

The Packhorse Road Trial

Marsden Council win case and still have to pay damages!

On Monday 30th March 1908 at the Leeds Winter Assizes, before Justice Channel, Marsden Council found themselves having to defend an action brought by the then Lord of the Manor, Sir Joseph Percival Radcliffe (Bart). The Council were represented by Mr. Tindall Atkinson, KC with input from the Solicitor and Clerk to the Council, Mr. J.W.Percy, Mr Scott Fox acted on behalf of the Plaintiff.

The important question to be decided was that of a right of way along a packhorse road on that part of Marsden Moor, known then as Clowes Moss, (now generally referred to as Close Moss), and owned by Sir Joseph Radcliffe 'Lord and tenant for life'. The way went over Clowes Moss starting between Close Gate Bridge and Blake Lea Lane to join the Wakefield and Austerlands road adjacent to Haigh Gutter, the present A640 or Buckstones road. The general opinion was that this was a public right of way and had become so under what is described as 'public by user'.

The previous September the Local Board had, according to the plaintiff carried out works of 'cutting out, levelling and making a path 4 feet wide and upwards. They had built bridges of wooden planks on stone abutments at Haigh Gutter, Willmer Green Clough, Oldgate or Willie Kaye Clough and Stone Pit Lee Clough. In addition the stream banks had been faced with stone retaining walls or buttresses. In places they had laid stones through a bog at one point, diverted the channel of a stream for about 20 yards and built rubble walls eighteen and eight yards to support the path in two places'. Outside of the plaintiff's land at New Hey Road end they had caused a notice to be erected stating 'Notice – Marsden Urban District Council – Public Pack Horse Road to Marsden'. This was supplemented at the Blake Lea end by a similar notice inscribed with the words Public Pack Horse Road to Rochdale. Each sign had a hand pointing the way. 9 intermediate stones carved 'P H Road' had been erected at intervals along the way. Also works of repair had been carried out at Close Gate Bridge, better known today as Eastergate Bridge.

When requested the defendants had refused to remove the stones, paths and bridges. Sir Joseph Radcliffe maintained that the track had never been dedicated to the public as a packway or footway. Prior to the works carried out the path was visible on the moor in certain places as an old grass track or shepherds path, only a few inches wide. Nowhere did it exceed 2 feet, nor was it continuous. It was not visible from the Huddersfield to New Hey Road to some distance East of Haigh Gutter. The path made by the defendants was not on the same line as the old visible sections in this area. From Haigh Gutter the new track was South of the original line and East from the Willie Kaye Clough crossing the original line was some 150 yards to the North. Prior to the works now the subject of the case the 'track had never been repaired by the defendants, or the inhabitants of the parishes, or the surveyor of highways'. [note:- Marsden was earlier in its history split in to two parishes known as Marsden – in - Huddersfield and Marsden – in – Almondbury].

If, which was denied, there was any public right of way it was on the line of the old track, never more than 2 feet wide, and any public dedication was subject to the exclusion of the public from all rights of repair. The stones had been erected on land belonging to the complainant, not on the path. The defendants had increased the burden of, and altered the evidence of such dedication.

Six claims were put forward on behalf of the plaintiff, Sir Joseph Radcliffe: -

1. That there was no public right of way.
2. That if the Court decided there was, it was no more than 2 feet wide and deviations created are no part of it.
3. An order to remove walls, buttresses, bridges, sign posts and stepping-stones.
4. If not removed by the defendants that he, the plaintiff, has the right to remove them.
5. An injunction to restrain the defendants from any 'act of repair or other act' along the line of the path.
6. Damages for defendants wrongful acts, and costs.

The defence case was then outlined. The plaintiff, Sir Joseph Radcliffe, was 'not possessed of the Manor of Marsden'. At the date of the actions complained of 'there was, and from time immemorial had been of right, common and public pack and prime way over the land between the Huddersfield and New Hey Road and Blake Lea'. Not only that but the duty of maintenance fell upon the Parish of Marsden – in – Huddersfield, (i.e. that part of Marsden lying on the North side of the river flowing down Redbrook Clough via Close Gate Bridge/Hey Green and Waters Road).

In or around September 1906, the way was surveyed, found to be in need of repair and the boundaries not clearly defined. So Marsden UDC set about doing repairs, as they deemed necessary to put it back into good order, to a width of 4 feet. Involved in this work was the construction of walls, bridges (consisting of two wooden planks on supports !) and stepping stones. They denied making any deviations but admitted erecting sign posts at each end of the track as well as 9 way marker stones at intervals along its length. In doing so they admitted trespass on to Radcliffe land which was not part of the way. By this time it was no longer used as a packhorse way nor did the Council see it being used as such. The point at issue was the existence of a public right of way. The Council had been alerted to its condition by complaints received that in some places it was difficult to distinguish between the path and those made by sheep grazing the moor, ('sheep trods').

Witnesses statements given by deposition.

Mrs Hannah Bolton, High Fall, Marsden, aged 84.

Stated that she knew the road and had used it for over 70 years and claimed that her mother knew the road when she was a little girl. She recalled seeing John and Simon Garside, father and son, travelling the road, on horseback, to attend fairs in both Marsden and Meltham. (Three per year in Marsden during April, July and September). 'Nobody had been stopped or interfered with, nor had anyone been turned back so far as she was aware'. Her father had helped to repair the road when he worked for the UDC. Another user that she recalled was Luke Brearley of Marsden, a shopkeeper and carrier who used it to transport goods to Lancashire. Under examination she admitted that Luke Brearley was dead before she was born, but remembered her mother talking about him. Marsden people had taken their sheep and cattle over the road to Haslingden Fair. Mrs Bolton further recalled a man called Dowse charging a toll for carts to use Blake Lea Lane.

John Whiteley, Little Fall, Marsden, aged 81.

He was a farmer who was born in the house he now lived in. He said that if he was going to Rochdale he used the Packhorse Road. His first memory was of when he was about 10 years old going with his father to Raghole. He had used it ever since and had never been stopped or threatened by anyone in all those years. He kept sheep on the Lancashire side of the moor and also used this road when he tended to them. He could not recall it ever being used by packhorses, but did remember Marsden Council carrying out repairs 'four or five years ago'. The last time he had actually used the road was three years previously, (1904/5).

Francis Goodall, born and bred in Marsden. (Died before the trial came to court aged 64 years).

Vice Chairman of the Council and on the Highways Committee. He was appointed by the Council to deal with the road in question following complaints received in 1905 that the track was in a bad state of repair and dangerous. He also said he had been at the Court Leet 1935, (held after Ascension Day) when the 12 jurors did not take action on 'copyhold property' as the District Council was going to take up the matter. There was some correspondence, but it was not reported to whom this was addressed, that alleged that the gamekeepers for the landowner were trying to stop people they did not know from using the path. A special sub-committee was formed consisting of himself, the Chairman of Highways and the Surveyor who went over the ground with a Council employee who had lived in the area all his life. It was this sub-committee that decided where the way marker posts should be erected and the other 'necessary' repairs. He had used the path for over 40 years, as had his

father before him who regularly travelled to Rochdale. No one had tried to stop him. To him it had always been known as 'the old packhorse road' and was used by the public not just those with cattle or sheep grazing rights (gates). It was the short route to Rochdale and people used it to get to Hollingworth Lake. He remembered his father talking about packhorse trains, and also knew of repairs carried out by the Council, the first some 12 years ago. These included repairs to Eastergate Bridge. He had never used 'Blind Jack's road'.

Mrs. Ellen Wrigley, Badger Hey, Marsden, wife of David Wrigley. Age 89.

Born in Marsden as was her father who had died in 1845. He had been a cloth manufacturer and had regularly used the Packhorse Road, on horse back to take his cloth to Rochdale. As long as she could remember it had always been regarded as a public right of way.

John Hall, Lane Head, Binn, aged 93.

He had been born at Scout in Marsden but had lived at Binn since he was 24 or 25. He had walked the road many times, knowing it as March Haigh foot gate, but had never been stopped from using it.

Daniel Hall, age 88, address not given.

He too had lived in Marsden all his life. His father used to ride the road on horse back and whilst he himself was not familiar with it his brothers had walked it many times.

This was the last of the evidence which had been taken on commission, and we now come to the living witnesses who journeyed each day to the trial. This may well have been as far as many of them had ever travelled.

William Wild, Whiteley Dean, Littleborough, age 78.

He regularly attended the fairs at Marsden from being about 10 years old, taking sheep to sell. Always used 'Clowes' footpath, a track with flags laid in wet places. He had not met many other people using the way. He knew 'Old Kenyon', the gamekeeper and the other gamekeeper 'Uttley'. Neither had ever tried to stop him using the route, which he also did when attending the fairs at Meltham. His grandfather had ridden a donkey along the track and on one occasion made the return journey in the company of a man on horse back about 60 years previously. He always used this route to move his stags and pigs to and from the fairs.

(Note; It was the younger Kenyon (who helped his father as assistant gamekeeper) and Uttley who were murdered on the moor and whose murderer was never brought to justice.)

Samuel Gartside, Green Acres, Oldham.

When asked his age he caused some amusement in the court by replying '80 years old this coming 26th May at 3-0 o'clock in the morning'. Went to live at Oldham 30 years ago and knew Clowes Moss and the track across it. He first traversed it when he was only 7 years old on the back of a horse ridden by his father, and had fallen off. Knew it as Marsden Old Gate. Later in life he had also used a horse when driving cattle and sheep to the fairs at both Marsden and Meltham. Always thought of it as a public right of way and had often spoken to the two gamekeepers. He said the way was easy to see.

At one point during the giving of his evidence the judge didn't quite hear what he had said in answer to a question put to him, so the barrister said he would ask him to repeat it. The judge told him not to bother as he, the judge, could 'only understand a quarter of what the witness said anyway'.

John Bottomley, Shaw, Oldham. 73 years of age.

Lived at Rishworth until he was 15, then Saddleworth for 9½ years. He knew 'Clowes' and had driven sheep across many times and as with one of the other witnesses his first experience came at around 10 years of age. He travelled the moor with Simon Gartside, keeper of the

'Black Tup' ale house, who also did some sheep dealing at Meltham and Marsden fairs. The last time was September 1903 when the murders of the two game keepers occurred.

William Rigg, Round House, Hollingworth. 68.

Testified that he had taken sheep and cattle over the Packhorse Way and had seen other people doing the same.

Joseph Milne, Higher Booth, Hollins.

He had walked across the moor using this route as recently as 'last back end'.

John Whitehead.

He told the court that he had built a wall on the Marsden side of the stream 'about 20 years ago under instruction from the Marsden Local Board. About four years ago he knew of another man being similarly employed to repair the parapet of Eastergate Bridge. When the reservoirs were being built up the Wessenden valley he had directed 30 or 40 people over the track looking to be employed on the construction.

James Whitehead, Contractor of Oldham.

Had been born in Marsden. In 1867 he and his brother were employed in building Dowry Castle for a brewer named Gartside. The work lasted for three or four years and each Monday 8 or 10 men who lived in Marsden used this route to get to their work, returning the following Saturday. He personally had not used the way since 1870 but remembered stepping stones in the streams but no bridges.

George Fielding of Marsden.

Confirmed he was one of the men the previous witness had referred to.

Robert Whitehead Gartside, farmer, Lower Great Owlars. (this may be a mistake in the address and possibly could be Lower Green Owlars).

From where he lived the Packhorse Way could easily be seen, and he often saw people on the path, particularly in summertime. 27 years ago he had built two walls at Haigh Gutter helping his father who was surveyor to the Marsden – in – Huddersfield Local Board. In 1878 he again assisted in building a retaining wall below Eastergate Bridge.

William Bolton, 79 years old.

Worked on the first railway tunnel construction in 1848. He had also worked for the Local Board and knew the track well. Testified that he had seen people, other than those attending fairs, using the road.

Samuel Shaw, New Hey Farm, Marsden. Age 73.

Told by his father that the packhorse road was a public road and had seen many people using it whilst he shepherded his father's sheep.

J.B. Abbey, Engineer and Surveyor.

He attested that the greatest width of the Packhorse Road was 6 feet, and no part was as wide as 16 feet. The flags at Laminot appeared to have been there a long time and the cobbles on Eastergate Bridge were worn.

The KC acting for the Council, Mr. Atkinson, then put forward a document dated the 5th January 1832 by the Enclosure Commission. This referred to a 'public carriage road 33 feet wide', which was part of the ancient road leading from Rochdale to Marsden and known as Rapes Highway. When asked by Justice Channel if there was a map attached to the document, Mr. Atkinson said that unfortunately the map had been lost.

This brought the second days hearing to a close.

The following morning, Mr. Atkinson said that overnight he had managed to obtain a copy of the Act he had referred to concerning the enclosure of Denshaw Moor. It was not a Queens printer's copy because he stated that none had ever been made and he had proof of that fact. At this Mr. Scott, KC for the plaintiff withdrew his objection. Mr. Atkinson then proceeded to say the award was dated 1813 and enrolled in 1832. A map of 1848 was produced showing the actual position of the Rapes Highway. As there was no evidence of it having been stopped by Quarter Sessions it must still exist and witnesses could testify to its position. The point of the map was to show a way from Eastergate Bridge across the moor, although not necessarily a public right. Mr. Scott said that his client also had a map but as neither were Ordnance maps the Judge discounted them both.

Reference then turned to the Minute Books of the District Council and its predecessor the Local Board, and what constituted 'repairs'. The defence was asked by his Lordship regarding the erection of the stone posts on land owned by the plaintiff. This led into a discourse between the judge and the Council's representative as to the alterations made, turning the path into something different to what had existed before. The minute books recording the repairs to be undertaken were produced as a means of proving that this must be a public right of way, otherwise the Council would have no responsibility for its upkeep.

The plaintiffs acknowledged there was a path across the moor but contended that this was mainly used at fair times to bring sheep and cattle to them. At other times it was used only casually by the passage of the odd horse or cow, or by people on foot. This did not however confer on it a public right of way and had Sir Joseph ordered his men to remove the posts, etc., he would only have been abating a trespass and could not have been convicted of damaging a public right of way.

The Judge then questioned if there was ever any authority for changing a 'green road' into a made highway. As far as could be established there was none. It was at this same juncture that the Judge indicated that up to that point in time he was inclined against the plaintiff in so far as the existence of an old highway was concerned. There was evidence of a right of way for foot traffic of both persons and animals, and not just at the time of local fairs. The doubt in his mind was justification for the actions of the local authority. He knew of no right of the making of a right of passage into a properly made path. There had been a failure to establish where the old highway went before the building of Eastergate Bridge. [Researchers note:- the fact that an old inn or similar establishment existed at this point earlier would indicate that this may have been a junction of more than one way or road. Inns generally became established at places where two or more routes met or crossed.] The plaintiff's counsel did agree that on the plan of 1801 another road did cross the River Colne.

A contractor, James Edward Kaye, gave evidence in support of Sir Joseph Radcliffe that in his opinion, the bridge at Eastergate was (at that time) 70 or 80 years old.

Mr John Sykes, Solicitor, said he was the Deputy Steward of the Manor of Marsden and had established that the Lords of the Manor had not resided within the Manor since 1724. Whilst they themselves had not shot on the moors the rights had been let to others.

A land agent/surveyor from Huddersfield, Mr C.F.Mallinson, said he had never heard claims of a public right of way over the moors until approximately two years before the present hearing.

Mr. Atkinson, Defence Counsel, stated it was not correct to say that the Local Board had cut a track where previously none had existed. They had simply repaired and reshaped the path to improve it for those who had a right to use it. He accepted the original purpose of being for use by pack animals had ceased to exist, but this was an ancient highway which had become overgrown by the infrequency of its use. Because of its original use it would of necessity needed to be wider than if only persons had used it alone, as evidenced by the four-foot width of the packhorse bridge. It was equally obvious that at times it might be necessary for trains of packhorses to pass each other and then much more than four feet would have been required.

In reply to the Judge, Mr. Atkinson said that any cutting of the path done by the Local Board was only to restore the path to the width it had been previously. No paving or channelling had been carried out.

Mr. Scott Fox, for Sir Joseph Radcliffe, said it was clear that the Local Board had not relied on any statutory right save that of being 'surveyors of highways'. The road, or path, in question had never been granted by statute, but as Mr. Atkinson had shown, a right of way 'by user' had been obtained by the public over the two miles of moorland for at least the previous 40 years. What may well be deduced is that in allowing his tenants in Marsden, (sheep farmers in many cases) to cross the moor with their animals, and people from Lancashire who traded in Marsden and elsewhere, to have passage, so as not to restrict trade, Sir Joseph or his predecessors had granted something they then could not stop. Early maps showed a ford at Redbrook near where this meets the stream coming down Haigh Clough, and these were obviously in use before any bridges were built. However what the Board had done amounted to trespass and his client was entitled to relief.

The Judge asked Mr. Scott Fox what the plaintiff wanted him to do, nothing had been said about the stone marker posts that had been erected. To this Mr. Scott Fox replied that was up to his Lordship as it was a matter of degree. The erection of the posts was a clear trespass and they were unnecessary for users in the way the path had been used. The sign posts erected at either end of the track were not on his client's land. Asked by the Judge if he wanted a declaration entitling him to remove the posts Mr. Scott Fox replied that they would rather have a declaration to remove the bridges and posts.

Justice Channel said his view was that the defendants had exceeded their rights in some things but in his opinion they had not done any great harm, except in a way that he thought he could not take action over. By improving the state of the path it was likely that more people would now use it than did so previously. Mr. Longstaffe, who was assisting Tindall Atkinson, said that what had been done by the defendants probably benefited the plaintiff in that people were now less likely to stray from the path.

To this Mr. Scott Fox rejoined that the more private a moor was kept the better it is and asked for a declaration that Sir Joseph was entitled to remove those things which the Judge had said were a trespass. Whether he would remove them or not would be his choice.

In delivering his judgement, Justice Channel said the main question was did a right of way over the moor owned by Sir Joseph exist. On this matter he commented that the old evidence that had been given was of a rather better character than was usually the case in such matters. The evidence of user for a long period was considerable, more distinct and more reliable than one usually got in these cases. By reputation the road satisfied evidence of being an ancient packhorse way. Nothing obtained in cross-examination contradicted this view, and in his opinion it was a highway for all general purposes other than for wheeled traffic.

As to the route of the way across the moor only Mrs. Bolton had been cross-examined. The 1801 map did not show a bridge at Eastergate, nor was there a track going to the site of the bridge. There was a track marked going in the general direction but then it disappeared. The evidence given tended to the view that the bridge was somewhere between 70 and 100 years old, i.e. constructed around the period 1800 to 1830, and had been in continuous use ever since. Whilst there was some doubt about the actual position of the route the Judge was satisfied that the evidence proved there was a route over the whole of the area in dispute. Any deviations being very minor, the principal one being at a point known then as Lady Brow. [This is not marked on today's maps but from the comments made in the judgement, "there, he dared say, pedestrians went up the straight up the steep part of the rocks, but he had equally little doubt that the packhorses and animals went round by the side", leads one to think this is the place now called Stack End. See photos.]

On this basis he concluded that the right of way did exist and that the Local Board were entitled to have it, as a right of passage for pedestrians and animals. They would be expected to take it as they found it but if an area or section became too soft the Board were entitled to carry out necessary repairs by, for example, laying flat stones. He did not agree however that the right of repair extended to altering or improving as had been carried out. To make a 'cutting' was a trespass on 'the soil of the person in which they did the cutting'.

The bridges, which had been created (planks across various streams) were not authorised. He didn't think the stone pillars, which had been erected, did any great harm but having been put up at the side of the road this constituted a technical trespass, but were a convenience in preventing people losing their way by indicating the track. Having said all this, the Judge did not consider they warranted

an injunction against the Local Board to remove what they had installed. He gave judgement to the plaintiff in respect of the trespass but found it difficult to assess damages. He finally settled on a sum of 40 shillings (£2-00) to confirm that Sir Joseph's right had been infringed. [On learning that 5 guineas, £5-5s-0d or £5-25p, had been paid in to court prior to commencement of the trial, the figure for damages was increased up to the amount deposited.] The plaintiff could have a declaration entitling him to remove any works carried out, but he must leave the track in a passable condition. If he removed anything it had to be returned to the Local Board, as it was their property.

Each side had to bear their own legal costs.

At a subsequent Council Meeting the Council's solicitor, Mr Piercy, presented his bill of costs of the case which it was approved should be sent to the Clerk of the Peace for taxation. He pointed out that Sir Joseph's bill against the Council was made out for taxation at £1,641, and was taxed and allowed at £269. The Council's costs against Sir Joseph were taxed and allowed at £763, which left a balance payable by Sir Joseph to the Council, with interest, amounting to £518. That sum had been received. The total cost of both sides was about £3,000.