act of 1855, incorporated into Code of 1873, it is provided that a railway company shall be liable to an employé as to a passenger for want of care in running their train. The fact of his being an employé shall not bar his recovery if he is himself without default.

NOTE.—For an exhaustive discussion of the whole subject see McKinney on "Fellow Servants," and for the cases in Pennsylvania, a pamphlet by Mr. A. Rolles, issued by Department of the Interior of Pennsylvania, in 1891, on "The Liability of Employers in Pennsylvania."

FRANCIS H. BOHLEN.

DEPARTMENT OF PROPERTY.

EHRET *v.* SCHUYLKILL RIVER EAST SIDE R. R. CO., APPELLANT,[1] SUPREME COURT OF PENNSYLVANIA.

Eminent Domain—Leaseholds—Damages.

Where, in a proceeding to recover damages for leasehold premises appropriated by a railroad company under the right of eminent domain, it appears that plaintiffs were under a contract to remove daily from the gas works of the City of Philadelphia, adjoining their leased premises on the River Schuylkill, a large quantity of tar, and that the premises in question, which they leased from the city, enabled them to receive the tar without cost and to manufacture it without transporting it to and from distant points, it is proper to admit evidence that, after the land was taken, it became necessary to carry the tar to a place of distillation by a boat specially constructed; that it was necessary to erect temporary works for the distillation of the tar when received; and that it was necessary to haul over inaccessible roads the barrels needed to hold the tar and its products.

THE MEASURE OF DAMAGES FOR THE APPROPRIATION OF LEASEHOLDS BY THE EXERCISE OF THE RIGHT OF EMINENT DOMAIN.

There are two requisites to a valid exercise of the right of eminent domain: the property taken must be for a public purpose and compensation must be made. Constitutions of the various States con-

[1] Reported in 30 W. N. C., 564; 151 Pa., 158. Decided October 3, 1892.

ain provisions guaranteeing just compensation for property appropriated by an exercise of the sovereign's delegated right of eminent domain. But before the enactment of constitutions the right to compensation was admitted as an indispensable incident to the right, and in reality is independent of constitutional authority: 30 Am. Law Reg., 449, 452, 465.

Where an entire tract of land is appropriated, the compensation to the owner is its market value in money: 30 Am. Law Reg., 491; 6 Am. and Eng. Ency. of Law, 567; Lewis on Eminent Domain, §§ 463, 478. Where only a portion of a tract of land is taken, the value of what is appropriated is recoverable and damages to the portion unappropriated: Lewis on Eminent Domain, § 464. But it often happens that the partial appropriation benefits the unappropriated part of a tract of land. In that event the measure of compensation differs in various States: Id., § 465. In Mississippi benefits are not considered: Id., § 466. In Maryland, Nebraska, Tennessee, Virginia, West Virginia and Wisconsin special benefits only are allowed to be set off against damages to the remainder, but not against the value of the land which is taken: Id., § 467. In Georgia, Kentucky, Louisiana and Texas, general and special benefits can be set off against damages to the part of land not taken, but not against the value of what is taken: Id., § 468. In Alabama, California, Delaware, Illinois, Indiana, New York, Ohio, Oregon and South Carolina general and special benefits may be set off against both damages to the remainder and the value of the part of the land taken: Id., § 470. In Connecticut, Kansas, Maine, Minnesota, Massachusetts, Missouri, New Hampshire, New Jersey, North Carolina, Pennsylvania and Vermont only special benefits may be set off against both the value of the part taken and damages to the portion of the land unappropriated: Id., § 469. The rule in Pennsylvania was formulated by GIBSON, J., as follows: "What would the property, unaffected by the obstruction, have sold for, at the time the injury was committed? What would it have sold for, as affected by the injury? The difference is the true measure of compensation:" Schuylkill Navigation Co. *v.* Thoburn, 7 S. & R., 411, 422–3 (1821). In the adjustment of this difference, a fair and just comparison must be made of the advantages and disadvantages necessarily resulting. Special advantages and actual disadvantages to the particular property alone are to be considered. If the particular property advances in market value beyond the general increase in value of other neighboring properties, this element of advantage can be considered. The disadvantages must, in no sense, be speculative, but it is essential that they affect the present market value of the land: 30 Am. Law Reg., 492–3. The market value includes the value for particular uses to which the land is peculiarly adapted: Lewis on Eminent Domain, § 479; 30 Am. Law Reg., 498. But speculative inquiries as to possible uses and improvements of the property are not permissible in estimating damages: Lewis on Eminent Domain: Id., § 480. In estimating damages for the appropriation of a portion of a farm, the jury may consider, as an element of damage in estimating the injury to the entire tract, that a part

was ripe for building improvement; but calculations based upon values at which the building lots would sell are erroneous: Wilson *v.* Equitable Gas Co., 31 W. N. C., 451 (1893). The compensation must be estimated for the land as such: Lewis on Eminent Domain, § 486. The value of land as farming land or mining land is recoverable; but the value of coal or stone, supposed to underlie the tract, is not to be considered: Id., 30 Am. Law Reg., 497. The elements to be considered are "as varied as the properties affected and the uses to which they are applied:" Kersey *v.* R. R. Co., 133 Pa., 234, 240; 25 W. N. C., 455 (1890). In Pittsburg, Brad. & Buf. Rwy. Co. *v.* McCloskey, 110 Pa., 436, 442, 443 (1885), CLARK, J., said: "The inconvenience arising from a division of property or from increased difficulty of access, the burden of increased fencing, the ordinary danger from accidental fires to the fences, fields or farm buildings, not resulting from negligence, and generally all such matters as, owing to the particular location of the road, may affect the convenient use and future enjoyment of the property, are proper matters for consideration; but they are to be considered in comparison with the advantages only as they affect the market value of the land." The risk of fire and the cost of fencing are elements to be considered in estimating damages: Lewis on Eminent Domain, §§ 497, 498; 30 Am. Law Reg., 496. Evidence of the loss of custom of a mill, in consequence of a location of a railroad in front of it, is admissible, not as a distinct or legitimate item of damage, but to show to what extent the value of the mill property has been lessened: 30 Am. Law Reg., 496. But any supposed loss of profits cannot be considered, though the fact that the premises are more difficult to rent is an element which may be considered in determining the difference in value: Id.; Lewis on Eminent Domain, § 487. In Pittsburg and Western R. R. Co. *v.* Patterson, 107 Pa., 461, 464–5 (1885), CLARK, J., said: "The use to which the property has been, or may be, applied, is proper for the consideration of the jury, in the estimate of its value; its adaptation for any particular purpose may enhance its market value; but the Court was certainly correct in saying that the jury could not take into consideration any supposed loss to the plaintiff of profits in his business. Such an assessment would be purely speculative, and a rule which justified it would lead to most ruinous results. If the property, by reason of its location or otherwise, is especially adapted to any particular use to which it is applied, if it is worth more for that particular use than for any other, its market value will be measured accordingly." Mr. LEWIS says, in his treatise on Eminent Domain, § 487 (1888): "The profits of a business do not tend to prove the value of the property upon which it is conducted. The profits of a business depend upon its extent and character, and the manner in which it is conducted. One man will get rich while another will become bankrupt in conducting the same business upon the same property. It is proper, however, to show how the taking will interfere with the use of the property, either for the purpose to which it is actually devoted, or for any purpose to which it is adapted."

The foregoing general principles

are peculiarly applicable to the appropriation of property in possession of the owner; but the owner may have leased his estate to a tenant whose possession is disturbed by an appropriation of the property by the exercise of the right of eminent domain. Such a case was that of Ehret *v.* Schuylkill River East Side R. R. Co., 151 Pa., 158 (1892), of which this article is an annotation.

A tenant for years being the owner of an estate in the land, it is well established that he may recover damages to his interest: 30 Am. Law Reg., 500, 501; 6 Am. and Eng. Ency. of Law, 590; Lewis on Eminent Domain, § 483; Ehret *v.* Schuylkill River East Side R. R. Co., 151 Pa., 158 (1892); Kersey *v.* Schuylkill River East Side R. R. Co., 133 Id., 234 (1890); Penna. S. V. R. R. Co. *v.* Ziemer, 124 Id., 560, 571 (1889); Lafferty *v.* Schuylkill River East Side R. R. Co., Id., 297 (1889); Phila & Read. R. R. Co. *v.* Getz. 113 Id., 214 (1886); Pittsburg & Lake Erie R. R. Co. *v.* Jones, 111 Id., 204 (1886); Penna. R. R. Co. *v.* Eby, 107 Id., 166 (1884); Getz *v.* Phila. & Read. R. R. Co., 105 Pa., 547 (1884). In Brown *v.* Powell, 25 Pa., 229, 231 (1855), LEWIS, C. J., said: "A tenant for years is an owner within the meaning of the Act, and is entitled to compensation, according to his interest." See, also, Turnpike Road *v.* Brosi, 22 Pa., 29 (1853); Frost *v.* Earnest, 4 Wharton (Pa.), 86 (1838); Fitzpatrick *v.* Penna. R. R. Co., 10 Phila. (Pa.), 107 (1874); *In re* Barbadoes St., 8, Id., 498 (1871); Balt. & Ohio R. R. Co. *v.* Thompson, 10 Md., 76 (1856); Burbridge *v.* R. R. Co., 9 Ind., 546 (1857); Muller *v.* Earle, 35 N. Y. Supr. Ct. (3 Jones & Spencer), 461 (1873); Livingston *v.* Sulzer, 19 Hun. (N. Y.), 375 (1879); Coutant *v.* Catlin, 2 Sandford Chan. (N. Y.), 485 (1845); Turner *v.* Williams, 10 Wendell (N. Y.), 139 (1833); *In re* Mayor of New York, 34 Hun, 441; 99 N. Y., 569 (1885); Alex. & Fred. Rwy Co. *v.* Faunce, 31 Grattan (Va.), 761 (1879); Brooks *v.* City of Boston, 19 Pick., 174 (1837); Patterson *v.* City of Boston, 20 Id., 159 (1838); Chicago & Evanston R. R. Co. *v.* Dresel, 110 Ills., 89 (1884); Booker *v.* Rwy Co., 101 Id., 333 (1882).

In No. Penna. R. R. Co. *v.* Davis & Leeds, 26 Pa., 238 (1856), the railroad company purchased the reversion of land held by Davis & Leeds as lessees under a lease for two years with a covenant for renewal by lessors upon the expiration of the two years if requested, and were using the land as a lumber yard, with almost a year of the first term yet to expire, when the company appropriated it for railroad purposes. WOODWARD, J., held (p. 241): "The direct injury done to them, or, in other words, the value of the thing taken from them, was to be measured by the worth of the lot at the stipulated rents for the residue of the term of two years and for the whole of the term of three years. No assessment of damages or compensation would have been just and adequate that did not embrace both these terms, for the true measure of the interest the lessees had in the land was the joint or aggregate value of the two terms." The company took all the lessees had in the land, and were required to pay for the value of their entire estate.

In Renwick *v.* R. R. Co., 49 Iowa, 664, 674 (1878), it was held that the measure of damages to

lessees for the location of a railroad through the leased premises is the difference between the value of the annual use of the premises before taking the right of way and what it was worth afterward.

In Patterson *v.* City of Boston, 20 Pick., 159 (1838), it was held that for the deprivation of the use of a store the lessee can recover from the municipality damages computed for such time as would be reasonably necessary to remove his goods and make the repairs and move back again; the loss or value of the store to him for that period, and not the rent and taxes specifically, is the measure of his indemnity. He is also to be remunerated for the diminished value of the premises caused by the taking of a portion, for the residue of the term, he continuing to pay at the same rate the rent and taxes. But he cannot recover for loss of custom because of occupying a less advantageous place of business while repairs were being made.

In Getz *v.* Phila. & Read. R. R. Co., 105 Pa., 547 (1884), it was decided that landlord and tenant may unite in a proceeding to recover damages for the taking and injury of the property by a railroad company. The tenant need not show that he holds under a written lease for a term certain; it is sufficient if it appear that he is a tenant from year to year at a certain annual rent. The proper procedure would be for the jury to designate the portion of the award to which each party was entitled. In estimating the damages to the tenant, the jury should consider, as elements of damage, the fact that the location of the railroad compelled the removal of the business conducted by the tenant, and the depreciation in value of the leasehold and of the machinery and personal property of the tenant which he used in his business, consequent upon the removal. The difference between the value of the machinery in connection with the business conducted on the property and its value to be removed and applied to the same or other use, is a proper element of damage for the consideration of the jury. In that case, Hiram S. Getz owned the premises, and Hiram S. Getz and James K. Getz, trading as H. S. Getz & Co., were the lessees. The case came again before the Supreme Court in 1886 (Phila. & Read. R. R. Co. *v.* Getz, 113 Pa. 214), and it was there explicitly held that if the location of a railroad so affects the property as to compel the removal of the business conducted by tenants from year to year to another place, and the machinery used in the business is in consequence depreciated as it stands, the difference between the value of the machinery in connection with the business conducted on the property and its value to be removed and applied to the same or other uses, is an element of damage proper for the jury's consideration. In ascertaining the value of the machinery as it stood after the injury, evidence as to the expense of removing it, rendered necessary by the location of the railroad, from the property to a new place of business, is admissible.

In Kersey *v.* Schuylkill River East Side R. R. Co., 133 Pa., 234 (1890), the plaintiff was the lessee of a wharf property under a lease having eighteen months to run, when the defendant's railroad appropriated part of the premises. The terms of the lease restricted

him to the use of the property as a coal yard. The construction of the railroad destroyed appliances belonging to him, which were essential to the conduct of his business, and necessitated the construction of others in their place by him, and an increase in the handling of coal and breakage and waste of it. It was held that evidence was admissible to show the amount of the lessee's necessary expenditure in reconstructing appliances to secure the facilities for continuing the business he had previously enjoyed, and the increased expense and loss in handling the coal with them, not as specific items of claim, but as affecting the market value of the leasehold.

This case was followed in Ehret *v.* Schuylkill River East Side R. R. Co., 151 Pa., 158 (1892). There Ehret & Co. showed that by reason of the location of their leasehold property, which the railroad company appropriated, they were saved a certain expense in the performance of a contract, which was made because of the advantages of the location, as fixing their damages; and also showed the cost to fulfil the contract in another and distant place, which they were obliged to obtain because of the loss of the leasehold. It was urged that such testimony was a "covert attempt to recover profits." But the Court "held it was nothing of the kind." These matters "were elements which evidently and properly entered into the consideration and determination of the value of the lease. It was a part of the property taken by the defendant company as *locum tenens* of the Commonwealth, property for which defendant was bound to make just compensation to plaintiffs, from whom it was taken. . . . On principle, as well as authority, we think such evidence was not improper. In Railway Co. *v.* Vance, 115 Pa., 327, testimony was received to prove loss of custom at a mill, not with the view of recovering the amount as damages, but for the purpose of showing the extent to which the value of the mill property has been diminished. Railroad Co. *v.* Getz, 113 Pa., 214, recognizes the right of owners of a leasehold to recover, as damages, the cost of removing their machinery:" *per* STERRETT, J., 151 Pa., 166, 167.

In Penna. R. R. Co. *v.* Eby, 107 Pa., 166 (1884), it was held proper for the plaintiff to prove, as the measure of damages, the value of the leasehold over the rent he paid for it. He was afterward permitted to testify that had he "stayed on there, rather than moved away, it would have paid me $1000 a year;" which was held to be testimony in the nature of future profits, and inadmissible. TRUNKEY, J., said (p. 173): "It was competent to prove the market value of the leasehold by the opinion of witnesses in the same manner as it would be the value of other property. That value is what the leasehold was worth—it was worth to the plaintiff the same sum as it was worth for sale and transfer, and the mode of ascertaining the sum is by testimony of witnesses upon its market value. If by reason of the taking of the property, or its destruction, the plaintiff was specially injured, he is entitled to compensation for such injury, as for the time necessarily required in removing and the expenses of such removal, and for other loss directly resulting from defendant's act. That does not include estimated profits of future

trade or business, or other supposed consequential injury."

In Pittsburgh & Lake Erie R. R. Co. *v.* Jones, 111 Pa., 204 (1886), the plaintiff owned a ferry and held a leasehold in the landing, and the defendant constructed a railroad materially interfering with the landing of boats. It was held that the measure of defendant's liability was the difference between the value of the leasehold for the purpose to which it was applied until the end of the term under ordinary circumstances, and its value for the same period as affected by the construction of the railroad, and that it was error to allow the recovery of damages for the depreciation of the value of the franchise unconnected with the leasehold.

In Lafferty *v.* Schuylkill River East Side R. R. Co., 124 Pa., 297 (1889), a tenant to whom land was demised with notice that a railroad was located upon it, was allowed the value of growing crops, destroyed by the construction, which were planted before he had notice of the time when the company would interfere with his possession. The right to be paid for an injury to growing crops passed with the right to plant them. Having notice of the tenant's possession, the company could not discharge their liability to him by a payment to his landlord. The general rule is that the value of interests in land is to be determined at the time of the location of the railroad or commencement of proceedings for condemnation: Burt *v.* Merchants' Ins. Co., 115 Mass., 1 (1874); Lawrence's Appeal, 78 Pa., 365 (1875). Therefore no recovery can be had for improvements made by the lessee after the filing of a petition to condemn: Schreiber *v.* R. R. Co., 115 Ills., 340 (1885); Chicago, E. & L. S. R. R. Co. *v.* Catholic Bishop of Chicago, 119 Id., 525 (1887.

An interesting subject is the consideration of the method of assessing damages as between lessor and lessee, respectively, when their interests are entirely taken.

Some of the cases are to the effect that a taking by eminent domain extinguishes the lease, while others hold that the covenants are not necessarily affected: Lewis on Eminent Domain, §483; 2 Taylor's Landlord and Tenant, §519, and cases cited in notes; Barclay *v.* Pickles, 38 Mo., 143 (1866). In Foote *v.* City of Cincinnati, 11 Ohio, 408 (1842), it was held that the covenant to pay rent subsists, though the whole property has been appropriated; and, therefore, the compensation to the lessee by the taker must at least cover such rent. In City of Chicago *v.* Garrity, 7 Ills. App. (Bradwell), 474 (1880), it was held that as a tenant is entitled to compensation for so much of his leasehold estate as is taken for public use, there is no reason why he should be excused from a performance of the covenants of the lease; the condemnation of land does not in any way extinguish the lease. In Parks *v.* City of Boston, 15 Pick. (Mass.), 198 (1834); it was held by SHAW, C. J., that lessor and lessee are entitled to recover compensation for the damages sustained by them respectively in consequence of an appropriation of part of the premises. The lessee must pay the rent because he still holds what was granted him in consideration of the rent subject to the sovereign right of eminent domain. He has ample remedy against the public, the fact that he is compelled to pay full

compensation for an estate diminished in value being an element of compensation to be received from the public. See, also, Patterson *v.* City of Boston, 20 Pick, 159 (1838); O'Brien *v.* Ball, 119 Mass., 28 (1875); Folts *v.* Huntley, 7 Wendell (N. Y.), 210 (1831); Workman *v.* Mifflin, 30 Pa., 362 (1858); Dyer *v.* Wightman, 66 Id., 425 (1871).

If a property taken by right of eminent domain has been leased, the estate of the landlord is in the reversion. His voluntary act has given a part of his estate to his tenant. There is a division of the ownership. The landlord is not entitled to the full value of the estate, because he has a less interest. Both lessor and lessee are, therefore, to be compensated in proportion to the damages sustained respectively, because of an appropriation of the property or injury to it by a taking for public use. The sum of the damages to those holding various interests in the property, therefore, cannot exceed the value of the fee, because the value of the fee comprises the values of the various estates into which a property is apportioned. If the value of the fee is paid the owner, the lessee can recover from him the value of his estate, which is included in the fee.

If the entire property be taken, the measure of damages, as has been seen, is the market value. The market value to the lessor is diminished by the value of the leasehold. If the leasehold have no value exceeding the rent, then the tenant's interest is worth only the rent for which he is liable. If under no liability, and possessing a valueless leasehold, the tenant suffers nothing, and the landlord gets the full market value of the property he had leased. But the annual value of a leasehold often exceeds the annual rent. This excess of rental value over the rent reserved is the value of the tenant's interest, for which he must be compensated.

In re William and Anthony Streets, 19 Wendell (N. Y.), 678 (1839), it was held that commissioners for laying out streets in New York, in estimating damages for property taken, must consider all covenants and conditions in a lease where the land is held for a term of years thereunder. If there is a covenant for renewal, which at the rent reserved may add to the value of the tenant's interest, such value, in addition to the present value of the term, should be allowed the tenant. If the rent reserved equals the full annual value of the property, the landlord gets all the damages, since the tenant in that event loses nothing, or, at most, a nominal sum. If the rent is less than the annual value, then the tenant sustains a loss by the appropriation. In that event the longer the term was to continue the greater is the tenant's loss, while the loss to the landlord as owner of the fee is correspondingly diminished. So, also, the covenants in a lease may increase the value of the reversion and be detrimental to the tenant, and are to be considered in estimating the value of the reversion to the landlord.

In re Morgan R. R. & S. S. Co., 32 La. An., 371 (1880), it appeared that the company appropriated a certain lot of ground in New Orleans for its uses. The lot was under lease for a term of three years, with privilege of renewal for three additional years, at a monthly rental of $60. The owner's measure of damages was held to be the value

of his property encumbered by a lease. If the lessee's estate was only worth what he agreed to pay for it, then as the company became the owner subject to the lease, to it was due the rent *in futuro*, and nothing was due by it to the lessee. But if the lessee's right was worth more than he agreed to pay for it, then the company owed him the amount of this excess, because he is entitled to the value of the right taken from him. The compensation to the owner does not include the lessee's damages because of the value of the lease beyond the rent agreed to be paid when the company practically assumes all the right and estate of the lessor. SPENCER, J., said: "The only true test of this excess of the value of the lease over the stipulated rental or price thereof is to ascertain what sum the right of lease or leasehold will bring over and above the rent stipulated to be paid. In the case before us the rental is $60 per month. If the right of lease would sell for $75 per month of its term, then the excess of its value over the price is $15 per month."

In Burt *v.* Merchants' Ins. Co., 115 Mass., 1 (1874), which was a proceeding to assess damages to the insurance company as owner of land appropriated for the enlargement of the Boston post office, the trial judge instructed the jury as follows: "It is the fair market value that you are to ascertain; and your verdict will consist of several items, substantially these: In the first place you will ascertain the total amount of the value to the owners of the estate, estimating the same as an entire estate, and as if the same was the sole property of one owner in fee simple; and that may not improperly be called the total value of the estate. In the next place you will ascertain the fair value of the estate to the Merchants' Insurance Company who, in this case, are the owners of the fee of the land. In the third item you will ascertain and find the fair market value of the interest and term of Haley, the first lessee. In the fourth item you will ascertain the fair market value of the interest and term of Harris & Avery, the sub-lessees. And the sum of the last three items will be equal to the first; for it is a diversion that you are to make among these several parties in interest." In affirming these instructions GRAY, C. J., said: "No contracts between the owners of different interests in the land can affect the right of the government to take the land for the public use, or oblige it to pay by way of compensation more than the entire value of the land as a whole. . . . The petitioner shows no just ground of exception to the instructions in this respect. The jury were clearly directed to ascertain in the first place the total amount of the value to the owners of the estate, estimating it as an entire estate as if it was the sole property of one owner in fee simple, regard being had to the situation of the estate and the manner of its occupation; and then divide that total value among the owners of the fee and the lessees and sub-lessees:" 115 Mass., 5, 15-16.

The same conclusion was reached by the same Court in a previous case, where it was said by WELLS, J.: "The situation of the estate and the manner of its occupation are doubtless to be taken into consideration in estimating the injury caused by disturbing that occupation. But between the public and the land owner it is but one estate.

The public right is exercised upon the land itself, without regard to subdivisions of interest by which the subject is affected through the various contracts of individual owners. The public cannot be expected to forego its right to take property for public uses because the exercise of that right will defeat private contracts; nor is it reasonable that losses arising from the failure of such contracts, which otherwise might furnish grounds of damage between the individual parties, should measure the compensation to be rendered for the property so taken. Such a rule would seriously impair the public right. A fair compensation for the property taken and injury done, ascertained by general rules, is a substitute to the owners for that of which they are deprived. That is the whole of the transaction with which the public is concerned. The apportionment is merely a setting out to the several owners of partial interests of their corresponding rights in the fund which has been substituted for the property taken :" Edmands *v.* City of Boston, 108 Mass., 535, 544 (1871).

In Wiggin *v.* Mayor of New York, 9 Paige's Chan., 16, 19 (1841), WALWORTH, Chancellor, said: "If the tenant has a beneficial lease, that is, if he has rented the property for a term of years at less than the use of the property was actually worth, he sustains damage by being deprived of the occupancy at this low rent during the remainder of his term. But that damage must necessarily go to diminish the amount which the landlord would have been entitled to receive if the property had not been under a lease, or had the rent reserved upon the lease been the full value of the use of the lot. The proper way of assessing the damages where two or more persons have distinct interests or estates in property taken for the improvement is to ascertain the damage to the whole fee of the lot in the same manner as if one person alone had the entire interest therein; and then to apportion the amount among the persons interested in the lot, as landlord and tenant, or otherwise, according as the interest of the one or the other will be affected by the taking of the property for the improvement."

A similar decision was given *In re* Application by the City of Buffalo, 1 Sheldon (N. Y. Super. Ct.), 408, 411 (1874), where SMITH, J., said: "This fair market value which is the just criterion, is not to be enhanced or in any manner affected by different or conflicting rights of parties, having different estates or interests in the same land. The sovereign must pay for the property taken but once, and but one price for the whole, embracing the estates, rights and interests of all who have any claim. It is taken as an entirety, and in the first instance, and so far as the sovereign is concerned, the compensation is to be fixed without regard to the separate rights of those owning or interested in the land, as between themselves. . . . The commissioners are to fix a value upon each separate estate and interest in the land, but this is only for the purpose of awarding to each his just proportion of the whole compensation to be paid."

In Coutant *v.* Catlin, 2 Sandford Ch., 485, 488 (1845), it was said that the proper mode of assessing damages where two or more persons have distinct interests or estates in lands appropriated by