

205-3 A MUNICIPALITY WAS NOT REQUIRED TO REIMBURSE A UTILITY COMPANY FOR COST OF RELOCATING PIPES, MAINS, AND CONDUITS FROM BEDS OF CITY STREETS WHICH WERE CLOSED FOR PUBLIC SCHOOL USE ON THEORY OF CONDEMNATION, IN VIEW OF FACT CITY MADE NO ATTEMPT TO APPROPRIATE THE UTILITY'S PROPERTY.

On April 10, 1969, the New York Court of Appeals reaffirmed the common law rule that a city need not pay compensation to a public utility which owns structures located beneath city streets when such structures are condemned for public purpose because the owners of such structures have only a privilege and not a vested property right in the use of the subsurface of the street. The court held that it would be stretching the exception too far to apply it in cases like this--where the city is not going into business for itself--as it does when it operates a bus line or subway system.

This case is the result of a consolidation of two proceedings which arose out of a decision of the City of New York to condemn (a) an area of several blocks in lower Manhattan near the Brooklyn Bridge for urban renewal purposes and (b) two blocks in the south Bronx for the purpose of building a public school on the site. In each proceeding, the Consolidated Edison Company of New York sought compensation for damages resulting from its being required to remove and relocate its pipes, mains, and conduits from the beds of the streets in the condemned areas.

New York's highest court, the court of Appeals of New York, emphasized that the city is not attempting to appropriate Consolidated Edison's pipes, mains, and conduits to its own use but is simply compelling this utility company to relocate them. The court felt that, certainly, the city should not be required to recompense the company for the loss of a privilege which it obtained without paying the city a penny for its use. It observed that the company, indeed, may ultimately benefit materially from this compulsory removal since resurrecting a blighted portion of the utility company's monopoly area of service enhances its future prospect and enables it to exercise unimpaired its full franchise rights in the urban renewal area. The court noted that the company has no vested property right to the use of any particular street but must assume the risk of having to relocate as part of its general right to use the streets. This court has made it abundantly clear in several cases that the rule at common law was to be applied whenever property was condemned to permit the State or City to carry on a "soverign" or "government" function.

The court further observed that the common law rule is not abrogated by the statutory definition of real property, because the burden and expense traditionally imposed on the public utility to remove and relocate its property may not be transferred to the taxpayer absent the express direction of the legislature. Also, the precedent relied upon by the utility company is limited to a situation where the taking is for a proprietary purpose and that here, both the urban renewal project and the school construction project were governmental functions of the city. (Consolidated Edison Company of New York v. Lindsay, 24 N. Y. 2d 309, 248 N. E. 2d 150, 300 N. Y. S. 2d 321 (1969).)