FILED
AUG 30 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-93 / 89-715

MONTICELLO STATE BANK, Monticello, Iowa,

Appellee,

vs.

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DOROTHY M. HOLMES,

Appellant,

and

CHRISTOPHER A. HOLMES,

Appellee.

Appeal from the Iowa District Court for Jones County, Thomas J. Koehler, Judge.

Defendant, Dorothy Holmes, appeals a declaratory judgment action in which the district court found plaintiff had a valid mortgage lien against property awarded to her pursuant to her divorce from Christopher Holmes, also a defendant in the underlying action. **AFFIRMED.**

R.L. Sole of Glasson, Grove & Sole, Cedar Rapids, for the appellant.

Michael W. Fay, Springville, for the appellee, Christopher Holmes.

Considered by Oxberger, C.J., and Schlegel and Habhab, JJ.

OXBERGER, C.J.

Dorothy and Christopher Holmes were married for thirty-seven years and divorced on March 10, 1988. In 1954 Dorothy and Christopher purchased an undivided one-half interest in 140 acres of farmland referred to as "Farm B." Dorothy and Christopher are joint tenants with right of survivorship. Christopher inherited the remaining one-half interest in Farm B in 1966.

On June 1, 1981, Christopher executed a deed of trust on Farm B for loans previously advanced to him by the Monticello State Bank. The deed of trust was subsequently duly recorded. Dorothy did not join in the signing of the deed of trust. At no time during their marriage was Farm B ever used as a homestead. Additionally, since 1979, no additional principal has been loaned to Mr. Holmes. His renewal of the notes has increased solely due to interest accrual.

The indebtedness secured by the deed of trust is also secured by approximately 360 acres titled solely to Christopher Holmes, denominated "Farm A," and by UCC article 9 security and equipment and other personalty.

The district court in its declaratory judgment action found in favor of the bank. The court referred to the four corners of the divorce decree and specifically looked to the language in which Dorothy Holmes was awarded legal title to Farm B subject to any encumbrances.

Dorothy argues that she is now the sole owner of what was formerly joint property; that her ex-husband has no further interest to foreclose upon. She argues that absent her consent, no security granted by her husband attached to her property interest. She asserts that once the marriage relationship broke down, she was placed in a no-win situation. She could stay married to her husband and endure an intolerable relationship in order to preserve her homestead and dower protections, or she could seek a dissolution of the marriage and thereby lose the economic protection she had safeguarded by refusing to sign the bank note or deed of trust.

Finally, Dorothy argues the district court erred in holding that the divorce decree awarded her sole legal title to Farm B subject to any encumbrance. She argues that it can be inferred from the divorce decree that the language "subject to encumbrance thereon" implies an encumbrance that is or has priority over the titleholder.

Defendant, Christopher Holmes, joins in the filing of the brief by Monticello State Bank. The bank argues that Christopher had authority to mortgage his undivided three-fourths interest in Farm B without Dorothy consenting to or joining in the deed of trust. The bank points to Iowa Code section 557.11 which states:

> A married person may convey or encumber any real estate or interest therein belonging to the person, and may control the same, or contract with reference thereto, to the same extent and in the same manner as other persons.

The bank also argues that the fact they chose to accept the deed of trust from Christopher Holmes without securing Dorothy's release of dower is irrelevant to the issue of validity of the mortgage. Further, the bank asserts as a result of the Holmes' divorce, Dorothy's dower rights in the interest of Farm B held by Christopher Holmes terminated. Although a cotenant or joint tenant cannot encumber the entire jointly-owned property without the consent of the other cotenant, a mortgage or deed of trust executed by less than all the cotenants is valid as to the cotenant who executed it.

The bank also argues that the divorce court only had authority to adjudicate the respective rights of Christopher and Dorothy Holmes and did not have the authority to determine the rights of third persons such as the Monticello State Bank. Therefore, the court could only distribute Farm B to the parties subject to the existing mortgage lien on the undivided three-fourths interest of Farm B. Further, the bank argues that a decree is to be construed like any other written instrument; the court's decree expressly states that Dorothy Holmes was to receive sole legal title to Farm B subject to any encumbrances thereon. The bank asserts that the divorce court correctly found that the money borrowed from the Monticello State Bank, for which the deed of trust was granted, had been consistently applied for the joint benefit of Dorothy and Christopher Holmes.

As this case was tried by the court sitting in equity, our review is de novo. Iowa R. App. P. 4.

First, the parties agree that the divorce court had no jurisdiction to adjudicate the rights of third parties who were not a party to the action. Schantz v. Schantz, 163 N.W.2d 398, 404 (Iowa 1968). The divorce court has authority to divide the property between the divorcing parties and determine the respective interests or rights of each party. Iowa Code § 598.21 (1989). Therefore, the validity or invalidity of any liens or encumbrances on property must be decided in a separate action, such as the case at bar.

The language used by the court in the divorce decree "subject to any encumbrances thereon" only refers to the fact that the divorce court would not attempt to adjudicate the rights or interests of third parties in the property. Dorothy was essentially put on notice she may not be taking the property free and clear.

> A decree is to be construed like other written instruments; the determining factor is the intention of the court as gathered from all parts of the judgment. Effect must be given to that which is clearly implied as well as to that which is expressed.

Local Board of Health, Boone County v. Wood, 243 N.W.2d 862, 865 (Iowa 1976) (emphasis in the original).

We agree with the trial court that the divorce court did not intend Dorothy to take the property free and clear from the mortgage of Monticello Bank. Rather, the divorce court put her on notice that the deed of trust remained in effect.

Second, none of the parties to the case question the validity of the deed of trust as to Christopher Holmes. Nor do they argue that if he still retained title with his wife to Farm B, that the deed of trust would be valid as to his three-fourths interest. Therefore, the only real question is whether the deed of trust is still valid now that Dorothy Holmes is the titleholder of Farm B.

Third, the trial court found that Farm B had been used for both Dorothy and Christopher for the duration of the marriage. Some of the loan money had been used for the purchase of Farm B by Dorothy and Christopher. The trial court found all the loan monies secured by the deed of trust had been used for the farm operation for the mutual benefit of Dorothy and Christopher.

Fourth, there is no requirement in Iowa that a spouse must sign off or waive his/her dower right for a conveyance or mortgage of property to be valid or effective. Peddicord v. Peddicord, 242 Iowa 555, 562, 47 N.W.2d 264 (1951). This also applies to real property held as joint tenants with right of survivorship, unless there is some express statutory prohibition or requirement that a release of dower be secured.

If the spouse does not waive his/her dower right to property which is sold or mortgaged, the purchaser or mortgagee merely takes title to the property or has a lien on the property which is subject to the contingent inchoate

dower right of the spouse. Id. A dower right is an inchoate right in that if one spouse fails to survive the other, or is divorced from the other, the dower right terminates. See Fowler v. Chadima, 134 Iowa 210, 111 N.W. 808 (1907); Iowa Code § 598.20 (1989). It is also characterized as an inchoate right which does not become a vested property interest until the death of the spouse holding title to the property.

Dorothy is essentially arguing for an extension of the dower right to divorce cases. However, dower does not vest until the death of the title-holding spouse. In this case, Christopher has not died. The parties were divorced. No dower right has vested.

Dorothy received title to Farm B through the divorce action. The title taken by Dorothy is as good as could be conveyed by Christopher. He can convey no more interest than he has in the property. She takes title subject to any valid encumbrances or liens upon the property. Whether she or other lienholders or creditors have priority is a matter for each lienholder or creditor to determine, either by a declaratory action such as the present one, or through some other legal means.

We decline the invitation to extend the doctrine of dower to divorce cases. Dower is a creation of the legislature. If and when that body sees fit, they may so extend the dower interest. In the meantime, we are

constrained to hold that the dower right does not vest until the death of the title-holding spouse.

Simply because Dorothy did not join in signing the deed of trust will not defeat the bank's otherwise valid mortgage. Any holding otherwise would open the door wide to all kinds of schemes and wreak havoc in the commercial and banking world.

The holding of the trial court is affirmed. Appellant is to pay costs on appeal.

AFFIRMED.