539; Hargis v. Railroad Co., 100 Mo. 210, 223, 13 S. W. 680; Moore v. City of Waco, 85 Tex. 206, 211, 20 S. W. 61; Sherlock v. Railway Co., 115 Ind. 22, 17 N. E. 171; Liddon v. Hodnett, 22 Fla. 442.

We are not referred to any decision of the supreme court of the state of Wisconsin which, in our judgment, militates against the position taken or against the principles announced in Scheuber v. Held. In Pinkum v. City of Eau Claire, 81 Wis. 301, 51 N. W. 550, the owners in fee of certain lands executed to the city a perpetual lease, which should become void upon failure by the city to maintain and operate a raceway upon the westerly shores of the Chippewa river, and a public highway along and contiguous to the westerly shore of the canal; the grantors reserving the right to cut trees and timber, quarry stone, and dig earth, and remove the same from the premises described. A bill in equity was filed by the assignee of the lessors for breach of conditions, and for damage occasioned thereby, with the prayer for a mandatory injunction to compel the lessee to comply with the conditions and pay the damages, or, in the alternative, that the lease might be canceled. The case came before the court upon demurrer to the bill, one ground of demurrer being that the suit was not brought within the time limited by law. In other words, the city claimed that its possession under the lease, being for a period of more than 10 years before suit, was adverse, and vested in it title to the possession. The claim was remarkable, and was briefly disposed of upon the ground that the possession was only such as was necessary to the easement conferred by the lease, and could not, therefore, be adverse, or constitute a defense to a charge of violation by the city of its obligations under the instrument by which it obtained and held possession. In City of Racine v. Crotsenberg, 61 Wis. 481, 21 N. W. 520, it was held that a city cannot maintain ejectment to recover possession of a public alley or street, and that, because its interest therein is a mere easement, it was not entitled to the possession of the premises, within the meaning of the statute respecting actions of ejectment. The court observed that ejectment lies only to recover things corporeal which may be the subjects of seisin, entry, and possession, and that there can be no seisin of an incorporeal hereditament, and it cannot be the subject of entry and possession. It "lyeth in grant and not in livery." It is an interesting question whether the easement which a municipal corporation acquires in the modern street ought ever to have been classed in the category of incorporeal hereditaments. They are rights issuing out of a thing corporate (whether real or personal), or surrounding or annexed to or exercisable with the same, while a corporeal hereditament includes that which is of a substantial, tangible nature. 1 Washb. Real Prop. (5th Ed.) p. 36. A right in a highway was originally classed, and rightly so, with incorporeal hereditaments, because there was granted a mere right of passing over, and it came about that the streets of a city have been placed in the same category; but the rights which a municipal corporation has in the streets of a city are very different from the rights of the public in a highway of the country. The easement is not confined to a mere passing over. The street may be graded and improved, the grade may be rais-

ed or lowered, the earth excavated. It may be tunneled, and water mains, gas mains, sewers, and telegraph and telephone wires laid therein, and cars propelled by steam, electrical, cable, or horse power may be authorized to be operated in such tunnel, as likewise upon the surface of the road (except, possibly, as to cars operated by steam power); and so, also, great steel structures spanning the roadway of the street may be authorized to be constructed for the operation of an elevated railway. In fact, there is at this day, as declared in Barney v. Keokuk, 94 U. S. 324, no substantial difference between streets in which the legal title is in private individuals and those in which it is in the public, as to the rights of the public therein. Notwithstanding, the public right in a street still seems to be classed as an incorporeal hereditament, although it possesses many if not all of the substantial qualities of a corporeal hereditament. The evolution of the law does not, in this instance, seem to have kept pace with the evolution of society. The classification is, however, purely technical, not affecting substantial right; for while ejectment may not be maintained to recover possession of an easement, because of the highly technical ground stated, it is still true that the law will protect possession under an easement in an equitable proceeding. Indeed, there would seem to be little question at this day that a railway company, having the right to the exclusive possession of its right of way, which is an easement, may maintain ejectment to protect the right. We need not further consider the opinion in City of Racine v. Crotsenberg; for, conceding its correctness, it by no means leads to the conclusion that a prescriptive right may not be obtained by adverse possession under the statutes of Wisconsin. If the title acquired be not such as will support an action of ejectment, possession for the prescribed period under claim of right creates a title and a right to the claim asserted, which is effectual as a defense against one seeking possession.

The questions discussed have by no means been free from difficulty. We are, however, constrained, after careful investigation, and consideration, to the conclusions stated. It is proper to add that the court below, in its charge upon the question of 20 years' adverse possession, seemed to entertain no doubt that such adverse possession would come within the protection of the statute, although the claim under which entry was made and possession held was not hostile to the title in fee. For the reasons stated, we are of opinion that the instruction asked and refused should have been given, and that the charge to the jury, in the particulars referred to, was erroneous. We do not deem it requisite at this time to consider the other objections raised at the trial. The judgment will be reversed, and the cause remanded, with directions to grant a new trial.

ILLINOIS CENT. R. CO. v. GRIFFIN.[1]

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 862.

1. CARRIERS—DANGEROUS PREMISES—INVITATION TO ENTER BAGGAGE ROOM.
Where plaintiff, the owner of several pieces of baggage in a baggage room at a railway station, told the baggage master that a part of it was wanted, and the baggage master, upon going in and leaving the door open, was followed by plaintiff, who while there was injured, the jury was authorized to find that plaintiff entered the room at the invitation and for the benefit of the railroad company.

2. SAME—DEFECTIVE PREMISES.
Where the owner of baggage enters a baggage room at a railway station at the invitation of the baggage master, for the purpose of pointing out the baggage wanted, and is injured by the falling of a defective door in an attempt to open it for the purpose of asking a street-car motorman to wait, the questions of negligence and contributory negligence are for the jury; there being testimony tending to show defendant's knowledge of the defect, and testimony—contradicted by plaintiff—tending to show she was told not to open the door.

3. TRIAL—MOTION FOR PEREMPTORY INSTRUCTION—REMARKS OF COURT.
While the better practice is to send the jury out of the room when a motion for peremptory instruction is to be made, argued, or decided, there can be no reversal because of remarks of the court thereon in the presence of the jury, when there was no exception, and no request that the jury retire.

4. SAME—INTERROGATION OF WITNESSES.
It is in the discretion of the court to permit the plaintiff to be further interrogated as a witness after the motion for a verdict has been decided, and there can be no reversal therefor unless that discretion is abused.

5. PLEADING AND PROOFS—EVIDENCE AS TO PERSONAL INJURIES.
Under a declaration alleging nervous prostration, and sensations of numbness and pain in certain parts of the body, as the result of personal injuries, the sympathetic affection of other parts of the body may be shown.

6. DAMAGES—PHYSICAL EXAMINATION.
A physical examination of one suing for personal injuries, by physicians to be designated by the court, cannot be compelled either before or during the trial.

7. TRIAL—INCONSISTENT CHARGES.
A party cannot complain of inconsistent charges where the inconsistency is between a proper charge and an erroneous instruction given on his request.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

The recovery in this case was for personal injury to the defendant in error, attributed to the negligent omission of the plaintiff in error to keep in safe condition a door to its baggage room at Madison, Wisconsin. There is little dispute about essential facts and circumstances, and, while the assignment of errors contains a large number of specifications, the question of chief importance is whether the court ought to have directed a verdict for the defendant. The passenger station of this company at Madison is between the railroad track, on the south, and Bedford street, on the north. The baggage room is at the east end of the station, and is separated from a waiting room by a partition. Its dimensions are 23 feet east and west by 17 feet north and south. There is on the south side of the room a sliding door, and on the north side a similar door, the jambs into which they lock being within a few inches of the wall of the waiting room. The doors are 7 feet and 7 inches high, 6 feet 3¾ inches wide, 2½ inches thick at the edges, and made for the most part of yellow pine, in two thicknesses, "filled in on one side," and "paneled on both sides." They

[1] Rehearing denied June 17, 1897.

have rollers on the bottom, which run upon a small iron rail on the floor, and on the top each has a guide strip designed to run in a groove above. The locks are set entirely on the inside, and mortised in. There are no projecting handles, but depressions on each side serve as handles. In the depression on the inside of each door is a spring, which, when pressed upon, causes the catch or bolt of the lock to be lifted from the iron fastening in the jamb of the frame, whereupon, if the pressure be continued with sufficient force, the door will be pushed aside. From the outside the doors can be opened only by the use of a key. On the outside of each was painted "Baggage Room," and in front of each was an incline made of plank "thinned off at the lower end, and reaching from the door sills out upon the platform." The door on the south side alone was in customary use; that to the north, it is claimed, being "never used for delivering baggage," and during the five or six years since it was put up not having been "used in any way, save only a dozen or fifteen times." There is no other door or opening into the baggage room, excepting an interior window communicating with the waiting room. Extending entirely around the station building is a wide platform, flush on the south with the railroad track, and on the north with Bedford street. On the east and west, between the platform and Main and Washington streets, respectively, are open areas for the use of omnibuses, hacks, and the like. An electric street-car line, with a terminal at Washington street, runs on Bedford and Main streets to Capitol Park. Lucia B. Griffin, the defendant in error, unmarried, about 30 years old, an elocutionist by profession, and without previous knowledge of the place, arrived at the station at 7:45 o'clock p. m. of July 30, 1894, with three pieces of checked baggage. A hand satchel and bundle she deposited, on arrival, in the ticket office of the company for safe-keeping until the next day, and, without claiming the checked baggage, went into the city for the night. The unclaimed baggage, pursuant to a rule of the company, was placed in the baggage room for safe-keeping. About 1 o'clock p. m. of the next day, Miss Griffin returned to the station by a street car, from which she got off at Washington street. The motorman promised to wait a couple of minutes, and to stop his car for her opposite the baggage room. She was able promptly to get her satchel and bundle, but as much as 10 minutes passed before the baggage master, Katter, who was at the freight depot, arrived. At the door of the baggage room she gave him her checks, telling him, as she testified, that she wanted part of the baggage. He unlocked the door, and, leaving it open behind him, went to the baggage, on the north side of the room. Following him in, she stopped at the desk near the waiting room window; and then, according to her own testimony, while Katter was engaged with the baggage she went to open the door on the north, to see if the car was waiting, to ask the motorman to wait, expecting to find him opposite the door, and the door, when she had pulled it back about five inches, fell upon her. While pulling the door open, she heard Katter "say something about being a big door for me to open,—something like that. I was a small person to open a big door,—something like that. I do not remember the exact words." Katter testified: That he had pulled off one check and laid it aside, when she asked if she could not go through that door,—the one that fell,—to which he answered: "No; you can't open that door. I will take your baggage around this way." That she then "started and took hold of the door with her left hand, and slipped and turned around; and the first time she didn't move the door, and she turned right around and took hold with her both hands, and just moved it about four or five inches, and I see the door coming over on her." After the refusal of the court to direct a verdict for the defendant, the plaintiff, by permission of the court, was recalled, and, in response to the question whether Katter told her not to go out of the door, answered: "I think you asked me before, and I told you that I was never warned at all anything about the door,—not even an intimation that the door was unsafe. There was nothing like a warning in any way." And in response to further questions she testified that Katter did not tell her not to go out of that door; that she did not say anything to him about opening the door. Thereupon she added: "I am very much accustomed to waiting on myself. I never ask anybody to open doors for me. I am not accustomed to have a gentleman go with me to open doors. * * * Never dreamed of there being the least doubt but that I could open it. I have opened these baggage-room doors * * * in other places." Proof was made, and not disputed, that

about a month before the occurrence in question the other door to the baggage room had fallen in the same manner,—the fall being due in part to the wearing of the iron rail, but mainly to the shrinkage of the wood of the door and to the settling of the building,—and that a repetition of the fall was guarded against by means of a wooden cleat fastened upon the grooved strip, and extending below the end of the door on the inside. Concerning the door in question, the answer alleges that, "owing to the shrinkage of the wood and settling of the building, the door, when partly opened, could be pulled out of the groove," but that the shrinkage and settling were "only just sufficient to permit the door when pulled sidewise, and not endwise, to slide from the groove." It is not alleged that the liability of the door to be pulled over was unknown to the plaintiff in error.

B. J. Stevens (James Fentress, of counsel), for plaintiff in error.

John M. Olin and Harry L. Butler (J. C. Mabry, of counsel), for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The primary question, upon which all other questions of importance in this case turn, is whether the railroad company was under any duty to the defendant in error to make the baggage room a safe place. The contention of the plaintiff in error is that while railway waiting rooms, platforms, and the approaches thereto, are places to which the public having business with the railway company are invited, a baggage room is necessarily a private place, where the one who goes without invitation, express or implied, is a trespasser, or at best a mere licensee, to whom no duty is owing, and that in this case, there being no pretense of an express invitation to the plaintiff to enter the room, there was no implied invitation, because she entered solely for her own convenience; the proper place for receiving her baggage being at the door or on the platform outside, and her presence inside being in no sense to the advantage of the company. We do not agree that a baggage room at a railway station, when open for the reception and delivery of baggage, is a private room, as against owners of baggage who are permitted to enter. In its relation to the public, the company is represented by the baggage master or other employé whom it puts in charge of the room; and, if an owner of baggage enters upon the invitation or by permission of the baggage master, it is the invitation or permission of the company; and whether, in a given instance, one who goes in by permission does it only for his own benefit, or for the advantage of both parties, must ordinarily be a question for the jury. If thereby the baggage master is aided in the performance of his duties or labors, the company which he represents is benefited. In this case the baggage master was told before he opened the door that a part of three pieces of baggage was wanted, and it was certainly to his convenience that the part or piece desired should be pointed out without his being required to bring the three pieces to the door or platform; and when he passed in, leaving the door open and giving no admonition to Miss Griffin to stay out, it was, to say the very least, a question for the jury whether she was not invited to