

Barre Record

PA., THURSDAY, OCTOBER 14, 1954

Glen Alden Wants to Mine Under Common

Second Firm Reported Ready to Request Agreement With City

Glen Alden Coal Company was reported yesterday as preparing a request to Wilkes-Barre City for right to mine coal under South River Common.

Lehigh Valley Coal Company has submitted a request to the City Council for permission to mine under North River Common. This request will formally come before the council at its next regular meeting scheduled Tuesday.

Before either proposal gets serious consideration from council, ownership of the two commons will have to be established. Lawyers for the coal companies and the city will have to dig into historical archives, public records and search the acts of the Commonwealth of Pennsylvania to establish legal claims.

After all this has been done, it was stated yesterday by an interested party, it will probably take an official court decree to establish definitely where ownership rights are vested.

Oscar Jewell Harvey, in his "History of Wilkes-Barre and Wyoming Valley," included in the Harvey-Smith Volume, records that "Early in June, 1770, the 'town-plot' of Wilkes-Barre was planned by Major Durkee, and under his direction was surveyed and plotted by Samuel Wallis, assisted by Joseph Jacob Wallis and others. . . . In the center of the town-plot was laid out a diamond-shaped space containing four acres and 41 shillings of ground, which remained a part of the common, or public, undivided lands of the township. A few years later this open space received the name of 'Center del Square,' but for some time now has been known as Public Square. The land lying between River Street and the river—upwards of 35 acres in extent, and now known as the River Common—also remained a part of the public undivided lands of the township, and was not included in the town plot."

Historically, at least, there is one starting point on the question of vested right. History reveals that King Charles 2 of England gave grants of land in the local area to Connecticut settlers and later grants to William Penn for some of the same area. The grants overlapped. Settlers of Connecticut and Pennsylvania disputed one another's claims and their disputes continued until 1770 when titles in dispute in the town-plot were effected in the Connecticut settlers.

Pennsylvania claimants were paid in money by the Land Office of the Commonwealth of Pennsylvania, but the settlement of that dispute did not determine the question of ownership of public lands such as Public Square and the River Commons.

In 1850, there was a patent given to Wilkes-Barre Borough, or its successors by the Land Department of the Commonwealth of Pennsylvania for title to the River Commons and Public Square. Here another problem arises. Lawyers say the land having been dedicated to public, can a bureau of the Commonwealth, like the land department, convey such land to the city? If the answer to that problem is in the affirmative, can the city sell or lease the land for private use?

The Legislature of Pennsylvania in the Code for Third Class Cities allows a city to lease coal under any common or park. Up pops another question, "Can the Legislature do this? Is it constitutional?"

The Supreme Court of Pennsylvania in 1930 in a suit of Taxpayers vs. the City of Pittsburgh set (See GLEN ALDEN on Back Page)

GLEN ALDEN

(Continued from Page 17)

forth that a legislature has not authority to sell the private use property which has been dedicated to the public.

Lawyers say that numerous

Court May Get Commons Coal

Solicitor Reported Ready With Opinion

Plans of Wilkes-Barre City Council to consider proposals of Glen Alden Coal Company for lease or sale of coal under North and South River Street Commons and Lehigh Valley for the same rights under North River Common have taken definite shape.

Until City Solicitor Howard E. Kennedy has furnished an opinion establishing ownership of the coal, council will be inactive. After the solicitor has expressed himself, council will take up the proposals in the conference. From these conferences, it may develop that all interested parties will turn to the courts for a decision.

As matters stand, the solicitor will determine whether, in his opinion, vested rights of the coal is in the general public, the City of Wilkes-Barre or the Proprietors of Wilkes-Barre Township of which the City of Wilkes-Barre formerly was a part.

It is estimated mineable coal under the two Commons is valued at from \$400,000 to \$500,000.

Members of council are not keen to enter into any discussions about probable sale or lease unless they are legally convinced the city owns the coal.

An opinion by the solicitor would be a guiding step, but the city and the coal companies may have to agree to submit the question to judicial decision before conferences can reach any serious stage.

Looking Back

From the Record, Dec. 31, 1904
It has been about the estate of the late Robert H. Spaulding of New York who lived nearly all his life in Wilkes-Barre, is worth nearly a million dollars.

Chief objection to the lease of coal underlying the river common is to the small minimum royalty offered by Lehigh Valley Coal Co., \$8,100, and the term of years for remove the coal, 45.

From the Record, December 31, 1928

Tomorrow marks the retirement of Adam P. Meier from the F. W. Woolworth Company after an outstanding record of 42 years in the 5 and 10 cent business.

Rev. J. J. Curran, pastor of St. Mary's Church and president of Municipal Water Ownership League, last night took steps to curb threatened dissension among the league officers by calling a "harmony meeting" to start the New Year right.

Ownership of Commons Coal to Be Discussed

Several attorneys will confer at council chambers at City Hall Friday afternoon to discuss legal questions pertaining to ownership of coal under North and South River Street Commons.

The conference is not open to the public, Solicitor Howard E. Kennedy stated yesterday.

Only attorneys who represent a party having a legal interest in the matter will be permitted at the conference, Kennedy said. "There will not be a discussion of policy," he added.

Agenda of the conference is confined to whether the city may sell or lease for mining purpose the River Commons coal. Ownership is what the conference seeks to establish.

1950 Gov. Fine passed a law to permit mining under River Commons.
See Supreme Court decision on Pitts. Column I

This publication is necessary — News were represented as meeting

Dec 1954

River Common.

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Pennsylvania claimants were paid in money by the Land Office of the Commonwealth of Pennsylvania, but the settlement of that dispute did not determine the question of ownership of public lands such as Public Square and the River Commons.

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Here another problem arises. Lawyers say the land having been dedicated to public, can a bureau of the Commonwealth, like the land department, convey such land to the city? If the answer to that problem is in the affirmative, can the city sell or lease the land for private use?

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(See GLEN ALDEN on Page 17)

GLEN ALDEN

(Continued from Page 17)

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Lawyers say that numerous questions are involved in the River Common matter because of the extensive and complicated historical background. They cite that back in colonial times the Connecticut settlers made purchases of land from the Indians and that Pennsylvania settlers purchased some of these lands from the same Indians.

Connecticut settlers, under Connecticut Colony patents, came into Wyoming Valley and settled, calling themselves the Susquehanna Company. Then Pennsylvania proprietaries came in and drove off the settlers from Connecticut. The latter went back for reinforcements and recaptured the land. There were several of these fights.

After the Revolution the Continental Congress tried to adjust the settlers' dispute at a trial in Trenton, N. J. In a nutshell the Treaty of Trenton decided that Pennsylvania had jurisdiction over the land, but did not decide whether Pennsylvania or Connecticut owned the land.

Passage of an act by the Pennsylvania Legislature was meant to establish ownership of disputed lands, but the act, in the view of lawyers, settled many property disputes but neglected to establish ownership of plots such as the River Commons and Public Square.

The late Attorney Frank P. Slattery, Sr., maintained for many years that title to Public Square was not vested in the city but in the public. There is an opinion on that point by Attorney Slattery on file in the city archives. Legal viewpoint is that the same question is involved in the River Commons as in the ownership of Public Square.

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**Ownership of Commons
Coal to Be Discussed**

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*1950 Gov. Fine passed a law to pass mining under River Commons.
See Supreme Court decision on Potts & Calumet I*

The publishing company

CITY LACKS RIGHT; CANNOT SELL COAL

BREAK GROUND

Kennedy Says Surface, Mining Rights Dedicated To Public Use By Grant

The controversial question of possible sale of the coal underlying the River Common was apparently ended this morning when Wilkes-Barre City Council was informed it does not have the authority to dispose of the land or mining rights.

The opinion of City Solicitor Howard E. Kennedy climaxed an exhaustive search project into documents and land transfers dating back to the granting of letters patent by King James I of England to the Duke of Lennox and others regarding the local area.

Tentative offers had been made to the city by the Lehigh Valley and the Glen Alden Coal Companies for the right to mine under the River Common, for which the municipality would be paid several hundred thousand dollars.

When information concerning the proposals became generally known, the matter became a controversial one. Proponents of the sale pointed out that the city would benefit financially, and it would result in additional work for the mining operations, among other reasons favoring the sale.

Opponents, however, cited the potential danger of subsidences in central city, loss of property value, the possible destruction of the River Common as one of the city's landmarks and weakening of the flood dikes.

Solicitor's Opinion

The nub of Solicitor Kennedy's opinion was that the River Common is land dedicated to the public use, and as such, neither the municipality nor the Legislature can authorize sale or lease of the land or any part, including the coal thereunder. Council will take formal action on the matter at the meeting November 16.

In his summary, Mr. Kennedy found that "The City of Wilkes-Barre has no implied or incidental authority to sell or lease dedicated public lands or any part thereof for private use; hence, it has no implied or incidental authority to sell or lease the River Common or the coal thereunder for private use."

"Under present existing legal authorities, the State Legislature cannot authorize a municipality to sell or lease for private use any lands or parts thereof which have been dedicated as public lands; and which have been maintained by the municipality with moneys raised by taxation; and where abutting property owners have improved their lands in reliance upon the grant or covenant which the dedication evidences."

"The Act of June 23, 1931, as amended by the Act of June 28, 1931, supra, which provided, 'that Council may sell or lease...the coal under any park or common owned by and situated within the corporate limits of the city... must be restricted or limited to apply to those situations where the city would own a part or common in fee simple absolute, unsubjected to a dedication to public use.'

"It is, therefore, my conclusion that on the basis of the authorities recited herein, the officials of the City of Wilkes-Barre lack the authority to sell or lease for private use the coal under the River Common of the City of Wilkes-Barre."

Given to Colonists

Reciting the chronological material events which established title to the River Common as public land, Mr. Kennedy listed the following:

1. The patents issued by King James I and King Charles II to the Connecticut Colony and the occupancy of the area by the mem-

note: The Susquehanna
Land Co (Connecticut settlers)
reserved all beds of
mines ore, coal, silver
gold etc - to the Land Co.

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1. The patents issued by King James I and King Charles II to the Connecticut Colony and the occupancy of the area by the members of the Susquehanna Company as authorized by the Connecticut Colony.

2. The laying-out of the township of the Township of Wilkes-Barre by Mayor Durkee and the reservation of the River Common as part of the public undivided lands of the township of 1770.

3. The passage of the Act of April 4, 1799, providing the method for awarding to the members of the Susquehanna County legal title to the lands of the Seventeen Townships of Luzerne County.

4. The issuance of a certificate for the River Common as public lands by the commissioners appointed under the Act of April 4, 1799, to Lord Butler, Matthias Holtenback and Jesse Fell as the township committee of Wilkes-Barre Township in 1804.

5. The incorporation of the Borough of Wilkes-Barre by the Act of March 17, 1806.

6. The granting and setting apart as a public common and to remain as such forever by the Pennsylvania Legislature to the Borough of Wilkes-Barre by the Act of April 9, 1807, for the River Common from South street to approximately Union street.

7. The granting and setting apart as a public common by the Legislature to the Borough of Wilkes-Barre by the Act of March 28, 1846, of the River Common from Union street to North street.

8. The issuance of a patent on January 10, 1870, for a "public Common" (River Common) (including the coal thereunder) by the Land Department of the Commonwealth of Pennsylvania to the Burgess and Town Council of the Borough of Wilkes-Barre, to have and to hold, under the Burgess and Town Council of the Borough of Wilkes-Barre and their successors, forever.

9. Incorporation of the City of Wilkes-Barre as a city by the Act of May 4, 1871.

"All of which clearly establishes," Mr. Kennedy told Council "that the River Common, including the coal thereunder, is part of the public lands of the City of Wilkes-Barre."

Firemen Called

T. D. ...

River St. Widening Is Opposed By Society

'Only Decent Street' Will Be Mutilated, Says This Reader

Editor,
Times-Leader, Evening News
I agree with person who wrote letter protesting removal of trees on South River street. I disagree that it is a fair city.

It was disgraceful enough that beautiful Riverside Drive was 'decorated' with hideous dikes and now the only other decent street in town is to be mutilated.

What other beauty spot have we than along the river?
How about a campaign to make W-B. more attractive physically?

S. W. BARREAN.

Payne Says 'Beauty And Historical Significance' Would Be Destroyed

Wyoming Historical and Geological Society's stand against the use of the River Common for either parking or widening of South River street or both, was defended by the society's president in a letter to Mayor Luther M. Kniffen.

Bruce Payne, president of the Historical Society, referred to Council receiving and filing "without action" the society's resolution regarding the River Common except for a comment from Councilman J. Harry May.

On November 10, the Historical Society adopted a resolution regarding the use of the River Common for parking and sent copies of the resolution to the mayor and to the City Planning Commission.

The society's resolution stated in part: "It is the opinion of the board that such use would seriously impair if not destroy an area of great natural beauty and historical significance, and would drastically reduce the enjoyment and use of his area by the citizenry as a whole."

At the November 15 City Council meeting, Finance Director May noted that the reference to using the widened street area for parking was in error, since the city had not proposed such usage of the additional street width. The city proposes to widen South River street from Market street to West South street five feet on the River Common side to provide another lane of traffic.

Mr. Payne wrote: "I do not think the resolution was in error. The traffic experts report, to which you refer, definitely recommended the use of the River Common for parking by Wilkes students and others. This society is definitely opposed to any impairment of the appearance of the area of the River Common."

Favors New Curbing

Municipal officials reported the widening of South River street between Market and South streets would improve the appearance as the present curb is broken and it would be replaced by a new curb.

Referring to this, Mr. Payne stated, "If the curb needs spot repairs, or replacement, the work should be done. But how could a new curb compensate for the destruction of the trees which would be razed—some of these trees being the oldest and handsomest on the River Common."

In a 15-page report presented to city officials early in August by Wilbur Smith & Associates, who conducted a six-month traffic survey, one of the recommendations called for providing of parking spaces on the River Common through widening of South River street into the common.

Parking For Students

The engineers' recommendation stated: "Four lane traffic is essential on River street, but widening of the street would provide a significant number of spaces for parkers destined to Wilkes College as well as the central business district stores. Total width to provide angle parking separated by a divided from moving traffic lanes would be approximately 75 feet. This improvement should be undertaken at an early date."

Following a two-hour conference of City Council November 13 when Council appropriated \$30,000 to widen South River street, Councilman May said he was opposed to the Smith recommendation that a parking area be built on the River Common and said he didn't know of any other city official who favored it.

City to Record Data on Coal

River Commons Facts Going into Archives

Wilkes-Barre City Council will meet at 10 this morning in council chambers in City Hall to pass on second reading the 1955 budget and tax rate ordinances. A salary ordinance providing for the same rate of compensation as in this year's budget will be submitted for first reading, as will the admission tax ordinance, which must be passed annually.

Budget, passed on first reading two weeks ago, anticipates income of \$1,999,385.05, a drop of \$8,462.50 from the budget for 1954. Tax rate was increased nine-tenths of a mill, to 15.9 mills, revenue from the increase to be applied for park purposes.

Resolution reflecting requests of Lehigh Valley and Glen Alden coal companies to mine beneath the river common will be passed. After intensive research into ownership of coal beneath the commons, City Solicitor Howard E. Kennedy came to the conclusion the coal cannot be used for private purposes. Today's resolution will serve to write the status of coal underlying the river common into the city's official records which can be cited in future if the question again rises.

City will authorize payment to C. F. Goeringer Construction Company of \$27,016.47 for repairs and reconstruction of city streets.

But once that to would be open to central city.
★
In spite of all believe there is around the edges of the city. It seems quite definite independent stance—actual shouldn't in the section.

Is 'Black Curtain Tight'?

NOW Is the Time to Make SURE Coal Under Central City Is Secure

The Sunday Independent is not impressed by Mayor Kniffen's statements that no mining has been done under central city . . . back of the Black Curtain—the barrier owned by the city.

It is this ownership of mineral rights under the Laurel Line racks, Pennsylvania Ave., South St. and the River Common which makes it possible to keep mining companies from getting at the coal under central city, thus affording full protection to the area.

Actually, it was to keep this barrier solid that the city sought a way to turn down efforts of two coal companies to purchase the coal under River Common.

There is little danger to River Common itself.

But once that coal were mined the way would be open to take all the rest under central city.

★ ★ ★

In spite of all this, there is reason to believe there has been some chiseling around the edges.

It seems quite well known that a now-defunct independent company—for one instance—actually did mine where it shouldn't in the North Pennsylvania Ave. section.

There have been reports of other violations.

★ ★ ★

This is no effort to raise an alarm.

In good conscience the Sunday Independent can say it is convinced the penetrations—so far—of the Black Curtain have been inconsequential.

But with companies already having purchased the mineral rights in some parts of the protected zone, with others known to have attempted to buy still more, the possibilities are obvious.

As a result, it is just as obvious what should be done.

A competent engineer should be employed to check the maps with the actual mining by means of a tour of those operations along the barrier.

And it should be done right now—BEFORE any trouble occurs.

Let's not wait until we get what Forty Fort has been getting.

★ ★ ★

Never before was the anthracite market so competitive.

Never before have the mining companies been so hard pressed.

Never before were all these acres of virgin coal under central Wilkes-Barre so tempting.

Wilkes-Barre May Not Own Coal Under Common; Check Delays Action

Before any serious consideration can be given, Lehigh Valley Coal Company's offer to lease for mining the coal under North River Street Common, there will have to be much historical research and a legal action for the lease or sale of the River Common coal.

Just as the ownership of the coal under the North and South River Street Common is vested in a debatable question, according to local talent.

A fact to be established, before any sale can be considered is where the title to the coal lands is vested. Unofficially, it was stated at City Hall yesterday that the question of ownership is so debatable that city officials are compelled to postpone action until the title is clear.

The City of Wilkes-Barre, which is the proprietor of Wilkes-Barre, from which the City of Wilkes-Barre was carved, or unless it is established that Wilkes-Barre City has sole ownership, no lease can be consummated, as the title is in doubt.

And at the present time, no one appears willing to go on record with a definite answer.

RIVER COMMON SITE.

Judge Woodward Says the County May Build There.

OPINION HANDED DOWN DISMISSING THE APPLICATION FOR AN INJUNCTION—THE HISTORY OF THE RIVER COMMON GONE INTO BY THE JUDGE—THE CONTENTIONS OF THE APPLICANTS FOR AN INJUNCTION.

[Daily Record, Dec. 29, 1900.]

Judge Woodward yesterday handed down an opinion in the court house site case, deciding that the county has a right to build on the river common site and that the city has a right to transfer the site to the county. The case is the one in which an application for an injunction by Dr. E. Gumpert and others was made to restrain the county commissioners.

Judge Woodward goes into the history of the case and gives some interesting findings of fact with reference to the river common.

The case will now be taken to the Supreme Court and when that body hands down a decision the site question will be finally settled one way or the other.

Judge Woodward first quotes the ordinance of Wilkes-Barre councils transferring the site to the county and the petition of the county commissioners to the court asking for approval of the site. The judge then goes on to say:

The bill prays for restraint by injunction "from expending any of the county funds for the erection of a court house on the said river common site, and from creating any obligations whatever with the City of Wilkes-Barre concerning the same."

The bill also prays "that the Court declare the said ordinance null and void," and also that the city be made a party to the proceeding.

The bill in paragraph 17 sets forth the ground and reason of these prayers as follows:

That the City of Wilkes-Barre is without any warrant or authority in law, either by the ordinance mentioned in the third paragraph of this bill, or otherwise to grant to the County of Luzerne the right or privilege to erect

and build a court house, or any other kind of building, on the public common between Union and North streets, in said city. That by an Act of the General Assembly the said common was dedicated to the public and set apart as a public common, and if the County of Luzerne is allowed to take possession of and erect a building on said common, then the public will be deprived of the use and enjoyment of the same, which will result in an irreparable injury to your orator and the public in general.

Omitting for the present any consideration of several minor questions suggested by the pleadings in the case, we come at once to the main and controlling point in the controversy.

Have the municipal authorities of the City of Wilkes-Barre the legal right to make such disposition of the plot of land known as the upper river common, as was contemplated by the ordinance of the 12th of November, 1900? This of course brings us to the question, what is the nature of the title of the city to the land in controversy and what right of disposition and control is vested in the city by the law applicable to the subject?

It is claimed by the plaintiffs, that the whole of the river bank fronting the Susquehanna River from South street to North street was originally laid out for and dedicated to the purposes of a public common, and as such belongs to all the people of the whole Commonwealth. And it is argued that the land so dedicated cannot be diverted to a new and inconsistent use by the municipal authority having the immediate charge and custody of it.

In 1662 the King of England granted to the colony of Connecticut, a tract of country (including this land) extending from North to South a whole degree of latitude. This grant to Connecticut was confirmatory of an earlier one made by James I. in 1620, to what was known as the Plymouth company, and was intended to embrace a part of what was called New England. By an error of description, however it was found by actual survey that the grant reached around New York, and enclosed the territory afterwards known as Westmoreland, and now embracing the territory of seven of the Northeastern counties of our State.

In 1733 an association was formed in Connecticut called the Connecticut Susquehanna Company, and under their auspices the first settlement of the Wyoming Valley was made in 1762. Several townships were subsequently

laid out by the Connecticut settlers, and of these Wilkes-Barre was one.

The first survey of Wilkes-Barre was made by David Meade, in 1770. And in 1773 another was made by Capt. Durkee, which established what was known as the "Town Plot," showing a division of lots, and an open space along the river upon which the lots bounded. This is the earliest authentic evidence of an intention by the first settlers to leave an open space in front of the town and along the river for public use.

It is no part of my purpose to recall the events which occurred during the struggle between the Connecticut settlers and the claimants to the Wyoming lands under William Penn. At the close of the Revolutionary War this contest was settled by a court created by Congress for the purpose, which met at Trenton and made a decision in favor of Pennsylvania on the 30th of December, 1782. On the 4th of April, 1783, an act was passed "entitled an act for offering compensation to the Pennsylvania claimants of certain lands within the seventeen townships in the County of Luzerne." This act was supplemented by another act approved 15th March, 1800, and by still another of 6th April, 1802. The purpose of this legislation was to vest in the Connecticut settlers a valid title to the lands which they had actually occupied before the decree of Trenton, and at the same time to offer compensation to the Pennsylvania claimants of the same lands.

On the 2d of January, 1804, Thomas Cooper and John M. Taylor, commissioners duly appointed under the act of 4th April, 1783, and its supplements, issued a certificate to Lord Butler, Matthias Hollenback and Jesse Fell, as the township committee, for 39 acres and 41 perches of land in the Township of Wilkes-Barre, "being the Public Square in the town plot thereof, and the public common on the river bank between the river Susquehanna and the town plot." Diagrams or drafts are attached showing that the entire river front from North street to South street is embraced in the certificate, the entire contents being 85 acres.

This ends the history of the river common under the Connecticut settlement of the Township of Wilkes-Barre.

The Borough of Wilkes-Barre was incorporated by an act entitled, "An act to erect the town plot of Wilkes-Barre and its vicinity in the County of Luzerne into a borough," approved 17th

March, 1806. (Laws of Pennsylvania, 529.) Section 1 of the act is as follows: "Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same that the town plot of Wilkes-Barre and its vicinity, in the County of Luzerne, shall be and the same is hereby erected into a borough which shall be called the Borough of Wilkes-Barre, bounded and limited as follows: that is to say, Here follows the description of the old city.

The first legislation after the incorporation of the borough, in reference to the river common, is found in the act of April, 1807, (Laws of Pennsylvania, 196) which enacts that "all that certain lot of land fronting the town lots in the Borough of Wilkes-Barre on the bank of the Susquehanna extending from the land of Jabez Fish up the said river 192 rods, in a line parallel with the front line of the town lots, be and the same is granted and set apart as a public common, and to remain as such forever."

It is to be observed that this dedication of a portion of the river bank as a public common includes only the land lying between South and Union streets and does not apply to that portion of the river bank lying between Union and North streets, which is the parcel of land involved in the present controversy.

On 28th March, 1846, by an act entitled "a further supplement to an act entitled 'an act to erect the town plot of Wilkes-Barre and its vicinity into a borough, etc.' " It was provided, Section 6—"That all that certain tract of land fronting the town lots in the Borough of Wilkes-Barre, on the bank of the Susquehanna River, extending from the north side of Union street up the said river about sixty-three rods to the north side of North street, be and the same hereby is granted and set apart as a public common, and to be under the control and jurisdiction of the town council of the Borough of Wilkes-Barre.

By an act of assembly approved 3d May, 1852, it was provided inter alia as follows: "That it shall be lawful for the said town council of said borough (Wilkes-Barre) to rent for the best price they can obtain for the same, the public common between Union and North streets."

By an act approved 8th May, 1855, (P. L., 444) the Borough of Wilkes-

Barre was authorized to lease to the Wilkes-Barre Gas Company a portion of this upper common. The same act authorized the borough to subscribe to the stock of the gas company, and to borrow money for the purpose.

It was stated at the argument and is set forth in the answer filed by the defendants, that, after the completion of the North Branch Canal along the front of this open space, the ground was excavated and a portion of it used for some years as a canal basin; that another portion of it was leased to J. E. Patterson & Co. for the erection of a saw mill, and the manufacture of building materials, and that subsequently it became a waste place and up to some ten years since was used as a dump for garbage. It was then filled up and graded, but has never been looked upon as an inviting spot for rest or recreation.

The ordinance of the 19th of November, 1900, is in effect a lease by the City of Wilkes-Barre to the County of Luzerne of the upper common for the public purpose of a new court house. A lease, in its legal definition, is a contract whereby one party transfers to another the use and possession of real estate. A lease is generally made for a definite time and is based on a consideration, good or valuable. In the present instance the time is defined as "so long as the same is used for court house purposes," and the consideration is ample, for the reason that the city gets the best of the bargain and is enabled to regain the entire control of the Public Square, free and clear of all easements and incumbrances.

The proposed exchange of the one property for the other will promote the comfort and welfare of the whole public, the County of Luzerne will acquire, without expense to the taxpayers of the county, a site for the new court house which, all things considered, is the best one available.

As to the question of right of the county commissioners to make the exchange in question, without a finding of the grand jury, we have no doubt. Neither the Act of 1846 nor that of 1882 has, in our judgment, any application to the exchange of the land when the right to make the exchange is clear. And in this connection we refer to the able and comprehensive opinion of Judge Rice, in *Bennett et al. vs. Norton et al.*, 171 Penna. 221.

If reference to the other objections raised by the bill, or suggested by the

arguments by the learned counsel we have to say, that they involve questions of discretion, rather than of power, with which it is not our province to interfere.

The Act of 1846, which made the space between Union street and North street a public common, also enacts that it shall be under the control and jurisdiction of the town council of said borough. It seems clear to us that this provision cannot fairly be held to apply merely to the oversight and policing of the common. For such purposes the legislation was not needed. Lying within the borough limits, and being recognized as public property, the authority of the municipal government would extend to it ipso facto, and the Act of 1846 would have accomplished nothing. The Act of 1867 declared the common between Union and South streets "a common forever," without condition or qualification. The Act of 1846 on the contrary, ordains the common between Union and North streets with the proviso, that it shall be under "the control and jurisdiction of the borough." And that this was the general understanding and the contemporaneous construction of the statutes, is apparent from the uses to which the common has been from time to time, put, with the approval and consent of the borough authorities during many years. If this view is not conclusive of the case, all doubt on the subject is removed by the Act of 3d May, 1882, which vests in the municipal authorities the power to lease the common for the best price obtainable, which is substantially the exact thing they are now proposing to do and which the bills asks us to enjoin.

After a careful consideration of the whole case in all its aspects, we can see no good reason for granting the injunction prayed for. As was said by Judge Rice, in *Crellin vs. Schafer*, 4 Kulp 212; "the issuing of a preliminary injunction cannot be justified by the mere fact that it will do the defendant no harm. The plaintiff must show not only a clear right, but immediate and urgent danger of irreparable injury."

The motion for an injunction is denied and it is further ordered that the costs be paid by the plaintiff.

PENDENT

THIRD
SECTION

SUNDAY, JANUARY 29, 1939

ght Name

Started Out Career
Known as 'Centre Square';
First River Common Deed
Ignores Coal Beneath

The original deed for Wilkes-Barre's River Common contains no mention of the coal the present city council considered so valuable that it recently refused mining rights to it to Lehigh Valley Coal Corporation.

And, strangely, the same deed covers the setting forth of "Centre Square," now generally, but incorrectly from the viewpoint of the deed, called Public Square.

The deed covering transfers of both parcels is recorded in hand in one of the first books in the recorder of deeds office. Transfer of the properties was made in January 2, 1804, in accordance with various acts of the Legislature and supplements from 1799 to 1802.

And It's Not a Square

To be exact, Public Square is not a square, but measures 27.4 perches on both the north and south sides and 26.4 perches on the east and west sides, and it contains a total of more than four acres.

A perch, by the way, is the same length as a rod—and that is 16½ feet.

The deed to the River Common covers approximately 35 acres and maps of both pieces were filed with the original deed.

The transfer was made by Thomas Cooper and the other commissioners to Lord Butler, Matthias Hollenback and Jesse Fell, who were designated as the committeemen of Wilkes-Barre Township authorized to accept the parcels of land in behalf of the municipality.

Wanted as Pasture

Nor were the early city leaders motivated by desires to beautify their city when they acquired this lovely stretch along the then far lovelier, much cleared and full-of-fish Susquehanna.

Instead, they were looking most of all for a good pasture land on which the people living not quite so near the farming lands—which started about Ross street—might have some place upon which to run their cows.

They say Bostonians still have a perfect right to use the famed Boston Common for their cattle. Very likely, if someone got nasty about it, he could force a couple cows on our River Common right now.

That chance is remote to be sure. What with dikes and grading, a cow would starve there.