

that during the trial . . . the question of fraud was not gone into at all.

Notwithstanding all this, if the facts proved established fraud, we might now allow an amendment, and, if all the facts were before the Court, permit the finding of fraud to stand, or, if all the facts were not or might not be before the Court, direct a new trial.

But here the facts, in my view, do not even indicate or suggest, much less establish, fraud. What the learned trial Judge relies upon as establishing fraud may be conveniently formulated thus:—

(1) Omission to credit Washburn with the amount received for goodwill of the business on sale by Wright after Washburn's death, and the proceeds of book-debts.

(2) Charging up freight and express charges.

(3) Also repairs and alterations, fixtures, etc.

A fourth will be mentioned later in its proper place.

(1) What, with great respect, I think the error of the judgment appealed from, arises from a misapprehension of what the deceased bargained for. He got no interest in the premises or the goods or in the "business." What he got was a right to receive from and be paid by the defendant "one-half of the net profits of the . . . business." There is much difference between the profits made by selling out a business and ceasing to carry it on and the profits of a business. A business may not make profit at all, but be sold out at a profit by reason of a desire to get rid of competition, or other reason. There is no justification for the proposition that the amount paid for goodwill to Wright when ceasing business is "net profits of the business." *Sims v. Harris* (1901), 1 O.L.R. 445, is conclusive authority upon that point, in the Court of Appeal. Even if otherwise to be considered part of the "net profits," this amount was not made during the employment of Washburn. The book-debts are expressly excluded.

(2) Remembering that the amount of which Washburn was to have one-half, "the net profits of the said business after deducting all rents, advertisements, and other expenses," the second ground of complaint is seen to be without solid foundation. Amongst the "other expenses" must necessarily be the cost of getting the goods in and out, however large these expenses may be. And I cannot see that charges for getting goods into the shop are any less to be charged against the month in which they are made because they may not realise profit dur-