" to the underwriter before the subscription to the policy, as to the existence of some fact or state of " facts, tending to induce the underwriter more readily to assume the risks, by diminishing the esti- " mate he would otherwise have formed of it." He elsewhere observes, " it is of some matter intrinsic " to the contract, and generally, if not always, relates to the present state and condition of the subject " insured. The term in insurance, it has been considered, as in the nature of a collateral contract " either by writing, not inserted in the policy, or by parol, and is a communication of facts and cir- " cumstances relative to the insurance made to the underwriters with the view to enable them to esti- " mate the risk and calculate the premiums to be paid." So also, 1 Arnold, 439; Ellis, p. 30. c. 4. " It is asserted that it is said to be material when it communicates any fact or circumstance which " may be reasonably supposed to influence the judgment of the insurer in undertaking the risk or " calculating the premium, and whatever may be the form of the expression used by the insured or " his agent in making a representation of it, have the effect of imposing upon or misleading the " underwriter, it will be material and fatal to the contract. There is a material difference between a " Representation and a Warranty; the former being a part of the preliminary proceedings which " propose the contract, and only a matter of collateral information on the subject of the insurance, " and makes no part of the policy; the warranty is a part of the written contract, as it has been " completed, and must appear on the face of it. The former may be substantially correct, but ren- " ders the contract void on the ground of fraud; the latter must be strictly and literally complied " with, and non-compliance with it is an express breach. Fraud is an element which vitiates every " contract, and a want of truth in a representation is fatal or not to the insurance, as it happens to " be material or immaterial to the risk undertaken; but when a thing is warranted to be of a parti- " cular character or description, it must be exactly such as it is represented to be, otherwise the " policy is void and there is no contract. This may be considered as a first principle in the law of " insurance." These representations have been classed as positive representations and as statements of belief, expectation or opinion; the latter are not representations of what is stated to be intended or expected or believed as a matter of fact to be made good by the assured, and will not affect the contract, though the fact prove otherwise, if the statement is made honestly and not fraudulently with intent to deceive the underwriter and draw him into a contract which he might decline. On the other hand, positive representations are affirmative and promissory, although the distinction is one more of form than substance, as in fact most positive representations, even when in terms affirmative are, in effect, promissory, and whenever it is a positive statement of the actual or evident existence of some first material of the risk, it is only distinguishable in form from a warranty by not being on the face of it. At the trial the statement in the policy was assumed as a representation, and as such parol evidence was admitted in relation to it. That evidence clearly proved that Tate, the agent, did represent the Malakoff to be in Tate's Dock temporarily for repairs, and that when completed she would navigate between Hamilton and Quebec, principally as a freight boat, affirming the written statement on the policy. In spite of written and parol testimony, the Jury find that Plaintiff made no such declaration or representation; the finding is manifestly contrary to clear evidence adduced by parol and is singularly contradictory of the written evidence of the statement afforded by the contract, thereby in opposition to a rule not of law alone, but of common sense, that what is contained in the policy or other instrument or written upon it, purporting to belong to it, at the time of signing is part of the contract and is adopted by the signature. Both parol and written evidence concur with the result of the common sense and legal construction of the statement; representations must be construed by the same principles by which all other contracts in writing are expounded, in which the intention of the parties is always to be sought for in the instrument. In this statement the Plaintiffs' intention to navigate the Malakoff so soon as the repairs should be completed was understood by both parties, whilst it is equally manifest that no intention existed on Plaintiffs' part that she should be kept in the dock during the entire insurance year; and the Jury, moreover, find her at the date of the policy to be in running order. Whether this intention of navigation could be considered as influencing the insurer's estimate of the character and degree of the risk to be insured against is not doubtful, inasmuch as Mr. Wood swears positively that he would not have taken the risk at all had the intention existed to keep her in the dock. The finding of the Jury upon this special point and its materiality is either negative or nonsense, to which no legal meaning can attach. Under all these circumstances of the judicial rulings and instructions, above adverted to, and the irregular and incorrect findings of the Jury, the motion for a new trial has been sustained, and a new trial would unhesitatingly be ordered, did not the remaining motion, for the entering up judgment for the Defendants *non obstante veredicto*, urge its importance upon the Court, because the final determination and judgment of the Court mainly depends upon the subject matter of this motion. Although the same point is contained in the motion for a new trial, it appeared advisable to consider it in connection with the motion *non obstante*, as being its more legitimate position, free from minor technicalities or argumentation. The grounds taken in this motion are the special warranty and condition written in the policy, that the Malakoff should navigate, &c., and the Plaintiffs' non-compliance and breach with them, the Malakoff having, in fact, never left the Dock from the time of effecting the insurance in question. The judicial ruling and instruction declared the statement to be merely permissive. Bearing in mind the express written statement in the policy, it must be observed that the