

Pease & Chitty's Law of Markets and Fairs, 6th Edition

Chapter 12 THE IRISH DIMENSION

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1 MARKETS AND FAIRS IN IRELAND

A The historical perspective^[1]

Market and fairs in Ireland are of considerable antiquity and stem from the Gaelic tradition as exemplified in the *margad* [*h*] ('market'^[2]), and *óenach* or *aonach* ('fair'). Their origins seem to derive from two sources, namely: (1) provincial or tribal gatherings established in order to celebrate the harvest, and (2) assemblies, where gifts were exchanged between Kings and trade took place amongst followers. Markets and fairs underwent a slow gestation during the 8th and 9th Centuries often generated as a result of the involvement of the larger monasteries which themselves had grown in their own right into trading centres and functioned as assembly and exchange sites throughout Ireland. Monasteries were not urban areas as such, but were centres of population, power and influence in the areas over which they dominated prior to the foundation of the first towns in Ireland by the Vikings.

B Fairs

It appears in fact to be impossible to dis sever the idea of the fair from the gathering on the day of a festival in early English or Irish history, and it may fairly be supposed that the gatherings in their original form were held in heathen times on those great occasions when the national sacrifices were offered, and the public assemblies were held. Although little is known of the divisions of the ancient calendar, there appear to have been gatherings for these purposes at the solstices, and at the end of the harvest. The year began with the Yule feast, and a great festival was held in September, when thanks were given for the harvest, and offerings made to secure a prosperous winter. Another great anniversary was occupied by the November sacrifices, and these great anniversaries coincided with popular assemblies and assizes. This conclusion is borne out by what can be gleaned from the ancient Irish fairs. These, according to O'Curry:

'were not, like their modern representatives, mere markets, but were assemblies of the people to celebrate funeral games and other religious rites during pagan times, to hold parliaments, promulgate laws, listen to the recitation of tales and poems, engage in or witness contests in feats of arms, horse-racing, and other popular games. They were analogous in many ways to the Olympian and other celebrated games of ancient Greece.'^[3]

O'Curry quotes a minute description from the Book of Leinster (dating from about 1150AD), and the Book of Ballymote, of one of the most famous of these gatherings called the fair of Carman held where Wexford now stands. The following extracts will sufficiently illustrate the nature of such ancient assemblies.

After describing the death of Garman and his begging them to institute a 'fair of mourning' for him, the Book of Ballymote proceeds as follows:

'The people of time of Cathair Mor ... There were seven races there, and a week for considering the laws and the rights of the province for three years. It was on the last day that the Leinstermen of Gabhra South held their fair, which was called 'the steed-contest of the Ossorians.' The Forud of their king was on the right of the King of Carman. The Forud of the King of O'Failge on his left: and their women were seated in the same manner." In another part of the description the following lines occur: "Seven mounds without touching each other: Where the dead have often been lamented: Seven plains sacred without a house: For the funeral games of Carman: Three markets in that auspicious country: A market of food, a market of live stock: And the great market of the foreign Greeks: Where gold and noble clothes were wont to be"^[4].

O'Curry points out that these fairs were regulated by strict byelaws, a breach of which was punishable by death. No one who attended them could be arrested on account of any previous transactions, nor could the property of any one be distrained going to, at, or returning from a fair. Women, he says, were especially protected, and an enclosure was set apart for their exclusive use, which was called a '*cot* or *cotha*'.

Besides this Wexford fair, there were other provincial assemblies of the same kind at Tailte in Meath; at Cruachan, the burial place of the Kings of Connaught; at Nenagh in Tipperary; at Aenach-of-the-burgh on the Boyne; and at the burial places of the Kings of Leinster and Munster^[5].

C Markets

The concept of the market as a permanent trading institution appears to have been introduced into Ireland by the Vikings. From the 9th Century onwards the concept of the market took root although these assemblies were undoubtedly informal and casual arrangements for the supply and sale of goods. Such assemblies were undoubtedly the forerunners of commercial activity where the functions of buying and selling goods at fixed locations started to develop. Economic activity took place by means of economic exchange and bartering at a time before the introduction of money, and constituted a market at a somewhat basic level based upon Viking trading posts. These centres later emerged as towns; some of which began to be established at significant Irish port sites.

The Anglo-Normans who arrived in Ireland in the late 12th Century rapidly established control over much of the east and south of Ireland although this wave became absorbed into the existing socio-economic culture. However, a second wave of Anglo-Normans then followed and by the 13th Century, markets and fairs, market towns and associated commercial activity developed in Ireland with the spread and consolidation of Anglo-Norman power through colonisation and settlement. As an example, the Hiberno-Norse town of Cork, was taken in 1177 by the Normans, and during the 13th Century the influx of people into the Cork area, coupled with agricultural innovation and the production of surpluses, led to a growth of internal and external trade. As portrayed in '*Serving a City – The Story of Cork's English Market*'^[6], Anglo-Norman lords who established boroughs on their newly acquired lands sought Royal licence to establish weekly markets or yearly fairs to promote the economic fortunes of their boroughs and to generate revenue for themselves. As documented in the case of Cork, such markets were held in definite locations at specific times and required protection and regular supervision if they were to attract trade and render tax in the form of tolls to a lord. Markets were essential to the existence of boroughs and urban areas through the development of local trade.

As with much of Western Europe, the 13th Century in Ireland was a period of unparalleled population and economic expansion, and it can be portrayed as the heyday of the Norman achievement. The rapid development of trade and commerce was the driving force for a developing market-oriented economy, in particular in the east and south of the island of Ireland. The growth of towns and the concomitant development of fairs and markets became the hallmark of the most advanced regions of Britain in the 13th Century, and a similar pattern emerged in those parts of Ireland successively colonised by the Normans.

By means of Royal charters markets were established during this period throughout Ireland in a similar way to that which such markets had developed in Britain, with the concept of the market franchise and the monopoly of market based upon the common law distance, and the enforcement of market rights by means of the tort of disturbance. Markets were granted either to the various city and town corporations, or to individuals such as the Marquis of Downshire. In the case of Cork during the reign of Henry III in 1242 onwards successive corporations were granted the exclusive right to hold markets within the city, and in 1299 the Sheriff of Cork listed 36 markets and market towns that by then formed a network of commercial activity especially in the north and east of what is now Co. Cork. A similar pattern emerged in relation to fairs, in that charters of rights to hold fairs from the King to local lords developed throughout the 13th Century in Ireland^[7].

The 1220s and the 1250s marked the high point in 13th Century Ireland of the grant of fair franchises together with the grant of market charters and letters patent. The book '*Fairs and Markets of Ireland*'

provides a detailed examination of the development of fairs and markets in Ireland and the way in which the grantees of the monopoly of fairs and markets were those who had successfully petitioned the King for a charter. Such petitioners fell into several categories. Lords accounted for the largest owners of market and fair charters followed by bishops and then corporations and burgesses. The Anglo-Norman lay elite also sought fair and market licences in order to promote the fortunes of their settlements, and to formalise trade and enhance their revenues. This was particularly so within Co. Cork.

By the early 14th Century the mechanisms of trade, towns, markets and fairs had begun to collapse resultant upon invasion, disease, pestilence, lawlessness and disorder. The common law area shrank and Gaelic lords recovered their lordships. By the beginning of the 15th Century even staunch Anglo-Norman towns had felt the slump in commerce. By the 16th Century old trading patterns were in serious decline. In the 14th Century very few charters were being confirmed within the Pale, or in the Marches beyond. However by the 16th Century there was some revival in market trade, and the older town corporations were granted new market charters such as in Kildare and Kilkenny. Another development as a result of Elizabethan policy was for Gaelic patrons to obtain the grant of market and fair charters.

However, from the beginning of the 17th Century to the early 19th Century, social, cultural and economic activity grew apace in what has been described as 'the last western European country to abandon the medieval world'^[8]. The driving force was the growth in trade which resulted in the further development of towns and markets and fairs within such urban areas. The number of letters patent granted in respect of markets and fairs especially during the reign of James I (1603–1625) developed apace and this had the effect of creating new settlements. Letters patent were granted to the new proprietorial colonial order leading to the creation of new towns and villages and the regeneration of older town centres. The new town or village settlement was formed with the triangular green at its centre comprising the market place. This settlement often took its name from its New English or Scottish proprietor to whom charter rights were granted for the holding of weekly market and annual fairs in the market place. The rapid development of the grant of letters patent for markets and fairs followed a similar pattern to the development in England, with the owners of such granted rights seeking to safeguard their property rights and to ensure that no rival landowner could lay claim to a franchise in the same area.

At this stage the proprietors of such markets and fairs fell into three categories. The first category was comprised of the landed proprietors or landlords; being the New English, the Old English and the Gaelic, and who accounted for in excess of 80% of the grants, The second category were the town corporations incorporated by charter in the first half of the 17th Century. The third category was the Church who continued to hold markets and fairs, although following the Reformation, Protestant bishops often succeeded to the old diocesan centres, and to the proprietorship of markets and fairs within such centres. However, during this period it was in Ulster where new landowners were most assiduous in their pursuit of letters patent in respect of markets and fairs at central points within their estates, an example of such being the Marquis of Downshire.

The pattern continued during the 18th Century with the continuing expansion of trade in Ireland. Locations of fairs expanded rapidly in the second half of the 18th Century in all 32 counties of Ireland. However, during the first half of the 19th Century there was a downturn in the number of grants, which may have resulted from a weakening in the proprietor's economic position together with Royal crisis, and a stagnation of towns and villages, except in the north of Ireland. This culminated in the Great Famine of 1845–1851 when the population fell by about two million.

In 1852–3 the Fairs and Markets Commission reported, which sought to provide a complete list of all the extant markets and fairs in Ireland by place and county, together with their proprietor's dates (if any) of the first and subsequent letters patent, the days provided for in such patents, and the days or dates on which the fairs and markets were currently being held during that year. According to the information provided by the Report, markets were being held at 349 locations throughout Ireland, and fairs were being held at 1,297 locations. However, the Report demonstrated major discrepancies, in that in a third of those cases where markets were being held, no letters patent could be identified to authorise their legal origins. The proportion in respect of fairs is almost identical. Two legal factors gave rise to consideration in that: (1) in those cases where there was no lawful origin by virtue of a charter or letters patent from the Crown were those markets and fairs being held illegally, and (2) in those cases where markets and fairs were being held on days other than those provided for in the letters patent, were such markets and fairs being held illegally.

In 1887 the Royal Commission on Market Rights and Tolls was established in order to inquire into the question of market rights and tolls in the United Kingdom of Great Britain and Ireland. The Royal Commission provides a primary historical source of unparalleled value. The terms of reference were specifically the Commission sought to enquire as to the extent to which market rights are in the hands of–

- (1) Local Authorities;
- (2) Trading companies; and
- (3) Private persons or bodies of persons other than trading companies.

The Royal Commission also decided, *inter alia*, generally how and under what authority such rights are exercised, and how far market rights, market byelaws and regulations, market tolls, rents, stallages, and dues, and tolls affecting market towns are restrictive of trade, and also to report generally as to the alterations which may be desirable in the existing law relating to markets, having due regard to the interests of those concerned.

Upon the issue of the Royal Commission, a series of questions was prepared to elicit the fullest information as to the management of markets, their costs, and the profits derived from tolls, stallages, rents and other sources. In 1889 the First Report of the Royal Commission on Market Rights and Tolls was published by Mr C.I. Elton QC and Mr B.F.C. Costelloe, Between 1888 and 1891 the Commissioners conducted extensive inquiries into market and fair rights throughout Great Britain and Ireland hearing evidence from the owners of market rights and other witnesses at local level. Inquiries were also made as to the operation of foreign markets in France, Belgium, Prussia, Saxony, Austria, and the United States. Some 12 volumes of evidence, and other material such as statistics, were published. In 1891 the final Report was published^[9]. Its first and paramount conclusion was that it was desirable to put an end to the system under which no person is allowed to hold a market within a certain distance of an already existing market, due regard being had to the interests of the existing possessors of the monopoly rights.

The conclusions of the Royal Commission on Market Rights and Tolls were never implemented in Britain and Ireland, and market and fair rights continue to be exercised extensively in England and Wales by franchise and statutory market owners. In the case of Ireland the position since independence is somewhat more uncertain having regard to the current status of the Royal Prerogative. No recent case law exists on the subject insofar as franchise rights are concerned, the last reported case of note being that of the *Marquis of Downshire v O'Brien* (1887) 19 LR Ir 380.. However, there have been pronouncements in a

number of recent cases in the Irish courts insofar as statutory market rights are concerned particularly in relation to their interaction with casual trading, to which reference is made below^[10].

D The Royal Prerogative in Ireland

Insofar as the Republic of Ireland is concerned, in principle the Royal Prerogative has not survived the constitutional changes brought about by the amendments made to Article 51 of the 1922 Irish Constitution by Article 49 of the 1937 Constitution. However, as with many aspects of legal interpretation all is not quite as it seems and in certain respects it is probable that aspects of the Royal Prerogative have not 'faded out' being the phrase used in Kelly in his book *'The Irish Constitution'*^[11].

The opening sentence of Article 51 of the 1922 Constitution, until its amendment by the 1937 Constitution, provided as follows:

'The Executive Authority of the Irish Free State (Saorstát Éireann) is hereby declared to be vested in the King, and shall be exercisable, in accordance with the law, practice and constitutional usage governing the exercise of the Executive Authority in the case of the Dominion of Canada, by the Representative of the Crown.'

Article 51 then went on to envisage that the Executive Council (ie what corresponded to the Government in the 1937 Constitution) was to 'aid and advise' in the exercise of this Executive Authority. The Crown continued to be represented in the Irish Free State by the Governor-General whose role was purely symbolic and ceremonial, the Executive Council having effective executive power. The assumption was therefore made that those parts of the Royal Prerogative which were not otherwise unconstitutional had survived for the benefit of the Executive Council, and that it had survived in some shape or form after 1922^[12].

In 1936 the then Government, having already previously announced its intention to promote a new Constitution which would remove all trace of the Crown, decided that the abdication of King Edward VIII on 10 December 1936 provided the appropriate occasion for the radical amendment of the 1922 Constitution. On 11 December 1936 the Dáil enacted the legislation which removed the Governor-General from the Constitution, together with virtually all trace of the King, by repealing in its entirety the opening sentence of Article 51 (as reproduced *above*).

Article 49 of the 1937 Constitution provides as follows:

- (1) All powers, functions, rights and prerogatives whatsoever exercisable in or in respect of Saorstát Éireann immediately before the 11th day of December, 1936, whether in virtue of the Constitution then in force or otherwise, by the authority in which the executive power of Saorstát Éireann was then vested are hereby declared to belong to the people.
- (2) It is hereby enacted that, save to the extent to which provision is made by this Constitution or may hereafter be made by law for the exercise of any such power, function, right or prerogative by any of the organs established by this Constitution, the said powers, functions, rights and

prerogatives shall not be exercised or be capable of being exercised in or in respect of the State save only by or on the authority of the Government.

- (3) The Government shall be the successors of the Government of Saorstát Éireann as regards all property, assets, rights and liabilities.

However, as Kelly states:

'The King survived only in a hidden form – like a face camouflaged by foliage in a children's puzzle – namely in a new sentence interpolated into Article 51. This provides as follows:

"Provided that it shall be lawful for the Executive Council, to the extent and subject to any conditions which may be determined by law to avail, for the purposes of the appointment of diplomatic and consular agents and conclusion of international agreements, of any organ used in a constitutional organ for the like purposes by any of the nations referred to in Article 1 of this Constitution [viz "the Community of Nations forming the British Commonwealth of Nations"]'

This 'organ used as a constitutional organ' turned out to be the King as recognised by Australia, Canada, Great Britain, New Zealand, and South Africa. This arrangement continued until the external executive functions were transferred to the President by the Republic of Ireland Act 1948.

Thus, for all intents and purposes from 1948 the disappearance of the Crown from the Irish state was fulfilled and any remaining prerogative rights did not survive and ceased to be part of the law of Saorstát Éireann. As it was put in the case of *Byrne v Ireland*^[13]:

'All royal prerogatives to be found in the common law of England and the common law of Ireland prior to the enactment of the Constitution Saorstát Éireann 1922 ceased to be part of the law of Saorstát Éireann because they were based upon concepts expressly repudiated by Article 2 of that constitution and, therefore, were inconsistent with the provisions of that constitution and were not carried over by Article 73 thereof'

Following this, in the case of *Webb v Ireland*^[14] the question of the non-survivability of prerogative rights was again considered in the case of treasure trove where it was held in judgments at both first instance and in the Supreme Court that the prerogative right did not survive the 1922 Constitution. It should be noted that in the case of the Supreme Court although it was held that the prerogative rights such as treasure trove had not survived, the Court nonetheless found for the State on other grounds.

Thus in principle it would seem that none of the ancient prerogative rights survives for the public benefit. However, such an absolutist view ignores the position with regard to the creation of corporations by letters patent or, indeed, the franchise rights of markets and fairs granted by the Crown in former centuries to corporations and to private individuals. It has been suggested that only those aspects of the Royal Prerogative which are to be construed as incompatible with the democratic and republican character of the State no longer survived, while other parts such as those founded on the public interest or public benefit did so pass.

In the case of *Howard v Commissioners of Public Works*^[15] the question was raised whether the building of 'interpretative centres' in two sites of outstanding natural beauty proposed by the Commissioners of

Public Works required a prior grant of planning permission. This raised the difficult question as to whether the Commissioners, as an emanation of the State, could avail themselves of the supposed rule whereby the State was exempt from the application of statute – a similar position to the status of the Royal Prerogative. It was held by a majority that the supposed rule had not survived the enactment of the Constitution and as a question of construction of the constitutional framework the common law in Ireland had been divested of its association with the entire doctrine and history of the Crown Prerogative.

Do these three cases, namely *Byrne*, *Webb* and *Howard* therefore render the provisions of Article 49 of the 1937 Constitution ineffectual and redundant? As Kelly puts it not only is this a remarkable interpretation having regard to a provision of the Constitution, but also it seems somewhat disingenuous to have arrived at such a conclusion without having regard to the constitutional history of the Irish Free State. Instead it is apparent that the Crown and its prerogative were understood to have survived into the newly independent State. This interpretation is made when regard is had to the statutory development of the Irish Free State, both positive and negative, and the opinions of judges who played a role in the drafting of the Constitution, together with the record of what actually had occurred in the 50 or 60 years prior to the judgments in the three cases mentioned above. To adopt the approach that progenitors had misunderstood the nature of the edifice that they constructed and operated was to 'adopt an unreal and intellectually unamiable position'^[16]. An aspect of this 'unreal and intellectually unamiable position' is found in the case of *Howard* where members of the Supreme Court were willing to admit to the existence of the rule whereby the State was exempt from the application of statute albeit not one based upon the notions of the Royal Prerogative, but implied by way of a constitutional reconstruction. Similarly in the case of *Webb* the former Royal Prerogative as to treasure trove survives albeit in a different constitutional context.

The question therefore is posed as to whether it is possible that the former Royal Prerogative out of which grants were made whereby charter rights to operate markets and fairs were vested in corporations and individuals has survived under the 1922 and 1937 Constitutions? Further, even if the Prerogative itself may not have survived have the rights so granted under it themselves survived? It is suggested that certain rights formerly regarded as prerogative rights can and have survived in a democratic republic and that such rights are not 'inseparable from the institution of kingship'^[17]. There are therefore conflicting views that prerogative rights may survive in a democratic state and that such rights are or are not 'inseparable from the institution of kingship'^[18].

In this regard there is *dicta* in the cases of *Simmonds v Cork County Council*^[19], *Skibbereen UDC v Quill*^[20], *Listowel Livestock Mart Ltd v William Bird and Sons Ltd*^[21] which can be construed as supportive of this position. In the cases of *Director of Public Prosecutions (Long) v McDonald and O'Mahony v Biggs*^[22] Henchy J (with whom Griffin and Walsh JJ concurred) found no difficulty in finding in the context of byelaws made under the Road Traffic Act 1961 for the regulation and control of traffic and pedestrians that there was a presumption of immemorial usage from which a lost grant might be presumed for the holding of a lawful market.

This limitation of the scope and application of byelaws made under s 92 is necessary because a fair or a market is a property right. It is a franchise conferring a right to hold a concourse of buyers and sellers to dispose of commodities. The property rights involved in that franchise are required by Art 40.3, of the Constitution to be protected as far as practicable by the laws of the State. The Legislature, by s 92 (of the Road Traffic Act 1961) obviously considered that the common good warranted that a fair or market held

on a public road could be encroached on by byelaws made under that section, but only to the extent of securing the free passage of vehicular traffic through the public road on the occasion of the fair or market.

Thus although the aspect of the Royal Prerogative and its survival *post* the 1922 and 1937 Constitutions was not expressly addressed in this judgment the assumption seems to have been made by the court that franchise markets rights are required to be protected by Art 40.3 of the 1937 Constitution.

Essentially it would seem that a justifiable case can be made out for accepting that franchise market rights granted under the Royal Prerogative have survived the enactment of the 1922 and 1937 Constitutions. If this interpretation is correct then precedent which had developed prior to 1922 in Great Britain and Ireland as to market rights and the entitlement of the owner of a market or fair to the peaceful enjoyment of his franchise, and to protection from disturbance within the common law distance, should still be of application despite the provisions of Article 49 of the 1937 Constitution. This is particularly striking when regard is had to the terms of Article 40.3.

In this context reference should be made to a number of pre-1922 Irish cases dealing with the question of both market and fair rights^[23].

However, insofar as markets created by statute and in particular the development in England of the principle that a market established under a local or public act enjoys all the instance and privileges of a market created by charter, unless the statute otherwise provides^[24] the position is perhaps somewhat clearer. Such markets were not created by virtue of the Royal Prerogative but by Parliament, and the law regarding the remedies for the tort of disturbance and the *cordon sanitaire* derives from case law and not from the Royal Prerogative. It is true that the case law insofar as a statutory market is concerned seeks to mirror the case law derived in respect of charter rights granted originally under the royal charter, but that in itself should not prevent a statutory market owner from seeking to rely upon such case law when invoking its statutory market rights against a rival market operator. Time will tell as to whether this interpretation is correct.

Therefore in principle, and subject to the interaction of franchise rights with the provisions of the Casual Trading Act 1995^[25], it would appear that such rights are still capable of being exercised within the Irish jurisdiction. Thus the holders of franchise or statutory market rights on the basis of their monopoly could in principle still seek to exercise and enforce such rights in order to suppress rival markets or fairs.

2 CASUAL TRADING IN IRELAND

A Casual trading

In general, 'casual trading' means the selling of goods in a place to which the public have access as of right, or in any other place that is designated as a casual trading area. This is to be contrasted with 'occasional trading' which means the selling of goods by retail in premises or a place to which the public do not have access as of right, and in relation to which the seller has been in continuous occupation for less than three months including the date of selling. The essential difference between the two forms of trading is that casual trading takes place on the public thoroughfare, or in a place designated as a 'casual trading area' whilst 'occasional trading' takes place on privately owned premises in which the seller is not in long-term continuous occupation.

B The Casual Trading Act 1995^[26]

The purpose of the Casual Trading Act 1995 ('the 1995 Act') was to decentralise to local authorities the control and regulation of casual trading in Ireland. It was enacted on 18 July 1995 and repealed previous legislation including the Casual Trading Act 1980 ('the 1980 Act')^[27]. Under the earlier statutory framework in place before the 1995 Act came into force, licences were issued for the entire country by the Department of Enterprise, Trade and Employment, and the licence fee was fixed at €441. There also existed local permits which carried fees of up to €438. The list of exemptions under the previous law was wider than that now specified under the 1995 Act and previously extended to goods such as fruit and vegetables, and newspapers. It is to be emphasised that the fact that the removal of those exemptions previously exempted under the 1980 Act does not render such activities unlawful but makes them subject to regulation.

C The main provisions of the 1995 Act

(1) Interpretation

Section 1 provides a number of definitions for the purposes of the 1995 Act, including the definition of a 'market right'. This is as follows:

'... means a right conferred by franchise or statute to hold a fair [or] market, that is to say, a concourse of buyers and sellers to dispose of commodities.'

(2) The definition of casual trading

Casual trading is defined by s 2 of the 1995 Act as:

'selling goods at a place (including a public road) to which the public have access as of right or at any other place that is a casual trading area.'

The 1995 Act provides for three exemptions from the scope of regulation. These are defined by sub-s (2) as follows:

- (a) selling by a licensed auctioneer;
- (b) door-to-door selling;
- (c) selling in aid of a charity or for some purpose from which no private profit is made, such as famine-relief organisations, hospitals, organisations that help the poor, churches, mission societies, schools, and sports clubs.

Sub-section (3) provides that the Minister for Enterprise and Employment may, by, regulations, amend (whether by the addition, deletion or alteration of classes) the classes of selling specified in sub-s (2)^[28]. Sub-section (4) empowers local authorities under bylaws to add to the classes of selling specified in sub-s (2) in their functional areas.

Formerly, s 2(2)(h) of the 1980 Act provided an exemption for 'selling at a market or fair held in pursuance of a market right'. In the case of *Skibbereen UDC v Quill*^[29] the defendants were charged with

trading without a licence in the town of Skibbereen contrary to ss 3 and 5 of the 1980 Act. They defended the charges on the basis of the exemption provided by s 2(2)(h) of the 1980 Act. Lynch J, *inter alia*, held that the trading engaged in by the defendants came within the exemption on the basis that the market right was defined as a right conferred by franchise or statute to hold a fair or market. Such a franchise was granted in 1675 in Skibbereen, and the charter was purchased by the Skibbereen UDC in 1949 but was never exercised. The local authority did not avail itself of the powers contained in what is now s 8 of the 1995 Act (formerly s 9 of the 1980 Act) to seek to extinguish the market right owned by it. It was held by Lynch J that the non-user of a franchise to hold a market or fair does not extinguish the franchise or right to do so. However, the learned judge also held that there was no obligation on the market owner to hold markets in accordance with the terms of the charter.

(3) Casual trading licences

Section 3 of the Act provides for general restrictions on casual trading. A person shall not engage in casual trading unless that person is, or is the servant or agent of, a person who holds a casual trading licence which is for the time being in force, and the casual trading is in accordance with the provisions of the licence. There are limitations specified by sub-s (2)(a) on such casual trading. However, sub-s (2)(b) provides that the restriction on a casual trader effected by sub-s (2)(a) shall not apply during the currency of a casual trading licence issued by the Minister for Enterprise and Employment under the 1980 Act to that casual trader in respect of a local authority which has not designated a casual trading area under the 1980 Act.

Section 4 provides that a local authority shall, subject to certain specified provisions, grant a casual trading licence to an applicant who pays the fees (if any) fixed by byelaws under s 6 and who fulfils certain conditions as specified. The licensing system enables a local authority, either to issue a general licence without territorial limitation in its own jurisdiction, or to confine it to casual trading areas (known as 'designated areas'), or to issue licences for special events.

Conditions may be attached to a licence, and it may be revoked at any time if any of its conditions are contravened. It is an offence to fail to comply with the conditions. Furthermore, local authorities are empowered to refuse to grant a licence^[30], or to revoke a licence, when a person commits an offence connected with casual trading, or connected with the importation, sale or possession of goods whilst the holder of a licence. Sub-section (9) provides that the application form for a casual trading licence shall be in the prescribed form, and the local authority can seek such further information as it may request for the purposes of the exercise of its powers and functions under the section. If the person fails to comply with this sub-section, the local authority may refuse to grant the person the licence.

Section 5 provides for the display of casual trading licences at the designated places, and a person who contravenes the section shall be guilty of an offence.

(4) Byelaws and guidelines

Section 6 provides the local authority with general powers to make bye-laws relating to the control, regulation, supervision and administration of casual trading in its functional area. This includes making byelaws relating to the designation of casual trading areas, the maximum area to be occupied by a person in a casual trading area, the regulation of access to casual trading areas, the fixing of fees, and the

provision of trading places for disabled persons and reinforcement rules. It also provides for the procedure to be followed by a local authority in the making of byelaws and for appeals.

A new section, s 6A, was inserted into the 1995 Act by s 98 of the Consumer Protection Act 2007. This makes provision for the Minister to prepare and issue guidelines in writing regarding the performance of local authorities of their functions under s 6 in relation to byelaws. The current guidelines were those issued in July 2006 by the Minister for Enterprise, Trade and Employment for Local Authorities for the carrying of their functions under the 1995 Act.

(5) Acquisition and extinguishment of market rights

Section 7 of the Act also provides that a local authority may acquire any market right or fair in its functional area by agreement, or compulsorily. Provisions of the Local Government (No 2) Act 1960 and the Housing Act 1966 shall apply in relation to a market right in respect of a market or fair as they apply in relation to land. This section repeats s 8 of the repealed 1980 Act. Additionally, and somewhat controversially as it has subsequently transpired, the section further provides that where a market right in respect of a market or fair in the functional area of a local authority remains unexercised for a period of not less than ten years after the commencement of the section, then, the market right concerned 'shall stand extinguished' (sub-s (4)). The relevant date for the purposes of calculation is 1 May 1996^[31]. This section should be read in the context of s 8 which empowers a local authority to extinguish a market owned by it in certain circumstances (see *below*).

Section 8 provides further powers on the part of the local authority in relation to market rights owned by them. Sub-section (1) provides that a local authority may carry on, manage and regulate a market or fair to which a market right owned by it relates as if it were a market established by it under s 103 of the Public Health Act (Ireland) Act 1878, and shall have all such powers as may be necessary for those purposes^[32]. A local authority may also by order extinguish a market right owned by it (see sub-s (2))^[33]. However, it is provided by sub-ss (3) to (5) that:

- (1) It shall not extinguish a market right under the section unless it provides, or has already provided, alternative facilities in the same vicinity as the market or fair to which the right relates and comprising or including facilities reasonably corresponding in all respects, having regard to all the circumstances, to the market or fair;
- (2) Where a local authority acquires a market right compulsorily under the Act it shall not discontinue the holding of the market or fair to which it relates unless it provides, or has already provided, alternative facilities in the same vicinity as the market or fair to which the right relates and comprising or including facilities reasonably corresponding in all respects, having regard to all the circumstances, to the market or fair;
- (3) Whenever a local authority proposes to extinguish a market it has to follow a formal process by giving notice in writing of the proposal to any person appearing to the local authority to have an interest in the right, and to publish notice of the proposal in at least two newspapers circulating in the area in which the market or fair to which the right relates is held;
- (4) A person who is aggrieved by such a proposal to extinguish a market right may within 21 days appeal to the district court against the extinguishment. The court may on the hearing of the appeal, if it is of the opinion that the extinguishment would, notwithstanding the alternative facilities to be provided or already provided by the local authority and having regard to all the circumstances,

constitute an undue interference with the facilities enjoyed by the public in relation to the market right, prohibit the proposed extinguishment or authorise the extinguishment subject to such conditions (if any) as it may deem appropriate and specify;

- (5) A local authority shall not proceed with the proposal to extinguish a market right under the section before the expiry of 30 days from the date of compliance by the local authority with the notice provisions, referred to above, or if an appeal is brought against the proposal, before the final determination of the appeal.

Section 9 provides that it shall be an offence to give false information to a local authority in relation to a licence, to alter or to use a licence with intent to deceive, or defraud a licence.

(6) Enforcement

Sections 10–12 provide for enforcement of the byelaws, whereby any authorised officer of the local authority, or a member of the Garda Síochána, may inspect any place where they believe casual trading is being carried on, require the trader to produce his/her licence, ask to see any documents relating to the trading and other such functions. If the person concerned does not comply with these requirements they can be told to remove themselves and their goods or to be arrested. There is also provision for the disposal of goods seized by the Gardai.

By s 13 of the Act each local authority is required to keep a register of licence holders which must be kept in an electronic form. Section 14 provides for penalties which attach to offences under the Act. A person who commits an offence under the Act can be prosecuted summarily or on indictment. The penalties provided are monetary, although there is provision for imprisonment of the person concerned upon conviction upon indictment for a maximum period of six months. The section streamlines the jurisdiction of the courts. Section 15 provides that regulations under the Act shall be laid before each House of the Oireachtas. Section 16 amends certain provisions of the Occasional Trading Act 1979. Section 17 provides for the repeal of the 1980 Act and makes appropriate transitional provisions. Section 18 contains the short title of the Act, and makes provision for the commencement of the Act.

The Consumer Strategy Group reported in May 2005 and recommended, *inter alia*, that the Minister for Enterprise, Trade and Employment should have powers to issue statutory guidelines to local authorities to ensure a consistent approach to casual trading be adopted throughout the country. A High Level Inter Departmental Committee was established to consider the various recommendations of the Group. In respect of casual trading the Group made the following recommendations:

- (1) That the guidelines issued by the Department of Jobs, Enterprise and Innovation should contain a specific provision advising local authorities of the need to encourage the sale of fresh fruit and vegetables;
- (2) That the guidelines be reviewed after an appropriate period to ascertain what effect they were having; and
- (3) That the 1995 Act be amended to permit the Minister to introduce statutory guidelines at some stage in the future, if required.

At its meeting on 13 December 2005 the Government endorsed the recommendations of the High Level Inter Departmental Committee and approved the preparation of a general scheme of a Bill to implement

the recommendations into law. The principal recommendation made was to establish a new National Consumer Agency.

The intention in issuing the guidelines was to attempt on a voluntary basis best practice for the operation of casual trading by all the stakeholders involved, such as traders, local authorities and the Gardai, with the ultimate aim of providing more choice for consumers in the retail sector.

Following this the Consumer Protection Act 2007 was enacted. Section 98 inserted a new s 6A into the 1995 Act in order to provide guidelines with respect to performance of functions under s 6 of that Act^[34].

D The Report of the Competition Authority

On 22 August 2002 the Competition Authority published a report entitled 'Report on the Implementation of the Casual Trading Act 1995' pursuant to s 11 of the Competition Act 1991 (as amended) ('the Report'). The purpose of the Report was to investigate how the 1995 Act had been implemented by local authorities, and to examine its effect on competition in local markets. The study also examined whether measures employed by local authorities were necessary for the achievement of public interest objectives such as, amongst other relevant matters, public order and safety. To this end the Competition Authority commissioned market research consultants (MRBI) to conduct a data collection exercise and to survey those persons most affected by the 1995 Act. Thus a large-scale survey was undertaken of casual traders and permanent businesses across the State together with in-depth interviews with various bodies. The Report found that at that stage only 58 of the 88 local authorities within the State had introduced byelaws under the Act, and that traders in possession of licences issued by those local authorities who had complied with the legislation numbered approximately 1,350. It found that the most commonly traded goods were clothing, and fruit and vegetables, though in general the range of goods traded in local markets was quite substantial. It also found that licence fees varied greatly across local authorities ranging from €13 up to €1,770 per annum. Given that some traders operate in more than one local authority, the total fee such traders would pay would be greater than this.

The Report also found that many local authorities stated that the 1995 Act had provided them with the necessary control to manage casual trading more efficiently. It was also stated that the Act had, and would, put an end to many arguments over pitches and types of goods sold. Further, it was found that all local authorities interviewed in-depth felt that the 1995 Act would enable them to eliminate illegal trading. There was, however, some divergence in attitudes towards casual trading in general. The vast majority of urban local authorities felt that casual trading was to be encouraged as it added to the atmosphere of a town as well as attracting consumers who would also shop with the permanent businesses. A significant number of rural authorities felt that casual trading was to be discouraged in that it had a negative effect on the area and on permanent businesses based there. It was also noted that a high demand for licences occurred in urban authorities, whilst rural authorities suggested that demand was low in their areas.

The views of casual traders themselves were sought and are summarised in Chapter 6 of the Report. Licensed traders tended to feel that, if properly implemented, the 1995 Act would be of benefit, whilst unlicensed traders were more sceptical. All traders felt that they obtained relatively little from the local authorities, in terms of facilities and space, in return for their licence fees. They were also of the opinion that the 1995 Act was unfair in not allowing them to directly appeal the level of the licence fees charged.

It was felt by IOMST (the Irish Organisation of Market and Street Traders) that the 1995 Act was frequently being used to unfairly discourage casual trading.

The principal issues raised by traders were:

- (1) Licence fees charged by local authorities varied very widely throughout the country, and could be very high;
- (2) No account was taken by local authorities of the practical difficulties of traders, such as the size of stalls, the parking of vans, and other related issues;
- (3) Local authority members could be faced with a conflict between their duties under the 1995 Act and their private interests;
- (4) Local authorities saw casual traders as a nuisance rather than part of the commercial life of a town;
- (5) Casual traders who wished to move from area to area had to pay a fee in each local authority area where they wished to trade (there are 88 local authorities); and
- (6) Local authorities had been very reluctant to use their powers to exempt specified activities from the application of the 1995 Act within their own areas and this had impacted particularly severely on fruit and vegetable growers who had enjoyed a general exemption to engage in roadside sales under the 1980 Act.

The Executive Summary to the Report provides a summary of the views of those consulted in the following terms:

'..it seems that, with very few exceptions, stakeholders believe that if the Act was correctly and fully implemented, as was envisaged by the Department of Enterprise, Trade and Employment, it would ultimately benefit casual traders, local businesses, public order and safety and consumers alike. The main areas where MRBI found that the Act was not being implemented as envisaged were: (a) one-third of local authorities have no bye-laws, and thus the Act has not been implemented at all in these areas – this also hinders the implementation of the Act in other areas; (b) licence fees are typically set without consulting casual traders and seemingly without regard to the level of facilities being provided; that is, they often appear to be set arbitrarily; (c) in some areas, the designated trading area is in a location which ignores the potentially beneficial spill-over effects, both to the public and to sellers, of placing casual traders near to the permanent businesses (in the case of event trading, the designation of a trading area is sometimes unmindful of public order and safety or disproportionately cautious); and, (d) pitch sizes are frequently too small for some casual traders' stalls.'

The Report also noted that there was a lack of consistency in the implementation of the 1995 Act. It noted that there were large variations in the fees charged by different local authorities, there were differences in levels of facilities being provided, there were attempts by local authorities to allocate efficiently scarce pitches and licences, and it was also suggested that there was a possibility that local authorities in some areas were using fees to raise revenue. The Report noted that a policy of setting fees to maximise revenue would be regarded as unreasonable and could constitute a barrier to entry and a distortion of competition. The Report also considered the apparent rise in private trading where markets are held on private land. The 1995 Act does not apply to such trading, and it was noted that unless it is appropriately applied

throughout the State, casual trading itself may suffer, with attendant negative implications for local economies.

Chapter 11 of the Report sets out the recommendations of the Competition Authority arising out of the research and analysis conducted during the study, and the reasoning behind the recommendations. The recommendations made are as follows:

- (1) The 30 local authorities that have not yet introduced byelaws under the Casual Trading Act 1995, should do so without delay.
- (2) Local authorities should consult casual traders and other interested parties when introducing or amending byelaws and making decisions under the 1995 Act.
- (3) Guidelines should be drawn up at a national level to direct local authorities in implementing the 1995 Act.
- (4) The determination of pitch sizes, set by local authorities under the 1995 Act should not act as a barrier to entry for any type of trader; local authorities could designate a number of larger pitches for certain classes of trader.
- (5) Fee set under the 1995 Act, should be based solely on the administrative cost of issuing licences and any costs associated with providing facilities.
- (6) Section 6(4) of the 1995 Act, should be amended to read '..local authorities shall have regard to the facilities and services provided by it to persons engaged in casual trading'.
- (7) Licences issued under the 1995 Act, should be allocated on a historical basis or a first-come, first-served basis, with a waiting list operating for pitches that become free.
- (8) The possibility of mutual recognition of licences among the local authorities should be investigated so that an event trader might need to apply only once in full for a licence under the 1995 Act.
- (9) Local authorities should be required to make available to the public a list of its licence fees under the 1995 Act, together with a breakdown of the various costs leading to those calculations. This same information should be collated centrally.
- (10) The 1995 Act, should be amended to enable fees, and amendments to fees, to be challenged in the District Court with a provision to appeal to the Circuit Court, as are other aspects of byelaws.

The current position is that none of these recommendations has currently been implemented.

3 MARKET RIGHTS

There have been a number of reported and unreported cases in the Irish courts, most notably being challenges to the provisions of the 1995 Act, and its predecessor the 1980 Act. A number of these have involved legal argument on markets and market rights in Ireland insofar as the implementation of the casual trading provisions and the extinguishment of market rights are concerned. This work has been cited by Counsel and extracts from it relating to market rights form part of the *obiter dicta* in several judgments of the Irish High Court and Supreme Court. There have also been a number of challenges in the courts as to the provisions of the 1980 and 1995 Acts the *vires* of its implementation by some local authorities. It should be stated that this chapter is not directed to an examination of casual trading in Ireland, and the reader's attention should be directed elsewhere for such information^[35].

It has already been noted *above* that under s 8 of the 1995 Act a local authority may extinguish any market right owned by it, once it has provided alternative corresponding facilities in the same vicinity as the market or fair to which the right relates. The 1995 Act provides an appeal procedure to the District Court against any proposed extinguishment. Since the 1995 Act came into force there have been a number of legal challenges in the courts against such proposals for extinguishment of market rights, and it appears that in the main the local authority concerned has been unsuccessful in this endeavour (see *below*).

4 RECENT IRISH CASE LAW

The following cases are those in which market rights have been the subject of detailed examination by the Irish Courts: *Duffy v Dublin Corporation*^[36]; *DPP (Long) v McDonald and O'Mahony v Biggs*^[37]; *Skibbereen UDC v Quill*^[38]; *Hand v Dublin Corporation*^[39]; *Bridgeman v Limerick Corporation*^[40]; *Simmonds v Cork County Council*^[41]; *Simmonds v Kilkenny Borough Council*^[42]; and *Listowel Livestock Mart Limited v William Bird & Sons Limited*^[43].

A *Duffy v Dublin Corporation*^[44]

Three issues arose for consideration in *Duffy*. First, the proposed closure of the market by the City Corporation; secondly, whether there was an obligation on the part of the Corporation to keep market open; thirdly, the meaning of the phrase 'it shall be lawful'.

Section 79 of the Dublin Improvement Act 1849^[45] ('the 1849 Act') provides that 'it shall be lawful' for the Corporation of Dublin at any time, and from time to time, as they think fit to purchase lands to be appropriated and used as a market as therein mentioned. Section 80 of the 1849 Act provides that 'it shall be lawful' for the corporation to build and provide upon the land to be purchased, and for ever afterwards to maintain and improve, one or more market place or market places for the sale of cattle. Pursuant to these sections, the Corporation purchased land and provided a cattle market thereon in the year 1864. Owing to changes in the marketing of cattle, the market's trade diminished to such an extent that a substantial subsidy from the local rates was required to keep the market open. The Corporation decided to close the market, and Mr Duffy and other plaintiffs, being members of an association of cattle salesmen, brought an action in the High Court in which they claimed a declaration that the defendants were obliged by statute to continue to hold markets for the sale of cattle at the market on the appointed days.

On appeal by the plaintiffs from the dismissal of the claim it was held by the Supreme Court in disallowing the appeal, first, that in accordance with its ordinary meaning, the phrase 'it shall be lawful' was equivalent to the conferring of a power. Secondly, that the context of ss 79 and 80 of the 1849 Act did not justify the application of any other meaning to the phrase. Thirdly, that, accordingly, those sections merely enabled the defendants to do the acts there specified, and did not oblige them to do such acts:

'If it was mandatory on the defendants to maintain the market, then it would also be mandatory on them to improve it, but in the absence of clear and unambiguous words there should not be imputed to the legislature, in any Act expressly passed for the improvement of the City of Dublin, an intention to impose on the defendants a perpetual obligation to maintain and improve a market place regardless of the cost to the rate payers or the absence of public demand or its unsuitability... Section 80 of the Act of 1849 does no more than its marginal note indicates:-

"Council empowered to provide market places."

That section gives a power, but no more than a power, to build, provide, maintain and improve market places. There is nothing in the wording of the section or in the rights or interests of the public for whom the discretion was enacted, or in the general context of the statute as a whole, to suggest that the power should be treated as a duty. Therefore, the defendants were within their rights in deciding not to maintain a market place any longer on the north circular road site.'

B Director of Public Prosecutions (Long) v McDonald and O'Mahony v Biggs^[46]

Section 89 of the Road Traffic Act 1961 ('the 1961 Act') empowers the making of byelaws for the regulation and control of traffic and pedestrians, and s 90 empowers the making of byelaws for the control and regulation of the parking of vehicles on public roads. Section 92 provides for the making of byelaws to provide free passage of vehicular traffic through public roads on the occasion of fairs or markets. The defendants were street traders who sold their wares at fairs and markets using their motor vehicles as mobile shops. They were prosecuted and convicted in the District Court for breaches of byelaws made under ss 89 and 90. They appealed unsuccessfully by way of case stated to the High Court and then appealed to the Supreme Court contending: (1) the byelaws were bad for being unreasonable; (2) they were bad for lack of good faith in their making, and (3) that byelaws under ss 89 and 90 were not applicable to the circumstances of these cases.

In the first set of cases ('the Carlow Prosecutions') it appears from the case stated that no evidence was adduced to show that a market existed under either statute or express grant in any street in Carlow. However, there was uncontradicted evidence that from at least 1950 until 1956 a regular market was held in Tullow St., Carlow, apparently without let or hindrance from anybody, and that many of the defendants and their predecessors traded there from their vans on market days. In 1956, at the instigation of the Garda Siochana because of traffic congestion, the traders in the market in Tullow St. were asked to transfer to Barrack St. This they did, and from 1956 until 3 May 1976 (the date of the alleged offences) the market was regularly and continuously held in Barrack St.

The defendants in the second set of cases ('the Dungarvan Prosecutions') had contravened byelaws made under ss 89 and 90 by parking their vans in Grattan Square, Dungarvan for over one hour during a market. Uncontradicted evidence showed that a market had been held during living memory in the Square on the third Wednesday of each month.

It was held by the Supreme Court that submissions (1) and (2) were not supported by the evidence. However, as to the third submission, on the facts when a market had been held for such a long period as the market at Barrack St. there was a presumption of immemorial usage from which a lost grant might be presumed. The holding of a regular market uninterruptedly there since 1956, and indeed elsewhere in Dungarvan since 1950, raised the presumption that it was a lawful market. Insofar as the Grattan Square market was concerned the evidence established that there had been a lawful market at Grattan Square on the occasion of each of the offences giving rise to the second set of cases. In each set of cases, byelaws made under s 92 would be required to make the conduct complained of unlawful. Since the only byelaws relied on by the prosecution in each set of cases were made under ss 89 and 90 which were accordingly not applicable, the appeals in each of the two cases stated were allowed:

'There is a third way provided in the Act for the resolution by bye-laws of a special kind of local traffic problem on the roads. This is to be found in section 92. Bye-laws made under this section are designed to provide 'free passage of vehicular traffic through public roads on the occasion of fairs or markets'. Unlike bye-laws made under section 89 or section 90, such bye-laws are made, not by the Commissioner of the Garda Síochána, but by the relevant local authority acting on its own. Furthermore, the scope of their operation is more limited in time and place, for they are permitted to be made only for the purpose of securing the free passage of vehicular traffic through public roads on the occasion of fairs or markets.

This limitation of the scope and application of bye-laws made under section 92 is necessary because a fair or a market is a property right. It is a franchise conferring a right to hold a concourse of buyers and sellers to dispose of commodities. The property rights involved in that franchise are required by Art. 40.3, of the Constitution to be protected as far as practicable by the laws of the State. The Legislature, by section 92 obviously considered that the common good warranted that a fair or market held on a public road could be encroached on by bye-laws made under that section, but only to the extent of securing the free passage of vehicular traffic through the public road on the occasion of the fair or market. Such an inroad on the property right was obviously deemed by the Legislature to be constitutional.

Therefore, on a comparison of the power to make bye-laws under section 89 or section 90 with the power to make bye-laws under section 92, I am satisfied that the legislative intent was that when what is to be controlled is vehicular traffic in a fair or market held in a public place (which s. 3(1) defines as 'any street, road or other place to which the public have access with vehicles whether as of right or by permission and whether subject to or free of charge'), the bye-laws must be made under s.92' (per Henchy J).

(1) The Carlow Prosecutions

'80. The law would appear to be that when a market has been held for such a long period there is a presumption of immemorial usage from which a lost grant may be presumed.

What period of user will raise that presumption will vary from case to case, but the authorities show that the unexplained user of an easement or other incorporeal right for a period of twenty years is presumptive evidence of the existence of the right from time immemorial. The cases also show that the rule is not inflexible and that the period of twenty years is fixed only as a convenient guide.

I am inclined to view that the holding of a regular market uninterruptedly in Barrack St. since 1956 raises a presumption that it is a lawful market. Further, I consider that to that prescriptive period may be added the period from 1950 to 1956, for, as the judicial authorities show, where a market or fair is granted to be held in a district, such as a borough, township, or manor, it may be held throughout that district or in any one or more places within that district, but where it is granted to be held in a place defined by metes and bounds it must be held within those metes and bounds. There is no suggestion that the Carlow market (if such exists) was defined by metes and bounds.

In these Carlow cases it does not lie with the prosecuting authorities to say that the market now held in Barrack St. since 1956 is not lawful continuation of the market which was held before that year in Tullow St., for it was the Garda Síochána authorities who persuaded the market traders in 1956 to transfer the market from Tullow St. to Barrack St. They cannot now suggest – nor do they – that what they persuaded the traders to do in 1956 was an illegality.

My deduction from the evidence is that the conduct alleged to constitute the offences charged arose out of trading in what may be a lawful market. If it is, the control of trading in that market so as to make the conduct complained of unlawful would require the bye-laws to have been made under s. 92. Apparently no such bye-laws were made. The only bye-laws relied on by the prosecution are those made under ss. 89 and 90, but they may have no application to the conduct complained of in these prosecution. It would be inappropriate in dealing with these District Court prosecutions (in which the only parties represented were the Garda Síochána and the defendants) to express a conclusion which might be taken to be a judgment *in rem* in favour of the existence of a lawful market in Barrack St. on the occasion in question. It has to be said, however, that the evidence was such that an onus was placed on the prosecution to show that a lawful market was *not* being held on that occasion. That onus was not discharged by the prosecution. The summonses, therefore, should have been dismissed.' (pages 226/227)

(2) The Dungarvan Prosecutions

'These prosecutions differ from the Carlow prosecutions in that apparently a charter for the market in question was said to exist. However, the charter or a copy of it was not produced in the District Court, so it is not permissible to act on hearsay evidence as to its existence or contents. As against that, there was categorical and uncontradicted evidence that, so far as living memory goes, a market has always been held in the Square on the third Wednesday of each month. *Prima facie* at least, therefore, the occasion of each offence charged was a lawful market, for it was agreed by the prosecution that the parking objected to in each prosecution took place on the third Wednesday of each month and was for the purpose of selling goods in the course of the market held in the Square on that day.

For the reasons I have given in dealing with the Carlow prosecutions, I consider that bye-laws made under sections 89 and 90 were not intended by Parliament to deal with the conduct complained of. If the prohibitions in these bye-laws could be said to apply to a fair or a market, they could be used to cripple or put out of existence, without any compensation, the particular fair or market. And that could be unconstitutional. Moreover, if bye-laws made under sections 89 and 90 could be used to prevent obstruction of traffic by fairs and markets, the enactment of section 92 would have been superfluous and pointless. Such an exercise in futility should not be imputed to Parliament. The inescapable conclusion is that, whereas local problems as to the control of traffic and pedestrians and parking may be dealt with by bye-laws made under sections 89 and 90, the control and regulation of vehicular traffic through a public road where a fair or market is being held can be effected only by bye-laws made under s. 92(1), and then only to the extent allowed by that subsection.

Accordingly, because the evidence supports a *prima facie* conclusion that a lawful market was being held in Grattan Square on the occasion of each of the offences charged, I would rule that the convictions made in each of the Dungarvan prosecutions should be set aside and all the summonses dismissed, on the ground that the bye-laws alleged to have been contravened were not shown to apply to the facts of these cases.'

C Skibbereen U.D.C. v Quill^[47]

In 1949 the complainant local authority purchased the franchise to hold markets and fairs on Wednesdays and Saturdays granted by King Charles II in 1675 in the town of Skibbereen. Since that date the local authority has not held or promoted any markets in the area, except for the years from 1968 to 1972 when

they collected tolls from two persons trading in the areas on Saturdays. Section 2(2)(h) of the 1980 Act provided an exemption so that casual trading did not include selling at a market or fair held in pursuance of a market right^[48]. A 'market right' is defined in s 1 of the 1980 Act as a right conferred by franchise or statute to hold a fair or market, that is to say a concourse of buyers and sellers to dispose of commodities.

Summonses were issued by the local authority against the defendants charging them with offences contrary to ss 3 and 5 of the 1980 Act. These alleged that the defendants had carried on casual trading in a casual trading area without a licence or permit or (in the case of some of the defendants) in contravention of the conditions contained in the permits that had been granted to them. The defendants contended that they were not engaged in casual trading within the meaning of the 1980 Act because they were selling at a market held in pursuance of a market right and were therefore within the exception provided for in s 2(2)(h). At the trial of the action in the District Court the District Judge on his own motion had stated a case for determination by the High Court of certain questions of law raised in the action.

It was held by Lynch J, in ruling on the points of law:

- (1) That the franchise created by the charter was not terminated by the complainant's lack of exercise of the market rights. There was no obligation on the complainant to hold markets in accordance with the terms of the charter;
- (2) That whether or not the complainant held markets under the charter, those members of the public wishing to trade had rights, which were in the nature of proprietary rights, to attend at the market place on the date specified in the charter to engage in trading. Such trading was within the exception provided for in section 2(2)(h) of the 1980 Act.

It is also to be noted that the 1675 franchise was granted expressly without metes and bounds. In his judgment Lynch J found as follows:

'In the foregoing circumstances the owner's failure to hold the market amounts to no more than a neglect on its part to collect the tolls and other charges to which it would have been entitled under the franchise. The non-user of a franchise to hold a market or fair does not extinguish the franchise or right to do so. Thus non-collection of tolls over a long period would not extinguish the right of the owner of the franchise to resume collecting proper tolls at any time if he thought fit.'

The judge also made reference to the provisions of s 9 of the 1980 Act which, as he stated, clearly recognised that other persons besides the grantee of the franchise, or owner of the market, may have an interest in the market which must be taken into account and provided for before a market right can be extinguished.

'The conclusion also follows from the authorities which were cited to me by Counsel from which it is clear that once a franchise to hold a market is granted, potential sellers have rights in the nature of proprietary rights to use the market apart from the proprietary right of the owner of the franchise to hold the market... It should also be remembered that non-user by the grantee of the franchise to hold a market may be a cause for forfeiture of the franchise to the Crown (now the State) however, such forfeiture does not in itself extinguish the market which remains in existence for the benefit of the locality, the tolls (if any) being payable to the Crown or the State instead of to the owner.'

D Hand v Dublin Corporation^[49]

This Supreme Court case emphasises the principle that Parliament has sole and exclusive power to make laws for the Irish State. Specifically Parliament had expressly enacted that the Minister should not grant a licence to a person who had been convicted of two or more relevant offences which, although minor were not trivial and thereby indicated its opinion of its gravity. The plaintiffs' argument in relation to proportionality failed.

The plaintiffs were street traders who had been convicted at least twice under the provisions of the 1980 Act. They had been in contravention of the relevant provisions of that Act during most of the period in which they were trading in Henry Street in Dublin. There were 85 'places' allocated in Henry Street to casual traders who had both a licence and a permit for the Christmas period for which there were upwards of 900 applicants each year. The plaintiffs applied to the Minister for a licence in November 1985 in respect of the following year and each plaintiff was refused under the provisions of s 4(6) of the 1980 Act. Section 3 of that Act required the holding of a casual trading licence and a casual trading permit in order to engage in casual trading. Such licences were issued by the Minister under the provisions then contained in ss 4 and 5.

The plaintiffs sought a declaration that the provisions of ss 4 and 5 of the 1980 Act were null and void on various grounds. The High Court dismissed the plaintiffs' claim, who then appealed to the Supreme Court on some of the grounds the subject matter of the original claim, and in addition made further submissions as to the deprivation of their rights. The Supreme Court dismissed their appeal. The submissions made as to proportionality to the effect that the Minister should not have refused a licence on the basis that the convictions of two or more relevant offences were minor were rejected. The case *R v Barnsley MBC, ex parte Hook*^[50] was expressly not followed. It was held that none of the issues in that case was relevant to the issues which the court had to determine in the instant case. Further it was held that the right to earn a livelihood was not unqualified and, assuming without deciding that it was a property right, s 4(6) of the 1980 Act did not constitute an unjust attack on the plaintiffs' rights to obtain a licence protected by Article 40, s 3(2) of the Constitution of Ireland 1937^[51].

E Bridgeman v Limerick Corporation^[52]

In this case the Supreme Court held that an area designated for casual trading under the scheme enacted in Ireland under the 1995 Act for the control and regulation of such trading does not create a franchise market within the definition, and it was not the intention of the legislature to do so. This is confirmed by the wording of ss 7 and 8 of the 1995 Act which expressly empowers a local authority to acquire and extinguish market rights, as defined in s 1 of that Act.

'I do not think that it was the intention of the Oireachtas, in enacting the Act of 1995 and enabling bye-laws to be made, designating areas in which casual trading could take place, to create a "market" as thus defined [as quoted in Halsbury's Laws of England (3rd Ed.) Vol 25, at p. 381]. That view is confirmed by the wording of the Act of 1995 which expressly empowers a local authority, in sections 7 and 8 to acquire and extinguish a "market right" and defines such a right as 'a right conferred by franchise or statute to hold a fair or market, that is to say, a concourse of buyers and sellers to dispose of commodities'. Those provisions are patently inapplicable to the casual trading licences which the local authority is empowered

to grant under the Act, and in respect of which, a self contained statutory scheme is provided for their grant and revocation.^[53]

The background to the case

On 13 July 1998 Limerick Corporation made byelaws pursuant to s 6 of the 1995 Act in relation to the control, regulation, supervision and administration of casual trading in its functional area. The Corporation designated a casual trading area in the vicinity of the milk market comprising certain roads. The applicant sought a judicial review of the decision by way of order of Certiorari, declarations and injunctions, on the basis that the byelaws contravened the provisions of the Limerick Markets Act 1852 (as amended), and in particular s 32. That section expressly prohibits the holding of markets, other than markets provided and established under the 1852 Act within the municipal boundaries of the borough of Limerick, and within a circuit of one mile therefrom, on the basis that such bye-laws must not contravene or purport to authorise the contravention of existing legislation. For their part Limerick Corporation relied upon the following grounds:

- (1) The Limerick Market Acts 1852–1992 have no function whatsoever in regulating the type of trade in which the applicant is employed and accordingly the applicant lacked *locus standi* to maintain the application by him;
- (2) The casual trading area proposed by the Limerick Corporation Casual Trading Bye-laws 1998 is not a market within the meaning of the Limerick Markets Acts and is therefore not created in contravention of any provision of those Acts;
- (3) In particular the byelaws in question authorise no breach of s 74 of the 1852 Act because the byelaws give rise to no necessary breach of the section;
- (4) The power to enforce the provisions of the Limerick Market Acts is vested solely in the trustees of the said markets established under the Acts;
- (5) The Limerick Corporation Casual Trading Bye-laws 1998 were passed by the Corporation in consequence of a statutory duty to do so under s 6(1) in execution of its statutory duty to issue casual trading licences in respect of its functional area or part thereof pursuant to s 4(1) of the 1995 Act;
- (6) The activities of licensed hawkers were always permitted within or without the Limerick market area which activities are now regulated by the 1995 Act in succession to earlier regulation contained in the 1980 Act and before that the Street Trading Act 1926 and the Hawkers Act 1888;
- (7) The applicant having failed to avail himself of the procedures for challenging the byelaws provided by s 6(6) of the 1995 Act, it was urged that the High Court should refuse in its discretion the application made by the applicant.

Finnegan J, at first instance, after having referred to the definition of a 'market' at common law in the case of *Marquis of Downshire v O'Brien*^[54], found that on a true construction of the 1852 Act that the word 'market', when it is intended to refer to the market place, is coupled with the word 'place'. Elsewhere, where not coupled with the word 'place' it is intended to refer to a concourse of buyers and sellers, and that is the sense that the word 'market' is used in the second sub-clause of s 32 of the 1852 Act. Accordingly, he found that the effect of the section was to prohibit the holding of a concourse of buyers and sellers within the municipal boundaries of Limerick and within a circuit of one mile therefrom. However, he further found that having regard to the scheme of the Act, and in particular the preamble thereto, the same does not prohibit a concourse of buyers and sellers in relation to goods, products or produce other than

livestock and specified agricultural produce. The byelaws passed under the Limerick Corporation Trading Bye-laws 1998 do not create a market in livestock and the specified agricultural produce. He therefore found that the provisions of s 4 of the 1995 Act with regard to licences would enable the Limerick Corporation to ensure that no market which would infringe the provisions of s 32 of the 1852 Act would be held within the casual trading area. Accordingly, the creation of a casual trading area *per se* does not infringe the provisions of s 32 of the 1852 Act and therefore the application made by the applicant failed upon both grounds upon which he relied.

F Simmonds v Cork County Council^[55]

In Bantry in County Cork, market and fairs rights are owned by the local authority, but historically derive from the Crown and have been exercised since the 17th Century. In 2001 the local authority sought to regulate the market rights and to implement the Casual Trading Bye-laws in Bantry by relocating casual traders from their traditional market place in Wolfe Tone Square in the town centre (which has the market rights attached to it) to an area designated for the purpose. This was an area comprising a car park created on reclaimed land outside the town and adjoining the foreshore. It was proposed by the local authority that the market traders would be required to trade from this designated area and to obtain casual trading licences for that purpose. It was also proposed that the market rights should be extinguished on such removal under the provisions contained in the 1995 Act. This proposal was challenged by casual traders in the District Court, and they were granted an interlocutory injunction allowing them to trade in the original market area. The court found that the local authority had not followed the correct procedures required to extinguish the market rights.

As noted by Aindrias O Caoimh J in his judgment, an issue arose as to the effect of this requirement by the local authority which would mean that traders would lose their ancient franchise market rights to trade in the Square and the markets and fairs would be extinguished.

'...[T]he power to move a market at law is limited and accordingly the power to regulate casual trading may not extend to defeat proprietary rights of members of the public in the absence of clear statutory authority.' [para 24]

G Simmonds v Kilkenny Borough Council^[56]

In 1609 a market franchise was granted by a Charter of James I to the Corporation to hold markets in Kilkenny. As so found by Smyth J, this franchise right was discontinued and extinguished by the enactment of the Kilkenny Markets Act 1861, and in particular by the provisions of s 28. Once the construction of a new general market in Kilkenny for the sale of fruit and other agricultural produce and other items had occurred it was then lawful for the Corporation to remove the existing market and market places to the new purpose-built general market. The rights to trade in the existing markets were then extinguished. Accordingly, it was held that there was no longer an extant market right to trade at the Parade in Kilkenny, or any other place in the Borough, under the Charter, as asserted by the plaintiff. Furthermore, it was noted by Smyth J that there was a fundamental difference between the provisions of the 1980 Act and the 1995 Act in that the latter 'very pointedly and deliberately removes' selling at a market or fair in pursuance of a market right as an exclusion from the expression 'casual trading' in s 2(2), whereas in the former this was included as an exemption. This, he held, emphasised the essential distinction between a franchise or statutory market right, and the scheme of regulation imposed for casual

trading under the 1995 Act. However, the judge also found that the effect of the provisions of the 1995 Act meant that a person selling at a market or fair would still require a casual trading licence, would be subject to the regulation of the 1995 Act and thus would still require a casual trading licence if the area in question had been designated by the local authority as a casual trading area.

H The Listowel Livestock Mart Limited v Bird^[57]

Market and fair rights and obligations conferred by two 17th century letters patent granted by James I in 1612, and James II in 1686, were held by the plaintiff (as successor in title to the original grantee) in the town of Listowel, County Kerry. The markets and fairs to be operated in accordance with the terms of the letters patent were not described by reference to any specific place within Listowel. ie were not limited by metes and bounds. The plaintiff had acquired land, known as the Market Place, in the 1950s for the purposes of establishing a mart in the town and thereafter conducted regular sales at the site. The plaintiff and defendants had entered into leases providing for an entitlement on the part of the defendants to occupy the Market Place for a period of approximately two weeks each year, spanning the Listowel Races festival, for the purpose of providing amusements and other facilities.

In recent years the plaintiff had moved its regular sales to a new location just outside of the town of Listowel, and in 2004 the Market Place was offered for sale and the parties entered into a contract. The defendants asserted that the existence of the rights and obligations flowing from the 17th century charters continued to affect the lands in question. The effect of this was they could not be sold without either providing another site which was convenient and located within Listowel, or ensuring that the lands remained available for market and fair use.

The plaintiff commenced proceedings in the High Court seeking orders and declarations to the effect that no public entitlements arising under the letters patent attached to the lands known as the Market Place and that the defendants did not hold any estate, right, title or interest entitling them to conduct rides, stalls or amusements on the said lands. The defendants counterclaimed seeking orders and declarations to the effect that they were entitled forever to enter on the lands provided that they paid a toll and confined themselves to the dates set out in the letters patent, arguing that the market and fair obligations under the letters patent had been 'appropriated' to the lands in question.

Clarke J made a number of important findings. In granting orders and declarations in favour of the plaintiff and dismissing the defendant's counterclaim he found as follows:

- (1) That the grant was made for the benefit of the public as well as for the benefit of the grantee and that certain obligations lay on the grantee including one to hold the market or fair concerned.
- (2) That the principal public entitlement in respect of a fair or market was a right of coming into the place of the market and frequenting it for the purposes of buying and selling, subject to the limitation that that right could only be exercised when the market or fair was open and could be confined to a specific category of goods where the market or fair was limited, in its terms, to those goods. Persons had, in the course of a fair or market, an entitlement to sell their goods by public auction, (following *Nicholls v Tavistock Urban District Council*^[58]).
- (3) That mere non-user would not, as a matter of common law, extinguish a public right to a market or fair. Subject to the 1995 Act, rights still subsisted in relation to the markets and fairs granted by the charters in this case. *Wyld v Silver*^[59] and *Skibbereen U.D.C. v Quill*^[60] followed.

- (4) That any person who would have an entitlement to benefit from a public right to a market or fair had an entitlement to maintain appropriate proceedings to enforce the right. Such a right was an incident of the public entitlement concerned coupled with the absence of an entitlement on the part of others to excuse the wrong. The fact that the defendants' purpose might not have been, in reality, directed towards the conduct of markets or fairs in accordance with the charter was not a material consideration in considering whether enforceable public rights remained in relation to those lands. *Wyld v Silver* followed^[61].
- (5) That the obligation to hold a market in a general district was an obligation lying upon the owner of the market right concerned and did not attach to any particular piece of land. Such a general market right, not confined by metes and bounds, could not, therefore, be said to apply to any specific piece of ground even if the lands in question had happened to be used for the purposes of the market. *Skibbereen U.D.C. v Quill*^[62] followed. *Wyld v Silver*^[63] distinguished.

A number of paragraphs of the judgment of Clarke J require a more detailed appraisal. Under the heading '*The current status of the letters patent in relation to the lands*', he stated as follows:

"The existence of market rights or fairs held under charter goes back to the Middle Ages. Over the centuries, in these islands, the right to conduct a market or fair was conferred in many locations, most normally, it would appear from the many authorities, on either a local corporation or a local grandee.... While the grant of such rights was seen in English law as being derived from the law of prerogative, it was not suggested in these proceedings that there is anything inconsistent with the constitutional framework of this jurisdiction in the continued existence of such rights and entitlements derived from pre-independence royal grant. (paragraph 27)

Turning of the obligations of the owner of a market place, it is clear that the grant is made for the benefit of the public as well as for the benefit of the grantee and that certain obligations, therefore, lie on the grantee. It was accepted on behalf of the plaintiff that amongst the obligations which rest on the owner of the market and fair rights is one to hold the market or fair concerned. However, three key issues were raised. (paragraph 29)

Firstly, it is said that the obligation does not relate to any specified piece of land unless, perhaps, as it not the case here, the precise boundaries within which the fair or market is to be conducted are themselves specified in the grant (a so called "metes and bounds" grant) (paragraph 30).

Secondly, it is said that the consequences of a failure to hold markets and fairs do not include an entitlement on the part of third parties to require that they be held. Rather, it is said, that the owner of the market and fair rights loses an entitlement to prevent others from holding a competing market or fair (in breach of the monopoly conferred by the patent). In addition, it is said that a failure to hold might result in a forfeiture of the entitlement. However, it is argued that no remedy lies in the hands of a member of the public who might have wished to attend the fair, either as a buyer or a seller, to enforce its continuance (paragraph 31).

As a combination of both of those points it is argued that, even if there remains some residual entitlement on the part of a member of the public to enforce the obligations of the owner of a market right, any such entitlement cannot extend to one affecting any particular lands owned by that person in the absence of the

market rights concerned being defined by charter as being referable to specific identified lands (paragraph 32).'

Under the heading '*Attachment of market and fair rights to land*' Clarke J stated that there did not appear to be a case dealing directly and solely with the issue as to whether there was an 'attachment' of general market and fair rights and obligations to a specific site. The judge referred to a number of cases in this regard and in particular to the case of *Wylde v Silver*^[64] from which he found a number of propositions from the judgments:

'Firstly, the right to hold the fair concerned was determined to be a public right which could not be lost by mere non-user. The basis for that being that no individual could lose a public right which was held for the benefit of the public generally, or a section of it, and indeed, no one generation could lose the public right which ought to inure for the benefit of future generations.' (para 41)

Thus mere non-user will not as a matter of common law extinguish a public right to a market or fair. The judge also found that the fact that the market or fair in question had a different provenance in that it was established by an Act of Parliament rather than by Royal Charter did not make any difference (citing Lynch J in *Skibbereen U.D.C. v Quill*^[65]).

Further, the question arose for consideration as to how such rights are to be enforced and by whom. Clarke J found that any person who would have an entitlement to benefit from a public right to a market or fair has an entitlement to maintain appropriate proceedings:

'Such a right is an incidence of the public entitlement concerned coupled with the absence of an entitlement on the part of others to excuse the wrong.' (para 45).

As the judge stated, the key question comes down to one of whether the rights and obligations in respect of the markets and fairs under consideration in the case can be said to attach to the lands in question:

'It seems to me, therefore, that the obligation to hold a market in a general district is an obligation lying upon the owner of the market rights concerned and does not attach to any particular piece of land. Such a general market right, not confined by "metes and bounds", cannot therefore be said to apply to any specific piece of ground even if the lands in question have happened to be used for the purposes of the market. The fact that it is possible to confer market rights on a person who owns no land within the relevant area makes it clear that the obligations on the owner of the market does not necessarily apply to any particular piece of land' (see Lynch J in *Skibbereen U.D.C. v Quill*^[66]). (para 54).

The case of *Wylde v Silver* was concerned with a fair on a specific piece of land. The judge was not satisfied that any public entitlements that may exist in the case can be said to attach to the lands in question.

As to non-user under the 1995 Act, after analysing the extent of the use of the market and fair rights and obligations over a number of years, the judge was satisfied that none of the fair rights nor the Tuesday or Saturday market rights in Listowel had in fact been exercised for much longer than a ten year period. In those circumstances he would have in any event been satisfied that the rights had been extinguished under

the provisions of the 1995 Act. He was also satisfied that where separate markets and/or fairs are created by a charter or charters, the non-user provision in the Act apply separately to each of them.

As to removal, the judge found that it was abundantly clear on the authorities that the entitlement to remove the market must be exercised within the confines of the area described in the letters patent creating the market or fair in the first case. It seemed clear to him, and indeed agreed by the parties, that any subsisting obligations (whatever they may be) can be validly removed to a suitable location within the parameters defined by the relevant charters (convenient location).

Finally, as to the constitutional issue relating to the Royal Prerogative, and referred to above, the reference made in paragraph 27 of the judgment of Clarke J should be reiterated:

'While the grant of such rights was seen in English law as being derived from the law of prerogative, it was not suggested in these proceedings that there is anything inconsistent with the constitutional framework of this jurisdiction in the continued existence of such rights and entitlements derived from pre-independence royal grant.' (paragraph 27)

^[1] This text is drawn upon passages contained in the final Report of the Royal Commission on Market Rights and Tolls published in 1891, and see Annex, below. See also Fergus Kelly: *A Guide to Early Irish Law*, Dublin – Institute of Advanced Studies 1988, and Michael Ritcher: *The Enduring Tradition* – Dublin, Gill and Macmillan, 1988.

^[2] From the Latin word is from the '*mercatus*', and the Norse word '*markadr*', and see Chapter 1, footnote 1.

^[3] *Manners and Customs of the Ancient Irish*. Vol. III, p 523.

^[4] See O'Curry *Manners and Customs*, Vol. III, pp. 523-547, and Vol. II, pp 39-47, and Introduction, pp. cclv., ccxxvi. Another version (Vol. III., p. 531) describes the markets as follows: 'Three markets there; to wit, a market of food and clothes; a market of live stock, cows and horses, &c.; a market of foreigners and exiles selling gold and silver, &c. The professors of every art, both the noble arts and the base-acts, and non-professionals were there, selling and exhibiting their works to kings; and rewards were given for every work of art that was just or lawful to be sold or exhibited or listened to.'

^[5] The common Irish word for a fair was *aenach*, which appears in a large number of place-names. *Nenagh* is the same word with the addition of the article. The name of *Monasteranenagh* in Limerick seems to connect the fair with some grant to the monastery founded in the 12th century, but it appears from the *Annals of the Four Masters* that there had been a fair there in more ancient times called 'Aenach-beag'. Ballymenagh, 'the town of the fair', occurs in Limerick, Tipperary, and Derry: Lissaneena, 'the fort of the fair', in Cork and Sligo. Ballymeanig in Kerry and Ardaneanig near Killarney and again in the county of Clare, are other forms. *N'as* is a word of similar meaning which has given its name to Naas in Kildare and to several places in Leinster. Joyce, *Irish Names of Places*, I. 203-7. The word 'Enoch' a fair, is also used as a place-name in Galloway: see Sir H. Maxwell's *Topography of Galloway*.

^[6] Diarmuid ó Drisceoil and Donal ó Drisceoil, the Collins Press 2011.

^[7] See *Fairs and Markets of Ireland – A Cultural Geography* by Patrick J O'Connor, Oireacht na Mumhan Books 2003, for an overview of the economic geography of fairs and markets in Ireland. This work makes no reference to the Royal Commission on Market Rights and Tolls which published its Final Report in 1891 after having taken extensive evidence in Ireland as well as Britain. This work also does not make any reference to the monopoly of market and the tort of disturbance. These features were, and still remain, an essential feature of the significant role that markets played in the economic development of Britain and Ireland.

^[8] See LM Cullen, *The Emergence of Modern Ireland* London 1981, 25.

^[9] The conclusions of the Royal Commission have been reproduced in Annex 1, *below*.

^[10] See pp 198 *et seq*.

^[11] 4th Edition, 2003 ed by Dr G Hogan and Professor G Whyte. The following text draws upon parts of this valuable work.

^[12] See *Laurentiu v Minister for Justice* [1999] 4IR 26, at p 91, and see *Webb v Ireland* [1988] IR 353 in which the Supreme Court seems to have accepted that certain common law rules which had been construed as aspects of the Royal Prerogative could have survived in a re-constructed constitutional form if otherwise compatible with the democratic and republican character of the State.

^[13] [1972] IR 241 at 273.

^[14] [1988] IR 353.

^[15] [1994] 1 IR 101.

^[16] See Kelly, *Hidden Treasure and the Constitution* (1988) 10 DULJ 5.

^[17] See *Cork County Council and Burke v Commissioners of Public Works* [1945] IR 561 where the court examined the question as to whether a prerogative right could exist in a republican constitution. A number of early American cases were reviewed with regard to the question of exemption of the State from the application of certain statutes.

^[18] Per Black J in the *Cork County Council* case.

^[19] [2002] IEHC 17.

^[20] [1986] 1 IR 123.

^[21] [2009] 4 IR 631, in which Clarke J stated that '...while the grant of such rights was seen in English law as being derived from the law of prerogative, it was not suggested in these proceedings that there is

anything inconsistent with the constitutional framework of this jurisdiction in the continued existence of such rights and entitlements derived from pre-independence royal grant.' (paragraph 27).

[22] [1983] ILRM 223, see p 199, *below*.

[23] See *Downshire (Marquis) v O'Brien* (1887) 19 LR Ir 380; *Loughrey v Doherty* [1928] IR 103; *Middleton (Lord) v Power* (1886) 19 LR Ir1; *R (Kennedy) v County Court Justices* (1911) 45 ILT 217; *Wynne v Martin Batty's Reports* 110.

[24] See *above* p 21.

[25] It is now provided by s 7(4) of the Casual Trading Act 1995 that where a market or fair right remains unexercised for a period of not less than 10 years then the market right shall stand extinguished. It is also provided by s 7(1) a local authority may acquire any market right in respect of a market or fair either by agreement or compulsorily, see p 192, *below*.

[26] This section had been written with due regard to the annotated version edited by Mr Timothy C Bird BCL, BL, in the Irish Current Law Statutes. The full annotated version of the 1995 Act is included in the Statutes section at p 338, *below*.

[27] SI 267/1995 brought into effect all the sections of the 1995 Act on 1 May 1996, save for ss 6 and 17(1)(b).

[28] See for instance SI 191/2004 which was promoted by the Competition Policy Section of the Department of Jobs, Enterprise, and Innovation within the framework of the Competition Act 2002, as amended. These regulations exempt from the provisions of the 1995 Act the selling of strawberries, raspberries, blueberries, gooseberries, blackberries, loganberries, tayberries and currants and potatoes having loose skins and which have been harvested prior to maturity between 1 May and 30 September in any year. The exemption is only applicable to growers of the products concerned, their servants or agents.

[29] [1986] IR123, but see the position under the 1995 Act and *dicta* in *Simmonds v Kilkenny Borough Council* [2007] IEHC 208, per Smyth J, at p 21.

[30] See the case of *Hand v Dublin Corporation* [1991] ILRM 556, *below*.

[31] It is probable that sub-s (4) was enacted in response to the judgment of Lynch J in *Skibbereen UDC v Quill* [1986] 1 IR 123 where he held that the franchise created by charter and subsequently purchased by the local authority was not extinguished by lack of exercise.

[32] See *Simmonds v Cork County Council* [2002] IEHC 17 (22 February 2002). This was a case where an interlocutory injunction was sought and obtained against a local authority who sought to implement Casual Trading Bye-laws in Bantry, and to regulate the market rights by moving the market traders from Wolfe Tone Square to an area of reclaimed land adjoining the foreshore comprising a car park. It was proposed by the local authority that the market traders would be required to trade from this designated area and to obtain casual trading licences for that purpose. Market and fairs rights in Bantry derived from the Crown and had been exercised since the 17th Century. As stated by Aindrias O Caoimh J in his

judgment, an issue arose as to the effect of this requirement by the local authority which would mean that traders would lose their ancient franchise market rights to trade in the Square and the markets and fairs would be extinguished. '...the power to move a market at law is limited and accordingly the power to regulate casual trading may not extend to defeat proprietary rights of members of the public in the absence of clear statutory authority.' [para 24]

[33] In this context it should be noted that this power on the part of a local authority to extinguish a market is limited to the circumstances where it owns the market rights. Thus the power is of no effect in the case where the franchise right still continues to be held by a private person pursuant to the original grant by way of a royal charter or letters patent.

[34] See s 6A, at p 192, *above*.

[35] For such cases see eg, *Lyons v Kilkenny Corporation* unreported 13th February 1987, (where a byelaw imposing further charges made under the 1980 Act, s 7(8), was held to be *ultra vires*); *Comerford v O' Malley* [1987] ILRM 595 (a case under the 1980 Act as to whether the local authority's designation of an area as a casual trading area was perverse and *ultra vires* – the matter was remitted to the local authority for re-consideration of its decision); *Crosby v Delap* [1992] ILRM 564 (whether the selling of cooked food cooked at place of sale was in breach of the 1995 Act, s 3); *Shanley v Galway Corporation* [1995] 1 IR 396 (where it was held that the local authority had not acted *ultra vires* in designating a specific area as a casual trading area as the 1980 Act, s 5, gave it a very wide discretion. It was also held that the constitutional right to work and earn a living under Art 40, s 3 of the Constitution of Ireland 1937 is not an absolute right and a local authority may impose conditions for the common good. The delegation by the Oireachtas to the local authority to impose conditions on casual trading and its exercise of power was valid and did not contravene natural justice or the constitutional right of the plaintiff to earn a living – following *Hand v Dublin Corporation* [1991] 1 IR 409 and *AG v Paperlink* [1984] ILRM 373. Further Art 40, s 3(2) does not impose upon the State any obligation to oversee the exercise by a local authority of the functions delegated to it by the Oireachtas under the 1995 Act); *Byrne v Tracey and Wicklow Corporation* [2001] IEHC 239 (a case where judicial review was sought of the respondents' decision to designate or retain a previously designated casual trading area known as 'the Square' in Blessington. The basis of this application was that the applicant had a legitimate expectation that the Square would be retained as a casual trading area since it was the ancient and historical trading area of the town granted by letters patent by the Archbishop of Dublin in 1669 to hold markets on Thursdays. The application failed through want of evidence.

[36] [1974] IR 33.

[37] [1983] ILRM 223.

[38] [1986] IR 123.

[39] [1991] 1 IR 409.

[40] [2000] IEHC 121 (2 June 2000), affirmed [2001] IR 517 (15 June 2001).

[41] [2002] IEHC 17 (22 February 2002).

[42] [2007] IEHC 208 (15/6/07).

[43] [2007] IEHC 360 (date).

[44] [1974] IR 33.

[45] Section 71 of the 1849 Act enacted that the Markets and Fairs Clauses Act 1847 (with one exception) was incorporated with and forms part of the 1849 Act.

[46] [1983] ILRM 223 referred to in *Byrne v Tracey and Wicklow Corporation* [2001] IEHC 239, see footnote 35. In *Byrne* a judicial review was sought of the respondents' decision refusing to designate or retain a previously designated casual trading area known as 'the Square' in Blessington. The basis of the review sought was, inter alia, that the applicant had a legitimate expectation that the Square would be retained as a casual trading area from which he could continue to trade since it was the ancient and historical trading area of the town granted by letters patent by the Archbishop of Dublin in 1669 to hold markets on Thursdays 'in pursuance with ancient custom'. It was held by Frederick Morris J that no evidence had been tendered other than one page of the purported grant, and it was not known whether the market right was ever used and if so by whom, nor was there any evidence offered of the status of the right at the time of the hearing. Further, there was no sufficient evidence to establish a presumption of the existence of a market by immemorial user from which a long grant could be presumed, see *DPP (Long) v McDonald*, above. Thus the applicant had failed to establish the existence of a market right in Blessington.

[47] [1986] 1 IR 123, referred to in *Byrne v Tracey and Wicklow Corporation* [2001] IEHC 239.

[48] This exemption was expressly not re-enacted in the 1995 Act, see the judgment of Smythe J in *Simmonds v Kilkenny Borough Council* [2007] IEHC 2, at p 21 where he stated that the 1995 Act '... very pointedly and deliberately removes as an exclusion from the expression 'casual trading' in section 2(2) selling at a market or fair in pursuance of a market right.'

[49] [1991] 1R 409.

[50] [1976] 1WLR 1052.

[51] 'The State shall, in particular, by its laws protect as best it may from unjust attack and in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.'

[52] [2001] 2 IR 517.

[53] Per Keane CJ at pp 524–525, affirming the decision of Finnegan J at first instance [2000] IEHC (2 June 2000).

[54] (1887) LRIR 380, at p 390.

[55] [2002] IEHC 17 (22 February 2002).

[56] [2007] IEHC 2, and see ante Chapter 8, p 56.

^[57] [2009] 4 IR 631.

^[58] [1923] 2 Ch. 18.

^[59] [1963] 1 QB 169.

^[60] [1986] IR123.

^[61] [1963] 1 QB 169.

^[62] [1986] IR 123.

^[63] [1963] 1 QB 169.

^[64] [1963] 1QB 169.

^[65] [1986] IR 123.

^[66] *Ibid.*