FERGUSON *vs.* BLAKENEY.

The right of summary proceeding, given an execution purchaser, for possession of land, by the 68th section of 60th chap. Rev. Stat., is against the defendant in the execution, or his lessee, and does not lie against a person holding adversely. *Etter vs. Smith*, 5 *Ark. Rep.* 90, *cited and approved.*

On a motion for order of possession, under this statute, the court should require competent and satisfactory proof, that the party whose removal from the land is sought, is either the defendant in the original judgment, or his lessee.

The correct practice under this statute, is to require the purchaser to state, in his petition, that it is either the defendant or his lessee, who is in possession, and to set forth such facts as are sufficient in law to divest either (as the case may be,) of whatever right, title, and interest he may have had in the

premises, and vest the same in himself: and to conclude with a prayer for a rule upon the party in possession, to appear at a time and place therein designated, to show cause, if any he can, why the order should not be made against him.

Where the defendant appears and disclaims, he waives his right to notice in writing.

Where defendant, in his response to the petition, disclaims title in himself, states that by making the order of possession the rights of others will be seriously affected, but does not claim to hold under them—it is not a sufficient showing why the order should not be made.

Where the facts stated in the petition, if true, are sufficient to entitle the party to possession, and the record states that the "court was well and sufficiently advised of and concerning the motion of possession, and of what order to make," and there is no conflicting evidence, the legal presumption is that the facts stated in the petition were proven, and though not specially recited in the order, their existence is thereby affirmed.

Appeal from the circuit court of Pulaski county.

THIS was a motion for possession, by a purchaser of land at sheriff's sale, determined in the circuit court of Pulaski county, at the April term, 1845, before the Hon. J. J. CLENDENIN, judge.

Benj. Blakeney presented to the court a petition, stating "that on the 21st day of April, 1845, being the first day of the Pulaski circuit court, he became the purchaser of the S. W. ¼ of sec. 17, T. 4 N. R. 9 W. containing 160 acres, lying in Pulaski county, for the sum of $74, and procured therefor the deed of Wm. B. Borden, sheriff of said county, on the 21st April, 1845, duly acknowledged and filed for record, in the proper office, on the 6th May, 1845; the said tract of land being then and there sold by said sheriff, under a judgment of said court, in favor of Nathan Midgett against Moses Ferguson and Michael Hogan, rendered at the May term, 1843, and under an execution issued on said judgment." The sheriff's deed to the petitioner was exhibited, and prayed to be taken as part of the petition.

The petition further stated, "that said Moses Ferguson still remains in possession of said tract of land, and although the possession thereof has been demanded by petitioner, yet the said Moses Ferguson, one of the defendants in the execution, absolutely refuses to permit the petitioner to take possession of the land and ap-

purtenances thereto belonging, or to have or enjoy the same''—concluding with a prayer for an order for possession.

Ferguson appeared, by counsel, and responded to the petition, ''that he had not, and never had any title to the land, and that under the sale set forth in the petition, Blakeney acquired none, and that, by granting the prayer of petitioner, the rights of others, who had no notice of this proceeding, would be endangered, and manifest injustice done.''

The decision of the court, is entered upon the record thus: ''And the court being now well and sufficiently advised of and concerning the motion for possession in this case, and of what order to make and render herein, it is therefore ordered and considered by the court that,'' &c., then follows the order that the sheriff put the petitioner in possession of the land, and a judgment for costs against Ferguson.

Ferguson's counsel moved to set aside the order, on the grounds: 1st, that there was no notice given, of the application for an order of possession, to defendant or any other person interested: 2d, that Blakeney did not exhibit to the court the sheriff's deed, or other evidence of title, before the order was made: 3d, because the heirs of Samson Gray, deceased, were not permitted to file their petition to be made co-defendants in the case, and show that the title to the land was in them.

The court overruled the motion, the defendant's counsel excepted, and took a bill of exceptions, from which it appears, that, pending the motion for possession, the defendant offered to file the petition of the heirs of Samson Gray, deceased, praying to be made parties to the defence, and exhibiting their evidence of title to the land, which the court excluded and defendant excepted. The bill of exceptions sets out the petition and exhibits. It was further stated in the bill of exceptions that the sheriff's deed was not presented or exhibited to the court, before the order of possession was made. The defendant appealed.

LINCOLN & JORDAN, for the appellant.

HEMPSTEAD & JOHNSON, contra. The statute designed to give purchasers at judicial sales a summary remedy against the defendant in execution and his lessee, to obtain the possession of real estate. *Rev. Stat.* 385. The court, on application, is peremptorily required to make an order directing the sheriff to put the purchaser in possession without delay. Whatever right the defendant may have, it is divested by the sale and the sheriff's deed; and neither he nor his tenant can hold over by attempting to show title in a third person; otherwise, sales of this description would be a snare to the purchaser. Title cannot be tried in this proceeding, nor are the rights of third persons affected, since the action of ejectment is left open to them against the purchaser in possession. The statute does not require notice. But here is notice; the original judgment, the issuance and levy of the execution, the advertisement and sale of the sheriff: the deed, acknowledgment and record of it, and the demand for and refusal to give possession, constitute the highest grade of notice, if any were required.

The response of Ferguson disputed no fact set out in the petition, and the rule of pleading applies that a fact asserted on one side, and not disputed on the other, is admitted. *Story's Pl.* 55. 1 *Wilson* 338. 9 *Cowen* 302. 2 *New Hampshire Rep.* 376. Besides, the deed of the sheriff to Blakeney was an exhibit and part of the petition, and just as much before the court as the petition itself.

The petition of Hamilton Reynolds, as the guardian for the heirs therein mentioned, was properly excluded. 1st, it was not verified by affidavit: 2d, because the deed of the sheriff to those heirs is void, in not conforming to the certificate of purchase, and in being made in the absence of any petition or order of court as required by law: 3d, because the title to the land could not be tried in this collateral manner: 4th, because they do not even pretend that they were tenants in possession under any person whatever: and 5th, because they were total strangers to the proceeding, having no interest or connection with either of the defendants in the original execution. *Rev. Stat. page* 383.

Consent cannot confer jurisdiction; and in our opinion an appeal or writ of error was never contemplated by the legislature in

this class of cases. The language of the statute implies that the purchaser shall have immediate possession, without hinderance or delay from any quarter or in any shape whatever.

JOHNSON, C. J., delivered the opinion of the court.

The appellant urges numerous objections to the order and decision of the court below. We do not conceive it necessary to discuss the several objections in the order in which he has stated them, as subsequently to the making of the order, he moved the court to set it aside, which motion being overruled, every point that could possibly arise in the case is necessarily presented. The 68th section of the 60th chapter of the Revised Statutes of Arkansas, provides, that "if, on the sale of any real estate or any improvement on the public lands of the United States by any sheriff or other officer under any execution, the defendant or his lessee shall refuse to give the purchaser possession of such real estate or improvement, it shall be the duty of the circuit court on the application of the purchaser to make an order directing the sheriff or other officer to put the purchaser in possession of such real estate or improvement; which order shall be executed by such officer without delay; and if necessary he may call to his assistance the power of the county in order to carry such order into effect." It was ruled by this court in the case of *Etter vs. Smith,* 5 *Ark. Rep.* 90, that the right given by this summary proceeding, is against the defendant or his lessee and would not lie against a person who holds adversely. In this construction of the statute we fully concur; and under it we consider it clear, that the circuit court is bound to require competent and satisfactory proof that the party, to remove whom the order is sought, is either the defendant in the original judgment or his lessee. The act, by which the remedy is created, is wholly silent as to the manner in which the party in possession shall be brought before the court, and also as to the nature and extent of the defence which he shall be permitted to set up in support of his right of possession. There seems to be no uniform rule of practice among the circuit courts of the State, upon the subject; and such is the confusion growing out of the omis-

sion of the legislature that we deem it necessary to chalk out and lay down some rule by which the remedy may be enforced, and that too without giving countenance or sanction to the least infringement or violation of the constitutional rights of the party in possession. The act speaks of the defendant and his lessee. Was this designed as an ex parte proceeding, or did the act contemplate a regular suit with plaintiffs and defendants? We cannot believe for an instant that it was ever intended to affect the rights of the citizen so far as to oust him of his possession without giving him an opportunity of being heard, and showing, if in his power, that he does not fall within either class of persons specified in the act. We think that the correct practice, in such cases, is to require the purchaser to state in his petition, that it is either the defendant or his lessee, who is in possession, and also to set forth such facts as are sufficient in law to divest either, as the case may be, of whatever right, title, and interest he may have had in the premises and to vest the same in himself; and then to conclude with a prayer for a rule upon the party in possession to appear at a time and place therein designated, to show cause, if any he can, why the order should not be made against him. The defendant in this case by appearing and disclaiming waived his right to notice in writing. The only question, therefore, to be decided is whether the petitioner has set forth such facts as to entitle him to the benefit of the order made in his own behalf. He states that on the 21st of April, A. D. 1845, the same being the first day of the Pulaski circuit court, he became the purchaser of the south west quarter of section seventeen in township four north in range nine west, containing one hundred and sixty acres, situate in said county of Pulaski, for the sum of seventy-four dollars, and procured therefor the deed of William B. Borden, sheriff of said county, dated April 21st, 1845, duly acknowledged and filed for record in the proper office of said county, May 6th, 1845, and said land was then and there sold by said sheriff under a judgment rendered in said court in favor of Nathan Midgett and against Moses Ferguson and Michael Hogan at the May term, A. D. 1843, and under an execution properly issued on said judgment, and then refers to said sheriff's deed and

the recitals therein contained and prays that they may be considered as evidence, and taken as a part of the petition. He further states that the said Moses Ferguson still remains in possession of said land and absolutely refuses to deliver the same to him, though requested to do so. To this petition the defendant entered his voluntary appearance, and disclaimed any right whatever in himself, but stated that by making the order, the rights of others would be seriously affected. He does not claim to hold under them, nor does he ask to have them made co-defendants to assist him in his defence. The facts set up in the petition, if supported by competent proof, are sufficient to authorize the court to make the order. The record states that the court was well and sufficiently advised of and concerning the motion for possession and of what order to make. Such being the case, and there being no conflicting evidence, the legal presumption is, that all the facts were fully proven by the evidence; and though not specially recited in the order, their existence is thereby affirmed. We are therefore of opinion that there is no error in the judgment of the circuit court of Pulaski county herein rendered. Judgment affirmed.