

Wright v. Boynton, 37 N. H. 9, 19; *March v. Eastern R. R.*, 40 N. H. 548, 583), they were waived by his appearance and motion for a continuance. His motion to dismiss, although made within the first four days of the first term (*Seaver v. Allen*, 48 N. H. 473), was not seasonably made after his motion for a continuance was submitted. *Smith v. Whittier*, 9 N. H. 464; *Downer v. Shaw*, 22 N. H. 281; *State v. Richmond*, 26 N. H. 232, 242; *Gilmanton v. Ham*, 38 N. H. 108; *Robinson v. Potter*, 43 N. H. 191; *Peebles v. Rand*, 43 N. H. 342; *Candia v. Chandler*, 58 N. H. 127.

Exceptions overruled.

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

JENNESS v. JENNESS.

Single instances of neglect by one having the means to provide his wife with the necessaries of life, or to furnish her with medical assistance, unaccompanied by circumstances showing danger or reasonable apprehension of danger to her life or health, do not, as matter of law, constitute extreme cruelty as a cause of divorce.

LIBEL FOR DIVORCE. The petition charged extreme cruelty, and specified acts which, if true, would support the charge. A referee reported that the libellant was not entitled to a divorce, and at her request also reported that the libellee, being of sufficient ability, failed in a few instances to make the provision for his wife that he ought, and that upon one occasion, more than five years previous to the libel, he neglected to procure a physician in her sickness. The court denied the motion of the libellant to recommit the cause for further hearing, and dismissed the libel. The libellant excepted.

J. H. Hobbs, for the libellant.

S. B. Carter, for the libellee.

ALLEN, J. What conduct constitutes extreme cruelty as a cause of divorce is matter of law. Whether such conduct exists is matter of fact to be proved by competent evidence. *Janvrin v. Janvrin*, 58 N. H. 144. Isolated instances of neglect by a husband having the ability to provide his wife with the necessaries of life, or to furnish a physician in case of sickness, unaccompanied by circumstances showing danger or apprehension of danger to her life or health, are not, as matter of law, extreme cruelty. Whether

the instances of neglect were such as to cause danger or a reasonable apprehension of danger to the life or health of the libellant, and prevent her from safely discharging her marital duties, was a question of fact. 1 Bish. Mar. & Div., s. 769. There having been a full hearing upon the facts before the referee, there was no error in the refusal of the court to recommit the cause for further hearing. *Janvrin v. Janvrin*, 58 N. H. 144, 146.

Exceptions overruled.

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

CHAMBERLIN *v.* OSS�PEE.

The plaintiff being charged with feigning an injury, her conduct indicative of pain at a time when she supposed no one was observing her is competent evidence on the question of the genuineness of her suffering. A witness may refresh his recollection by reference to a memorandum made so near the time of the facts recorded that he then knew them to be true.

Evidence of the plaintiff's efforts to procure a lantern is competent on the question of whether there was want of reasonable care in driving in the darkness without a lantern.

Evidence of a fact shown by the admissions of a party may be contradicted by a witness knowing the contrary.

CASE, for personal injuries from a defective highway. Trial before referees. The facts appear in the opinion.

Worcester & Gafney, S. B. Carter, and *Whipple*, for the plaintiff.

Quarles, Copeland, and *Weeks*, for the defendants.

ALLEN, J. The defendants claimed that the injury was simulated, and, against objection, the referees permitted the plaintiff's witness to testify what she saw in the plaintiff's conduct indicating distress, when the witness was apparently asleep. The conduct and expressions of the plaintiff indicative of the condition of her mental or bodily health at the time were competent evidence on that subject (*Howe v. Plainfield*, 41 N. H. 135, 136; *Perkins v. Concord Railroad*, 44 N. H. 223, 225; *Bacon v. Charlton*, 7 Cush. 581, 586; *State v. Howard*, 32 Vt. 380), and the belief or opinion of the witness as to the plaintiff's condition, drawn from observation of her conduct and expressions, was properly received.