

## Opinion No. 16-1799

May 15, 1916

**BY:** FRANK W. CLANCY, Attorney General

**TO:** Mr. C. C. Gregory, Nolan, New Mexico.

**How husband and wife may convey or mortgage separate property without the other joining in such conveyance or mortgage.**

### OPINION

{\*365} Your letter of the 11th instant was received here on Saturday last, but I was not able to find time to answer until today. You ask whether a husband acquiring real estate in this state by inheritance from his parents, can transfer the same by mortgage or deed without the consent of his wife. Since the passage of the statute which is printed as Chapter 84 of the Laws of 1915, a husband certainly can make such conveyance. That act contains a provision "that either husband or wife may convey or mortgage separate property without the other joining in such conveyance or mortgage." Property acquired through inheritance by either husband or wife is what is meant by the phrase "separate property." Prior to the adoption of that statute the law is not so clear although I am of opinion that the husband could make such a conveyance. The only chance of doubt is in the form of two sections, one immediately following the other, in Chapter 37 of the Laws of 1907, which reappear as Sections 2757 and 2758 of the Codification of 1915. The first of these sections defines what is the separate property of the wife, following which is a statement that she may, without the consent of her husband, convey her separate property. The next section defines what shall be separate property of the husband {\*366} in the same language as the first part of the preceding section, but it does not contain any statement that he may convey his separate property without the consent of his wife. Another section of the same statute, which is now Section 2766 of the Codification, does, however, by implication, indicate that the husband has absolute power of disposition of his separate estate, so that taking the whole statute together, a court might hold that the omission in Section 2758 was accidental and that the husband could make a valid conveyance without the consent of his wife, although this is not absolutely clear.

You will see, therefore, that in passing upon the question of the validity of such a conveyance, the time when it was made may be an important factor.