Falcon Chambers

Law of Property Act 1925 – the first 100 years

Focus on Section 193 of the Law of Property Act 1925 – public access to commons and waste land

Summary

- Section 193 grants public rights of access for open air and exercise to various categories of common land
- The section seeks to balance the public interest and the proper regulation of land subject to access rights
- The section was not part of an overall legislative scheme, but arose from various social, political and economic trends
- Public access to open spaces in the 21st century is governed by a patchwork of statutory rights, of which section 193 remains part

Introduction

Section 193 is found in Part XI of the Law of Property Act 1925 ("LPA 1925"). This part of the Act is headed "Miscellaneous".

The section gives the public 'rights of access for air and exercise' to commons and waste land in urban areas, and also to commons in rural areas where the owner of the common has granted such rights by deed; in all these cases, the section provides that the access may be subject to statutory regulation, or to limitations and conditions imposed by the Minister.

As one might have anticipated from its inclusion in a part headed "Miscellaneous", s. 193 was not part of the scheme for reforming and clarifying property law brought about by the various 1925 property statutes. It was the successor provision to s. 102 of the Law of Property Act 1922 ("LPA 1922"). The LPA 1922 had been introduced by Lord Birkenhead. That Act was a necessary precursor to the 1925 legislation since it did away with the old system of copyhold tenure. As we shall see, however, s. 102 of Lord Birkenhead's Act had itself only been introduced by an amendment as the bill made its way through Parliament.

For most property law practitioners, s.193 is a curio which one seldom encounters in practice. For the legal and social historian, however, it has an interesting place in the history of land tenure in England and Wales and of how Parliament sought to accommodate the competing

trends of urbanisation, public welfare, and land reform, in the 18th, 19th, and 20th centuries. The history of s. 193 itself, and its place among earlier and subsequent legislation, reveals a piecemeal legislative approach to public access to open spaces as those competing trends were balanced; and s. 193 remains part of the patchwork of legislation which regulates open spaces and public access in the twenty-first century.

It is beyond the scope of this short essay to explain in detail this social and legal history. In order to understand s.193, however, it is necessary to understand a little of the historical context. While the 1925 legislation is seen as doing away with medieval forms of land tenure, even today it remains necessary to have a grasp of the pre-modern world. In that world, land was extensively held and cultivated through "manors".

Medieval to modern … via industrialisation, urbanisation and recreation

Manors were a social, political and legal unit of medieval England having their origins in the semi-communal method of cultivating land which continued from Anglo-Saxon times until the 19th century. It was a common or open field system and the land was held by the lord of the manor and his tenants. By the 16th century, it was held by lawyers that a manor had to have existed since time immemorial.[1] The lord of the manor, however, was a landowner, and he had tenure of the land deriving from the Crown and a fee simple estate in land.

The lord would take all the produce from the home form and demesne land around the manor house. The lord's tenants would farm arable fields around the demesne land in strips, holding their strips free or by copy of the court roll (as copyhold tenants). When the arable crop had been taken, the fields would be opened for all the tenants to graze their animals on a common basis. There was also a common meadow, where the tenants could cut hay for their animals in strips, and then graze their animals in common after the hay harvest. When the crops and hay were growing on the arable fields and common meadow, the tenants' animals would be grazed in common on the land which had not been brought under the cultivation of the manor, known as the manorial waste land.

[1] See Holdsworth, *History of English Law*, vol. 7, 297-298.

With all this in mind, "common land" may be broadly described as land over which rights of common may be exercised. A right of common is the legal right for one or more persons to take part of the natural produce of the land (often grass, for grazing their livestock)..[2]

By the late 18th century, the manorial system of agriculture was seen as inefficient. At the same time, copyhold tenure was increasingly seen as anachronistic. The problems associated with copyhold tenure had been identified as early as the 17th century,[3] and had been the subject of extensive criticism by the Real Property Commissioners in 1832.[4]

Legislation therefore enabled a move away from land being grazed in common towards it being parcelled up into private, freehold ownership. This was achieved under thousands of private Inclosure Acts from 1700 onwards, culminating in the general Inclosure Act of 1845 ("the 1845 Act"), which itself led to some 650,000 acres being enclosed. The land so enclosed included manorial waste land and common fields. Copyholds were enfranchised into freeholds upon enclosure and statutory enfranchisement become possible under the Copyhold Act 1852 and Copyhold Act 1894

At the same time, increased efficiency in agriculture as a result of agricultural reforms enabled the feeding of cities and towns. The Industrial Revolution of the 18th and 19th centuries resulted in a significant growth in population, as well as a huge shift in population from rural communities to the industrial towns and cities. Attitudes began to change around the middle of the 19th century, as it came to be realised that common land and waste land could provide "green lungs" for the towns and cities, and opportunities for amenity and recreation for the urban populations. Much of this land was underused. There was therefore a movement towards protecting common land. Section 27 of the 1845 Act had already provided that regard should be had to the 'health, comfort and convenience of the inhabitants of any cities, towns, villages or populous places' before approving a proposed enclosure. The Metropolitan Commons Act 1866 prohibited any further enclosure of the common lands within the Metropolitan Police District in and around London. The Commons Act 1876 modified the process applicable under the 1845 Act, so that the emphasis was on the regulation rather than the enclosure of commons,

[2] Generally on the history of common land, see *Gadsden and Cousins on Commons and Greens*, Third Edition (2020), chapter 1.
[3] See Roger North, *Lives of the Norths*, i. 31.
[4] See the 1832 Third Report of the Royal Commission on the Law of Real Property, paras 14-19; Holdsworth, *History of English Law*, vol. 7 pp 309-310.

and so that enclosure would only be authorised if it would be for 'the benefit of the neighbourhood'.

Besides protecting common land, there was also a movement towards allowing access to common land. The public had been taking access to some common land as a matter of fact for many years, albeit without authorisation, but legislation began to catch up. Under s. 7 of the Commons Act 1876, schemes of regulation for commons were expected to make provision for free access 'to any particular points of view' and for the 'privilege of playing games or of enjoying other schemes of recreation'. Under the Commons Act 1899, most schemes of regulation conferred a right of access to regulated commons on the inhabitants of the neighbourhood.

Lord Birkenhead's Act: The LPA 1922

Fast forward to the twentieth century, and the predecessor provision to s. 193, and it can be seen that tensions remained between the various competing priorities. The abolition of copyhold, and of the incidents of manorial tenure, had been under discussion for some time. This was finally achieved by the LPA 1922, which provided for the abolition of copyhold and manorial tenure, leaving the lord of the manor with vestigial interests and rights.

However, there was a concern that the abolition of copyhold and manorial tenure would lead to increasing difficulty in the identification of common lands and their protection, and hence access to them (it was not until the Commons Registration Act 1965 that a system of registering common land on a commons register would be introduced, and that system was by no means perfect). In the context of discussions between the Commons and Footpaths Preservation Society, who wished to protect public access to the commons, and the Land Union, who wished to protect the interests of landowners, the eminent Parliamentary draftsman B. L. Cherry (later Sir Benjamin Cherry)[5] drafted an amendment to the Law of Property Bill 1922, which would ultimately be enacted as s. 102 of the LPA 1922, and then re-enacted as s. 193 of the LPA 1925.[6]

The provisions of section 193

[5] One of the editors of previous editions of *Wolstenholme and Cherry's Conveyancing Statutes*, a commentary referred to in several previous articles in this series from Falcon Chambers on the LPA 1925.
[6] See Selwyn, B., 'The Origins of Sections 193 and 194 of the Law of Property Act 1925', published in 1997, available at <https://www.oss.org.uk/origins-of-sections-193-194-law-of-property-act/>.

Section 193(1) opens by stipulating that 'members of the public shall, subject as hereinafter provided, have rights of access for air and exercise to…', and then continues to specify the commons and waste lands which are, or may become, subject to section 193 rights. In specifying the various categories of land, s. 193 of the LPA 1925, like s. 102 of the LPA 1922 before it, uses various expressions – such as 'manorial waste', 'a common', and 'rights of common' – without any definition for the expressions being provided in the statute. This was possibly the result of s. 102 having been inserted into the LPA 1922 by an amendment to the bill, rather than being included as an original part of the legislative scheme, but it may also reflect the inherent difficulty in defining some of these concepts. The meaning of the various expressions in s. 193 was considered by Lewison J (as he then was) in *ADM Milling Ltd v Tewkesbury Town Council* [2011] EWHC 595 (Ch.), [2012] Ch. 99. Essentially, it is necessary to look back at the common law, and earlier statutory concepts and definitions of commons and rights of common, fully to clarify the scope of s. 193, while understanding that these concepts and definitions can themselves be fluid and non-exhaustive.

In broad terms, s. 193 applies to three categories of land:

- 'a metropolitan common within the meaning of the Metropolitan Commons Acs, 1866 to 1898': A "metropolitan common" is defined under the Metropolitan Commons Act 1866 ("the 1866 Act") as being a common, 'the whole or any part of which is in the Metropolitan Police District' – and a common is defined under the 1866 Act as being land subject at the passing of this Act (in 1866) to rights of common, and any land subject to being enclosed under the provisions of the 1845 Act.[7] This is a broad definition, encompassing commons falling wholly or partly within the Metropolitan Police District in and around London;
- 'manorial waste, or a common, which is wholly or partly situated within *an area which immediately before 1st April 1974 was* a borough or urban district'.[8] The italicised words were added to s. 193 by an amendment made under the Local Government Act 1972, which came into force on 1 April 1974 and reformed local government, replacing borough and urban district councils, and other types of council, with metropolitan and

[7] The definition of a "common" in s. 3 of the Metropolitan Commons Act 1866 appears to have included a misprint, but its meaning is clear: see *ADM Milling* at [57]-[58].
[8] The initial printing of the LPA 1925 omitted the comma after 'common', which would have led to a substantial change in the meaning, but it is clear that all manorial waste or commons located within the relevant areas are subject to s. 193: the comma had been included in s. 102 of the LPA 1925, which s. 193 of the LPA 1925 replaced.

non-metropolitan county and district councils. This second category is intended to apply to manorial waste land and commons falling wholly or partly within urban areas throughout England and Wales, but given the reform of local government in the 1970s, it is necessary to look at the boundaries of the old boroughs and urban districts to identify whether particular areas of common or manorial waste fall within s. 193;

- 'any land which at the commencement of this Act [*i.e.* on 1 January 1926] is subject to rights of common and to which this section may from time to time be applied in manner hereinafter provided'. This category includes rural commons which have been specifically dedicated by the owner as being subject to section 193 rights under section 193(2): that subsection provides that 'the lord of the manor or other person entitled to the soil of any land subject to rights of common may by deed, revocable or irrevocable, declare that this section shall apply to the land, and upon such deed being deposited with the Minister the land shall, so long as the deed remains operative, be land to which this section applies'. While at first blush, it may appear unlikely that the owner of a rural common would wish to dedicate public rights of access over it (particularly where one might expect a conflict between public access and the exercise of private shooting rights, for example), a dedication opens the way to the regulation of public access under s. 193. Dedications under s. 193(2) may continue to be made in England, although s. 193(2) was repealed in Wales with effect from 21 June 2004, so that no new dedications may be made there.

After conferring rights of access on the public over the specified categories of common land, s. 193(1) then makes four provisos as to those rights, under section 193(1)(a) to (d) – some of which are supplemented by later subsections in s. 193:

- under s. 193(1)(a), the rights of access shall be subject to any Act, scheme, or provisional order for the regulation of the land, and to any byelaw, regulation or order made thereunder or under any statutory authority – this provision recognises that the use of common land had already been coming under statutory regulation;
- under s. 193(1)(b), the lord of the manor, or any person entitled to the soil of the land [*i.e.* any owner of the common], or any person entitled to commonable rights affecting the land, may apply to the Minister to impose limitations and conditions on the exercise of the rights or the extent of the land affected by them. The Minister shall then impose such limitations and conditions as he considers necessary or desirable to prevent

injurious affects to any proprietary rights in or over the land; or to conserve flora, fauna, or geological or physiographical features of the land; or for protecting any object of historical interest. In England, the Minister is the Secretary of State for the Environment, Food and Rural Affairs; in Wales, it is the Cabinet Secretary for Rural Affairs, with specific responsibilities delegated to the Planning Inspectorate in Wales. Section 193(3) provides that where limitations or conditions are imposed by the Minister, they shall be published by such person and in such manner as the Minister may direct. The opportunity to secure regulation is an advantage of s. 193 for landowners and those with the benefit of rights of common, but the scope of the possible regulations also shows a broader concern with environmental conservation and protection of the landscape and heritage;

- under s. 193(1)(c), the rights of access conferred by s. 193 'shall not include any right to draw or drive upon the land a carriage, cart, caravan, truck, or other vehicle, or to camp or light any fire thereon'. Section 193(4) provides that a person who does any of these things without lawful authority, or who fails to observe any limitation or condition imposed by the Minister, shall be liable to a fine on summary conviction. When initially enacted, the fine was capped at 40 shillings, but is now not to exceed level 1 on the standard scale (currently £200);
- under s. 193(1)(d), the rights of access conferred by s. 193 shall cease to apply, firstly, to any land over which the commonable rights are extinguished under any statutory provision, and, secondly, to any land over which the commonable rights are otherwise extinguished, if the local authority assents by resolution to the land's exclusion from s. 193, and the resolution is approved by the Minister. The most frequent way in which section 193 rights will cease to apply is where a compulsory purchase order is made which includes a statutory extinguishment of commonable rights. Extinguishment by local authority resolution and approval by the Minister is extremely rare, and is only likely to be achieved if the land is required for some publicly beneficial purpose.[9]

[9] DEFRA figures as at the date of the latest (third) edition of *Gadsden and Cousins on Commons and Greens* (2020) recorded only three such resolutions by local authorities, of which two had been approved by the Minister: see *Gadsden and Cousins* at 9.86, fn. 336.

Section 193(5) provides that nothing in the section shall prejudice or affect the right of any person to mines and minerals, or to let down the surface of the manorial waste and common, thus protecting valuable mineral rights.

Section 193(6) disapplies the section from any common or manorial waste which is for the time being held for naval, military or air force purposes, and in respect of which rights of common have been extinguished or cannot be exercised – this prevents public access to sensitive military sites.

Section 193 in action – and in court

Section 193 confers on the public 'rights of access for air and exercise'. If matters stopped there, the rights would be very wide indeed, but, as we have seen, s. 193 itself imposes some express limitations on the rights, as well as providing for further regulations, limitations and conditions to be imposed by the Minister.

In its recent decision in *Darwall v Dartmoor National Park Authority* [2025] UKSC 20, [2025] A.C. 1292, the Supreme Court compared the provisions of the Dartmoor Commons Act 1985 ("DCA 1985") with s. 193 of the LPA 1925. The Dartmoor Commons, which are privately owned areas of unenclosed moorland on Dartmoor, are subject to the DCA 1985, and the owners of the Commons were becoming concerned about the potential harm being caused by people camping outside designated campsites ("wild camping"). The Supreme Court concluded that the provision under s. 10(1) of the DCA 1985 for the public to have 'a right of access to the commons on foot and on horseback for the purpose of open air recreation' included a right for wild camping. Although the reasoning focused on s. 10(1) of the DCA 1985 itself, the Supreme Court noted that the 'rights of access for air and exercise' applied to commons under s. 193 of the LPA 1925 were subject to an express exclusion of the right to camp under s. 193(1)(c) and s. 193(4): without that express exclusion, and in the absence of specific regulations, the broad rights conferred under s. 193 would include the right to camp, as did the broad rights conferred by s. 10(1) of the DCA 1985.

In *R v Secretary of State for the Environment, Food and Rural Affairs, ex parte Billson* [1999] Q.B. 374, public access for air and exercise had been permitted to Ranmore Common in Surrey by an expressly revocable deed made under s. 193(2) in 1929. Since then, tracks across the common had been extensively used by members of the public on foot and on horseback.

However, a new owner of the common revoked the deed in 1990 and blocked access to the tracks. The High Court upheld the decision of a planning inspector made at an inquiry that the tracks had not become public bridleways: the public's use of them had not been as of right, but by licence under the revocable deed.

In the well-known case of *Bakewell Management Ltd v Brandwood* [2004] 2 A.C. 529, Newtown Common in Berkshire had been dedicated for public rights of access under s. 193(2) by a deed made by the then owner, the Earl of Carnarvon, in 1927. Accordingly, it was a criminal offence under s. 193(4) for any person to drive a vehicle over the common without lawful authority. By the early 2000s, access to several properties neighbouring the common had been gained for many years by driving over the common, and the owners of the properties claimed a prescriptive right for such access by the doctrine of lost modern grant. In the earlier case of *Hanning v Top Deck Travel Group Limited* (1994) 68 P. & C. R. 14, the Court of Appeal had held that prescriptive rights of vehicular access over a common could not be acquired in such circumstances, because the vehicular access was illegal during the prescriptive period under s. 193(4). In *Bakewell*, the House of Lords overruled *Hanning*, and held that vehicular rights could be acquired by prescription by lost modern grant, notwithstanding s. 193(4), given that s. 193(4) allowed vehicular access 'with lawful authority', and the presumed grant under the doctrine of prescription would have given such lawful authority.

Public access to open spaces: a patchwork of legislation

The law of commons has developed since 1925, with the Commons Registration Act 1965 having created commons registers in the various local authority areas, and with Part I of the Commons Act 2006 having made various modifications and improvements to that (partly unsatisfactory) commons registration system – although Part I of the 2006 Act has so far only been fully implemented in nine "pioneer areas" in England.[10]

The law of commons and public access to them is part of a patchwork of legislation under which the public has rights to open spaces. As well as the legislation mentioned above, it includes the law of town and village greens and local authority provision of open spaces under the Open Spaces Act 1906 and the Public Health Act 1875 s.164. Additionally, Part V of the

[10] Being the areas of the following local authorities: Blackburn with Darwen Borough Council; Cornwall Council; Devon County Council; County of Herefordshire District Council; Hertfordshire County Council; Kent County Council; Lancashire County Council; Cumbria County Council; and North Yorkshire County Council.

National Parks and Access to the Countryside Act 1949 ("the 1949 Act") enabled the owner of any class of common land to agree with the local planning authority or conservation board that the land is "open country", and also enabled the local planning authority or conservation board to order that such land is "open country", with the purpose of such an agreement or order being to permit public access for open-air recreation. "Open country" in this statute means any area appearing to the authority to consist wholly or predominately of mountain, moor, heath, down, cliff or foreshore, and, in the countryside, woodland, river, or canal, or an expanse of water through which a river runs.

Part I of the Countryside and Rights of Way Act 2000 ("CROW 2000"), enacted by the New Labour government in the millennium year, conferred a wider right of public access, on foot and for open-air recreation, to open country (land wholly or predominately comprising mountain, moor, heath or down) and to registered common land, *i.e.* land on the commons register. Land falling within the scope of CROW 2000 can no longer be subject to an agreement or order under the 1949 Act. Under CROW 2000, Natural England has a duty to prepare conclusive maps showing all open country and registered common land. However, the public cannot rely on the conclusive maps alone to identify land subject to access rights under CROW 2000. Land which has been dedicated under CROW 2000, or is coastal margin, is accessible to the public under the statute even though not shown on the public maps. Moreover, land shown on the conclusive maps may be excepted from the access rights under CROW 2000 for various reasons, *e.g.* if it comprises a building or its curtilage, garden land, mineral workings, a golf course, a racecourse, an aerodrome, or land subject to military byelaws. Additionally, and importantly, s. 15 of CROW 2000 provides that the access right under that statute shall not apply to land which benefits from a subsisting statutory right of access for recreation – and this would include land subject to access rights under s. 193 of the LPA 1925.

Where to go from here?

Section 193 of the LPA 1925, although originating somewhat as an afterthought in the Law of Property Act 1922, marked an important step in securing public access to open spaces. Since then, the importance of open-air recreation has continued to be recognised in subsequent legislation. However, legislative provision for public access to open spaces is piecemeal. It can be difficult enough to identify land which is subject to s. 193 itself, and there is now added difficulty in identifying which land is subject to section 193 rights, or CROW 2000 rights, or

rights under other legislation.[11] The different legislative schemes also provide for different means of regulating public access to open spaces. This statutory landscape is confusing, but is the result of the compromises made by Parliament in balancing the competing priorities of landowners, developers and the groups lobbying for greater access to open spaces over the past 150 years. Given that the competition between those interests will continue, and given the inevitable need for political compromises, one can anticipate that this statutory landscape will remain complex.

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[11] See e.g. *R (Day) v Shropshire Council* [2023] UKSC 8, where an unwitting purchaser of land subject to the Open Spaces Act 1906 found itself bound by the statutory trust.