

affirmation, however, made absolutely and not as a mere expression of opinion, and intended to form part of the contract, is a warranty.

*Behn v. Burness*, 3 B. & S., p. 751, is authority for the rule that a representation was of no effect unless it was either fraudulent or a term in the contract. If a term in the contract, it would amount to a warranty. Bramwell, B., in *Stucley v. Baily* (1862), 1 H. & C., at p. 417, is thus reported: "A representation to constitute a warranty must form part of the contract. No doubt there may be a warranty without the word 'warrant' or even 'undertake' being used; if it can be collected from the documents between the parties, or if a reasonable person would understand from what was said by them that they intended that there should be a warranty, there would be one."

In *Irvine v. Godard*, 3 N.B.R., p. 364, the plaintiff bought a quantity of timber, and at the time of the sale the defendant stated "that he knew the timber to be good, and he would make it good; that there had been an opportunity of examining it as it lay on the brow." The timber turned out mostly rotten and worthless. The jury having found for the plaintiff, on motion for a new trial the Court held it was a question for the jury whether the representation amounted to a warranty, and they might infer that a sale took place at the time of such representation.

*Tisdale v. Connell*, 3 N.B.R., p. 401, was to the like effect. The vendor represented, on the sale of some pine timber, "that the timber was of good quality and uncommon long lengths." The timber having turned out to be of an inferior quality, it was held by the Court, on application to set aside the verdict for plaintiff, that it was a proper question for the jury whether, under all the circumstances, the representation amounted to a warranty.

Great difficulty frequently arises as to whether a representation, statement or assertion made by a vendor at or before the sale is a condition precedent, a breach of which will justify repudiation by the vendee, or an independent agreement which can only form the subject of an action for compensation in damages on failure thereof. It, however, has been considered a safe rule that if the representation is essential, and is so regarded by both parties, it is a condition precedent; if not essential, it is a warranty.

Under the Imperial "Sale of Goods Act, 1893," this question