

7. The materiality of evidence concerning the conduct of the justice before whom the preliminary examination was had is not apparent; but if it was material, the insinuation contained in the defendant's inquiry as to the conduct of the justice was properly rebutted by evidence that the trial was conducted in the usual way. *Valley v. Railroad, supra.*

8. This exception is disposed of by the failure of the defendant to properly insist upon it. *Felch v. Weare*, 66 N. H. 582.

Exceptions overruled.

PIKE, J., did not sit: the others concurred.

Merrimack, }
Dec., 1899. }

STEVENS v. HOOD, *Adm'r.*

If the principal on a probate bond die insolvent, a creditor is under no obligation to present his claim to a commissioner upon the estate, but may look to the surety for the whole amount.

PETITION, for leave to appeal from a probate decree made in 1898, finding a balance in the hands of Henry J. Crippen, upon the settlement of his account as administrator with the will annexed of the estate of George W. Lawrence. The plaintiff was a surety on Crippen's bond. Crippen died in 1893. His estate was settled in the insolvent course, the report of the commissioner being accepted in 1895. The claim of the Lawrence estate was not presented to the commissioner.

The court found that the plaintiff was prevented by accident, mistake, or misfortune from claiming the appeal; but that the petition should be dismissed unless the failure to present the Lawrence claim to the commissioner on Crippen's estate should modify the decree mentioned in the petition. It was ordered that the petition be dismissed, and the plaintiff excepted.

Leach & Stevens, for the plaintiff.

Sargent & Niles, for the defendant.

PEASLEE, J. It is found that justice does not require the granting of this petition, unless the failure to present the Lawrence claims to the commissioner upon the estate of the adminis-

trator who was liable therefor is a bar to a suit against his bondsmen. Such failure is not a defence. "If the principal die, and his estate be administered in the insolvent course, the creditor is under no obligation to present his claim to the commissioner and procure what he may from that estate. He has a right, in such a case, to look to the surety for the whole amount." *Sibley v. McAllaster*, 8 N. H. 389, 390; *Morrison v. Bank*, 65 N. H. 253, 280. The petition was rightly dismissed. *Holton v. Olcott*, 58 N. H. 598.

Exception overruled.

YOUNG, J., did not sit: the others concurred.

Merrimack, }
Dec., 1899. }

MORRILL *vs.* WEEKS.

The construction of a written contract by the parties thereto, as evidenced by a protracted course of action, will be adopted by the court unless the language forbids.

An agreement to pay a sum of money in the event of a default in the payment of a much smaller amount will be treated as a penalty or security to insure the performance of the contract by the obligor, and not as liquidated damages.

Delay in bringing suit for any period less than that prescribed by the statute of limitations will not constitute laches.

Where a demand for money due has not been made in accordance with the terms of a partnership agreement, interest is recoverable from the date when an action for an accounting is begun.

BILL IN EQUITY, for an accounting. February 19, 1880, the parties bought out the insurance business of Charles W. Cilley for \$250, each contributing one half of this amount, and on the same day entered into an agreement under seal for the purpose of carrying on the business. The material parts of the agreement are as follows:

"In consideration whereof, the said Rufus M. Weeks hereby agrees to have the said Morrill & Danforth issue policies upon, or cause the same to be placed in companies other than their own upon, all insurance risks in which he shall become interested as agent or broker, excepting any which he may write in the New Hampshire Fire Insurance Company of Manchester, N. H., as its agent. For all policies so written in said New Hampshire Com-