

two of these advertisements defendant canvassed for and obtained. . . . The Court, when satisfied that the servant has assumed a position in which his interest may conflict with his duty, will not enter upon an inquiry to determine whether in fact there has been any departure from the strict line of duty, or to what extent the fidelity of the servant has been affected. . . .

[Reference to *Shipway v. Broadwood*, [1899] 1 Q. B. at p. 373.]

It is impossible to say that as one of the proprietors of the "Elite Directory," sharing in the profits to be made from the advertising which it contained . . . defendant had not an interest which conflicted with his duty. . . . For the profits which he made out of this enterprise, of a character such that it might compete with plaintiffs' undertaking, such that it might give him an interest against his duty, he must be held accountable to his employer.

But of what nature is this liability? If it be at common law, defendant is accountable as for money had and received. The Statute of Limitations would thus be a bar to plaintiffs' claim, "Elite" having been published 10 years ago. If accountable in equity, it can only be on a fiduciary basis. If defendant be in any sense a trustee for plaintiffs of such profits as he made from the publication of "Elite," the trust is . . . a constructive trust, to the enforcement of which the lapse of time (by analogy to the statute) is a bar.

At the trial defendant applied for leave to set up a plea of the statute. The trial Judge assented to his doing so, upon the terms that he should pay costs. . . . The statute would, therefore, prevent plaintiffs recovering profits from this source for which defendant may be accountable. If there be no such profits, plaintiffs should not be awarded any costs, and probably should be ordered to pay the costs of defendant. If upon a reference they should establish that there were profits made by defendant, it would entitle them, not to such profits—because of the bar of the statute—but perhaps to costs of the reference and of the action from the time the defence was delivered until defendant sought leave to plead the Statute of Limitations.

The proper conclusion seems to be to allow defendant to elect within a fortnight whether he will take a reference to ascertain what profits, if any, he made out of the publication of the "Elite Directory." If he declines such reference, the judgment below will be varied by awarding to plaintiffs, in addition to the costs which that judgment gives them, the difference between costs on the County Court scale and costs on the High Court scale from the time of delivery of defence down to the time at which defendant applied for leave to plead