THE

SOUTHWESTERN REPORTER,

VOLUME 1,

CONTAINING

ALL THE CURRENT DECISIONS

OF THE

SUPREME COURTS OF MISSOURI, ARKANSAS, AND TENNESSEE, COURT OF APPEALS OF KENTUCKY, AND SUPREME COURT AND COURT OF APPEALS (CRIMINAL CASES) OF TEXAS.

AUGUST 2—DECEMBER 13, 1886.

ST. PAUL:
WEST PUBLISHING COMPANY.
1887.

HATCHER v. RAY and others.

(*Court of Appeals of Kentucky.* June 3, 1886.)

VENDOR AND VENDEE—VENDOR'S LIEN—RIGHTS OF HEIRS.

J. H. C. died intestate, some years ago, leaving several children, his heirs at law. At the time of his death he was the owner of three tracts of land, which the children, all of whom were adult, agreed to sell and convey to the purchasers. I. H. C., one of the sons, became the purchaser of one of the tracts; J. B. C., another son, became the purchaser of another tract,—the conveyance being made to his wife; and B. H., who had married a daughter of the intestate, became the purchaser of the third tract. All of the heirs united in the deed to I. H. C., and the wife of J. B. C., who was one of the heirs; and all of them united in the deed to B. H., except one of the sons, J. R. C.; the conveyance in each case reciting the payment in hand of so much of the price as was equal to the share of the grantees in the price of the three tracts. C. H., the wife of B. H., united as a grantor in the deed to him, which recited that a specific amount of the purchase price agreed to be paid by him was her interest in the tract of land conveyed to him; and her interest in the tracts sold to J. B. C. and I. H. C., and the remainder secured to be paid to the other heirs. After the sale to B. H., he and his wife, C. H., united in a conveyance to one M. of a portion of the tract sold to him, and B. H. sold the remainder to one H., taking his notes, and transferring them to the other heirs, which they took in place of his own for the balance of the purchase money owing by him. Upon these notes the heirs brought this suit, in which they attempted to subject the interest of C. H., the wife of B. H., in both pieces of land, as well as the interest of B. H. himself, to the payment of them. *Held*, that the heirs had no lien on the interest of C. H. in the land sold to H.

Appeal from Edmonson circuit court.

The facts of the case are as follows:

Some years ago Jesse H. Crump departed this life, intestate, having nine children,—Cynthia Hatcher, the appellant, wife of Benjamin Hatcher, being one of them,—his only heirs at law. By agreement of the heirs all of his property was divided by and among themselves, including three tracts of land, one of which was sold to Isaac H. Crump at the price of $1,200; another to Jesse B. Crump for the same sum, the deed being made to his wife; and the third to Benjamin Hatcher at the price of $2,000. All of the heirs united in the conveyances to these purchasers, including Mrs. Hatcher, the appellant, except John R. Crump, who did not join in the conveyance to Hatcher. The deeds in each case recited the payment in hand of so much of the purchase price as was equal to the shares of the grantors in the price of the three tracts. The deed to Benjamin Hatcher, in which Mrs. Hatcher, the appellant, united with the other grantors, contained a recital that $488.88 of the $2,000 is "in hand paid, being the interest of the said Cynthia E. Hatcher in and to the tract of land herein conveyed, and her interest in and to the two tracts of land this day conveyed to Jesse B. Crump and I. H. Crump, the receipt whereof is hereby acknowledged; and the remaining $1,511.12 secured to be paid to John R. Crump, E. C. Crump, Rebecca Ray, Anganicia Ray, and R. A. Crump." After the sale to Benjamin Hatcher he sold to one Moore,—Mrs. Hatcher, the appellant, joining in the deed—83 acres of the land; leaving 125 acres, which was afterwards purchased of him by one Hardy, who executed his notes for the price, which were subsequently assigned to the other heirs, in the place of his own, for the remainder of the purchase price of the land. The heirs thereupon brought suit upon the notes thus assigned to them; but, it appearing in the progress of proceedings that one of them, John R. Crump, had never executed the deed to Hatcher, the sale to Hardy, by the agreement of the parties, was rescinded, and his notes were canceled.

The judgment recites: "This cause is continued on the docket for the purpose of settling the accounts between the plaintiffs and the defendant Benjamin Hatcher upon the assignment of the notes on J. G. Hardy mentioned in plaintiff's petition; and all questions between the plaintiffs and Benjamin Hatcher are reserved for the future adjudication of this court." It was con-

tended by the appellant that this judgment destroyed all lien in favor of the appellees upon the land, or any of it, and left nothing open but the liability, if any, of Hatcher upon the assignment of the Hardy notes; that the appellant's interest could in no event be sold, either in the land sold to Hardy or to Moore; that the appellant did not, by joining in the deed to Moore, convey, or pretend to convey, her interest in the land embraced by the deed to Moore, but simply united in it for the purpose of relinquishing her dower interest therein. It was further contended by the appellant that, as one of the heirs, John R. Crump, had never united in the deed to Hatcher, as it was agreed at the time of sale he should do, he was not entitled to a judgment for his interest in the land. On the part of the appellees, it was contended that both the interest of the appellant in the land sold to Hardy, and also in the portion sold to Moore, were liable to the payment of the balance of the purchase money due by Hatcher to the other heirs at law of Jesse H. Crump.

Upon the trial the circuit court rendered a judgment on these questions in favor of the appellees, and from this judgment Hatcher and wife appealed.

Edwards & Hazlerigg, for appellant, C. C. Hatcher. *L. J. Proctor*, for appellees, B. J. Ray and others.

HOLT, J. Jesse H. Crump died intestate, the owner of three tracts of land. He left nine children, of whom the appellant, Cynthia Hatcher, who is the wife of Benjamin Hatcher, is one. Isaac H. Crump, who is one of the heirs, became the purchaser of one of the tracts, at $1,200; Jesse B. Crump, another of the heirs, purchased another tract, at a like sum,—the deed being made to his wife; while the third tract was conveyed to Benjamin Hatcher, at the recited consideration of $2,000. All of the heirs united in the deeds to Isaac H. and the wife of Jesse Crump; the deed in each instance reciting the payment in hand of so much of the price as was equal to the share of the grantee in the price of the three tracts. The appellant, Cynthia Hatcher, united as a grantor in the deed to her husband, which recited that $488.88 of the $2,000 is "in hand paid, being the interest of the said Cynthia E. Hatcher in and to the tract of land herein conveyed, and her interest in and to the two tracts of land this day conveyed to Jesse B. Crump and I. H. Crump, the receipt whereof is hereby acknowledged, and the remaining fifteen hundred and eleven dollars and twelve cents secured to be paid to John R. Crump, E. C. Crump, Rebecca Ray, Anganicia Ray, and R. A. Crump."

By the conveyances to the wife of Jesse Crump and to Isaac Crump it is clear that Mrs. Hatcher parted with her interest in the two tracts of land conveyed to them, but this is not true of her interest in the tract purchased by her husband, by virtue of the fact that she joined in the deed as a grantor. She has never legally parted with her interest in this tract, and it is clear from the deeds that, by agreement between all the heirs, her interest in all three of the tracts was transferred to the one purchased by her husband. It appears that, after the sale to her husband, both of them united in a conveyance to one Moore of 83 acres of the land, leaving 125 acres, which the husband subsequently sold to one Hardy, taking his notes, and transferring them to the other heirs in lieu of his own, which they held for the balance of the purchase money owing by him. Upon the notes so assigned to them they brought this suit; but it appearing from the defense by Hardy that John R. Crump, who is an heir of Jesse Crump, had never united in the deed to Hatcher, by consent the sale to Hardy was rescinded and his notes canceled. The judgment recites: "This cause is continued on the docket for the purpose of settling the accounts between the plaintiffs and the defendant Benjamin Hatcher upon the assignment of the notes on J. G. Hardy mentioned in plaintiff's petition; and all question between the plaintiffs and Benjamin Hatcher is reserved for the future adjudication of this court."

It is urged that this consent judgment destroyed all lien in favor of the

appellees upon the land, or any of it, and left nothing open save the liability, if any, of Hatcher upon the assignment of the Hardy notes. The entire contract with him was, however, rescinded. His notes, which had been transferred to the appellees, were by agreement canceled, and the effect of this was to restore all of the parties to the position and whatever rights they occupied and had prior to this assignment. They, however, had no lien upon the interest of Mrs. Hatcher in the land. She was still the owner of it, having never conveyed it. She is not entitled, however, to have what was her interest in the entire tract of 208 acres, to-wit, 488-2000 allotted out of the 125 acres, because she united as a grantor in the deed of the 83 acres to Moore, and it does not show that she did so merely by way of a release of any dower interest. The sale to Hardy does not affect her, likewise, because no deed was ever made to him, but only a title-bond by her husband, and even it was canceled. The court below must allot to her, by proper mode, the 488-2000 of the 125 acres, and then enforce the lien of the appellees against the remainder of the tract; first, however, causing the interest of John R. Crump, who, as a plaintiff herein, is asking judgment for the sum yet unpaid to him, to be conveyed by him, or the court's commissioner, to Benjamin Hatcher.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

STRATTON v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 5, 1886.)

CRIMINAL LAW—APPEAL—TRANSCRIPT OF RECORD—FELONY—CRIM. CODE KY. § 336.

On appeal in a felony case, where the bill of exceptions has been mislaid by the clerk of the lower court, and cannot be found until the expiration of the time within which the transcript of the record is required by law to be lodged in the clerk's office of the court of appeals, under the Kentucky Criminal Code, § 336, the court cannot take jurisdiction, unless the time prescribed by the Code has been extended by an order of the court of appeals.

Appeal from Logan circuit court.

J. S. Gollady, for appellant.

LEWIS, J. Under an indictment for willfully burning a barn, appellant was, at the July term, 1885, of the court, tried and convicted; and the motion for a new trial being overruled, an appeal was prayed, and by an order of court his bill of exceptions, duly signed, was, during the same term, filed, and made part of the record. But the transcript of the record in the case was not lodged in the clerk's office of the court of appeals until March 27, 1886; and the question is thus presented whether, under the Criminal Code, we have the power now to entertain the appeal.

Section 336 prescribes the time and manner in which an appeal in a felony case may be taken to this court, section 2 thereof being as follows: "When an appeal is prayed, the court shall, if the defendant desire it, make an order that an execution of the judgment be suspended until the expiration of the period within which the defendant is required to lodge a transcript of the record in the clerk's office of the court of appeals. After the expiration of such period the judgment shall be executed, unless the defendant shall have filed in the clerk's office of the court rendering the judgment a certificate, as provided in subsection 3 of this section, that the appeal has been taken, or a copy of an order of the court of appeals granting further time to lodge the transcript." Subsection 3 is as follows: "The appeal is taken by lodging in the clerk's office of the court of appeals, within sixty days after the judgment, a certified transcript of the record. The clerk of the court of appeals shall thereupon issue a certificate that an appeal has been taken, which shall suspend the execution of the judgment until the decision upon the ap-