to them and defendant should have been given a judgment for \$879.09 with no reduction therefrom as payment for repairs had already been paid. The payments were made by mistake, through error and misunderstanding and should be returned.

The various letters, etc., submitted by the plaintiff can in no way effect this case unless it be shown that a new agreement was entered into which is not shown by this mass of correspondence.

Mr. Gibbony did not communicate with the defendant the result of his alleged conference with Raymond (Case, p. 43, l. 12).

“Q Did you ever write to the H. J. Koehler Motors Corporation, saying that the price had been increased? A I don't remember having done so.

Q You never did, did you? A I don't remember that.”

Whether or not there was a new agreement in this matter, was a question of law and properly not submitted to the jury.

There was no evidence whatsoever that Raymond had the slightest authority to do anything for the defendant corporation except to carry back some castings which was his specific object in going to plaintiff's foundries and under those circumstances Raymond could have no authority either express or implied to make any agreement to pay 22 cents per pound for castings.

There could, therefore, be no ratification by the defendant.

The reason no inquiry was made by defendant concerning, nor protest made against, the increase in the price from that stated in the contract, is amply explained in the testimony of Marion M. Bennette, treasurer and book-keeper for the defendant corporation (Case, p. 49, l. 22):

“Q Did you at that time discover what you had paid? A During March, not during March, but at the time I paid those March bills, I found out a few days after that I had gone beyond the fifty

sets and thereafter my payments were made on account, and I stated on the remittance statement which went with the check that the amount was to be on account of what we owed, because I knew that sometime in the future this question would come up."

The defendant would not be estopped to assert the contract of January 3, 1920.

Whatever complaint was made against defendant's patterns was supposed to have been rectified by plaintiff at defendant's expense and the continued use of them by plaintiff was acquiescence by them of their fitness, which would indicate that.

The contract of January 3, 1920, was not abandoned by either plaintiff or defendant but operations were supposedly being continued under the terms of the same.

It is quite apparent that there was no intention on the part of the plaintiff to consider the defendant in the slightest degree, but that the price was arbitrarily raised without intending to bring the matter to the defendant's attention.

No implied authority could have been credited to Raymond to make any agreement which would bind the defendant company. He was merely an employee sent to the plaintiff's place of business for a specific purpose, namely, to hurry production of castings, and could not be considered as an agent with authority to bind defendant to any cost of agreement, and it is of course, absurd to even intimate that there could be any ratification on the part of defendant.

There was no agency agreement between the defendant company and Raymond.

There was no understanding between the H. J. Koehler Motors Corporation and Raymond any further than to the effect that he was to go to the plaintiff foundry and bring back some castings. Authority to create a new agreement was not mentioned either by Raymond or the defendant, and furthermore, the plaintiff admits that no

such authority was ever assumed by Raymond because this visit was the first in which they had noticed him at all.

(Case, p. 41, l. 1):

“Q You had never seen Mr. Raymond before?

A No sir; nor since.”

There must be a contract of employment either express or implied to create the relation of agency.

Uniontown Grocery Co. v. Dawson, 68 W. Va. 332.

“One who seeks to charge another with an act of an agent must prove that the agent acted within the scope of his authority actual or apparent or ratification or acquiescence in or acceptance of the benefit of the act on the part of the employer.”

Hall v. Passaic Water Co., 85 Atl. 349.

The plaintiff's contention that the Trial Court erred in directing a verdict for the defendant on the plaintiff's case and defendant's counter-claim is without merit.

It clearly appeared to the Court that no authority in Raymond had been proved.

It clearly appeared that there had been no intention of ratification of any act which Raymond may have done unknown or otherwise to defendant.

No new contract was ever contemplated by defendant, there was no meeting of the minds in this respect, no revocation of the original contract and therefore, no consideration for a new agreement.

Payments under the circumstances were made by mistake, defendant believing it was operating under the cost plus basis.

Plaintiff's contentions set forth in its brief are entirely without merit and should be dismissed.

W. EUGENE TURTON,

Attorney and of Counsel with Respondent.

