

The Opinion is printed in 13 Stew & 612

New Jersey Court of Errors and Appeals

NOVEMBER TERM, 1885.

Between CHARLES W. TROTTER,
Appellant,

and

CHARLES A. HECKSCHER and THE
LEHIGH ZINC AND IRON COMPANY,
LIMITED,

Respondents.

On Appeal and

Cross-Appeal.

This cause having been brought to a hearing, on cross appeals from the Court of Chancery, at the last June term of this Court, and Courtlandt and Richard Wayne Parker of Counsel with the said Charles W. Trotter, and Charles D. Thompson and George Northrop, of Philadelphia, of Counsel with the said Charles A. Heckscher and the Lehigh Zinc and Iron Company, Limited, having been heard and the questions brought up by said appeals having been duly considered :

IT IS ON THIS eighteenth day of January, A. D. 1886, ordered, adjudged and decreed that the com-

plainant is entitled to an account; that the monthly deliveries of ore were as follows, viz :

1881—June and July shipments were . . .	988.20 tons
August “ “ . . .	548.10 “
September “ “ . . .	262.65 “
October “ “ . . .	624.10 “
November “ “ . . .	955.55 “
December “ “ . . .	430.85 “
1882—January “ “ . . .	1076.30 “
February “ “ . . .	805.25 “
March “ “ . . .	644.85 “
April “ “ . . .	1096.35 “

AND IT IS FURTHER ordered, adjudged and decreed that the defendants had a right under the contract to refuse to sample and assay the ore before its removal from Franklin; that they were not bound to determine whether the ore contained twenty-six per cent. of oxide of zinc before delivery on the cars; that the receipt of the ore on the cars was not the taking intended by the agreement, but that by such taking was meant the final acceptance of the ore; and that after receipt of the ore the defendants were entitled to a reasonable opportunity to ascertain whether the ore contained twenty-six per cent. of oxide of zinc, and to accept or reject the same, if, on testing, it proved deficient in zinc; that in this respect the defendants were not in default.

AND IT IS FURTHER ordered, adjudged and decreed that defendants' method of sampling was just; that their assays heretofore made should be accepted, unless impeached for fraud or mistake; that there was no sign of fraud, but in some cases mistake was shown by analysis made under the direction of the Court below; that the ores delivered, under the contract, before this suit, are to be accounted for as

containing the following percentages of oxide of zinc, viz :

For June and July, a per cent. of	22.06	of zn.	0
“ August..... “ “ “	26.36	“ “ “	
“ September..... “ “ “	33.60	“ “ “	
“ October..... “ “ “	27.85	“ “ “	
“ November..... “ “ “	26.70	“ “ “	
“ December..... “ “ “	22.76	“ “ “	
“ January, 1882... “ “ “	23.27	“ “ “	
“ February..... “ “ “	28.67	“ “ “	
“ March..... “ “ “	27.97	“ “ “	
“ April..... “ “ “	22.18	“ “ “	

AND IT IS FURTHER ordered, adjudged and decreed that the ore, so far as the deliveries thereof contained more than twenty-six per cent. of oxide of zinc, shall be accounted for at the prices mentioned in the contract, and so far as the same contained less than twenty-six per cent. of oxide of zinc, its price under the contract is its fair value as zinc ore, if it be useful as zinc ore, or its fair value as mangan iron ore, if it be not useful as zinc ore, and that its price in this accounting shall, under the evidence, be fixed at three dollars and seventy-five cents per ton, less a deduction of fifty cents per ton for every per cent. below twenty-six per cent., and at that rate for fractions of a per cent.

That on the basis thus laid down, the amounts due the complainant (including small sums for stone and ore not embraced in the contract) are as follows, viz :

1881—August 15th.....	\$1,776.28
Int. thereon to May 15th, 1882, 9 months.....	79.93
September 15th.....	2,160.87
Int. thereon, as above, 8 months.	86.41
October 15th.....	2,065.77
Int. thereon, as above, 7 months..	72.30

1881—November 15th.....	2,917.67
Int. thereon, as above, 6 months..	87.53
December 15th.....	4,224.24
Int. thereon, as above, 5 months..	105.60
1882—January 15th.....	913.40
Int. thereon, as above, 4 months..	18.27
February 15th.....	2,566.98
Int. thereon, as above, 3 months..	38.50
March 15th.....	4,094.70
Int. thereon, as above, 2 months..	40.94
April 15th.....	3,053.36
Int. thereon, as above, 1 month..	15.26
May 15th.....	2,017.28
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	\$26,335.29

That the defendants are entitled to the following credits for cash paid, viz :

1881—June 4th.....	\$6,000.00
Int. thereon to May 15th, 1882, 11 months, 11 days.....	341.00
October 17th.....	3,000.00
Int. thereon, 6 months, 28 days..	104.00
1882—January 14th.....	5,000.00
Int. thereon, 4 months, 1 day....	100.83
1882—January 19th.....	5,000.00
Int. thereon, 3 months, 26 days..	96.67
April 30th, expense of hauling ores for complainant, Dec. 1881, to date	889.08
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	\$20,531.58
Balance due complainant May 15th, 1882..	\$5,793.71

AND IT IS FURTHER ordered, adjudged and decreed that the amount due the complainant on the 15th day of May, A. D. 1882, was the sum of five thousand seven hundred and ninety-three dollars and seventy-one cents, and that the defendants, The Lehigh Zinc and Iron Company, Limited, shall pay that sum to the complainant, together with the interest thereon

from that day until paid, after deducting therefrom the sum of three hundred and sixty-seven dollars and fifty-nine cents with the interest thereon from the 15th day of September, 1882 (being the amount over paid for ores on that date).

“AND IT IS FURTHER ordered, adjudged and decreed that the defendants were in default on and after March 15th, 1882, and that said default was brought about by two causes, one the mistakes of the defendant's chemist in analyzing Franklinite ores, and the other the indefiniteness of the contract with regard to the price of ore below the standard; that there was no repudiation of the obligations of the contract by the defendants; and that the complainant remained bound to make the stipulated deliveries of ore; that having failed therein for thirty days, and the defendants having given due notice, the defendants became entitled to the possession of the mine on the eleventh day of June, 1882, under the fourth clause of said contract, and the decree of the Court of Chancery to the contrary should be, and the same is hereby reversed, set aside and for nothing holden.

“AND IT IS FURTHER ordered, adjudged and decreed that the defendant's claim for damages under the cross bill should not be allowed in the present proceeding, and cannot be set off herein against the moneys due the said complainant for ore delivered, and that the moneys paid into the Court of Chancery, the proceeds of the sale of ore delivered under the contract, should not be retained to answer said damages.

“AND IT IS FURTHER ordered, adjudged and decreed that the complainant is entitled to his costs in the Court of Chancery, that the expenses of the manager, up to the end of his tenure, under the order of that Court dated August 9th, 1882, to wit: the seventh day of August, 1884, be divided between the parties equally, and that the complainant paid to the defendants all costs of appeal.

“AND IT IS FURTHER ordered, that the record and

proceedings being remitted to the Court of Chancery to the end, that this decree may be carried into execution, and that a decree be entered in the Court of Chancery in accordance with the terms of the foregoing decree, with the costs taxed in that Court for the complainant, and the costs of this Court for the defendants.

On motion of

CHAS. D. THOMPSON,

Sol'r of CHARLES A. HECKSCHER and THE LEHIGH ZINC AND IRON COMPANY, LIMITED.

IN CHANCERY OF NEW JERSEY.

Between CHARLES W. TROTTER,
Complainant,

and

CHARLES A. HECKSCHER and THE
LEHIGH ZINC AND IRON COMPANY,
LIMITED,
Defendants.

On Bill.

THE LEHIGH ZINC AND IRON COM-
PANY, LIMITED,

Complainants,

and

CHARLES W. TROTTER,

Defendant.

On Cross-Bill.

Take notice that I shall move on Saturday, the tenth day of April, instant, (the consent of the Chancellor having first been obtained for that purpose), at the rooms of the Historical Society, Broad street, in the city of Newark, at the hour of ten o'clock in the forenoon, or as soon thereafter as counsel can be

heard thereon, before his Honor, Vice Chancellor Bird, for a decree in the above entitled causes, in accordance with the decree of the Court of Errors and Appeals, a copy of which proposed decree is herewith served upon you.

Yours Respectfully,

CHAS. D. THOMSON,

Sol'r of CHARLES A. HECKSCHER and THE LEHIGH ZINC AND IRON COMPANY, LIMITED.

Served April 5th, 1886.

IN CHANCERY OF NEW JERSEY.

Between CHARLES W. TROTTER,
Complainant,

and

CHARLES A. HECKSCHER and THE
LEHIGH ZINC AND IRON COMPANY,
LIMITED,

Defendants.

On Bill.

Between THE LEHIGH ZINC AND
IRON COMPANY, LIMITED,

Complainant,

and

CHARLES W. TROTTER,

Defendant.

On Cross-Bill.

Upon opening the matter this day to the Court by Charles D. Thompson, of Counsel with the above named Charles A. Heckscher and The Lehigh Zinc and Iron Company, Limited, and it appearing that both the said Charles W. Trotter and the said The Lehigh Zinc and Iron Company, Limited, filed appeals from the decree made in this cause on the

twenty-eighth day of July, 1884, to the Court of Errors and Appeals in the last resort; and that said appeals have been determined by the said Court of Errors and Appeals, and the proceedings have been remitted to this Court to proceed further thereon according to law; and on reading the remittitur from the said Court of Appeals, whereby it appears that it was ordered, adjudged and decreed as follows, viz:

This cause having been brought to a hearing, on cross appeals from the Court of Chancery, at the last June term of this Court, and Courtlandt and Richard Wayne Parker of Counsel with the said Charles W. Trotter, and Charles D. Thompson and George Northrop, of Philadelphia, of Counsel with the said Charles A. Heckscher and the Lehigh Zinc and Iron Company, Limited, having been heard and the questions brought up by said appeals having been duly considered:

"IT IS ON THIS eighteenth day of January, A. D. 1886, ordered, adjudged and decreed that the complainant is entitled to an account; that the monthly deliveries of ore were as follows, viz:

"1881—June and July shipments were..	988.20	tons
August	"	" ... 548.10 "
September	"	" ... 262.65 "
October	"	" ... 624.10 "
November	"	" ... 955.55 "
December	"	" ... 430.85 "
1882—January	"	" ... 1076.30 "
February	"	" ... 805.25 "
March	"	" ... 644.85 "
April	"	" ... 1096.35 "

"AND IT IS FURTHER ordered, adjudged and decreed that the defendants had a right under the contract to refuse to sample and assay the ore before its removal from Franklin; that they were not bound to determine whether the ore contained twenty-six per cent. of oxide of zinc before delivery on the cars; that the receipt of the ore on the cars was not the

taking intended by the agreement, but that by such taking was meant the final acceptance of the ore; and that after receipt of the ore the defendants were entitled to a reasonable opportunity to ascertain whether the ore contained twenty-six per cent. of oxide of zinc, and to accept or reject the same, if, on testing, it proved deficient in zinc; that in this respect the defendants were not in default.

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“ February..... “ “ “	28.67	“ “ “			
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AND IT IS FURTHER ordered, adjudged and decreed that the ore, so far as the deliveries thereof contained more than twenty-six per cent. of oxide of zinc, shall be accounted for at the prices mentioned in the contract, and so far as the same contained less than twenty-six per cent. of oxide of zinc, its price under the contract is its fair value as zinc ore, if it be useful as zinc ore, or its fair value as mangan iron ore, if it be not useful as zinc ore, and that its price in this accounting shall, under the evidence, be fixed

at three dollars and seventy-five cents per ton, less a deduction of fifty cents per ton for every per cent. below twenty-six per cent., and at that rate for fractions of a per cent.

“That on the basis thus laid down, the amounts due the complainant (including small sums for stone and ore not embraced in the contract) are as follows, viz:

“1881—August 15th	\$1,776.28
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“AND IT IS FURTHER ordered, adjudged and decreed that the amount due the complainant on the 15th day of May, A. D. 1882, was the sum of five thousand seven hundred and ninety-three dollars and seventy-one cents, and that the defendants, The Lehigh Zinc and Iron Company, Limited, shall pay that sum to the complainant, together with the interest thereon from that day until paid, after deducting therefrom the sum of three hundred and sixty-seven dollars and fifty-nine cents with the interest thereon from the 15th day of September, 1882 (being the amount over paid for ores on that date).

“AND IT IS FURTHER ordered, adjudged and decreed that the defendants were in default on and after March 15th, 1882, and that said default was brought about by two causes, one the mistakes of the defendant's chemist in analyzing Franklinite ores, and the other the indefiniteness of the contract with regard to the price of ore below the standard; that there was no repudiation of the obligations of the contract by the defendants; and that the complainant remained bound to make the stipulated deliveries of ore; that having failed therein for thirty days, and the defendants having given due notice, the defendants became entitled to the possession of the mine on the eleventh day of June, 1882, under the fourth clause of said contract, and the decree of the Court of Chancery to the contrary should be, and the same is hereby reversed, set aside and for nothing holden.

“AND IT IS FURTHER ordered, adjudged and decreed that the defendant's claim for damages under the cross bill should not be allowed in the present pro-

ceeding, and cannot be set off herein against the moneys due the said complainant for ore delivered, and that the moneys paid into the Court of Chancery, the proceeds of the sale of ore delivered under the contract, should not be retained to answer said damages.

"AND IT IS FURTHER ordered, adjudged and decreed that the complainant is entitled to his costs in the Court of Chancery, that the expenses of the manager, up to the end of his tenure, under the order of that Court dated August 9th, 1882, to wit: the seventh day of August, 1884, be divided between the parties equally, and that the complainant paid to the defendants all costs of appeal.

"AND IT IS FURTHER ordered, that the record and proceedings being remitted to the Court of Chancery to the end, that this decree may be carried into execution, and that a decree be entered in the Court of Chancery in accordance with the terms of the foregoing decree, with the costs taxed in that Court for the complainant, and the costs of this Court for the defendants.

~~On motion of~~

CHAS. D. THOMPSON,

~~Sol^r of CHARLES A. HECKSCHER and THE LEHIGH ZINC
AND IRON COMPANY, LIMITED.~~

IT IS THEREUPON, on this day of eighteen hundred and eighty-six, on motion, as aforesaid ordered that the said decree of the said Court of Appeals, as above particularly recited and set forth, be and the same is hereby made the decree of this Court.

AND IT IS FURTHER ordered, adjudged and decreed, in accordance with the terms of said decree, that the injunction issued in the first of the above named causes, on the eighth day of June, A. D. 1882, and continued afterwards, restraining the said The Lehigh Zinc and Iron Company, Limited, from taking possession of the mine, mentioned in said

pleadings, be and the same is hereby dissolved.

AND IT IS FURTHER ordered and decreed that the said The Lehigh Zinc and Iron Company, Limited, are entitled to the possession of the mine, mentioned in said pleadings, with the appurtenances thereto belonging.

AND IT IS FURTHER ordered and decreed that the said The Lehigh Zinc and Iron Company, Limited, shall pay to the said Charles W. Trotter the sum of five thousand seven hundred and ninety three dollars and seventy-one cents, together with the interest thereon from the 15th day of May, A. D. 1882, until paid, after deducting therefrom the sum of three hundred and sixty-seven dollars and fifty-nine cents, with the interest thereon from the fifteenth day of September, 1882.

AND IT IS FURTHER ordered, adjudged and decreed that the said Charles W. Trotter do pay to the said The Lehigh Zinc and Iron Company, Limited, all costs of appeal, and that the said The Lehigh Zinc and Iron Company, Limited, do pay to the said Charles W. Trotter the costs of this Court, and that the expenses of the manager, up to the said seventh day of August, 1884, be divided between the parties equally.

TROTTER

vs.

HECKSCHER *et al.*

Messrs. CORTLANDT and R. WAYNE PARKER, for Complainant.

Mr. CHARLES D. THOMPSON and Mr. GEORGE NORTHLOP (of Phila.), for defendants.

BIRD, V. C.

On the return of the proceedings in this cause from the Court of Errors and Appeals, I am asked to advise a decree which, I think, will, if signed, make an addition to the decree which comes in with the remittitur. For example, besides the ordinary form that the decree of the Court of Errors be the decree of this Court, I am asked to advise, in effect, that Trotter surrender the possession of the mine, and, in case he fail to do so, then that execution do issue enforcing the decree, &c. Other additional provisions are sought to be engrafted on the decree.

It is the duty of this Court to enforce the decree of the Court above; nothing can be plainer; the statute is imperative (Revision p. 215, sec. 15); dereliction, intentional, in this respect would be reprehensible in the highest degree; but it would be equally reprehensible to add to or attempt to subtract from the directions given by the superior tribunal.

In the case before me, I do not understand the Court to say that the defendant company is at this time entitled to the possession of the mine; I only understand it to say that it was so entitled at the time the injunction was issued. Without this and other similar insistments, the case is plain; but, pressed as they are, I am embarrassed, and shall advise no decree, except the ordinary one, until I am instructed from the higher Court, whose pleasure I await.

N. J. COURT OF ERRORS AND APPEALS.

Between CHARLES W. TROTTER,
Appellant,

and

CHARLES A. HECKSCHER and THE
LEHIGH ZINC AND IRON COMPANY,
LIMITED,

Respondents.

On appeal.

Notice.

Take notice that I shall apply to the Court of Errors and Appeals on Saturday, the first day of May next, at the State House, in the City of Trenton, at the hour of ten o'clock in the forenoon, or as soon thereafter as counsel can be heard thereon, for an order that the decree made in this cause, on the 18th day of January last, should be amended in any and all particulars wherein the same does not express clearly and fully the intention and finding of this Court upon said appeals, and does not provide for the carrying out of the same; and, in particular, that the title of the decree shall be amended by inserting the name of the appeal wherein the Lehigh Zinc and Iron Company, Limited, are appellants, and Charles W. Trotter is respondent, so that the decree shall appear to be a decree on both appeals; and also that the said decree shall contain a declaration that the injunction originally issued in this cause on the 8th day of June, 1882, and afterwards continued, restraining the defendants The Lehigh Zinc and Iron Company, Limited, from taking possession of the mine, shall be dissolved; and, further, that it shall also contain a declaration that the said defendants The Lehigh Zinc and Iron Company, Limited, are

now entitled to the possession of the mine.

Dated April 23d, 1886.

Yours, respectfully,

CHAS. D. THOMPSON,

Sol'r of Respondent.

To Messrs. C. and R. W. PARKER,

Sol'rs of Appellants.