

*79 Cal. 200, \*; 21 P. 651, \*\*;  
1889 Cal. LEXIS 697, \*\*\**

C. A. LORING, Respondent, v. M. A. STUART, Appellant

No. 12881

Supreme Court of California

79 Cal. 200; 21 P. 651; 1889 Cal. LEXIS 697

May 21, 1889

**PRIOR HISTORY: [\*\*\*1]**

Appeal from a judgment of the Superior Court of Placer County, and from an order denying a new trial.

**DISPOSITION:** The Court. -- For the reasons given in the foregoing opinion, the judgment and order are affirmed.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Defendant mortgagor appealed from a judgment of the Superior Court of Placer County (California), which held in favor plaintiff mortgagee in the mortgagee's action to foreclose and from an order denying her motion for a new trial.


**OVERVIEW:** At trial the mortgagor argued that she was a married woman when she executed the mortgage and that the mortgaged property was community property, and therefore, the mortgage was void. The trial court found that the mortgagor was married but also found that at the time the mortgage was executed she was living apart from her husband and that the mortgaged premises were her separate property. On appeal, the court affirmed. The court found that it did not appear from the record that grounds for nonsuit were stated. The court held that where a motion was made for a nonsuit without stating the grounds upon which it was made, it was not error to overrule the motion. The court held that the testimony indicated a separate living arrangement within the meaning of Cal. Civ. Code § 169 and that the judgment could not be reversed on that ground. Finally, the court held that the mortgagor owned at least a portion of the mortgaged premises as her own separate property and had a right to execute the mortgage.

**OUTCOME:** The court affirmed the judgment and order below.

**CORE TERMS:** mortgage, separate property, nonsuit, community property, earnings, partly, infelicity, mortgaged, decree of foreclosure, mortgaged property, marital relations, tenant in common, whole property, purchase price, married woman, funds paid, own name, purchase-money, proportion, domestic, borrowed, intimate, boarders, resume, intend, decree, mouth

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**HINT**  When a motion is made for a nonsuit without stating the grounds upon which it is made, it is not error to overrule the motion. [More Like This](#)  
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**COUNSEL:** *J. M. Fulweiler*, for Appellant.

*Grove L. Johnson*, and *Wallace & Prewett*, for Respondent.


**JUDGES:** In Bank. Belcher, C. C. Foote, C., and Hayne, C., concurred.

**OPINIONBY:** BELCHER

**OPINION:** [**\*200**] [**\*\*652**] Action to foreclose a mortgage. Defense that the defendant was a married woman when she executed the mortgage, and that the mortgaged property was community property, and the mortgage therefore void.

The court found that at the date of the mortgage, and for more than ten years prior thereto, defendant was the wife of one Robert Stuart, but that she and her husband had lived separate and apart from each other for nearly [**\*201**] two years, and that the mortgaged premises were the earnings of defendant while so living separate from her husband, and were her separate property. Judgment was entered foreclosing the mortgage, and from that judgment, and an order denying her a new trial, defendant appealed.

The only [**\*\*\*2**] points made for a reversal are, that the court erred in not granting a nonsuit, and that the findings as to the defendant's living *separate* from her husband, and as to the mortgaged property being the earnings of defendant while so living, were not justified by the evidence.

1. It does not appear from the record that any grounds for the nonsuit were stated, and for that reason the first point cannot be sustained. It has long been settled that **HINT**  when a motion is made for a nonsuit without stating the grounds upon which it is made, it is not error to overrule the motion. (*Kiler v. Kimbal*, 10 Cal. 267; *People v. Banvard*, 27 Cal. 470; *Sanchez v. Neary*, 41 Cal. 485.)

2. There was testimony tending to show that the defendant had been living separate from her husband for nearly five years when the case was tried. It appeared that the parties were living together in Rocklin, Placer County, in April, 1883; that in that month he went away to Forest City, in Sierra County, and had ever since resided there; that she continued to live in Rocklin, and had kept boarders and done other work to support herself and children; that she had never visited him nor he her, though [**\*\*\*3**] he had twice passed through Rocklin; that he had written several letters to her and the children, and had three or four times sent small sums of money to the children. He testified: "The immediate cause of my leaving Rocklin was domestic infelicity, and such infelicity has not been healed by reconciliation. I do not

intend to resume intimate marital relations with my wife, but my intentions in that regard did not exist [\*202] on the 1st of January, 1885. It is only within the past six months that I fully determined in my own mind not to resume intimate marital relations with my wife again, but I have never ceased, nor do I intend to cease, performing my obligations to my family while I have strength to do so. I left my wife, and did not inform her when, if ever, I would return, and did not acquaint my wife about my future intentions as to living with her."

We think this shows a "separate" living within the meaning of section 169 of the Civil Code, and that the judgment cannot be reversed on this ground.

3. The defendant testified that in September, 1884, she made a contract to purchase the mortgaged premises for \$ 300, and that she paid the purchase price, and took a deed [\*\*\*4] for the property in her own name on the 9th of January, 1885; that she borrowed \$ 225 of the purchase-money, and made the balance by keeping boarders; that she executed the note and mortgage in suit to secure payment of the \$ 225 borrowed, and other money owing by her to the mortgagee.

Now, conceding that the borrowed money was community property, still it appears that a part of the purchase-money was the defendant's earnings and her separate estate. In [\*Schuyler v. Broughton\*, 70 Cal. 282](#), it was held that real property purchased by a married woman in her own name, partly with money belonging to her separate funds, and partly with money borrowed by her for that purpose, becomes in part the separate property of the wife, and in part community property. In such a case, it was said the wife becomes a tenant in common of the land with her husband in the proportion that the separate funds paid by her bear to the whole purchase price. Under this rule, defendant owned at least a part of the mortgaged premises, and had a right to execute the mortgage.

This being so, whatever separate interest defendant [\*203] has in the property may be sold under the decree of foreclosure, [\*\*\*5] and it does not lie in her mouth to object that the decree directs the sale of the whole property, and is therefore too broad.

We find no errors in the record, and advise that the judgment and order be affirmed.

The Court. -- For the reasons given in the foregoing opinion, the judgment and order are affirmed.