

## BATTLES FOR CAIRNGORM RIGHTS OF WAY

SANDY ANTON

Walkers today owe any practical freedom they may have to wander over the Scottish hills largely to the battles in the courts waged by the Scottish Rights of Way Society and a few public spirited individuals to stop the closure of traditional rights of way. Without those rights of way it would have been possible for landowners to police entry into our hills: with them, it is hardly practical for them to do so, however much they might want to.

The growing popularity of grouse-shooting and deer-stalking among the wealthy in the Victorian period brought substantial funds to highland landowners who became determined to protect their estates not only from furred and feathered vermin but against the intrusion of the growing band of walkers who, emulating their Queen, sought recreation in the hills. In an interesting anonymous article in an early Cairngorm Club Journal (CCJ Vol. VI, (1911), p. 300) the author records the closure of many routes around Braemar in the 1850's. "Doubtless the shutting up of the North Deeside Road west of the Invercauld Bridge of Dee, the closing of Glen Ey and the Coirenleirg route were occasioned by the then policy of endeavouring to shut out the public at all hazards from deer forests." The author referred in particular to Glen Ey where he spent his youth and explained that through this glen there was one principal cart road which divided into three lesser roads, the one leading to Glen Clunie by Corienleirig; a second to Glen Shee by Alltanodhar and Glen Tatnich; the third to Strath Ardle, Glen Fernate, etc. By 1911 all these routes had been closed. The author then records vividly the closing of Glen Lui Beg and other parts of the Mar Estates to pedestrians by the Duke of Leeds, who was then lessee of those estates.

Similar policies carried out in Glen Tilt were the occasion of the notable legal battle fought by the newly formed predecessor to the Scottish Rights of Way Society. The Lord Provost of Edinburgh, Adam Black, had called a public meeting of prominent Edinburgh men on 30th April 1845 and they agreed to form an "Association for the Protection of Public Rights of Roadway in and around Edinburgh". The second motion was "That the citizens of Edinburgh have cause to complain of various encroachments on their rights of access to many rural localities of traditional interest and picturesque aspect which afforded innocent gratification to them and proved objects of attraction to strangers". This motion was carried unanimously. The Association wasted no time in getting to work and by June of the same year it had taken up the questions of access to Hawthornden and to Corstorphine Hill, both near Edinburgh. It also soon began to look further afield. It was resolved in June 1845 that the Association should intervene in the then much discussed closing of Glen Tilt to the public.

### **Battle of Glen Tilt**

The immediate occasion was the attempt of the Duke of Atholl in 1847 to turn back the botanist, Professor Balfour, and a party of students on a journey from Braemar to Blair Atholl. The Duke appeared "herself" – in the phrase of one of the gillies – and told the party that they were trespassers in his domain and that they had to return the long Scots miles back to Braemar. In the words of *The Times*, the intruders, in the view of the Duke, "not only trespassed in having come there, but they were trespassers where they stood – if they passed to the right or left they were trespassers still. It was trespass if they moved, trespass if they retreated, and trespass if they remained where they were". Eventually, the party escaped by climbing over a dyke, with the Duke's familiars in hot pursuit.

On learning of these events, the Association wrote to the Duke's factor, who made it clear that no public right of way was admitted. The Directors wasted no time and at the meeting at which the factor's reply was reported, two motions were passed:–

"1. That in order to protect the rights of the public, it is necessary that the Association be provided with the sinews of war, and that application be immediately made to the inhabitants of Edinburgh and other towns for subscriptions to the funds;

2. That, as soon as the Association is provided with sufficient amount to secure them in such measures as they may be advised to adopt, active steps be taken to open to the public the accesses to the glens and mountains which have been arbitrarily shut up". The Association soon received in public subscriptions and private guarantees sufficient financial backing to raise an action against the Duke.

The matter was litigated in 1849 in the case of *Torrie v. Duke of Atholl*, where evidence of the use of the route by drovers, packmen, and others was submitted. The result was a resounding victory for the Society. The Duke, however, did not take his defeat well. In subsequent years there are reports of his blocking English students travelling through the glen and it is thought that the Duke subsequently destroyed an old bridge over the river Tarff in an effort to deter walkers.

### **Reconstruction of the Society**

During the years 1861 to 1883 the Association appears to have been rather inactive, but at a public meeting in 1883 it was decided that the Society should be reconstituted and incorporated under the Companies Acts as "The Scottish Rights of Way and Recreation Society (Limited)". Attention was drawn to the threat to some of the public routes through the Pentlands, lying as they did at Edinburgh's doorstep, and the Society gave financial support to its members in proceedings taken against them by the proprietor of Dreghorn Estate. Railways had now entered the scene and the Society did its best to ensure that their proliferation did not cause the loss of rights of way. Then there came the matter of the bridge over

the Tarff.

### **Bridge over the Tarff in Glen Tilt**

In 1879 a young Englishman, Francis Bedford, was drowned while trying to cross the Tarff when its waters were high. A fund had been started with the object of building a stone bridge as a memorial to him, but the project fell through because only £70 had been donated. The Society took the matter up in 1885 and arranged for the erection in the following year of a wooden suspension bridge, which still stands today as the "Bedford Memorial Bridge". This bridge was overhauled by the Society in the 1930's and again in 1959. On the latter occasion Dr. George Taylor of the Cairngorm Club had reported to the Society on the condition of the bridge and on the necessary repairs. The Cairngorm Club made a donation of Five Guineas which, perhaps, did not err on the side of generosity. To compound this, the then Secretary of the Club forgot to enclose the cheque.

### **The Glen Doll Case**

Of the Mounth tracks linking the southern glens with Deeside, one of the most attractive is the Tolmount, connecting Braemar with Glen Clova.

Viewed from the Clova side there are initially two routes. One follows the South Esk to the picturesque site of the ruined Bachnagairn Lodge, climbs past (south) Loch Esk – from which there are splendid views to the north – and eventually meets the other route near the cairn on Crow Craigies at some 3000 feet. The other route, usually called Jock's Road, skirts the Youth Hostel, the former Glen Doll House, and follows a forest track with striking views towards Craig Rennet. The track veers to the north-west, along the north side of the upper Glen Doll, winding its way among rocks and boulders until it reaches a rough shelter below Craig Lunkard. Jock's Road then moves less steeply upwards until it joins the Bachnagairn route and both pass the Tolmount on its right before descending steeply to Loch Callater.

In 1883 Duncan Macpherson, a Scot who had prospered in Australia, purchased the Glen Doll estate and decided to preserve it for deer-stalking. He began to turn away shepherds, tourists, botanists and others who wished to enter it. In the summer of 1885 two members of the Board of the Society with two friends entered Glen Doll, erected a signpost (which Macpherson later removed) and were met by the laird, his nephew and a keeper. One of the intruders was a notary public who, in the presence of all, went through the ancient legal ceremony of "taking instruments" recording the obstruction of the route. This curious ceremony so weakened the resolve of the keeper that he declined to implement his master's wishes and the party were allowed to proceed on their way.

But the systematic obstruction continued and not everyone has the prudence to have a notary public accompany him on the hills. Shortly afterwards, therefore,

the Society and various local people raised an action in the Court of Session against Duncan Macpherson and Colonel Farquharson of Invercauld, the owner of the Callater side of the Tolmount, to declare that there was a public road or right of way on foot and on horseback and for driving cattle and sheep from Auchallater in Glen Cluny through the Glen of Doll to Braedownie in Glen Clova. To his credit, Colonel Farquharson soon intimated that, so far as the road passed through his lands, he did not contest the action. Macpherson on the other hand, fought the action tooth, nail and claw, using every procedural device in the law books in an attempt to have the action dismissed. For example, contrary to the usual procedure in rights of way actions, he contended that the action should be tried without a jury, which, the laird argued, might have been prejudiced by correspondence in the Scotsman and London Standard. Macpherson won this round and the court directed that the proof of the facts should proceed before Lord Kinnear without a jury.

The 57 witnesses called by the Society no doubt sorely tried the patience of that eminent judge, but he gave judgement on the merits for the Society. He held that the earlier use of the route could not be imputed merely to the tolerance of previous proprietors and that, while the evidence of use – particularly during the winter months – was slender, it was such as might have been expected, having regard to the nature of the country and its sparse population, if the route had indeed been a right of way. The Glen Doll route was shorter than the route via Bachnagairn and was the natural and direct route from Braemar and further north to the fairs in the south. Lord Kinnear's judgement was upheld by the Court of Session on appeal in July 1887 and by the House of Lords in 1888.

The Society was awarded judicial expenses against Macpherson and the proceedings must have cost him some £5000, but the Society had to pay its own extra-judicial expenses, i.e. those not allowed by the Court. It is understood that these amounted to some £650, an enormous sum in those days, and its payment nearly bankrupted the Society. But thanks to the courage of the Society a century ago walkers of the present and future generations may freely use one of the more interesting and exhilarating of Scottish hill tracks. Indeed, once the implications of the decision were appreciated by landowners there was for long a marked hesitation on their part to contest the right of walkers to traverse old drove roads and other ways through the hills. The signpost which Macpherson had taken down in 1885 was replaced. In 1958, following the well-known disaster in which five New Year walkers of this route lost their lives, the Cairngorm Club made representations to the Society that a signpost should be erected where the track leaves Glen Callater. The Society furnished a signpost which was erected by the Club. More recently, in 1991, the Society has signposted the old right of way from Glen Doll over the Shank of Drumfallow to Glen Prosen and Glen Finlet.

### **The Battle of Braemar**

It may be mentioned incidentally at this point that a rights of way dispute – battle would perhaps be more appropriate – occurred in Braemar in 1891. The

Society did not intervene as such, but kept an eye on the proceedings. The then Laird of Invercauld, attempted to close a track which led from the Glen Clunie road by the back of Craig Coinnich to a point on the present Braemar-Ballater road near the rocky outcrop known as 'the Lion's Face'. The track is about three-quarters of a mile long and had been in frequent use by the people of Braemar and by visitors for many years. The laird had a fence erected across it, and the local people broke it down. It was repaired and again broken down. The Factor called in the police, but the Procurator Fiscal said that it was a civil matter, and did not come within the scope of the criminal law. The laird was obstinate and had the fence restored as often as it was demolished – and in one week in August 1891 it was demolished three or four times. The skirmishes in this battle became something of an entertainment for the local summer visitors: at one stage, under the supervision of Mr Foggo, the factor, estate employees were erecting the fence at one end while it was being demolished at the other. Doggerel verses were written to commemorate the occasion:

"Crush, crush, crush,  
Let's crush this Foggie man...

Eventually it became apparent to the laird and his factor that their tactics were unlikely to weaken the resolution of the people of Braemar and, resorting to legal advice, the laird ceased to obstruct the route. It is still open for a pleasant stroll today.

### **The Glentanar Case**

A writer in the Aberdeen Free Press on 2nd September 1921, after referring to the closure of certain roads in the Braemar district, pointed to the fact that from time immemorial there had been two public roads along Tanarside, one on the south side which had recently been locked up and another on the north side which has been made "as like the private approach to a gentleman's residence as possible, with great gates which are shut at night, while further up the glen there are at least two other sets of gates. These are intended to bar the way to Mount Keen, to which the road undoubtedly leads, and, as a further excuse for closing the road, the farmers in Glen Etnach were removed and their houses were left to lapse". The writer went on to catalogue various rights of way in the estate, including the Mounth over Mount Keen, the Fir Mounth road, the route from above the Bridge of Muick via Glen Etnach to Mount Keen and the south, and several others.

The Scottish Rights of Way Society took up the cudgels and, failing to weaken the resolution of the proprietors of the estate and itself lacking the financial resources to initiate legal proceedings, eventually persuaded the Deeside Committee of Aberdeen County Council and the County Council itself to raise proceedings against, among others, the Trustees of the deceased George, Baron Glentanar. This extremely hard fought case was heard before Lord Mackay in June 1930, and the evidence throws interesting light on the use of the routes

during the preceding 40 years and more. By and large the judgement was one very favourable to the County Council, which by then had taken over the action. The Trustees lodged an appeal but later entered into negotiations for a settlement. Its terms were eventually agreed, and the Court of Session gave its authority to those terms. The details are set out in the 1931 Cairngorm Club Journal at pp.42-43. From the standpoint of members of the Club, its most important features were the declaration that the road from Bridge of Ess towards Glentinar House remains a public road for all forms of traffic, but a slight change was made in the route approaching Glentinar House. The road, which used to pass in front of the house, was diverted past the stables and ends in the parking place which was formed beside the stables. The road from this point up Glen Tanar to Corrievrach at the foot of Mount Keen was declared to be a public right of way for passengers on foot or by horse or by non-mechanically propelled cycles. It is sometimes argued that Lord Mackay's decision was tantamount to one that a pedestrian public right of way is automatically one for pedal cycles. This is doubtful. The case was settled and Lord Mackay's judgement, in consequence, can hardly be regarded as being authoritative.

The Society recently renewed the signposting of many of the rights of way in the vicinity of Glentinar. Such signposting is important, not for route-finding purposes, but as a visible assertion of the existence of the right of way.

### **Recent Events**

In recent years the Society has tried, where at all possible, to secure the recognition of rights of way by agreement. One interesting case concerned the Forest of Birse. In recent times the Society had received persistent complaints about the intimidating signposts near the car-park at the end of the Forest of Birse road suggesting that the route past Ballochran Farm towards the Fungle was a private one. The Fungle route originally passed close to the formerly derelict Birse Castle but, with its restoration, this seemed an intrusion upon the privacy of its proprietors and an informal deviation was agreed between the estate and the Society whereby the main Fungle route from Tarffside to Aboyne was moved to the west of the policies of the Castle and the altered route was signposted. No provision was made for the signposting of the route to the Fungle from the Forest of Birse. As a result of the complaints the Society took up the matter again and the inclination of the estate at first was to deny that the route from the Forest of Birse was indeed a right of way. To establish this by court action would have been possible but quite expensive. The Society fortunately consulted Lewis MacAllan, a member of the Cairngorm Club and former County Clerk, who discovered that the route as far as the ford at Ballochran was on the Statutory List of Public Roads for the Kincardine and Deeside Division of Grampian Region. On being confronted with this surprising news and on the understanding that the Society would not object to the removal of this road from the Statutory List, the Estate agreed to a more acceptable diversion of the route and its adequate

signposting as a right of way.

Perhaps still more important has been the reaching of an agreement with the Forestry Commission in relation to the recognition and signposting of rights of way and the retention of existing access rights – not necessarily rights of way – through its forests. On the basis of this agreement it has been possible to open up and signpost an ancient route from Loch Tummel, near the Tummel Hotel, running through the woods to Blair Atholl. The Society, on the basis of this agreement, hopes shortly to identify and signpost the Builg Mounth, the Stock Mounth and the Cryne Corse Mounth.

Sometimes, however, litigation becomes an unfortunate necessity. Two recent examples concerned the route near North Ballachulish from Callert to Lairigmor and a route near Higgs Farm off the Lanark road. Both were eventually settled, but the latter in particular was expensive for the Society. For actions of this kind the Society desperately needs funds. Without substantial assets in its treasure chest the Society can present no credible threat to landowners.

A. E. Anton

**Editor's Note:** *The Society welcomes applications for individual membership and the making of donations. Enquiries should be made to the Secretary, John Cotton Business Centre, 10/2 Sunnyside, Edinburgh, EH7 5RA.*

