

# Some Problems in the English Law of Markets and Fairs

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If a foreigner visiting England in 1898 [1] were to have asked that famous man on the Clapham omnibus to describe an English market our visitor might have heard a colourful evocation of a busy market place in which crafty market traders who enthusiastically hawked their goods in a rich vernacular were always assured of a crowd, despite the sometimes shoddy nature or dubious origin of the goods sold; or our visitor might have heard how country folk, rising long before dawn, drove their cattle into market pens hours before the descent of the auctioneer, and of the astute farmers who might bid for the best beasts with a sly nod, or a surreptitious hand on a mutton chop whisker. He might have heard of charters granted to long deceased lords of the manor whose only modern memorial is perhaps a recumbent statue in a country church; the tale might have been of hiring fairs, where masters hired their servants at Michaelmas for the coming year, or of the great sheep fairs where there were gathered not only the myriad sheep whose incessant bleating denied all sleep to the inhabitants of Weyhill or Marlborough but also the drunken husbands who sold their wives [2]; and the Celtic drovers who counted their money in dark corners and eavesdropped on others' news to take back as gossip to the barren mountain farms in their homelands of Ceredigion or Gwynedd, Dwyfor or Plynlimmon. And so our visitor would have heard of a rich trading culture running through the veins of English history from the days of the Roman legion into modern times.

But if our visitor, after stepping from the Clapham omnibus, had shared a hansom cab with the learned jurist, Chitty, he would have received a very different answer to his question. A market, Chitty would have explained, is a right of property, an incorporeal hereditament. It is an exclusive or monopoly right to conduct a market which allows the owner of the property right to exclude all competitors.[3] Chitty would have added that the English courts may sometimes enforce this right by closing down those unlawful markets which inflict damage upon or "disturb" the established lawful market.[4]

If our visitor, in marvelling at the different answers he had received, had commented in his diary how strange it was that a nation so committed to free trade and competition as England should perpetuate the monopolies of ancient times, with how much more astonishment might the reader of that diary today learn that these monopolies are vigorously continued into an era in which de-regulation and competition are an article of faith with the government, and the supreme and directly applicable articles 85 and 86 of the Treaty of Rome mandate a prohibition on certain anti-competitive behaviour? This article proposes to ask questions about the existence, origin and extent of these market rights and to indicate some of the inconsistencies in market law that remain unresolved despite the long attention devoted to this chapter of the common law. It will also examine the recent failed attempt of central government to reform market law and suggest that, even in an age of free markets, such monopolies have some purpose.[5]

## Which Markets are Lawful?

It is at this point that a definition can be ventured. A market (whether lawful or unlawful) arises in law whenever there is a "concourse", or gathering, of buyers and sellers.[6] A market can be distinguished in fact (but not at common law) from a fair. The former is a frequent trading event; it normally takes place weekly, but may be held monthly. In contrast, a fair, properly so called, is usually an annual event, the origins of which sometimes lie in the village festival held to celebrate the day of the patron saint of the village church. As a matter of law both markets and fairs are markets; each is *capable* of being a monopoly.

But a *caveat* must immediately be entered. Not all markets and fairs are potential monopolies. English law distinguishes markets and fairs [7] according to their origin. Only lawful markets [8] are endowed with legal incidents which are known as the *rights of market*. It is the principle of these rights which entitles the market owner to the undisturbed enjoyment of the right of market, thus giving rise to the power to prevent the operation of certain rival markets.[9] "Informal" markets (which are not "lawful") are normally the product of entrepreneurial initiative where market traders operate because it is profitable to do so. They lack the legal authority of a "lawful" market and may "disturb" a lawful market conducted in the locality thereby becoming liable to closure by injunction.[10]

To acquire the necessary legal pedigree, the lawful market must be created either by a franchise, granted under the royal prerogative, (by charter or by letters patent) or under statute.[11] Market rights may also arise by prescription

or immemorial usage.[12] As a matter of law, Sunday car boot sales,[13] charitable bazaars, some auction sales, and even indoor "shops" consisting of individually partitioned units,[14] are all *capable* of fulfilling the legal definition of a market. Unless they are operated under the authority of a charter or statute ( and, of course, few are) they are "informal" and subject to the monopolistic rights of others.

A sham device intended to disguise what is in substance a rival market will not avail the would-be organiser: the operation of the rival may nevertheless result in a disturbance of a right of market and so be unlawful even if the rival market goes by another name. Thus labelling the activity as a "club", for example, will not prevent the activity from being closed down if the court is satisfied that it is, in law, a market.[15] This is so, it will be recalled, wherever there is a concourse or gathering of buyers and sellers a definition which is so remarkably wide as to give rise to rival (and so vulnerable) markets in many unintended circumstances, such as, for example, where certain kinds of auction are arranged.[16]

Markets can earn significant profits for the organiser. These derive from the charges made to traders (and sometimes buyers) who come to the market to buy and sell. A brief survey of these charges may be ventured since it is this lucrative revenue which provides the real incentive to market creation and operation.

## **Stallage or Rent**

It is a fundamental principle of the common law that a franchise or statutory (ie lawful) market is open to all members of the public to come and buy and sell. This rule does not apply to informal markets. However, whilst buyers and sellers have a right to come to a franchise or statutory market to trade, the seller becomes a trespasser if, without consent, he attempts to gain an exclusive occupation of part of the soil of the market;[17] perhaps by placing a basket or using a stall in a part of the market place. His occupation of that space excludes others from it. Thus permission to trade in this manner is required from the owner or lessee of the soil (normally the market organiser) to use or to place any stall or barrow in the market. The fee normally charged for this consent is traditionally known as stallage which is, in effect, no more than rent.

If a stall is erected without permission, an action will lie for the benefit of the owner or lessee against the stall holder, the occupier of the soil, for stallage upon an implied contract.[18] Stallage is thus a matter of agreement, either express or presumed. This is important because the right to recover it is not normally an incident to the grant creating the market. Because ownership of the market and of the soil of the market place may be vested in different individuals it is possible that stallage may not enrich the market owner. This is because there is no rule that the market place must be vested in the owner of the market right; he is entitled to hold the market on land on which he has a tenancy or even a mere licence to hold it.[19] There is some authority that if the market owner does not have exclusive possession of the soil of the market place he is not entitled to charge stallage.[20]

Stallage cannot be imposed on a seller who does not seek to trade from a particular site in the market place. This perhaps causes less difficulty today than it once might have done. In times past many individuals used to attend market to sell their goods without taking a stall. The "hawker" could sell his goods free of charge. Such a rule could cause difficulties in practice because a "hawker" was entitled to place his goods upon the ground when weary.[21] Similarly, when making a sale he could find himself in one site for a substantial period, especially if his goods were so popular that he was, in effect, selling continuously. At what point did he become liable to stallage? In practice, this was never satisfactorily resolved.

## **TOLL**

### **The Nature of Toll**

Coke defined toll as "a reasonable sum of money due to the owner of the fair or market upon sale of things tollable within (it)."[22]

Toll, properly so called, is a levy payable on goods sold in market.[23] Originally it was seen as a charge made of buyers for the prospect of undisputed ownership which a purchase in a public market offered.[24] Toll was thus levied on goods and was normally payable by the buyer and not the seller.

Because toll was supposed to be collected from buyers its collection posed significant practical problems. Gradually market owners seem either to have abandoned the system of tolls, preferring instead to replace the lost revenue by increasing stallage,[25] or to have switched the burden of tolls to sellers. In *A-G v Horner No2* [26] it was held that such a practice was not sufficient to give the owner a power to demand toll from sellers as of right.

### **The Right to Toll**

It must first be understood that the grant of a right of market (perhaps by Charter) did not by itself necessarily confer the right to take toll. That right might depend upon the terms of the original grant. If these did not support a right to

toll a separate grant or franchise of toll would be required.[27] Many markets were toll free. Where they were not, toll was collected by an official of the market.

It is true, however, that where there is a long custom of taking toll, the court may enforce it even if no actual evidence of a franchise of toll can be found, because the right may be established by the doctrine of prescription, or presumed lost grant. Alternatively, a court may presume that the highway on which the trading takes place was dedicated subject to the right to exact tolls for trading thereon.[28]

These traditional revenues are supplemented in modern markets (such as car boot sales) by a small charge made of individual buyers entering the market. This charge is lawful because these markets are not franchise markets which permit members of the public to enter the market as of right. The organiser is thus exercising a private law power to charge a fee for a licence or permission to enter the land upon which the market is held.

A principal reason for these charges, which are normally of a *de minimis* character, is that mere imposition of a charge, of itself, takes the market outside the statutory street trading regime.[29] If no charge were imposed, the local authority could take steps, in effect to prohibit the market. One means of doing so is to designate the market area as a prohibited street so that anyone trading therein would commit an offence.[30]

In sum, the very significant profits which can be gained from organising markets have led to considerable expansion in unlawful market activity and a renewed entrepreneurial interest in their creation. There are two means by which an intending market organiser may organise a new market without acting unlawfully. The difficulty is that, in each of these cases, his market will not have the right of monopoly; in fact its operation will depend upon the consent of the owner of market rights in the locality of the new market.

### **(i) Licensing Arrangements**

The owners of franchise (Charter) or statutory rights of market have a power to license or consent to others to organise markets within their franchise area, usually in return for payment. This is commonly done by local authorities who may well demand a percentage of the turnover subject to a fixed minimum fee. In 1993 one licensed operation in a large urban area was charged whichever was the greater, 5% of its gross revenue or £90,000. Any licensing agreement means that the new market is a lawful one, but it will normally lack the monopolistic attributes of the franchise.

### **(ii) Acquisition of Market Rights**

In the absence of such a licensing arrangement a would-be market organiser must acquire the rights of market for the relevant area. This is usually achieved either by leasing or by purchasing an existing franchise. Whichever of the above courses of action is chosen, the existing market owner clearly has the right to veto the organisation of the proposed market. According to one argument, it cannot be satisfactory that this is so. The opportunity for a rival to organise markets within a district should not be made to depend upon the consent of the individual or organisation which has existing trading rights therein. Nevertheless, the established market owner can refuse to license the would-be rival because there is clearly no obligation either to lease or to sell the franchise right.

Whether to avoid this veto or merely to cut costs, in practice many new markets do not have the consent of the relevant right owner; they are markets of an informal or unofficial character which are vulnerable to the monopoly rights of market owners. Their operation can be restrained by injunction [31] and the organisers may be liable in damages for losses inflicted upon the franchise market.

## **Problems of Competition**

The question is whether the state can justifiably continue legally to enforce this anti-competitive behaviour. One dimension of this controversy surrounding the creation of new markets focuses upon the changing perceptions of the proper roles of the public and private sectors. This is because, by the twentieth century, most market rights have been acquired by local authorities some of whom may operate council markets for the benefit of their locality. These local authorities are traditionally (but not universally) suspicious of entrepreneurial initiatives intended to create new markets within their area, because some of these markets have aroused local hostility and caused public order and nuisance problems. Such markets may detrimentally affect amenities and often cause a significant increase in road traffic. There is also a frequently expressed concern that, for example, car boot sales provide an outlet for stolen or pirate goods and even contraband alcohol. Some traders operate in breach of public health and consumer protection safeguards. Local authorities are not therefore easily persuaded that new markets will be beneficial in the local community *a fortiori* where they provide their own market(s). Because these authorities are often themselves the present owners of franchise or statutory market rights they can often rely on their "private" monopoly powers to restrain potential competition from would-be market operators. Development control powers can be added to the private law rights of local authorities who thus have extensive powers to restrain competition. Market operation in

modern Britain is very much controlled by the public sector which frequently exercises its powers with particular vigour where new rivals defy the law (by providing unlawful competition for a council operated market). Is this dominance justifiable in contemporary society? To answer this question it is necessary to examine the early purposes underlying modern law.

## **The Origin and Purpose of Market Rights**

As we have seen, there are persuasive arguments that market monopolies are an anachronism which no longer serve a useful modern purpose. It is important, however, to recognise that the issue is not entirely one-sided.

Markets and the monopolistic rights incidental to the right of markets were originally created to preserve public order. Anglo-Saxon laws often insisted that buying and selling took place before witnesses.[32] These witnesses were necessary to protect the buyer from claims that goods purchased had been dishonestly acquired. Transactions within the market place were more easily subjected to public scrutiny; title to goods would be observed to pass from seller to buyer, a consequence of importance not only to the parties to the transaction but also the public at large.[33] The franchise of markets could be regarded as a mechanism for delegating to private individuals a law-and-order function, which would otherwise have been the responsibility of the State. Such franchises were an effective use of State power because it would have been impossible for the State to achieve its goals without co-operation at a local level. The self-interest of the market operator provided the best means of ensuring the success of the market. Therefore, the burden of the public responsibility of the market was made more attractive by the profit that the market would generate for the owner. The franchise brought monopolistic rights to ensure commercial supremacy through the exclusion of those (unlicensed) competitors who own markets and could be said (as a matter of fact and law) to damage the success of the lawful market owner.

In the contemporary commercial environment such arguments for the continued existence of the monopoly ostensibly look somewhat fragile. But it is possible to find a case (albeit an unfashionable one) for continuing market monopolies enjoyed by local authorities.

As the Government recognises, the existence of a market monopoly also serves an economic purpose. By licensing "rival" market operators in return for a fee, local authorities generate significant income for the purposes of their general revenue. This means that the local authority need not provide a market itself, but can derive revenue from those whom it allows to do so. This is itself controversial (depending upon one's political standpoint) because the licensing fees can be seen either as a further burden on business enterprise, or a means by which businesses contribute to the communities in which they derive their profits. The real issue is that the local authority's general revenue is augmented by the arrangement thereby relieving burdens on local taxpayers at a time when central government grants are becomingly miserly. At one level this might be politically acceptable if it were viewed as a form of commercial activity by local authorities designed to reduce their reliance on tax revenue.

This argument, however, has not found favour with central government which, as a part of its programme of deregulation, attempted to initiate reforms designed to stimulate local private enterprise. These reforms culminated in clauses 21-23 of the Deregulation and Contracting Out Bill 1994 which were intended to remove the monopolistic rights of local authority owned markets, as well as local authorities' statutory powers to restrain certain sales outside the market. Nothing in the Bill, however, was intended to alter the market rights of private market owners.

This seemed to turn the only argument for continuing market monopolies on its head. Such arguments as there are for *continuing* the monopoly seemed only to apply to local authority markets where the monopoly can be exercised to further the interests of good government of the local area. In essence the arguments for reform actually bear most heavily upon privately owned rather than local authority markets which stifle competition to further the private interest of the owner rather than the inhabitants of the local area.

Whatever view is adopted, local authorities successfully lobbied backbenchers by invoking the spectre of unregulated markets and car boot sales, and the controversial proposals were dropped from the Bill.[34] The Government's response was to maintain its commitment to the principle of reform. The continuing commitment to reform means that the monopoly powers of local authorities are unlikely to survive far into the future.

## **The Highway as the Market Place**

One difficult area, which suffers from a considerable indeterminacy, which has never satisfactorily been resolved, concerns the regulation of markets which are held on the highway. The problems extend to street trading which is not conducted in a lawful market. This may either be trading in an informal street market, or something falling short of a market - perhaps the stationing of a stall or van upon the highway. This issue is important because it, in part, concerns the limit of the statutory controls over street trading (and thereby the controls over trading in street markets).

It is fundamental that informal markets fall within the statutory scheme of regulation under the Local Government (Miscellaneous Provisions) Act 1982, which means that trading therein can only take place under the authority of a licence/consent if the local authority has adopted the licensing scheme for the street in which trading takes place.[35] However, lawful markets are exempted from these controls so that traders are not required to obtain a licence/consent even if the street is designated as one where trading can otherwise only take place under the authority of a licence/consent. This is because market trading in lawful charter or statutory markets is deemed not to be "street trading" for the purposes of the 1982 Act.[36]

It is important that it is normally only in lawful markets that traders may operate without causing an obstruction of the highway contrary to s137 of the Highways Act 1980, since their trading in pursuance of a market right has "lawful excuse".[37] This is not so in informal markets, or trading outside markets.

Before examining the issues further it may be noted that where trading on the highway is concerned, informal markets are normally not of recent creation. Often they are customary markets of great age and antiquity. When compared with lawful, charter markets, they may, in fact, be of similar importance and age (but of different origin) and yet be differently regulated.

Because the issues are complex a summary will be offered below:

- i. *Lawful (statutory or charter) markets.* Here trading does not require the authority of a licence/consent from the local authority. It seems that that which is done in pursuance of market rights is not an obstruction of the highway contrary to s137 of the Highways Act 1980.[38]
- ii. *Trading in informal or customary markets.* Here the absence of market rights exposes traders to the risk of a conviction for obstruction of the highway.[39] The market traders do not benefit from the exemption in the Local Government (Miscellaneous) Provisions Act 1982 and must obtain a licence/consent where the street is so designated. If the street is not designated the trading is subject only to general highway law.
- iii. *Trading which falls short of a market.* If the street in which it takes place has been appropriately designated it is an offence to trade without a licence or consent.[40] The general highway law is also applicable. As in (ii) this also means that in undesignated streets the law of obstruction of the highways assumes considerable importance.[41] However, as will be seen below, traders operating in accordance with a long-established custom may find that the court will presume that the highway on which they trade was dedicated to the public subject to the rights of the traders. This means that the public only ever obtained a qualified right of free passage. The traders have a right to trade and so a "lawful excuse" within the meaning of s137. Whilst a conviction for obstruction is thus not possible, the local authority can designate the street so that (despite the long-established custom) it would be an offence to trade without a licence/consent.

The above rules indicate that the distinction between lawful markets on the one hand and unlawful markets and street trading on the other can have fundamental consequences. Were the distinctions between these classes of trading not of considerable indeterminacy the law might be in a more certain and satisfactory state. The reality, especially in relation to categories (i) and (ii) above, is that the distinction can be one without a real difference and that the law has an almost arbitrary character. This is so because market rights (and so lawful markets) can arise by prescription or under the doctrine of presumed lost grant. These principles allow the courts to legitimate a long-established and customary arrangement even though there is no evidence that the market was actually created by lawful means. Thus some, but not all informal, customary markets will acquire the clothes of legality. As will be seen, this means that although, in practice, two markets may each have similar, informal origins one may be treated differently from another and so become unlawful where the first is lawful. The same is true of other street trading, some examples of which can be conducted lawfully on a highway even if unlicensed.

## Prescription

The detailed rules governing establishing market rights by prescription lie beyond the scope of the present article, but essentially there are alternative means of founding a customary right. The first is less controversial than the second. In the former, a customary right of market can arise if there is "uninterrupted modern usage" of 20 or more years provided that there is no evidence that at some time after 1189 the right asserted did not exist.[42] This means of establishing user as of right is difficult because it is often possible to show that within the period of legal memory the market was not conducted.

The second means involves the doctrine of "lost modern grant" by which the court will presume that a grant of market was made but that the documentary evidence of such a grant has been lost or destroyed. This is essentially a legal fiction because the courts will invoke such a doctrine even if they are reasonably certain that no grant *ever existed*. Thus the doctrine is simply a device for preserving socially acceptable customary markets. This bold doctrine seems to bear cogent witness to a policy of the law, which is that the courts will seek to preserve certain long-established and customary markets and endow them with a legal pedigree where it is reasonable to do so.[43] The fiction cannot otherwise be explained or justified. The problem is that this policy is inconsistently applied and

this arbitrariness is capable of causing substantial difficulty. Some ancient markets are deemed to be lawful; others with similar characteristics and importance are not. The explanation for this arbitrary and unsatisfactory distinction lies in the conflicting alternative doctrinal approaches which the courts can adopt. It is true that at one level the courts appear to be asking whether the traders are, in some private law sense, the beneficiaries of a legal right to trade. As indicated above, this examines the origins both of the market and the legal regime affecting the site (normally the highway). This is described more fully below. An alternative approach allows the courts to exploit more fully the legal fictions than others. Here the court in fact passes over the clouded and antiquarian inquiry about the origins of market and highway respectively and focuses instead upon the *reasonableness* of the market use as a contemporary rather than an historical issue. This latter approach explains why the courts are so willing to "presume" lawful origins despite the complete absence of evidence. Moreover, if the obstruction caused by the market is a temporary and not a complete obstruction (as might be so where the trading occurs in a customary fair) the courts may be willing to regard it as reasonable and will rationalise this by blurring the question of origin.[44]

The so-called "hiring", "mop" or "statute" fairs, or "statute sessions" provide a problematic and unsatisfactory example of this dichotomy. These fairs are customary events which began to be held following the Statute of Labourers 1351. The Black Death had so diminished the working population that labourers and servants were in short supply. Competition for the services of the survivors became so extreme that wage inflation reached unacceptable levels. The 1351 Statute was intended to maximise the work force available by measures which, in effect, conscripted individuals to work. At a macro-economic level, the Act legislated an anti-inflationary policy which required magistrates to fix wages in the locality and the wages thus set would be binding upon employers and employees alike. The annual pronouncements of the magistrates were of such a significance that masters and servants would often gather near the court building to hear the result of the magisterial deliberations for the year ahead. Thomas Hardy, for example, describes how when these fairs became a means by which employers could find suitable labour, would-be employees would attend these fairs in order to find employment, many carrying the symbol of their trade. [45] A large number of these customary fairs still continue, often as amusement fairs, their original purpose having been superseded. They are frequently of ancient origin and yet, because they are known **not** to have been created by a charter they are not "lawful" events. This was decided in *Simpson v Wells*[46] where a street trader was convicted of an offence for having placed a stall on the highway during a "statute sessions" which was found to be of great antiquity. It was not disputed that no offence would have occurred if he had traded in a lawful market created by grant or presumed grant. The accused argued, unsuccessfully in this case, that because of the ancient origin of the fair, the right to trade should be inferred from custom, in particular because, *ex hypothesi*, the fair had been conducted for more than 20 years. His defence failed because the fair was known not to have been created by charter. Trading on the highway was thus an offence.

Similarly, this private law approach was also fatal in *Spice v Peacock*[47] where the court insisted on searching for a conditional dedication of the highway and refused to presume one where the highway was an immemorial one and the trading only arose within living memory. This meant, of course, that the traders could not assert a private right over the highway (because they could not establish a right which was first in time) and so lost their suit. The failure to establish this beneficial right meant that the public may well have been deprived of a reasonable and useful market. This demonstrates how the private law model sublimates questions of public interest to those of private right. Private law reasoning also dominated in *Jones v Mathews*[48] (although with a different result) where, in the absence of direct evidence as to the nature and scope of a dedication of a highway made within the previous 30 years, the laying out of the highway did not divest individuals of a customary right to trade which they had exercised in the last *forty years*. A prior right to trade therefore prevailed over the public's right of free passage over the highway.

However, the courts can alternatively appear to be applying a private law model but employing it in such a way as to disguise what is in substance something entirely different. This essentially disregards the actual origin of the trading (that is, whether or not actually created by a charter) and asks instead whether it is reasonable in all the circumstances. This was so in *Le Neve v The Vestry of Mile End Old Town*[49] where for many years the occupiers of certain property had made use (for street trading purposes) of a strip of land used as a public highway. This lay between the carriageway and the footway. In purported exercise of statutory powers the Vestry removed the obstructions placed on the land. The court held that the Vestry had exceeded its powers because it could be presumed that the traders occupied the land with the permission of the lord of the manor and that, when the highway was laid out, it was dedicated to the public *subject* to the rights of the traders. There was no positive evidence that such permission had been granted, nor of a conditional dedication of the highway. It is clear that here the court was essentially unconcerned by the origins of the trading; the only question was whether it was reasonable. This must have entailed some implicit balancing exercise in which the court found that the trading did not unreasonably interfere with the public's right of free passage.

*Elwood v Bullock*[50] is to similar effect. In accordance with an ancient custom, licensed victuallers placed "booths" on a highway during a fair. Here again, although there was absolutely no evidence that the highway had been laid out

after the creation of the fair, the court was willing to presume a conditional dedication of the highway so that the right of public passage was subject to the rights of the licensed victuallers.

These latter decisions illustrate how the courts will stretch established principle in order to achieve just results. Lord Denman CJ admitted that the decision in *Elwood* was founded on issues of public policy when he stated that the public's right of passage was not more important nor beneficial than the right of the licensed victuallers (from which the public also derived a benefit). In other words, the decision was essentially founded on the balancing exercise in which the court favoured the use which it perceived as more socially beneficial.

The reality is that this approach actually ignores both the history of the site and the origin of the market (hence the willingness of the court to presume an origin in the absence of any evidence whatsoever) and instead focuses on the question of the importance of the market judged against competing contemporary uses. This seems sensible. Where there is no evidence of a charter it is surely unimportant that a market may have been created in more recent times than the reign of Richard I. Since no individual can show a positive right to conduct the market, the issue is essentially whether its continued operation is in the public interest. This kind of inquiry must arguably provide the best solution to the difficult questions with which the court is faced.

It is not without significance that this approach can also be seen where the courts are confronted with giving meaning to charter rights but in the context of modern district boundaries. Here again the courts have moulded the common law to recognise modern trading conditions. This is so where a district which benefited from market rights has expanded beyond the boundaries which were current at the time of the charter. Narrow private law reasoning would suggest that sites within the *enlarged* district could not benefit from the rights created by the charter, (unless the terms of the charter were otherwise) since the charter rights would normally be construed as having been granted to the district existing at the date of the grant. But the courts have not felt bound to apply the logic of this approach. Instead, ancient charter rights can normally be interpreted as extending throughout the modern boundaries of a district even where it has expanded, or the centre of population moved.[51]

In conclusion, the narrow private law approach leads in practice to arbitrary outcomes subjecting all hiring fairs to more extensive regulation than that which applies to other markets and fairs of equal significance but perhaps of more recent date. It is also open to criticism because its focus is historical. It seems unimportant that the market, though conducted in pursuit of a private right, is unsuited to modern conditions. For example, market rights may attach to a highway and so legalise certain trading in an area which, in modern times, has become a busy commercial district causing much inconvenience to traffic.[52] But the private law approach treats the continued trading as a vested private legal right which prevails over the public right of free passage. This creates an ideological tension with more modern and utilitarian regimes, such as planning law, for controlling the use of land.[53]

The operation of the presumptions and principles of this aspect of market law has a fictional quality to it. That the livelihood of individual traders should depend upon whether their market was created as a matter of custom sometime after the enactment of the Statute of Labourers or in a charter (possibly of even more recent date) is a matter of regret. The focus should instead be placed upon whether the use made of the highway is a reasonable one taking into account, as Lord Denman CJ stated in *Elwood v Bullock* [54] the benefit the public may derive from the market, and also its duration and the degree of obstruction it causes. This approach would treat all long established, customary and lawful markets alike. Any other approach is an attempt to forge a distinction without a difference.

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# Some Problems in the English Law of Markets and Fairs

## ---Footnotes---

1. The first edition of Pease and Chitty's *Law of Markets and Fairs* was published in 1898.
2. Wife "selling", which was a form of informal divorce by mutual consent practised among the lower classes, was never particularly common. Where it did occur, a ritualised sale normally took place in a market or fair in order to obtain maximum publicity. This was, of course, precisely the same rationale as early markets which were created as a means of witnessing the transfer of title to goods and thereby avoiding disputes. The practice of "sale" in the market place was adopted in divorce cases because publicity was important to all parties concerned. It lessened the risk that the *de jure* husband would be imprisoned for debts incurred by his (ex) wife and avoided the possibility that she would claim dower from his estate after his death. The advantage for the wife was first that the (ex) husband would not in practice exercise his right to claim all her after acquired property and earnings and secondly, having publicly condoned the adultery could not bring an action for damages in criminal compensation against her new lover. See generally Lawrence Stone, *Broken Lives*, OUP, 1993 especially at pp 18-19 and by the same author *The Road to Divorce*, OUP, 1990; also Kenny (1929) 45 LQR 474. Research by Menafee (*Wives for Sale*, OUP 1981) suggests that wife sales reached a peak of popularity in the first half of the nineteenth century; but in the 1830s only 51 cases were recorded. Hardy, of course, famously describes such a sale in *The Mayor of Casterbridge* published in 1886 but the imaginary event is supposed to have taken place at the famous Weyhill Fair circa 1825-30. See the New Wessex Edition, Macmillan, London 1974. In the decade 1820-1829, 49 wife sales were recorded. Stone suggests that these "sales" were in fact ritualized consensual "divorce", but Kenny adduces some evidence that this was not always so.
3. eg *Manchester City Council v Walsh* (1986) 84 LGR 1. Other market rights enable the owner to prevent certain sales outside the market during market hours. The Food Act 1984, s56 allows local authorities to prohibit certain such sales by by-laws. Markets created by statute often incorporate the provisions of the Markets and Fairs Clauses Act 1847, of which s13 makes it an offence (subject to certain exceptions) to sell or expose goods for sale articles normally sold in the market. Only lawful markets benefit from this range of monopolistic rights.
4. There is an irrebuttable presumption that a market held within the common law distance of the established, lawful market and on the *same day* as that market is a disturbance of it, entitling the owner of the latter market to maintain an action against the operator of the rival market. The operation of the rival market is actionable *per se* without proof of loss by the owner of the lawful market. The latter will normally seek an injunction to restrain the operation of the rival, in which case any damages awarded may be nominal: *Stoke-on-Trent City Council v W & J Wass* (1989) 87 LGR 129. Where the rival market is conducted on a different day from the lawful market it is essential to establish that it causes loss to the latter. See, for example, *Northampton BC v Midland Development Group of Companies* (1978) 76 LGR 750.
5. This article is not concerned with the possible conflict between EC Competition Law and aspects of English market law. For a study of the latter see Hough and Harding, *Market Rights and European Community Competition Law* [1995] *Cambrian L Rev* 55
6. See per Chatterton V-C in *Downshire v O'Brien* (1887) 19 LR Ir 380, 390. No "concourse" arises in the case of a shop since buyers are said to come independently to buy from the owner of the shop: *per* Lord Keith *Scottish Co-operative Wholesale Society v Ulster Farmers' Union* [1960] AC 63, 85-86. However, the definition of a market does cause problems because some commercial activities fulfil the definition (and so are ostensibly markets) although it is unlikely ever to have been intended to subject them to market law. For example, markets and auction sales share many similarities since each is preceded by an invitation to the public to buy and sell and neither the owner of the market nor the auctioneer are owners of the goods sold; each provides a mechanism for facilitating the sales of goods owned by others. If this means that an auction is capable of constituting a rival market in law it too may be restrained if it disturbs the operation of a lawful market, see n (4) *supra*.
7. This discussion is principally concerned with markets and not fairs. Fairs have many of the legal characteristics of markets but are generally distinguished because they are held less frequently than markets. Whereas markets are usually held weekly or, occasionally, monthly, fairs are held in one locality on only one or two occasions in each year.



8. Lawful markets are created by charter or letters patent under the royal prerogative, or by statute: see further below. Even lawful markets and fairs cannot exclude all competitors; only those which "disturb" the lawful market are liable to restraint.
9. Market rights are vested in the owner of a charter (or franchise) market: *Tamworth BC v Fazeley Town Council* (1979) 77 LGR 238, or of a statutory market: *Manchester City Council v Walsh* (1986) 84 LGR 1.
10. *Supra*, n (4)
11. B1 Comm 1, 274; also *Downshire v O'Brien, supra* (6)
12. See generally Hough, *The Law of Street Trading*, Earlsgate Press, Winteringham, 1994.
13. *Newcastle-upon-Tyne City Council v Noble 1991*, 89 LGR 618
14. *Kingston-upon-Hull v Greenwood* (1984) 82 LGR 586; *Manchester City Council v Walsh* (1986) 84 LGR 1. Note also *East Staffordshire Borough Council v Windridge Pearce (Burton-on-Trent)* [1993] EGCS 186 where it was emphasised that much would turn on the facts of each individual case and in particular on the nature and size of individual units, the nature and source of the goods offered for sale, the proximity of the individual sellers one to another and the degree of control retained by the organiser.
15. *Staffordshire BC v Elkenford* (1976) 75 LGR 337
16. *Supra* n (6)
17. *Northampton Corporation v Ward* (1745) 2 Stra 1238
18. *Mayor of Newport v Saunders* 3 B & Ad 411
19. (1884) 14 QBD 245
20. *Lockwood v Wood* (1841) 6 QB 31 but *A-G v Horner* (1886) 11 App Cas 66
21. *Mayor of Yarmouth v Groom* [1862] 1 H & C 102
22. Co Inst 220
23. Sometimes toll was levied even on unsold goods
24. *Duke of Bedford v St Paul Covent Garden Overseers* (1881) 51 LJMC 41, 55 Bowen J
25. Eg, *Swindon Central Market Co Ltd v Panting* (1872) 27 LT 578
26. [1913] 2 Ch 140
27. *Heddy v Wheelhouse* [1598] Cro Eliz 558. A right may however arise by prescription
28. *Lawrence v Hitch* [1868] LR 3 QB 521
29. Para 1, Sched 4 of the Local Government (Miscellaneous Provisions) Act 1982
30. Contrary to para 10 of Sched 4 of the 1982 Act
31. *Supra*
32. See Pollock and Maitland, *The History of English Law*, 2nd edition 1968, p 59; Edgar IV, 6; Canute, II 24; 1 Edw I; 2 Athelstan 12.
33. See *Duke of Bedford v. St. Paul Covent Garden Overseers* (1881) 51 LJMC 41, 55, per Bowen J.
34. HC Debs, Vol 248, cols 184-185, 18 October 1994.
35. Street trading is defined in para 1 of schedule 4 of the 1982 Act. Under para 2 streets may be designated according to one of three categories. The controls do not apply to streets which have not been so designated.
36. Para 1 of Schedule 4 of the 1982 Act
37. See *Simpson v Wells* (1875) 39 JP 581 and *GER v Goldsmid* (1884) 9 App Cas 927 especially *per* Lord Selborne LC at p 942. However, it is possible to envisage cases in which informal or customary trading which does not take place under the authority of a statute or charter may in some cases not amount to an obstruction since "lawful excuse" might be established where the highway can be presumed to be dedicated subject to the rights of traders: see eg, *Elwood v Bullock* (1844) 6 QB 383 which seems to permit such an outcome. It would have to be open to the court to infer that the highway *may* (and not necessarily *must*) have been laid out after the customary trading was established: *per* Lord Denman at p 411.
38. In *A G v Horner* (1886) 11 App Cas 66 the court also found that the highway in question had been laid out after the creation of the market and so the public's right of passage was subject to the rights of market.
39. *Simpson v Wells* (1872) LR 7 QB 214
40. Para 10 of schedule 4 of the 1982 Act
41. eg, *Nagy v Weston* [1965] 1 WLR 280
42. *Hulbert v Dale* [1909] 2 Ch 570
43. *Angus v Dalton* (1877) 3 QBD 85; (1878) 4 QBD 162; (1881) 6 App Case 740; also *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528.
44. As, for example, in *Elwood v Bullock* (1844) 6 QB 383.
45. eg, *Far From the Madding Crowd*, the New Wessex Edition, Macmillan, 1974, p 75. An apparent example in which the carrying of a symbol of trade or business in a market which does not appear to be a hiring fair can be seen in *The Woodlanders*, Penguin Classics, 1986, p 76.

46. [1872] LR 7 QB 214

47. (1875) 39 JP 581

48. [1885] 1 TLR 482

49. (1858) 8 E & B 1054

50. [1844] 6 QB 383

51. *Killmister v Fitton* (1885) 53 LT 959

52. At Chipping Norton, for example, an annual fair, (possibly in former times a Michaelmas hiring fair) can cause the diversion of traffic on a major trunk road, sometimes resulting in considerable delays.

53. See, for example, *Spook Erection v Secretary of State for the Environment* (1988) 86 LGR 736. This concerned the application of planning controls to the revival of an ancient charter market.

54. *Supra* n (50)