tember next; and each party is authorized to take testimony, before any justice of the peace, to be read at the hearing, on giving to the opposite party three days notice as usual. Provided that a copy of this order, together with a copy of the said petition, be served on the complainant on or before the fifth day of September next.

Under this order testimony was taken and returned; sundry documents were filed in relation to the matter of the petition; and the case was thus brought before the Court.

BLAND, C., 10th October, 1828.—The matter of the petition of the defendant Mullikin standing ready for hearing, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

It appears, that the defendant Thomas Harwood was indebted to the State, and also to several individuals; for the payment of which debts, the late Benjamin Harwood and the defendant Mullikin, had become bound, by bond or by promissory notes, as his sureties; and that, for the purpose of saving harmless these his sureties, he executed a deed, on the 7th of April, 1810, by which he conveyed certain real and personal property to them, and the survivor of them, in trust for the payment of those specified debts for which they or either of them were bound as his surety: and, in case either of those debts were not paid, within five years from that day, with power to sell the whole, or so much thereof as might be necessary to satisfy them. After the execution of this deed of trust, this Thomas Harwood being indebted to the plaintiff Hodges, * he, Harwood, on the 11th of September, 1810,
505 by a deed legally executed, mortgaged the same property to Hodges for the debt due him. But as his mortgage recites the deed of trust, Hodges could only take subject to the prior lien created by that deed.

On this state of things, Hodges filed his bill, on the 15th of June, 1822, against Thomas Harwood, and Benjamin Mullikin, as the surviving trustee, to have the property sold for the satisfaction of the debt for which it had been mortgaged; by his bill, he makes an exhibit of the deed of trust as well as the mortgage, and states, that Benjamin Harwood was dead; in consequence of which the trust had survived to the defendant Mullikin. This suit, thus instituted, was marked on the docket for the use of Wilson & Sons. Harwood, in his answer, filed on the 12th of December, 1822, states that the debts specified in the deed of trust were still unpaid, and insists that a decree in favor of Hodges cannot be passed; on the ground, that those creditors have a prior lien, and should be made parties. But Mullikin, in his answer, filed on the 14th of July, 1823, merely says, that he has sustained