

Judgment Title: Simmonds v Kilkenny County Borough & ors

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Judgment by: Fennelly J.

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THE SUPREME COURT

Record No 19731P

**Fennelly J.
Finnegan J.
O'Donnell J.**

BETWEEN:

TOBY SIMMONDS

PLAINTIFF /APPELLANT

-AND-

KILKENNY BOROUGH COUNCIL

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Fennelly delivered the 8th day of June 2011.

1. This case is about market rights in the City of Kilkenny. The legal claim involves the examination of ancient charters, nineteenth century legislation and the practice of markets at the Market Yard and the Parade respectively. The Market Yard, established after 1861 seems to have ceased to operate as an open market in any real sense. It is now principally used as a car park. The respondent (whom I will call the Borough Council, formerly Kilkenny Corporation) has designated an area on the Parade under the Casual Trading Act, 1995. The appellant (whom I will call Mr Simmonds) campaigns for the recognition of market rights. He wishes to trade on the Parade but does not wish to apply for a casual-trading licence.

Facts

2. Mr Simmonds has been running a market business since some time in the early 1990's. He sells olives, mozzarella and fetta cheese, pesto, hummus, beans, sun-dried tomatoes and the like, in short, a wide range of Mediterranean and other European foods. He prepares them freshly for the market. He prepares marinades; he uses his own herbs. He imports from southern Europe and North Africa. Clearly, Mr Simmonds has built a successful business in high-quality products.

3. He operates directly or through franchises, partnerships or other arrangements. He started out at the English Market in Cork and has traded at markets on the relevant market days in Galway, Bantry, Macroom and Ennis among other towns. He has licences under the Casual Trading Act in Macroom and Galway. He also trades at Temple Bar and other markets in the Dublin area.

4. In 1995, Mr Simmonds sent an employee, a Mr Danny Morris to set up in the Market Yard in Kilkenny. Mr Morris, who did not give evidence, appears to have been approached by a traffic warden who permitted him to remain that day but, as I read the very brief evidence, suggested that he could not come back. By that time, the Market Yard had been converted into a car park, apart from a part of it which had been let to the Irish Countrywoman's Association. Mr Simmonds understood that he had been told not to be there.

5. Mr Simmonds next approached what he described as "a shopping centre, the Market Yard Shopping Centre." He struck a deal and paid £20 a week for about five months in 1995 but, as he said in evidence, "it didn't work: ...we didn't really do enough business and the situation was wrong." He added: "We pulled out." Mr Simmonds acknowledged that the Market Yard had been given over to a car park and that the only place where one could set up a market stall was on the surface of the car park.

6. Whatever the legal position regarding the historic market right to trade in the Market Yard, it is clear, on the evidence, that Mr Simmonds evinced no intention or wish to trade there after the desultory efforts in 1995. It is significant that he found that his trade there under the Shopping Centre agreement was unsuccessful and that, in his view, the situation was wrong.

7. Mr Simmonds had no further contact with Kilkenny until September 2002, when he wrote to Kilkenny and a number of towns enquiring generally about historical markets and market rights. In the case of Kilkenny, he stated that he understood that the County or Borough Council had acquired most market rights and that a number had been extinguished. The Borough Council replied on 17th September 2002, stating that it had not acquired market rights and that it had no records relating to the purchase or extinguishment of market rights.

8. In July or August 2003, Mr Simmonds went to trade in Kilkenny, this time on the Parade. In evidence, he said that the Parade was "the most apparent area in Kilkenny to hold a market..; if you want to have a market that is successful it would be the most obvious place." He sought to trade on a Thursday, which he acknowledged to have been a mistake, the correct day being Saturday. On 3rd August 2003, he wrote at some length to the Town Clerk. He noted that there were not at that date any Casual Trading bye-laws in Kilkenny. He asserted that the market rights granted to Kilkenny "over the past 800 years are alive and well." He claimed that they extended "from the Castle, down to what was Croker's Cross and up to what was the Market Cross." The Market Cross formerly stood in the High Street some distance down (in the direction of Parliament Street) from the Tholsel. He said that the Casual Trading Act could not be used to regulate market trading in Kilkenny and: "The Council will waste months maybe years trying to contest our position and in the meantime there will be a totally unregulated market all around the Parade and perhaps down and around the other market area (Dunne's Stores)." This last is a reference to the area of the Market Yard. He suggested that he meet the Council to "thrash out some form of regulation for the Parade."

9. It is material to note, at this point, that there had, at that time, been no market at the Parade, other than a market for the sale of hay, straw and coal up to about the 1920's. On some date, unspecified in the evidence, Mr Simmonds was approached by an official of the Borough Council stating that he was acting in violation of the Casual Trading bye-laws by trading at the Parade. According to Mr Simmonds, the market on the Parade grew to some seventeen traders by the end of the year 2003.

10. At this time, the Borough Council were considering the making of bye-laws under the Casual Trading Act. Mr Simmonds wrote on 31st October 2003 claiming that "market rights exist all over the ancient Town of Kilkenny." He asked that the Borough Council "acknowledge that the Parade was at numerous times in Kilkenny's past a location for trading in the city?"

11. The Borough Council adopted Casual Trading bye-laws on 8th December 2003 and invited Mr Simmonds to apply for a casual trading licence, which he declined to do, because, he claimed that he had market rights. The Council designated a separate railed off part of the Parade, the Mayor's Walk, containing originally fifteen bays for casual trading under the Casual Trading Act. The market day was Thursday. Almost all of those who had been trading on the Parade in 2003 applied for casual trading licences. Some twenty places, increased to twenty five, were provided. The learned trial judge found as a fact that the Borough Council sought to find a consensus with the traders in respect of location, facilities and terms.

12. Mr Simmonds returned to trade on Saturdays at the Parade in February or March 2004. Ultimately, he was prevented from trading. On 27th March 2004, the Gardaí intervened and seized his stall and produce.

13. In a letter dated 26th November 2004, after an interval unexplained in evidence, Mr Simmonds wrote to the Borough Council as follows:

"I am intending to trade with my market stall in the Parade, Kilkenny commencing on Saturday 11th December and every Saturday from there on. I am entitled to do so because of the Market Rights that exist on the Parade. If you have any reason why I would be prohibited from trading under market rights, I would appreciate if you would let me know before Wednesday 8th December. If I receive no reply I will assume that I am free to trade as I wish."

14. The Borough Council replied on 29th November 2004 stating that casual trading on the Parade on a Saturday was in breach of the bye-laws and disputing Mr Simmonds' view about market rights.

15. The net position on the ground was that the Borough Council had established a casual trading area. Mr Simmonds, asserting a market right, was refusing to apply under the Act. He claimed that the Casual Trading legislation blocked market development all over the country. He objected, in particular, to the obligation to apply for an annual licence, as distinct from paying per diem. He also disliked the designated area at Mayor's Walk because it was separated from the Parade.

16. Mr Simmonds issued his proceedings on 13th December 2004. He relies on a market right created by the Kilkenny Markets Act, 1861 and/or by Crown Grant of franchise and/or by virtue of the doctrine of lost modern grant and/or as a common law right having been exercised since time immemorial. He seeks a declaration that there exists a public right of concourse of buyers and sellers for the buying and selling of vendible commodities in the Borough of Kilkenny. The essence of the dispute between Mr Simmonds and the Borough Council is that he claims that he is entitled to set up his market stall at any place in Kilkenny "as he may choose in accordance with law." In fact, he has chosen the Parade and says that he has a legal right to sell there.

17. At a late stage of the hearing of the appeal, his counsel indicate a willingness to trade at any place in Kilkenny, in particular the Market Yard, in which the Court might find that the market right continued to exist. Nonetheless, I am satisfied that Mr Simmonds has consistently claimed the right in fact to trade at the Parade and that he had no interest in trading at any other place in Kilkenny after his unsuccessful attempts to trade in the Market Yard in or about 1995.

Markets in Kilkenny

18. The High Court heard evidence from Dr Donal O'Drisceoil, a historian and writer and lecturer in history at University College Cork. He is a specialist in the history of markets in Ireland. Dr O'Drisceoil examined historical records, including royal charters, two Royal Commission reports of the nineteenth century, minute books of the Kilkenny Corporation and its markets committee and press reports.

19. There were markets in Kilkenny from the earliest times. The earliest recorded market right was granted to the Bishop of Ossory for Irishtown in 1245. The right to hold markets and fairs in Kilkenny was granted to a new corporate body to be known as the "Sovereign Free Burgesses and Commons of the...Town or Borough of Kilkenny and to their Successors for Ever" (Kilkenny Corporation) by a

charter of King James I dated 16th October 1608. The Corporation could hold weekly markets on a Wednesday and Saturday with power to hold a Court of Pye Powder. There were other royal charters. One of 1609 gave Kilkenny the status of a City. The dates on which fairs and markets were permitted were varied over the centuries and are immaterial to the present appeal. The Corporation had the monopoly of holding markets.

20. The Royal Commission on Fairs and Markets reported in 1853 and confirmed the continued existence of the fairs and markets subject to the Royal Charter, though the collection of tolls but not customs charges had fallen into desuetude. There was no market house, although the area under the Tholsel (toll house) in High Street was considered the market. There was no market accommodation; fairs and markets were held in the public streets, including the Parade; an Ouncil House was recorded as being there about 1851; there was very little regulation or order; As Dr O'Drisceoil put it, there were "markets here, there and everywhere." The word, "ouncil" or "ouncel" is obscure. It does not appear in any dictionary even in the longest version of the Oxford Dictionary. Perhaps it is unique to Kilkenny. From context, it clearly means a weighing machine.

21. Local officials were unanimous in supporting the provision of a properly regulated market space. In 1859, the Corporation established St John's Green for the holding of fairs, i.e., for the sale of livestock. Livestock fairs have, in more recent years been replaced by marts and are irrelevant to the present matter.

22. At a meeting of 14th November 1860 it was resolved by Kilkenny Corporation (the Mayor, Aldermen and Burgesses of Kilkenny), that steps should be taken to obtain a private Act of parliament to authorise the establishment of a new general public market at Parliament Street, which is the street beside the Market Yard. Notice was published in the Dublin Gazette on 23rd November, 1860.

23. The Kilkenny Markets Act, 1861 resulted. That Act recited that Kilkenny Corporation were or claimed to be the owners of all the markets in the City of Kilkenny, except the meat market and that the present markets for the sale of agricultural produce were insufficient. It recited that it was "expedient that the Sale of all such Articles on the public streets of the said City should be prohibited." It was then recited that it would be "advantageous to the Inhabitants of the said City.....if the Corporation were empowered to erect a new General Market in the City....."

24. The declared objective of the Act was the establishment of a new single general market to be located at a designated place. Section 14 is specific as to the nature of the market which the Corporation is empowered to establish:-

"... A General Market for the sale of meat, fish, poultry, game, butter, eggs, bacon, corn, grain, turnips, fruit and all other agricultural and garden produce, goods, wares, merchandise and other marketable commodities ..."

The general words "and all other agricultural and garden produce, goods, wares, merchandise, and other marketable commodities" require to be construed ejusdem generis with the particular words which precede them. This market is described throughout the Act as "the General Market". Section 2 of the Act defines "markets" as meaning not only the General Market "but all Markets and Market Places now under the Control or from Time to Time under the Control of the Corporation." Both section 2 and section 5 recognise that there may exist markets and market places other than the General Market. This is also clear from sections 26 and 27 of the Act.

25. The new General Market was to be completed within five years (section 18). Section 27 becomes the key provision. It provides, firstly, for the removal of all existing markets (except the meat market, which does not concern us) to the General Market as follows:

"So soon as the said General Market shall be constructed and shall be completed and opened for public Use, it shall be lawful for the Corporation to remove all the present Markets and Market Places.....to the General Market, and thereupon all the several

Markets or Market Places,.....within the limits of this Act shall be discontinued and extinguished....."

26. Section 27 then dealt with the elimination of market tolls, "except the Rents and Tolls authorised to be taken under the provisions of this Act..." There followed a proviso, upon which the Borough Council places particular reliance and which will need further consideration. It reads:

"Provided also, that it shall be lawful for the Corporation to retain and use for the Purposes of this Act, and as a Market or Markets thereunder, any Market or Market Place now held or used by them."

The remainder of the Act of 1861 provided, in considerable detail, for the conduct and regulation of markets in Kilkenny. The Corporation had power, after the new General Market was opened, to keep order there or in any Market Places under their control (section 28) The power conferred by section 28 is to keep order in the General Market and other market places for the sale of "stock, goods, provisions, articles or commodities specified in Schedule (C) to this Act annexed." Schedule C sets out maximum rates of tolls and includes tolls in respect of produce not falling within the produce set out in section 14 of the Act and for the sale of which the general market was established. Thus maximum rates of tolls are prescribed inter alia for the following:

"For every cartload of hay or straw drawn by one horse or other animal 4d.

For every horse or other animal, for every additional horse or other animal 2d.

For every cartload of native coal or of iron, lead, copper or other mineral 6d.

27. Articles sold or exposed for sale were to be weighed or measured at the public weighing places provided, in accordance with precise rules and subject to penalty (section 31). The Corporation was given power to take tolls for the use of the markets (section 32) and for use of the weighing machines (section 33). The Act provided for the vesting of Tolls in the Corporation (section 35). Subsequent sections provide for the banking, application and accounting for Tolls collected.

28. Once the new General Market was opened for public use, as it was in about 1862, it was the clear intention of the Act that, subject to specified exceptions, all markets, except those retained pursuant to the proviso to section 27, would move into and take place in that Market, which was located in what became known as the Market Yard. The new markets were opened in or about 1862 by the Mayor, Alexander Colles, an event which is recorded on the City Sword.

29. A general market was held on Saturdays with a butter market on Fridays. Tolls were levied. Section 30 made it an offence to sell elsewhere. In other words, it was not lawful, subject to those exceptions, to trade outside the Market Yard, which necessarily included the Parade, unless the Corporation retained and used a market at such other places.

30. The minutes of evidence taken and recorded by the Royal Commission on Markets and Tolls, which reported in 1891, mentions that markets and lands attached, clearly meaning the Market Yard, had been established by the Corporation at a cost of £5,000, borrowed but paid off in 1882. It records:

"The Markets are held in a spacious enclosure, convenient to the principal street in the city. In the enclosure various sheds are erected for potatoes, corn, vegetables, roll butter, eggs fowl etc."

The minutes also record:

"Marketable commodities are not allowed to be sold outside the market precincts."

31. So far as the use of the Parade was concerned the evidence was:

"An ouncil is erected in the market place and another on the Parade, where the hay, straw and coal are sold. This "Parade" forms portion of the public thoroughfare, but is a wide space of ground, and hay, coal are exposed."

From the accounts exhibited in the report it would appear that a considerable amount of business was transacted at the Parade. The amount received from the ouncil at the general market (which had up to five scales) for the six months to 1st March 1886 was £18 10s 5 ½d whereas the amount received

from the Parade ouncil was £79 8s 9d. For the six months to 1st September 1887 the amounts were £14 12s 1d and £70 4s 10 ½d respectively.

32. There is evidence, in the form of old photographs, of hay being sold on the Parade in 1905 and of tolls being charged at least until the 1920's. Apart from the events giving rise to the present case from 2003, there is no evidence of produce other than straw, hay and coal actually being sold there at any time since 1861. In particular, there is no evidence of a market at the Parade for produce for which the general market was intended and that would include the foodstuffs sold by Mr Simmonds. Mr Donal O'Brien, former Town Clerk (up to 2005) gave evidence for the Borough Council to the effect that there had been no trading on the Parade within his memory. The learned trial judge found as a fact that, after 1861, there was no market at the Parade for the sort of merchandise for which Mr Simmonds contends, that any market outside the Market Yard had died out in the 1920's and that there had been no casual or street trading in Kilkenny for quite some time before 1980.

33. Two other aspects of the evidence should be mentioned. Mrs Susannah Crampton, the granddaughter of the distinguished Kilkenny writer, Hubert Butler, gave evidence of picking a wide range of fruit and vegetables at her grandparents' home at Maiden Hall, Bennetsbridge when she was a child and taking them for sale in the Market Yard on Saturdays. The Butlers lived from the produce of the market garden. This occurred in the 1980's, but the evidence suggests that this was a long established practice. Many other people were selling there.

34. Mr O'Brien gave evidence that the Borough Council had re-roofed a number of sheds in the Market Yard in the 1990's. These are let to country markets where produce is sold on two days per week. Rent is paid to the Borough Council, but no tolls have ever been levied.

35. The old market yard is now covered by a car park and ancillary buildings. Part of it has been sold to Kilkenny County Council for a sewage treatment plant and part to the O.P.W. The old market buildings such as they were have now disappeared. There were at the time of the trial in the High Court five sheds adjacent to the court house where the "Country Market" is held weekly under the auspices of Country Markets Limited a company formed by the Irish Countrywomen's Association.

36. The Borough Council initially took no action to implement the Casual Trading Acts. As Mr O'Brien explained, there was no need, as there was no casual trading until about 2003. Mr O'Brien accepted that the Borough Council made no inquiries as to the existence of market rights. Neither the Borough Council nor the Corporation have ever taken legal steps to extinguish market rights.

The High Court judgment

37. I have already referred to a number of the findings of fact made by Mr Justice Smyth in his judgment of 15th June 2007. As he summarised the matter himself, there were only two areas for trading in Kilkenny other than fixed places such as shops. They were:

- The sheds in the Market Yard let for country markets;
- The designated casual-trading area at the Parade.

38. The learned trial judge held against Mr Simmonds' claim to have the right to trade in Kilkenny, in particular at the Parade, by virtue of a historic market right. He held:

1. Any rights under the Charter were removed to the Market Yard by virtue of the Act of 1861 and thereupon extinguished; there was, therefore, no right to trade at the Parade or at any other place in Kilkenny under the Charter of James I;
2. After 1861, there was no market at the Parade for any merchandise of the type Mr Simmonds wishes to sell; he has no market rights at that location or, indeed, at any other place in Kilkenny;

3. Even if, in the alternative, Mr Simmonds has a market right at the Parade, it is subject to regulation and requires a casual-trading licence; this is because selling at a market or fair will still require a casual trading licence if it comes within the definition of casual trading;

4. If the market rights in Kilkenny survived until the commencement of the Casual Trading Act, 1995, they were, in any event, extinguished immediately pursuant to the retrospective effect of section 17(4) because they had not been exercised for 10 years prior to that date.

The appeal

39. Mr Simmonds has submitted very extensive written submissions with reference to a wide range of authority concerning the law of markets. The following summarises the essential points.

40. The right to trade in a market is a common law entitlement. According to Halsbury's Laws of England, 4th ed., at para 623: "At all times when a market ought lawfully to be held, every member of the public has, of common right, the liberty to enter and frequent the market-place for the purpose of bringing there and exposing for sale and selling, or of buying, such commodities as are vendible in the market."

41. The public right of trading at markets and fairs is governed by a self contained statutory code which includes the Market and Fairs Clauses Act, 1847. Market rights are not extinguished by neglect or non-user. Any interference would be unconstitutional. (per Henchy J. in the Supreme Court in *DPP (Long) -v- McDonald* (1983) I.L.R.M. 223).

42. The general market of Kilkenny was a consolidation of a plethora of market rights held by the Corporation of Kilkenny into a single general market to be operated pursuant to the provisions of the Kilkenny Markets Act, 1861. The Act confirmed the right. The Act of 1861 did not effect automatic removal and extinguishment of the market right. It merely conferred the right on Kilkenny Corporation to do so. That body took no step to extinguish the Parade market right.

43. The Market Yard had been turned into a car park. Thus the public are entitled, instead, to exercise the statutory market right in the Parade: if a market owner causes a reduction in the space available to the public, the public is entitled to buy and sell in the neighbourhood of the market.

44. Furthermore, there is a fundamental distinction at law between market trading, street trading and casual trading. The Casual Trading Act, 1995 is the statutory code governing that which was once described as "hawking", and was formerly governed by the Hawkers Act, 1888. The Hawkers Act, 1888 was repealed by the Casual Trading Act, 1980, which in turn was repealed by the Casual Trading Act, 1995. It is an error to seek to apply the provisions of one code to activities which are governed by another. It is submitted that the purpose and intention of the Casual Trading Act, 1995 is not to govern market trading except insofar as the provisions in respect of acquisition and extinguishment of market rights are to be found in Sections 7 and 8.

45. Mr Simmonds challenges the conclusion of the learned trial judge that the market right had been extinguished by non-user for ten years by virtue of the provisions of section 17(4) of the Act of 1995. Mr Simmonds and others had in fact and, in his case by the bringing of these proceedings, sought to exercise the right on a number of occasions within the ten-year period.

46. The Borough Council submits that a local Act for the regulation of a market or fair created by grant can extinguish the franchise and substitute the statutory right: *Manchester Corporation -v- Lyons* (1882) 22 Ch D. 287; *Mayor etc. of Windsor -v-Taylor* (1899) AC 41. The learned trial judge was correct to hold that as a matter of law the rights under the charter of James I of 1609 were removed to the market yard by the 1861 act and thereupon extinguished. Accordingly, there is no longer a market right to trade at the Parade or at any other place in Kilkenny under the charter.

47. After the Act of 1861, trading was confined to the market yard with the exception of licensed hawkers and pedlars and the use of the ouncel at the Parade. Trading in the old market in the Market Yard ceased in the 1920's.

48. Although, at common law, a market right could not be extinguished by mere non user, this has changed as a result of section 17(4) of the Casual Trading Act, 1996. It is also claimed that the Borough Council has established a casual-trading area and the the Casual Trading legislation governs any exercise of a market right such as is claimed by Mr Simmonds.

Analysis and conclusion

49. It is fundamental to any examination of Mr Simmonds' claim to ascertain whether he has any valid claim to exercise a market right in Kilkenny. For that purpose, I commence by accepting the hypothesis that a market right is a common-law right and that it is not extinguished by non-user. It is only if Mr Simmonds' right is established that it will be necessary to consider the relationship between market rights and the operation of the Casual Trading Act, 1996.

50. To my mind the central question to examine is the effect of the Kilkenny Markets Act, 1861. Clearly there were markets and market rights in Kilkenny prior to that date. I have summarised the principal provisions of the Act above. Mr Simmonds' main argument is that the Act did not effect any removal of market rights in Kilkenny to the Market Yard, in the absence of evidence of some decision to that effect by the Corporation. More broadly, he challenges the conclusion of the learned trial judge that the market right was extinguished and converted into a statutory right.

51. There cannot be any doubt about the general purpose of the Act. The Royal Commission Report and the action taken by the Corporation to promote a special Act of Parliament, advertised in the Dublin Gazette on 23rd November 1860, demonstrate that purpose as being to "authorize the establishing, erecting, managing and maintaining one new general public market and market-place, in the City of Kilkenny, at Parliament Street, heretofore known as the Coal Market..." The terms of the Act are consistent with this objective.

52. The preamble mentions the insufficiency of the existing markets, the expediency of the prohibition of sale of such articles on the public streets and that it would be "advantageous.....if the Corporation were empowered to erect one new General Market in the said City..."

53. Section 8 declares that "no Market other than the Markets now vested in the Corporation or to be provided by and vested in the Corporation under the provisions of this Act.....shall be held within the Parliamentary Boundary of the City of Kilkenny..."

54. Section 14 confers compulsory purchase powers over lands specified by reference to a "Book of Reference" and power to construct and establish there a "General Market..." Section 18 provides that the General Market is to be completed within five years of the passing of the Act.

55. Section 27, quoted above, but now repeated, provided:

"So soon as the said General Market shall be constructed and shall be completed and opened for public Use, it shall be lawful for the Corporation to remove all the present Markets and Market Places.....to the General Market, and thereupon all the several Markets or Market Places,.....within the limits of this Act shall be discontinued and extinguished....."

56. Section 30 makes it an offence, after the "General Market is opened for public Use," to sell goods for which tolls are to be paid in the General Market. The various provisions of the Act, summarised at paragraphs 24 to 27 above show that the Corporation were given extensive new powers and subjected to a wide range of duties concerning the conduct of markets in Kilkenny.

57. The effect upon the continued existence of ancient franchise rights, usually granted by royal charter, of new market legislation not dissimilar to the Kilkenny Markets Act of 1861, was considered

in a number of cases in the nineteenth century, some of them cited by the learned trial judge. In some of these cases, the town corporation sought to assert its continued right under the former common-law regime.

58. In *Corporation of Manchester v Peverley* (decided 24th April 1876 but reported as a footnote to *Manchester Corporation –v- Lyons*, cited above), Little, Vice-Chancellor of the County Palatine of Lancaster, considered the effects of the Manchester Market Act, 1846 on prior manorial franchise rights and ruled (see page 294 of the report):

“But if after such a grant has been made by the Crown the three estates which conjointly constitute parliament step in, whether on the solicitation of the grantee or otherwise, and by their joint act create the same rights or larger or different rights of the same nature and character in favour of the grantee, it seems to me that of necessity these parliamentary rights, emanating as they do from a paramount authority, must supersede those which the grantee was previously holding from the Crown alone, and that, after the passing of such an Act there can be no continuing tenure by the grantee under his original title, nor a continuance of his prior accountability on foot thereof to the Crown.”

59. Little V.C. ruled that, on the proper construction of the Manchester Market Act, 1846 it had not been intended by Parliament that the new parliamentary or, as we would say, statutory rights should have “concurrent co-existence with those previously existing rights...” The Court of Appeal approved this statement in its decision in *Manchester Corporation –v- Lyons*, already cited, where Jessel M.R. addressed, at page 301, the question whether the “ancient franchise belonging to the lords of the manor of Manchester to hold a market [was] still an existing franchise.....or whether it had been extinguished...” He concluded, at page 306, following detailed review of the terms of the Act, and approving the judgment of Vice Chancellor Little, that there was “a new market.....and that the old franchise was intended to be extinguished.” Bowen L.J. agreed that “the old franchise has disappeared under the Markets Act.” The Act considered in that case did not expressly provide for extinguishment.

60. *Mayor etc. of Windsor –v-Taylor*, cited above is another example of a new market Act superseding the old market right. As Lord Halsbury, L.C. put it, at page 45, the result was that “the person possessed of what was the new parliamentary right might act in defiance of the lord of the franchise.”

61. Section 27 is the provision which, on Mr Simmonds’s submissions, merely provides a power for the Corporation to extinguish but which it has not exercised. It is submitted that there is no evidence whatsoever that the Council exercised its power to remove and extinguish. It should be noted that the section did not, however, confer a power on the Corporation to extinguish market rights. It conferred a power to acquire land and to construct and establish a market thereon. Then the Corporation had power to remove the market to that place. Thereupon, the extinguishment of all existing markets was, as the section provided, to “be discontinued and extinguished.” That came about by operation of the statute and did not depend for its effect on the Corporation exercising any decision-making power of extinguishment. The language used is strong, clear and unambiguous: “all the several Markets and Market Places shall be discontinued and extinguished.” These terms are, if anything, clearer than the Manchester Market Act.

62. Subject only, therefore, to it being established that the markets were in fact moved to the Market Yard, they were otherwise discontinued and extinguished. I cannot entertain any doubt whatever that the markets were, in fact, moved to the Market Yard. The minutes of the Royal Commission and the inscription on the City Sword show that this happened in 1862. The moneys raised and paid off, the old photographs and the history and memory of Kilkenny all converge to confirm this. The evidence of Ms Crampton shows that, within living memory, the market for fruit and vegetables took place in the Market Yard.

63. Section 27 also contained a proviso:

"Provided also, that it shall be lawful for the Corporation to retain and use for the Purposes of this Act, and as a Market or Markets thereunder, any Market or Markets thereunder, any Market or Market Place now held or used by them."

64. Here, I am satisfied, lies the explanation for the trading in hay, straw and coal on the Parade. The records show that the Corporation erected and maintained an ouncil there, but, as found by the learned trial judge and, as I have already said, there is no evidence whatever of the sale on the Parade after 1861 of any other merchandise prior to the arrival of Mr Simmonds, commencing in 2003. The obvious conclusion from the facts is that the Corporation continued to provide a market but only for hay, straw and coal at the Parade until even that trade died out in circumstances about which there has been no evidence at all.

65. Mr Simmonds has not been able to establish any market right to trade in the fine foods in which he deals on the Parade. He has, of course, the right to apply for a casual-trading licence, but that is not something in which, to date, he has expressed any interest, though he has obtained such licences in other towns.

66. It emerged at a late stage of the hearing that Mr Simmonds would be willing to accept a declaration of his right to trade in the Market Yard. I am satisfied that he should not be permitted to alter his position in that way. Following early initial approaches in 1995, Mr Simmonds has never expressed the slightest interest in trading there. Indeed his principal reason seems to have been commonsense business ones. He did not do well there in 1995 and thought the location unsuitable. He has never expressed any interest in the Saturday markets which take place there, even if under a different legal regime. If it were to be the case that he had a right to trade in the Market Yard, the Corporation should have had the opportunity to respond. He has never asserted a right to trade in the Market Yard.

67. I have come to the conclusion that the appellant has not established any market right to trade at the Parade. I would uphold the decision of the learned trial judge at numbers 1 and 2 in paragraph 39 above. Thus, it is unnecessary to decide any of the other legal issues in the case. I express no view about the status of market rights in relation to the Casual Trading Act. It is unnecessary to decide whether market rights may be regulated or are subject to the Casual Trading Act, for the simple reason that Mr Simmonds has not established that he has any such right. Nor is it appropriate to consider the effect of section (17(4) of that Act on the facts of the present case.

68. I am satisfied that Mr Simmonds is not entitled to any declaration that he holds any market right. I would dismiss the appeal and affirm the decision of the High Court.