

# **The Forest of Lendrum**

Some Historical Sources

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## **INTRODUCTION**

This paper outlines the findings of some historical research commissioned by Birse Community Trust in the National Archives of Scotland to seek further information on the history of the Forest of Lendrum in the Parish of Birse, Aberdeenshire. The terms of the research were as follows: -

1. to establish the location and extent of the Commonty of Lendrum,
2. to seek evidence to explain the apparent coincidence of the Commonty of Lendrum and the Crown Common of Slewdrum and the apparent contradiction between the two,
3. to make any other observations as appropriate.

Sources identified are listed in Annex I. A selection of documents have been copied and are included in Annex II.

## **TIMELINE**

- |         |   |
|---------|---|
| 1853    | Summons of Division of Commonty of Lendrum. Nicol vs. Farquharson.  |
| 1866    | Farquharson of Finzean issues a Summons for the Division of the Commonty of Lendrum in the Court of Session.  |
| 1885    | Nicol vs Harper. Interdict to stop Harper fishing for salmon  |
| 1886 on | Crown challenges Farquharson and Nicol's rights to the fishings. Correspondence follows and leases are agreed by Crown to Nicol and Farquharson for Commonty Salmon fishings. These leases run until at least 1918. |
| 1930    | Crown claims salmon fishings and a court case follows - Farquharson and Nicol vs Commissioners of Crown Lands   |

## **EVIDENCE**

The following section outlines the evidence derived from documents (a list of which is provided in Annex I). I should point out that this research was carried out in a short timescale and that the documents copied in Annex II should be read as they may contain information that I have overlooked. Likewise the records consulted may contain further evidence.

## **The 1853 Case**

In GD1/584/33 there are 3 papers relating to the 1853 Case which is a Summons of Division of the Commonty of Lendrum Nicol against Farquharson and others (being) .....

In defence for Huntly, it was admitted that;

*the commonty of Lendrum is situated in the parish of Birse and county of Aberdeen and that it is bounded on the west by the Cairn o Mounth road and the farm of Tillenteach, in the north by the River Dee, on the east by the Dyke of the plantations of Blackhall and on the south by the lands of Strachan.*

In a revised defence, Huntly argues as follows;

*The defender has a right of property in said Forest of Lendrum and by himself, his predecessors and (other) proprietors of the lands before specified he has from time immemorial occupied and possessed the said forest and has exercised rights of pasturage and other rights of property therein.*

This case appears not to have proceeded beyond this point.

## **The 1868 Case**

In 1866, a further Summons for division of the Commonty of Lendrum is issued in the name of Francis Farquharson Esq. of Finzean against James Dyce Nicol of Ballogie and others. Dr Ian Adams, in his Directory of Scottish Commonties, claims that the commonty was divided. He states;

*The commonty of Lendrum was situated south of the River Dee on ground rising steeply to two peaks, Coulnacraig (593 ft) and Muckle Ord (724 ft) (NO6295). On the west it was bounded by the Cairn o' Mounth road and the farm of Tillenteach, on the east by the dyke of the plantations of Blackness, and on the south by the lands of Strachan. Summons was raised by Francis Farquharson of Finzean against James Dyce Nicol of Ballogie and others of the division of the forest or commonty of Lendrum in 1866 (Farquharson v Nicol - CS249/2197). A plan was made in 1853 (missing). The commonty was divided by decret dated 1868 (CS97/F/1/6). The privilege and liberty was claimed, on behalf of Nicol of Ballogie, of salmon fishing in that part of the River Dee lying contiguous to the commonty.*

Looking for File CS249/2197 yields only a slip of green paper with the words "no. Adam" written on it. File CS97/F/1/6 contains the legal papers but, importantly, no decret of 1868. As I shall now explain, I can find no evidence to support Adams's assertion that the commonty was divided. I report on the evidence from CS97/F/1/6

(the bundle of 12 legal papers) below before continuing the story by making reference to GD1/584/33 (a file of miscellaneous legal papers and correspondence in connection with the case).

The Summons of 1866 is reproduced in Annex II. In the Summons the pursuer (Farquharson) stated;

*The commonty of Lendrum is situated in the parish of Birse, and county of Aberdeen, and is bounded on the west by the Cairn O'Mounth road and the farm of Tillenteach, on the north by the River Dee, on the east by the dyke of the plantations of Blackhall, and on the south by the lands of Strachan, conform to plan or sketch thereof, and of the lands adjoining thereto, herewith produced.*

He goes on to narrate the lands held by him including,

*the town and lands of Tillygarmonth and moss thereof, commonly called Strathswen, within the Forest of Lendrum.  
.....with the liberty and privilege of commonty and common pasturage in the forests of Birse, Glenavon, and Glencate, and the said forest of Lendrum, lying betwixt the burns of Kettach and Girlach, on the south side of the water of Dee, within the hail bounds of the same, and of building of shiels within any part of the said forests, and likewise of casting, winning, and transporting of feual, feal, and divots in the said forests and each of them: As also of cutting and carrying away trees and timber in the said forests and each of them, for building and upholding of the houses of the said lands.....and likewise with the privilege and liberty of salmon fishing on that part of the Water of Dee lying contiguous to the said forest of Lendrum.*

In this bundle of papers there are Defences and revised Condescendences (legal terms for exchanges of arguments) by various parties. James Dyce Nicol of Ballogie issues a statement on 21 May 1866. There is an Inventory of the process (a description of the various papers submitted) which includes reference to production 8 - a plan of the Commonty of Lendrum dated 1853. No trace of this plan can be found. The Marquis of Huntly responds on 21 May 1866 in which he admits (agrees with) the boundaries as described and admits Plan No. 8 produced by the pursuer. All this leads to a revised Condescendence being produced by Farquharson in response to the submissions of other parties. This is dated 15 June 1866 and was lodged on 12 July 1866. In this statement he claims that;

*The commonty of Lendrum is situated in the parish of Birse and county of Aberdeen and is bounded on the west by the Cairn O' Mounth road and the farm of Millenteach, (sic) on the north by the River Dee, on the east by the Dyke of the plantations of Blackhall, and on the south by the lands of Strachan conform to plan or sketch thereof, produced. the said plan or sketch contains various*

*descriptions of the said commonty and adjoining thereto. The description of the said commonty in the Summons includes certain lands which might not to have been included, and a minute which is No. 23 of process has been lodged by the Pursuer in which the proper description of the said commonty is given. This minute is especially referred to....*

This minute is a joint Minute for Farquharson and the Marquis of Huntly and a copy is provided in Annex II. It clarifies the boundaries of the commonty and should be read.

A further defence is lodged by Douglas Wimberley Esq. late Lieutenant in the 79th Regiment of Foot now residing at Glenmillan, Aberdeen and Alexander Macnaughton Esq. etc. In this he claims that part of the description of the commonty includes part of the defenders lands of Blackhall. Another defender is Alexander Douglas Campbell, heir of Entail in possession of the lands and estates of Kilmartin and Blackhall. He states;

*The defenders rights over the commonty of Lendrum will be condescended on when the boundaries of the said commonty have been fixed and particularly are appointed to lodge claims in the division.*

In a revised defence for Nicol it is asserted that,

*3. The defender has a right of property in the said Forest or Commonty of Lendrum and he and his predecessors and authers proprietors of the lands and others described in the preceeding articles have for time immemorial by themselves and their tenants of the said lands professed and exercised rights of pasturage and other rights of property in the said Forest or Commonty.*

He further goes on to claim a right of fowling, shooting and fishing over the whole subjects following division.

In a revised defence for Campbell of Kilmartin and Blackhall issued on 17 January 1868 is it stated that he,

*will withdraw from process if Minute 23 is given effect otherwise will claim a right of property of whole commons lying in the parish of Strachan and County of Kincardine.*

The references to boundaries here appears to reflect the fact that the old Cairn O'Mounth road and the present one run on different alignments and that the Hill of Tillybaith should be excluded. This is the essence of the changes agreed in Minute 23 between Farquharson and the Marquis of Huntly.

The 1866 case papers in CS97/F/1/6 ends with a Schedule of Return of Process in

which the 12 papers referred to above are returned to the Lord Clerk Register. They are noted as having been received on 2 February 1877.

At this point one of the mysteries of the whole story becomes apparent. Adams claimed that the commonty had been divided in 1868. One would have expected this division to be ordered by a Decreet of the Court of Session. Indeed this is exactly what Adams claims happened. No such Decreet is contained in this bundle however. A search of the Court of Session Minute book (CS17/1/87) revealed nothing. A further search of all the Decreets issued by the Court of Session for 1868 found none relating to Farquharson or Lendrum. A search of all the indexes of Extracted Cases (those which have been entered into the official record) was carried out for the years 1863 to 1878 and no further cases were found relating to Farquharson of Finzean. However, a reference was found in GD1/584/33 to an interlocutor.

File GD1/584/33 contains some of the legal papers relating to the case but also letters between the parties' lawyers in respect of the proposed division. It is not immediately obvious which firm of lawyers is representing which party but on 17 February 1968, Messrs Henry and Shirress write to James C Baxter suggesting that Marquis of Huntly concedes his claim at once.

Responding in a letter of 24 Feb 1868, James C Baxter makes reference to;

*an interlocutor of 12th inst. sustaining the libel of Division and remitting to a Commissioner to visit and perambulate and take cognisance of the several limits and marches of the Commonty libelled.*

What is interesting about this letter is that it makes reference to a legal document (an interlocutor) dated 12 Feb 1868. This is after the papers in bundle CS97 have been closed. I have been unable to locate this interlocutor but an advocate is currently trying to locate this in the Advocate's Library.

One more letter in GD1/584/33 is worth quoting. It is a letter dated 18 March 1868 from James C Baxter who appears to be acting for Nicol and argues that Mr Nicol maintains a right to shoot over the whole of the commonty which right will not be affected by the division. It appears to be addressed to Lord Huntly's representative who I think is JA Robertson, a Trustee of Lord Huntly.

*Mr Nicol does not adopt the view you seem to entertain that the right of shooting over the Common falls to be restricted or confined to the portion of to be allocated to him. On the contrary, he maintains that it will continue to be exercised as at present over the entire forest notwithstanding the division which will not affect it.*

*Mr Nicol has no wish to put Lord Huntly to any unnecessary expenses in this process but in the meantime he is altogether ignorant of the nature and interest of his Lordship's rights in the Commons and*

*cannot give to admission you ask. My information is to the effect that His Lordship has no lands adjoining any part of the commons.*

*I am yours truly*

*James C Baxter  
Messrs Henry and Shirress*

### **1885 Case Nicol v. Harper**

This case concerns an attempt by William Edward Nicol of Ballogie to interdict William Harper, a wood Merchant residing at Bellhangie Cottage, Potarch from fishing for salmon in the Dee. A copy record of the case is reported in Volume C page 87 of the 1932 salmon fishings case and it is from that source that the following details are derived. In this case, Nicol seeks to;

*interdict the defender from unlawfully entering or trespassing on the South Bank of the River Dee where said river is contiguous to the Forest of Lendrum etc.....*

In the case papers it is;

*averred that the pursuers, the Marquis of Huntly and Dr Farquharson are sole proprietors of the Forest of Lendrum.*

In the statement for the defence (Harper) it is claimed;

*There formerly existed in the Parish of Birse four Royal forests viz. the forest of Birse, the forest of Glencat, the forest of Glenavon and the Forest of Lendrum otherwise called the Forest of Slewdrum.*

*The whole of these forests belonged in property to the Crown but in process of time they were all alienated, either by direct grants or conveyances or by grants of Heritable Forestry, with the exception of the said Forest of Lendrum which has never been alienated, and it is now the only Royal forest in the county of Aberdeen that still remains the property of the Crown.*

Harper's case rests on the forest being Crown property and the associated fishings thus being in some sense public and not the property of the local estates.

In answer, Nicol;

*Admitted that the Forest of Lendrum at one time belonged to the Crown. Denied that it is still the property of the Crown.*

Further evidence is given by Francis James Cochrane. He is an Advocate and owner of the estate of Balfour. He is a senior partner in Cochrane and MacPherson

who had acted as Factors for Finzean estate from 1837 to the present (1885).

*We have an ancient plan in our office showing the estate and showing the Forest of Lendrum. I think it is in process.*

by which he means he thinks the plan forms part of the documents produced for the case. I can find no record of this map which may remain in private hands.

### **1886 The Crown takes an interest in the salmon fishings.**

1886 seems to have been a pivotal year. In evidence to the 1932 case (see Annex II for copy), Joseph Farquharson says;

*In 1886 my brother Robert went to India, and was absent from Scotland for probably five months. It was then that the question was raised for the first time by the Crown that they had rights in the fishings opposite Lendrum.*

(Farquharson evidence pg. 188 1932 case)

In 1887, the first lease is granted by the Commissioners of Woods to Farquharson of Finzean and Nicol of Ballogie. This arrangement continued until 1929. In the statement of facts in the 1932 case (copied in Annex II) in answer 5, the complainers (Farquharson and Nicol) state;

*Upon their titles the complainers' authors continued to possess and share the said fishings by appropriate modes of fishing and continued to have exclusive and unchallenged possession of the said salmon fishings until or about October 1886, when the Commissioners of Her Majesty's Woods and Forests asserted for the first time, on behalf of the Crown, a right to share the said salmon fishings with the then proprietors of Finzean and Ballogie, who in turn disputed the alleged right.*

In evidence by Farquharson (p.206 of 1932 case), it is suggested that Huntly had an interest in the fishings before 1886 and had put a farmer up to fish. Might this be connected with the 1885 Harper case?

On 24 November 1886, JA Robertson CA, Edinburgh writes to George P Culley, Commissioner of Woods in London on behalf of the Marquis of Huntly's Trust (GD1/584/33 bundle). He goes on at some length about salmon fishings before turning to the issue of the Forest of Lendrum,

*You are probably aware that for nearly 200 years the rights of the Marquis of Huntly, Mr Nicol of Ballogie and Dr Farquharson of Finzean in the Forests of Birse, Glencat, Lendrum and Glenaan have been the source of frequent litigation and there appears to be ample evidence to prove that the Forest of Lendrum formed part of the Forest of Birse.*

.....

.....  
*In the Forest of Birse Lord Huntly is the proprietor of the solum while Mr Nicol of Ballogie has a right of shooting in the Forest and Dr Farquharson has certain grazing rights.*

*In the same way in the Forest of Lendrum I believe Lord Huntly to be the proprietor of the solum while both Mr Nicol and Dr Farquharson have probably joint rights along with Lord Huntly to fish for salmon ex adverso of the Forest.*

J Russell, of the Office of Woods etc. replies on 19 November 1886,

*Sir,*

*I am directed by Mr Culley to acknowledge the receipt of your letters of the 24th inst. further relative to the Marquis of Huntly's claim to the salmon fishings in the River Dee ex adverso of the Forest of Lendrum, County of Aberdeen in which you state that "there appears to be ample evidence to prove that the Forest of Lendrum formed part of the Forest of Birse" You do not however explain the nature of this evidence nor state where it is to be found and as the point is a most important one Mr Culley will be glad if you furnish him with this information.....*

On 20 December (no year is given but I suggest 1886), Lord Huntly writes a memo to JA Robertson (copy provided in Annex II) responding to a letter from a Mr Walker of 6 November (could find no record of this but presumably it is a letter from the Crown). This Memo should be read by those more familiar with the circumstances that I. In this memo is evidence of a continuing lack of clarity as to the legal status of the Forest of Lendrum,

*I have read Mr Walker's letter of 6th Nov to Mr JA Robertson. The proposal of the latter to which I assented proceeded on the footing of the owner of the "solum" in the Forest of Birse, and me of the joint owners of the commonty of Lendrum offering a settlement to the owners of servitudes in the forest and to the co-owners of Lendrum which would give to each a separate property and fairly divide the rights of all parties.*

At this point it is worth introducing perhaps the most significant and authoritative document found in relation to the legal status of the Forest of Lendrum. File CR10/253 Salmon Fishings Scotland is a file of 1886 Crown Office papers and correspondence relating to the salmon fishings ex adverso the Forest of Lendrum. In this file are two papers prepared by Donald Beith WS.

Donald Beith was a Solicitor for the War Department and other government departments in Scotland and a partner in Messrs Murray, Beith and Murray W.S. He

appears to have undertaken significant amounts of work for the Commissioners of Woods (for example preparing various reports on title, e.g. CR1/17 titles and possession of proprietors of lands on the sea coast to the salmon fishings in adverso thereof). He died in 1895.

In a paper of 30th July, Beith provides views on the Crown's rights to salmon. Of greater interest, however, is a 13 page letter dated 12 August 1886 which is a report on the title to the Forest of Lendrum. A full copy of this is provided in Annex II and the reader is advised to read the letter in full. Beith was instructed on 3 August to advise as to title to the Forest of Lendrum. He provides quotes from Farquharson's title of 1876 in which Lendrum is mentioned.

*I have also caused to be examined at record the title made up in 1876 in the person of the present Dr Farquharson of Finzean. It refers back to the Deed of Entail of the lands dated in 1790 wherein the lands are described, so far as relating to the present question thus: -*

*the town and lands of Tillygarmonth and moss thereof commonly called Strathswen within the Forest of Lendrum.....also the liberty and privilege of commonty and common pasturage in the Forests of Birse, Glenavon and Glencate and the said Forest of Lendrum lying betwixt the Burns of Kettach and Grelach on the south side of the water of Dee within the hail bounds of the same and of building of shiells within any part of the said Forest and likewise of casting and winning and transporting of feuel feal and divot in the said Forests and each of them - as also of cutting and carrying away of trees and timber in the said Forest and each of them for building and upholding of the houses of the said lands.....and likewise with the privilege and liberty of salmon fishing on that part of the Water of Dee lying contiguous to the said Forest of Lendrum.*

This description is identical in virtually all detail to the description given by Farquharson in the 1866 Commonty Division case. Beith cites the 1793 Statistical Account of the parish of Birse;

To the parish belong in property or at least by servitude four forests or glens namely Glen Birse, Glenaven, Glencatt and Glenslewdrum.

From this Beith argues;

*This is a rather indistinct description, but I confess it leaves in my mind the implication on my mind that "the Forest" meant Birse and that it embraced the other three Forests. If so I fear that although at one time a Royal forest the Crown has parted with any right it had in it. Especially in my apprehension will this be the case if the several proprietors W Nicol, the Marquis of Huntly and Dr Farquharson and their respective predecessors have among them had all the possession and use of the Forest or Forests of which they are*

*susceptible. If the other three Forests were not Royal Forests it would rather seem that they and particularly Lendrum or Glenslendrum belong, on the greater part if not the whole of it, to the Laird of Finzean.*

*Local enquiry may throw some light on the subject if it be deemed worth while to pursue the enquiry further. I return the papers and etc..*

It would be useful to know what papers Beith had been sent but these do not appear to be in the file.

Beith's advice is carefully argued and bears careful reading. It provides clear evidence that the Crown at this time was unclear as to who owned the Forest of Lendrum. It is worth noting that in 1871 Beith prepared a Memorial in regard to the Forest of Mamlorn which included a list of the Royal forests in Scotland. This memorial is probably closely connected to the document found in a collection of Case and Opinion Books (CR3/6) in which an opinion is found that the Marquess of Breadalbane's duties are to keep and preserve the subjects i.e. Mamlorn remains a Royal Forest (pg 441). On page 422 is an Opinion of 31 August 1877 relating to the Earl of Moray's rights in the Forest of Glenfinlas. It concludes that he is the Keeper of the Forest, does not own the soil and has a right of usufruct. I did not look at these opinions closely. They may have borne the imprint of Donald Beith.

Finally, in closing the events of 1886, File CR10/254 is a sizeable file of correspondence of the Crown relating to the salmon fishings from 1885 through to 1918. Most of it is concerned with the ongoing leases granted to Farquharson and Nicol. It contains a map of the Commonly fishings showing them marked in red on the south bank of the Dee between the Burn of Greenoch and the Burn of Kettock.

Further examination was made of CR3/6 a bound volume of cases submitted to the Law officers for opinions 1865 to 1873. None were found relating to Lendrum.

### **The 1932 Case**

We now come to the 1932 court case. The papers relating to this case are to be found in CS46/No. 63 of July 1933. See Annex I for further details of this large bundle of papers. The case was brought by Farquharson and Nicol against the Commissioners of Crown Lands in the form of an Interdict to stop the Crown from advertising for lease the salmon fishings of the Commonly Waters, that stretch of the River Dee adjoining the Forest of Lendrum from the mouth of the Burn of Grennoch to the mouth of the Burn of Kettock. The case was won by Farquharson and Nicol and during the proceedings mention was made of the Forest of Lendrum. The case was launched on 15 October 1930.

In the Statement of Facts for the Complainers (See copy produced in Annex II), Farquharson and Nicol claim the following,

*Statement 2. The said lands of Finzean and Ballogie are situated in the Parish of Birse. They lie to the south and west of the Forest of Lendrum (otherwise known as Slewdrum), along the north of which forest runs the River Dee.*

.....  
*.....The said Forest of Lendrum or part thereof is claimed to be part of the estate of Finzean.*

The Crown responded by denying this and, in answer to Statement 3, claimed

*The Forest of Lendrum has never been granted out by the Crown and remains Crown property.*

In evidence given by Joseph Farquharson at Finzean on 10 October 1931 (he was 85 years old and unable to travel to Edinburgh), he argues that the fishings belong to Finzean and Ballogie. (A copy of his evidence is provided in Annex II). In answer to the question why the fishings came to be called the commonty fishings, Farquharson replies that;

*there are a number of commonties here about.*

He goes on to say,

*Then there is this commonty between Ballogie and Finzean....and there is another commonty here between Ballogie and Finzean, which we have divided. I never understood it was claimed on my behalf that I had a proprietary right in the old Forest of Lendrum. I think the record is wrong when it states that "the said Forest of Lendrum or part thereof is claimed to be part of the estate of Finzean"*

He appears to be referring here to Statement 2 above. He implies one commonty (between Ballogie and Finzean) had been divided but that another had not been. it is not clear whether he is referring to the Forest of Lendrum in either case.

In the evidence of Nicol, I found nothing of significance relating to the Forest of Lendrum.

In the Opinion of Lord Moncrieff of 7 January 1932 (see copy produced in Annex II) he states that;

*these fishings are in that neighbouring stretch of the River which is bounded by the Forest of Slewdrum or Lendrum; which forest, as was admitted by the complainers in the course of the proof, still remains Crown Property.*

Despite this statement I could not find any evidence that Farquharson or Nicol had in fact admitted this fact. The evidence would bear a closer read to see in what context such a admission had been made.

In the Opinion of Lord Moncrieff, however is to be found perhaps a clue as to the Crown's ownership of the Forest of Lendrum. On page 264, Lord Moncrieff refers to Finzean's Crown Charter of 1708 and on page 265 refers to the dispositive clause in the Charter which reads;

*the privilege and liberty of fishing for salmon in that part of the water of Dee next adjacent to our Forest of Lendrum. (my emphasis)*

Whatever might have happened subsequently, this piece of evidence suggests that the Crown certainly regarded itself as the owner of the Forest of Lendrum in 1708.

## **CONCLUSIONS**

### **What is the status of the Commonty of Lendrum?**

The commonty of Lendrum or at least rights normally associated with commonties certainly appears to have existed in the minds of Farquharson, Nicol, Huntly and Campbell from 1853 to 1866. They went to much trouble and expense to pursue a division on two separate occasions. I draw three conclusions from the evidence.

1. The commonty (or rights similar) existed as evidenced by Farquharson's title and by the fact of the division proceedings.
2. The division appears not to have been concluded as no evidence of a final decret can be found.
3. The commonty is or was the same area of land as the current Forest of Slewdrum

This leads to some confusion over Ian Adams's statement that a decret was issued in 1868 which in turn is reflected in the puzzle of what happened to File CS249/2197. Adams was a first class scholar and spent considerable time in the Archives as an employee cataloguing the Plans held there. His Directory of Former Scottish Commonties is the definitive work on the topic and it is unlikely that he would report the existence of a decret unless he had seen it. Nevertheless it appears that no such decret was issued in 1868 otherwise all later events (activity in 1886 and the 1932 case) not to mention the titles of the Crown and Forestry Commission would not have proceeded as they did. Furthermore, one would have expected to have found the decret in File CS97/F/1/6. Did Adams misinterpret the documents? Has the decret gone missing?

It is worth noting here that in all the written evidence I have seen from 1885 onward (Harper case, Beith's advice and 1932 case) no mention is ever made of the Summons for Division of the Commonty issued in 1866. This is strange since the issue of the status of the Forest crops up from time to time and indeed is the central focus of Beith's paper prepared a mere 20 years after the Division case.

## **How did the Commonly of Lendrum apparently end up in the ownership of the Crown and subsequently the Forestry Commission?**

The most likely explanation upon the reading of the evidence appears as follows.

The estates were made aware sometime after 1886 that, although they held the view that the Forest of Lendrum was a commonly, it could not be divided since it was in fact owned by the Crown and Crown commons were excepted from the 1695 Act which they were using to pursue the division. On this reading the estates continued to enjoy the typical rights associated with the use of a commonly but accepted that division was not possible. This reading is further evidenced by the negotiations that took place between the Forestry Commission and the estates from 1950 onwards.

However, it is difficult to see what evidence the Crown had for claiming ownership. This may be simply because none is apparent in the documents so far examined (and the comments of Lord Moncrieff relating to Finzean's 1708 Crown Charter should be borne in mind here) but Farquharson's title of 1876 suggests that he had some sort of a right of property in the Forest (had the Crown in fact alienated Lendrum some time after 1708?) and Beith's enquiries in 1886 cast doubt on the Crown having a surviving title. Indeed the fact that such an enquiry was commissioned in the first place demonstrates some uncertainty on the part of the Crown who are maybe seeking to establish what rights they have over the Forest of Lendrum in order to fortify their position in relation to the salmon fishings.

Perhaps Robin Callander is right when he writes;

*It might be noted that a new line of Farquharsons had succeeded to Finzean in the late 1840s and that the Nicols had only become owners of Ballogie in the 1850s. Given that there would potentially be no conspicuous signs that Lendrum was a Crown Common, did they just not realise it?*

Whatever the evidence, it appears that the Crown at some stage asserted their superior title. The estates, confident in their continued enjoyment of rights over the Forest (but disappointed no doubt not to have been able to conclude a division), were perhaps far more interested in the salmon fishings and were prepared to concede assertions (of which I have seen no evidence) by the Crown that they and not the estates owned the Forest of Lendrum. The estates perhaps tacitly accepted that all they had were rights of servitude and this position informed their subsequent agreement with the FC in 1950. The Crown may not in fact have had title to the Forest but adopted a position which I have seen evidence of in more recent years which was to the effect that the burden of proof was on the estates to demonstrate that they had title. This may have been a tactic adopted to fortify their interest in the salmon fishings.

Certainly, Law Officers' Opinions provided to the Crown on Glenfinlas and Mamlorn

referred to in passing above, were unambiguous. These landowners were Keepers of the Royal Forests. A policy position may thus have been adopted internally by the Crown never to concede any rights that they might have in Royal Forests.

The rights which the estates enjoyed over the Forest of Lendrum appear to have been real and useful as evidenced by their titles, by their statements in the course of the 1866 division proceedings and by the fact of the agreements reached from 1950 onwards.

## ANNEX I

### List of Relevant Documents consulted

- Ian Adams 1971 Directory of Former Scottish Commonties. Copies held by NAS.
- CR3/6 Case and Opinion Books containing legal opinions for the Crown on various matters.
- CR10/253 Bundle of correspondence concerning Lendrum salmon fishings.
- CR10/254 Crown file containing correspondence on Lendrum fishings and Nicol vs Harper case.
- CR10/255 Correspondence between the Crown and Farquharson and others re salmon fishings. Much of this material appears to have been subsequently produced and reproduced in the 1932 salmon fishing case.
- CS97/F/1/6 Bundle of papers concerning the 1866 Division of the Commonty of Lendrum Case.
- CS249/2197 Cited by Adams but no material found.
- CS46/No.  
63 of July 1933 A thick bundle of papers relating to the 1932 salmon fishing case. Various legal papers are included (Statements, defences etc.). Volume B contains transcripts of the legal papers, evidence given in proof and the Opinion of Lord Moncrieff. Volume C is a Joint Printing of many Documents produced in the course of the case including a Copy record of the Nicol v. Harper case.
- GD1/584/33 A bundle of 20 documents comprising a private collection gifted by Earl of Aboyne concerning the 1853 and 1866 Division of the Commonty of Lendrum cases (all of which are also in CS97/F/1/6) together with various letters between the parties to the action.

## ANNEX II

### Documents reproduced

Documents are appended in order of the date of the document.

- CS97/F/1/6      Summons of Declarator and Division of the Commonty of Lendrum. Francis Farquharson against James Dyce Nicol. February 2 1866.
- Joint Minute for Francis Farquharson and Marquis of Huntly in Division of Commonty Farquharson v. Nicol and others. 17 December 1867.
- CR10/253      Forest of Lendrum. Donald Beith WS. Reporting on Title 12/8/1886.
- GD1/584/33      Memo from Lord Huntly to JA Robertson 1886? Copied subject to copyright agreement signed by Robin Callander 31 August 2005.
- CS46/No. 63 of July 1933      Reclaiming note for respondents in suspension and interdict Joseph Farquharson and another against the Commissioners of Crown Lands 21 January 1932.
- Evidence of Joseph Farquharson in case of Joseph Farquharson another against the Commissioners of Crown Lands 21 January 1932. Volume B. pg 183 - 207.
- Opinion of Lord Moncrieff n case of Joseph Farquharson another against the Commissioners of Crown Lands 21 January 1932. Volume B. pg 1244 - 265.