

STATE OF MICHIGAN
COURT OF APPEALS

BONEHEAD HUNTING CLUB,

UNPUBLISHED

Plaintiff/Counterdefendant-Appellant,

v

No. 196510

DEPARTMENT OF NATURAL RESOURCES,

Montmorency Circuit Court
LC No. 93-003012-CH

Defendant/Counterplaintiff-Appellee,

and

SHELL WESTERN E&P, INC., and NORTH
MICHIGAN LAND & OIL CORPORATION,

Defendants-Appellees.

Before: Smolenski, P.J., and MacKenzie and Neff, JJ.

SMOLENSKI, P.J. (dissenting).

I respectfully dissent. For the reasons that follow, I would reverse the June, 1996, judgment quieting title to the mineral rights in the subject real property in the State of Michigan. I would also reverse the October, 1995, order vacating that portion of the 1948 decree with respect to plaintiff's mineral rights in the subject real property. I would remand for reinstatement of the 1948 decree ordering that plaintiff is the sole owner of the subject real property.

As stated in the majority opinion, following a 1943 fire that destroyed the public records of Montmorency County, the Legislature enacted 1944 (1st Ex Sess) PA 52 (the act), MCL 561.1 *et seq.*; MSA 26.878(1) *et seq.*, for the purpose of providing a means to recreate the public records of and quiet title to real property. See *In re Petition To Establish And Quiet Title To Lands And Recreating Public Records In Montmorency County*, 329 Mich 683, 686; 46 NW2d 584 (1951). In accordance with the act, the Montmorency County prosecutor, on behalf of the people of the State of Michigan and Montmorency County, subsequently filed a bill of complaint in the Montmorency Circuit Court sitting in chancery. See MCL 561.2; MSA 26.878(2). The complaint was instituted

against defendants described as “all persons having or claiming any interest in or lien upon the real property herein described, or any part thereof.” See MCL 561.2; MSA 26.878(2).

Once the complaint was filed, the chancery court entered the statutorily required order for appearance. MCL 561.2; MSA 26.878(2). Defendant DNR states that the order for appearance was entered on April 26, 1944. There is no question but that on July 31, 1944, the Michigan Department of Conservation (MDC) filed an appearance as a defendant in this proceeding. See *In re Petition, supra* at 638. On August 4, 1944, the chancery court entered the statutorily required decree that, in relevant part, authorized the filing of intervening petitions. See MCL 561.2; MSA 26.878(2).

The above described proceedings in the chancery court have been characterized by our Supreme Court as the “primary or principal proceeding in which jurisdiction of the trial court over the general subject matter is determined.” *In re Petition, supra*. Where the MDC actually appeared as a defendant in this principal proceeding, I would further conclude that personal jurisdiction over the MDC was also established at this point. When plaintiff later petitioned the chancery court in 1948, plaintiff did not begin a new action. Rather, plaintiff intervened in the original action instituted by the prosecutor’s complaint. See MCL 561.5; MSA 26.878(5), which provides, in relevant part, that “[a]ny person having any interest in or lien upon any parcel or parcels of land covered by said bill of complaint may . . . intervene in said proceedings and petition the circuit court to establish his interest therein” The intervention proceedings under the act have been characterized by our Supreme Court as “supplemental or ancillary.” *In re Petition, supra*.

Thus, when the chancery court in the supplemental or ancillary proceedings entered the 1948 decree declaring plaintiff the sole owner of the property, I would conclude that the court possessed not only subject matter jurisdiction but also personal jurisdiction over the MDC by virtue of the MDC’s appearance in the principal proceeding. Because the MDC filed an appearance in the principal proceeding, there is no question but that it was entitled to but did not receive notice of the supplemental or ancillary proceedings instituted by plaintiff. MCL 561.2; MSA 26.878(2); MCL 561.5; MSA 26.878(5); *In re Petition, supra*. However, I would conclude that plaintiff’s failure to give the MDC the statutorily required notice was a procedural irregularity not amounting to lack of personal jurisdiction. Thus, the 1948 decree was simply voidable, not void. *Abbott v Howard*, 182 Mich App 243, 247-248; 451 NW2d 597 (1990). The trial court erred in concluding otherwise.

A court has the power to vacate a voidable decree. *Id.* at 248. Whether the court will do so depends upon the equities of the particular case. *Id.* In this case, the trial court’s erroneous conclusion that the 1948 decree was void caused it to enter the October, 1995, order vacating that portion of the 1948 decree with respect to plaintiff’s mineral rights without considering the equities of the case. This error in turn allowed the court to subsequently enter the June, 1996, judgment quieting title to the mineral rights in the State of Michigan. I would, therefore, reverse both the June, 1996, judgment and the October, 1995, order.

The equities of this case are determinative in deciding whether the 1948 decree should be vacated with respect to the mineral rights in the subject property. *Id.* at 249. Contrary to defendant DNR’s assertion, I find nothing in the record that would give rise to an inference that certain allegations

in plaintiff's 1948 petition were intentionally false. Certainly the MDC was denied its fundamental right to be heard in the 1948 supplemental proceedings regarding its alleged mineral rights. However, forty-five years passed between the time that the chancery court entered the 1948 decree quieting title in plaintiff and plaintiff filed its 1993 complaint in this case. During this time, plaintiff relied on the 1948 decree while neither the MDC nor defendant DNR ever brought a proceeding to set aside this decree or otherwise assert their rights. Finding this fact paramount, I conclude that it would not be manifestly unjust to enforce the 1948 decree. *Id.* Accordingly, I would remand for reinstatement of the 1948 decree ordering that plaintiff is the sole owner of the subject real property.

/s/ Michael R. Smolenski