

---

Volume 62  
Issue 3 *Dickinson Law Review* - Volume 62,  
1957-1958

---

3-1-1958

## **Pennsylvania Married Woman's Property-Power to Mortgage, Convey, Contract-Removal of Disability**

Howard N. Stark

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

---

### **Recommended Citation**

Howard N. Stark, *Pennsylvania Married Woman's Property-Power to Mortgage, Convey, Contract-Removal of Disability*, 62 DICK. L. REV. 255 (1958).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol62/iss3/6>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact [lja10@psu.edu](mailto:lja10@psu.edu).

## PENNSYLVANIA MARRIED WOMAN'S PROPERTY—POWER TO MORTGAGE, CONVEY, CONTRACT—REMOVAL OF DISABILITY

Under sections 1 and 2 of the Married Woman's Property Act of 1893<sup>1</sup> a married woman could not mortgage or convey her real property without her husband's joinder, and she could not contract as an accommodation endorser, maker, guarantor or surety. Over the past twelve years, 1945-1957, the Pennsylvania Legislature has enacted a series of statutes purporting to free her from these disabilities. The purpose of this note is to call attention to some of the problems occasioned by the 1945-1957 enactments. It should be noted from the outset that each of these enactments will be inapplicable to transactions executed prior to its effective date.

Prior to 1945 the Married Woman's Property Act of 1893 restricted the ability of a married woman to mortgage, convey, and contract. Section 1 of the Act of 1893 provided that:

" . . . hereafter a married woman shall have the same right and power as an unmarried person to acquire, own, possess, control, use, lease, sell, or otherwise dispose of any property of any kind, real, personal or mixed, and either in possession or expectancy, and may exercise the said right and power in the same manner and to the same extent as an unmarried person, *but she may not mortgage or convey her real property, unless her husband join in such mortgage or conveyance.*" (Emphasis added.)

Section 2 provided that:

" . . . hereafter a married woman may, in the same manner and to the same extent as an unmarried person, make any contract in writing, or otherwise, which is necessary, appropriate, convenient or advantageous to the exercise or enjoyment of the rights and powers granted by the foregoing section, *but she may not become accommodation endorser, maker, guarantor or surety for another, and she may not execute or acknowledge a deed, or other written instrument, conveying or mortgaging her real property, unless her husband join in such mortgage or conveyance.*" (Emphasis added.)

Hence the Act of 1893 prevented a married woman from mortgaging or conveying her real property without her husband's joinder, and from contracting as an accommodation endorser, maker, guarantor or surety. There were, however, some exceptions to the restrictions of the act when applied to specified transactions of a married woman executed after a recorded separation agreement released all her husband's interest in her real estate,<sup>2</sup> after she became a

---

<sup>1</sup> Act of 1893, June 8, P.L. 344, No. 284; PA. STAT. ANN. tit. 48, §§ 31 and 32 (1930).

<sup>2</sup> Act of 1897, July 9, P.L. 212, § 1; PA. STAT. ANN. tit. 21, § 52 (1955).

feme sole trader,<sup>3</sup> after a decree of divorce *a mensa et thoro* was issued,<sup>4</sup> and when she conveyed to her husband.<sup>5</sup>

The Act of 1945<sup>6</sup> amended sections 1 and 2 of the Act of 1893. What the legislature intended was not clear. According to the title of the Act of 1945, this was an act ". . . authorizing a married women to *mortgage or convey* her real property to the same extent as a married man; to make *contracts* as if unmarried." (Emphasis added.) Section 1 of the Act of 1945 provided that:

". . . hereafter a married woman shall have the same right and power as a married man to acquire, own, possess, control, use, lease, *mortgage, sell, or otherwise dispose* of any property of any kind, real, personal or mixed, and either in possession or expectancy, and may exercise the said right and power in the same manner and to the same extent as a married man." (Emphasis added.)

Section 2 provided that:

". . . hereafter a married woman may, in the same manner and to the same extent as an unmarried person, make any *contract* in writing, or otherwise, *but she may not execute or acknowledge a deed, or other written instrument, conveying her real property, unless her husband join in such conveyance.*

"All prior acts and parts of acts inconsistent herewith are hereby repealed." (Emphasis added.)

What, then, was the effect of the Act of 1945? Did it enable a married woman to convey without her husband's joinder? Did it allow her to contract as an accommodation endorser, maker, guarantor or surety, and to mortgage without her husband's joinder? If the Act of 1945 did not remove the restrictions of the Act of 1893 upon her ability to mortgage, convey and contract, how were these restrictions affected, if at all, by subsequent legislation? And if the Act of 1945 prohibited a married woman from conveying without joinder, did it repeal prior acts and parts of acts permitting her to convey without joinder in certain circumstances?<sup>7</sup> The Act occasioned questions involving a statutory hodgepodge.

One question raised by the 1945 amendment is, did the language of the title and section 1 of the act enable a married woman to convey without her husband's joinder? According to the title she could convey as if she were a

<sup>3</sup> Act of 1855, May 4, P.L. 430, § 2; PA. STAT. ANN. tit. 48, § 42 (1930); Act of 1915, May 28, P.L. 639, § 1 as amended by Act of 1927, May 11, P.L. 971, § 1; PA. STAT. ANN. tit. 48, § 44 (1930).

<sup>4</sup> Act of 1927, April 11, P.L. 181, No. 151, § 1; PA. STAT. ANN. tit. 48, § 117a (1930).

<sup>5</sup> Act of 1911, June 3, P.L. 631, § 1; PA. STAT. ANN. tit. 48, § 71 (1930).

<sup>6</sup> Act of 1945, May 17, P.L. 625.

<sup>7</sup> See text at notes 2-5 *supra*.

married man. Section 1 omitted the express provision in section 1 of the Act of 1893 prohibiting her unjoined conveyances and permitted her to "sell, or otherwise dispose" of her real property as if she were a married man. A married man could convey without his wife's joinder. Hence the apparent effect of the title and section 1 of the Act of 1945 would be to enable a married woman to convey without joinder. But section 2 of the Act of 1945 provided that a married woman "may not execute or acknowledge a deed, or other written instrument, conveying her real property, unless her husband join in such conveyance." How was this manifest inconsistency to be resolved? In *Briggs v. Hunter*,<sup>8</sup> a lower court decision, the deed of a married woman executed without her husband's joinder was decreed void. The inconsistency between sections 1 and 2 of the Act of 1945 was noted, and the specific prohibition of unjoined conveyances in section 2 prevailed over the general and antecedent section 1. The title of the act was not mentioned. In *Bosses v. Mahalsky*<sup>9</sup> enforcement of an option to buy in a lease executed by a married woman without her husband's joinder was precluded by section 2 of the Act of 1945. The title and section 1 of the act were not mentioned.

Section 1 of the Act of 1893 was further amended in 1951.<sup>10</sup> The "sell, or otherwise dispose" provision of the Act of 1945 was omitted, and a provision that "she may not execute or acknowledge a written instrument conveying her real property unless her husband join in such conveyance" was added. Contrariwise, in 1957 the Act of 1893, as amended, was repealed, and a married woman was expressly given the right and power of a married man to convey.<sup>11</sup> As to the unjoined conveyances of a married woman executed between 1945 and 1951, it would seem that the reasoning of *Briggs v. Hunter*<sup>12</sup> should be persuasive.

Another question raised by the Act of 1945 is, assuming that the act did not give a married woman the ability to convey without her husband's joinder, did the act enable her to mortgage without his joinder and become an accommodation endorser, maker, guarantor or surety? The Act of 1945 omitted the provisions in the Act of 1893 specifically prohibiting these transactions. Section 1 of the Act of 1945 gave a married woman the right and power of a married man to mortgage. A married man could mortgage without his wife's joinder. Hence section 1 of the Act of 1945, in effect, did permit a married woman to mortgage without her husband's joinder. Section 2 of the act per-

---

<sup>8</sup> 61 D. & C. 465 (1947).

<sup>9</sup> 365 Pa. 184, 74 A.2d 93 (1950).

<sup>10</sup> Act of 1951, August 24, P.L. 1416.

<sup>11</sup> Act of 1957, July 17, P.L. 1114, No. 417; PA. STAT. ANN. tit. 48, § 32.1 (Supp. 1957). See *infra*. This act became effective 90 days after approval.

<sup>12</sup> See note 8 *supra*.

mitted a married woman to contract as if she were an unmarried person. Hence section 2 did permit a married woman to become an accommodation endorser, maker, guarantor or surety. But the title of the Act of 1945 stated that this was an act authorizing a married woman to ". . . mortgage or convey her real property to the same extent as a married man; to make contracts as if unmarried." (Emphasis added.) A married man could convey without his wife's joinder. Therefore the title of this act, in effect, stated that a married woman was authorized to convey her real property without her husband's joinder. Assuming that the specific prohibition of unjoined conveyances by a married woman in section 2 of the Act of 1945 meant what it said, was the title of this act not misleading as to conveyances? The Constitution of Pennsylvania provides: "No bill . . . shall be passed containing more than one subject, which shall be *clearly expressed in its title.*"<sup>13</sup> (Emphasis added.) Apparently a misleading title violates the constitutional requirement.<sup>14</sup> Was the Act of 1945 therefore unconstitutional, either in whole or in part? If the title defect as to conveyances infected the whole act, then the Act of 1945 could remove none of the restrictions of the Act of 1893, and a married woman could not mortgage without joinder or contract as an accommodation endorser, maker, guarantor or surety even after the Act of 1945. If the title defect affected only part of the act, then the Act of 1945 might have enlarged the power of a married woman to contract while having no effect upon her unjoined mortgages. No case involving the unjoined mortgage of a married woman under the Act of 1945 has reached the courts,<sup>15</sup> but in *Banos v. Banos*,<sup>16</sup> a lower court decision in which the title (and therefore, the constitutionality) of the act was questioned, the act was held valid insofar as it enabled a married woman to become an accommodation maker. Knight, P. J., avoided expressing any opinion whether the title was "defective as applied to a conveyance or mortgage." In subsequent cases in which the constitutionality of the act was apparently not questioned a married woman has been held liable as an accommodation maker and surety under section 2 of the Act of 1945.<sup>17</sup> Would these cases have been decided differently if the Act of 1945 had been attacked on the theory that the title was defective as to conveyances and that the entire act was therefore

<sup>13</sup> PA. CONST. art. III, § 3.

<sup>14</sup> *Union Passenger Ry. Co's Appeal*, 81\* Pa. 91 (1872); *Provident Life and Trust Co. v. Hammond*, 230 Pa. 407, 79 Atl. 628 (1911).

<sup>15</sup> *But see* *Pedrick v. Gordin*, 382 Pa. 26 at 28-29, 114 A. 2d at 126 (1955) of statement without discussion that a married woman may mortgage but not convey without joinder under the Act of 1945 in holding a lease without joinder valid; *Smigell v. Brod*, 366 Pa. 612 at 614, 79 A.2d at 413 (1951) for statement that married woman cannot mortgage or convey without mention of the Act of 1945.

<sup>16</sup> 60 D. & C. 658 (1947).

<sup>17</sup> *McCune v. Gross*, 377 Pa. 360, 105 A.2d 367 (1954); *Roller v. Jaffee*, 387 Pa. 501, 128 A.2d 355 (1957); *Palatucci v. Woodland* 166 Pa. Super. 315, 70 A.2d 674 (1950); *ABC Plan Consumer Discount Co. v. Pontier*, 73 D. & C. 247 (1949).

unconstitutional, or would *Banos v. Banos* have been followed? It would seem that there is still a serious question whether the restrictions of the Act of 1893 upon the rights and powers of a married woman were affected at all by the 1945 amendment.

Assuming that the restrictions of the Act of 1893 continued in full force after the 1945 amendment due to a title defect in the amending act, the question then arises as to when the disabilities of a married woman were removed. The Act of 1957<sup>18</sup> would surely remove these restrictions, but the Act of 1957 would not affect transactions executed prior to its effective date, and as to these transactions it is important to note that the Act of 1893 was amended twice in 1947 and once in 1951. Would these amendments have any effect upon the ability of a married woman to mortgage and contract? The Acts of 1947 further amended section 2 of the Act of 1893 to provide additional means by which a husband could join in his wife's conveyances,<sup>19</sup> and to exempt conveyances by a wife to her husband, or to her husband and self jointly, from the requirement of joinder.<sup>20</sup> Both of the Acts of 1947 re-enacted the provision of the Act of 1945 permitting a married woman to become an accommodation endorser, maker, guarantor or surety. But it is doubtful whether the subject of the re-enacted provision was clearly expressed in the titles of the Acts of 1947. In 1951 section 1 of the Act of 1893 was further amended by the addition of an express prohibition of the unjoined conveyances of a married woman.<sup>21</sup> The Act of 1951 re-enacted the provision of the Act of 1945 permitting a married woman to mortgage without joinder. But it is doubtful whether the title of the Act of 1951 clearly expressed the subject of the re-enacted provision. Hence, assuming that the 1945 amendment was unconstitutional, and did not remove the restrictions upon the ability of a married woman to mortgage and contract, although the pertinent provisions were re-enacted prior to the Act of 1957, a married woman might easily be subjected to these restrictions until the effective date of the Act of 1957.

The final question occasioned by the Act of 1945 arises from section 2 of the act, which re-enacted the provision in section 2 of the Act of 1893 prohibiting the unjoined conveyances of a married woman and repealed all prior inconsistent acts and parts of acts. Did the Act of 1945 repeal prior acts and parts of acts permitting a married woman to convey without joinder in certain circumstances? If not, were these acts vitiated by the addition of the express prohibition of a married woman's unjoined conveyances in the 1951 amend-

---

<sup>18</sup> See note 11 *supra*.

<sup>19</sup> Act of 1947, April 11, P.L. 60.

<sup>20</sup> Act of 1947, May 31, P.L. 352, No. 159.

<sup>21</sup> See note 10 *supra*.

ment to the Act of 1893? Section 63 of the Statutory Construction Act of 1937 provides that:

“ . . . whenever a general provision in a law shall be in conflict with a special provision in the same or other law, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions be irreconcilable, the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the Legislature that such provision shall prevail.”<sup>22</sup>

Would it be difficult for the courts to find that the legislature did not manifestly intend to repeal these prior acts?

The Act of 1957 makes it clear that, although the Act of 1945 may not have removed any or all of the restrictions of the Act of 1893 upon the ability of a married woman to convey, mortgage and contract, such restrictions are no longer in effect. The Act of 1957 repealed sections 1 and 2 of the Act of 1893 as amended and provided in section 1 that:

“ . . . hereafter a married woman shall have the same right and power as a married man to acquire, own, possess, control, use, convey, lease or mortgage any property of any kind, real, personal, or mixed, either in possession or in expectancy, or to make any contract in writing or otherwise, and may exercise the said right and power in the same manner and to the same extent as a married man.”

But note that a married woman has the right and power of a married man to convey, not the right and power of a feme sole or unmarried person. Section 5 (a) of the Intestate Act of 1947<sup>23</sup> gives a widow statutory dower in real estate alienated by her husband in his lifetime without her joining in the conveyance. Section 5 (b) of the same act, which provides for the statutory rights of a surviving husband, contains no such provision for real estate alienated by a wife during her lifetime without her husband's joinder. Therefore, under the Act of 1957, there seems to be a question whether real property conveyed by a married woman without her husband's joinder can be subjected to rights in favor of the surviving husband which are comparable to the statutory dower provided for a surviving wife by section 5 (a) of the Intestate Act of 1947. Until this question is answered by the courts or the legislature the husband's joinder may be necessary, not to give his wife the power to convey, but to release his inchoate interest should he have one.

---

<sup>22</sup> Act of 1937, May 28, P.L. 1019, art. IV, § 63; PA. STAT. ANN. tit. 46, § 563 (1952).

<sup>23</sup> Act of 1947, April 24, P.L. 80, § 5; PA. STAT. ANN. tit. 20, § 1.5 (1950).

It would seem, however, that a mortgagee can now safely accept the unjoined mortgage of a married woman. The question as to the effect of the title defect of the Act of 1945 would not affect mortgages executed after the effective date of the Act of 1957. That a married woman's power to mortgage is no greater than that of a married man is of no consequence. Since a married man's unjoined mortgage can defeat his surviving wife's statutory rights,<sup>24</sup> it necessarily follows that a married woman's unjoined mortgage could defeat her surviving husband's statutory rights, if any.

Although the question as to the statutory rights of a surviving husband in connection with his wife's unjoined conveyances might have been eliminated, the Act of 1957 is certainly an improvement over pre-existing law. But the questions and problems growing out of the Act of 1945 will still arise in connection with the mortgages, conveyances and contracts of a married woman executed prior to the effective date of the Act of 1957.

HOWARD N. STARK.

---

<sup>24</sup> Scott v. Crosdale, 2 Dallas 127, 1 Yeates 75, 1 L. Ed. 317 (Pa. 1791); Bridgeford v. Groh, 306 Pa. 566, 160 Atl. 451 (1932).