wherein, in the absence of a written contract, is the contract of sale to be found? The actual sale took place at the auction, the terms of which, according to the evidence and the finding of the jury, were fairly and openly announced at the opening of the sale, that there would be no warranty. This was at the same time repeated by the vendor. Assuming that the plaintiff did not hear this announcement, it was no less publicly made by the auctioneer and his principal, the vendor. This was a plain declaration by the seller of the terms upon which he intended to contract, notwithstanding any thing which there might be in the catalogues distributed announcing the intended sale

It appears to me, under these circumstances, that the contract must be taken to have commenced when the terms of the sale were announced to the general public by the auctioneer, at the commencement of the auction, and ended, in so far as this particular beast is concerned, when it was knocked down to the plaintiff. If the seller or the auctioneer was sueing plaintiff upon his contract of purchase, as in *Eden* v. *Blake* (13 M. & W. 614), it might be, perhaps, that the plaintiff could object that the catalogue had deceived him, and that he had not heard the terms announced, to the effect that there would be no warranty, &c. But here the case is reversed, for upon the plaintiff lies the onus of proving that what is contained in the note, extracted from the catalogue, not only is a warranty of the nature insisted upon, but that it was contained in the contract upon which he purchased; and it was not if (as *Eden* v. *Blake* establishes) the vendor, before the sale to the plaintiff, made a deviation from the terms stated in the catalogue; and this we think he did do effectually, when, as found by the jury, the auctioneer made the announcement, at the opening of the sale, which was proved in evidence here. Upon the authority of *Hopkins* v. *Tanqueray* (15 C. B. 130), I think that the application to nonsuit the plaintiff, if the verdict had been in his favor, should have prevailed, for in the presence of clear evidence as to the terms of sale, as announced to the general public, we could not, upon an allegation that the plaintiff had not heard the announcement, from any thing which appears here, import into the contract of sale *with him*, a term which a bidder, who had heard the terms of sale, could not have claimed to be part of *his* contract, if *he* had been the purchaser instead of the plaintiff. If the plaintiff intended to insist, when the beast was knocked down to his bid, that the representation now relied on amounted to a warranty, and that he purchased upon the faith of it, it lay upon him to shew that the representation so relied on, was *in fact* imported into the *actual sale* which took place at the auction: this he has failed to do, and I see no ground whatever for disturbing the verdict. The fallacy of the plaintiff's argument, as it appears to me, consists in attributing to the catalogue the character of the contract of sale, which the plaintiff, upon whom the onus lies of establishing the contract, does not shew it to have been; whereas, on the contrary, I think the evidence sufficiently shews that it was not. The rule therefore must be discharged.

Rule discharged.

Ex rel McMullen v. Corporation of Caradoc.

Municipal corporation—Boundary of road allowance.

Held, that a municipal corporation has no power to declare certain posts planted by a surveyor to be the true boundaries of an original road allowance which they direct to be opened. They may give a description of the boundaries, but ought not to declare such boundaries to be the true boundaries, such being then a matter in dispute.

[22 C. P. 356.]

In Hilary Term last, *F. Osler* obtained a rule to shew cause why By-law No 176, intituled, "A By-law to open the side line between 8 and 9, in 2nd concession north of the Longwood Road, in the Township of Caradoc," should not be quashed, with costs, on the following grounds: 1. That the council had no power to pass such a by-law; 2. That the by-law was void on its face; 3. That if they had the power, it was not a proper exercise of their discretion, and that they should have left parties interested in the boundaries of the side line to ascertain the same by action.

Affidavits were filed on both sides.

The by-law was passed 18th November, 1871. It recited that it was desirable that the side road between lots 8 and 9 in the 2nd and 3rd concessions should be opened up, and according to a survey made by one Springer, a Provincial Land Surveyor, said road was bounded as follows, &c., &c. It then enacted that said road, as described in the by-law, should be and was thereby declared to be the side road between said lots 8 and 9, in the 2nd and 3rd concessions, &c., and that said road should be opened on 18th November then next.

A contest had existed for several years between the proprietors of lots 8 and 9 as to the true position of the allowance for road between the lots. For some years there had been a line travelled as the road, and public money and statute labour expended thereon.

In 1867 the council had the ground surveyed by Mr. Springer, and in his view the true road allowance was some rods further west than the travelled road, and one Bateman, acting as pathmaster, and others, entered on McMullen's lot, No. 8, and commenced cutting trees, &c., on the supposed new line of road.

McMullen brought an action against him, which was tried in the fall of 1869, as a question of survey, and a verdict was recovered by McMullen, which was upheld by this Court on motion. This was against Springer's evidence. It was alleged that Bateman was interested, and that by his interest and influence, the council had espoused his side of the quarrel, and after passing a by-law in March, 1869, which was quashed by this Court, no cause being shewn against it, the present by-law was passed.

The affidavits were voluminous, and bore almost wholly on the question of survey, each side producing a good deal of testimony.

In Easter Term, *J. H. Cameron*, Q.C., shewed cause. No injury is done to any one by this by-law. If the council proceed to open the side line, as defined by the by-law, they will do it at their peril, and the question may be tested in an action against them: sec. 205, Municipal Act.

The weight of evidence, on the affidavits filed, is in favor of the line as opened by the council; therefore the Court should not interfere in this summary manner, but leave the applicant to his legal remedy. On the former application no