clear that this is above all a book about power, not about law. It is not an analysis of the constitutional order of a free people. It is a manual for those who believe, like Sir Francis Bacon, that a path to personal power can be blasted through the ruins of a declining social order. In Bacon's case, this involved the demolition of the last feudal institutions, such as the common law, which might impede the full development of the royal prerogative, to which he had hitched his fortunes. Today, the waning of the *Weltanschauung* of technological materialism could provide an avenue for the rise of mombers of the "New Class" to positions of unlimited power, but only if remaining impediments such as the rule of law, the judiciary and the independent economic enterprise can be discredited and neutralized. Bacon knew that he could triumph only by defeating the main champion of common law liberties, Sir Edward Coke, and to that end secured Coke's dismissal from the court of King's Bench. But in the end, the principles which Coke had developed and disseminated defeated Bacon, though Baconian ideas triumphed everywhere else in Europe. If the next generation of lawyers learns about the constitution from this book, we will have no shortage of Bacons; but who will be their Coke?

G. de Q. WALKER*

The Protection of Trade Secrets, by W. R. McComas, M. R. Davison and D. M. Gonski, Sydney, Butterworths, 1981, xiv + 98 pp. $19.50.

There has long been a need for a well researched, well written and comprehensive treatment of the law of confidence and of trade secrets. This work does not set out to satisfy that need. The three authors, in their slender piece, disclaim the onerous burden in favour of a limited goal. Their object is to explain "the basics and necessities of the law" [sic] and designedly, they do not cover "every point", "all arguments". It would, thus, be unfair to criticize this work simply upon the grounds that the authors have failed to treat, or to give guidance upon, some important and contentious topics. Yet to this reviewer there is cause for surprise in their self restraint. No mention for example, is made of the protections afforded to confidential information in the processes of litigation: *cf. Australian Broadcasting Commission* v. *Parish*[1] and the cases noted therein. Damages for breach of confidence is discussed without even passing reference to Equity's compensatory jurisdiction: *cf.* (1981) 9 *Syd. L. Rev.* 415 *et seq.* It is simply not enough now to leave the public interest exception with the remark that "no clear limitation on the width of the exception is

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[1] (1980) A.T.P.R. 40-154.

detectable at this stage": § 3.7. And *Anton Piller KG* v. *Manufacturing Processes Ltd*[2] was, after all, a confidence case.

The formal ordering of the book is conventional enough. The authors begin with "The Origins of the Doctrine of Breach of Confidence", work through confidence to "Remedies" and conclude with chapters on "Other Means of Protecting Confidential Information" and "Particular Applications of the Protection of Trade Secrets and Confidential Information". This reviewer's difficulties with the substance of this work were to begin with "The Origins". Of recent times Lord Chancellor King's few words in *Keech* v. *Sandford*[3] have had much asked of them. In the authors' view they are to be burdened with having originated the restraints in English law on "divulging information": § 1.3. But to the authors — though not to this reviewer — *Keech* has a protean quality: it is, seemingly, also to be credited with the employee's duty to serve with good faith and fidelity: § 8.5. Curiously, the interest in origins is not matched with an interest in pedigree. After acknowledging the diverse jurisdictions prayed in aid of the action for breach of confidence they, first, assert enigmatically that the courts in confidence cases "do not confine themselves to purely legal or equitable principles". They then wonder "whether finding a satisfactory jurisdictional basis or ground for the action really matters". But, finally, they take refuge in the suggestion that the action is "sui generis": § 2.10. This unpreparedness to strive with the fundamental questions leads to the assertion of views with which this reviewer cannot agree — or, on occasion, understand.

The unexplained terms, "trust or faith" and "trust and good faith" — §§ 4.5, 4.13, 4.14 — help little in understanding when a duty of confidence will arise. The observations on "conscience" in Equity jurisprudence are breathtaking:

> What amounts at any given time to an obligation based on confidence which binds one's conscience? To be sure, confidences are relative and consciences change with values placed by society on all sorts of relationships. We do not see how one could define all that may be conceived as the "general level of conscience" in a community of people at any given time: § 5.3.

But more importantly, the authors do not satisfactorily distinguish the law on confidence either from that regulating conflict of duty and interest or from the common law duty of an employee to serve with good faith and fidelity: *cf. Timber Engineering Co. Pty. Ltd.* v. *Anderson*.[4] For this reason, this reviewer had some difficulties with Chapter 8 — and much of that difficulty is attributable to their thinking on *Keech* v. *Sandford*. Furthermore, the view the authors' take of an

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[2] [1976] Ch. 55.
[3] (1726) Sel. Cas. t. King 61.
[4] [1980] 2 N.S.W.L.R. 488.

employee's duty of fidelity is a somewhat idiosyncratic one. But what is surprising is that they did not seek support for it from *Thomas Marshall* (*Exporters*) v. *Guinle*[5] — an important, if unsatisfactory, decision on confidence and fidelity.

The unease felt with the treatment of doctrine carries over into the detailed treatment of the subject matter of the book. In some instances one registers surprise at the authorities mustered in aid of propositions. It is true, for example, to say that when determining whether information is confidential "[o]ne commentator has . . . suggested that it will be sufficient if the information is 'relatively secret' ": § 3.1. Indeed, one could say more accurately that quite a number of commentators have said this: e.g. Goff and Jones, *The Law of Restitution,* (2nd Ed.), 513. But it is surely more instructive to indicate that the judges have on a number of occasions endorsed the relative secrecy approach: e.g. *Franchi* v. *Franchi*.[6] This reviewer's concern is, however, with the author's general approach to confidence. Obviously, as their title suggests, they have at least a primary interest in trade secrets. But the law of confidence is not confined to such a discrete subject. And so they must range more widely. They enter upon confidence and personal affairs. They allude to "public" secrets. They acknowledge that confidence is not the exclusive province of Equity. The express and implied contractual term have their place. But the authors do not go far enough.

First, if one is concerned simply with trade secrets one may be able to assert that the most useful test of confidentiality is that "there must be some product of the human brain which suffices to confer a confidential nature upon the information": § 3.9. But once one moves beyond trade secrets it is quite clear that this test is misleading. Phenomena, events, facts can be the subject matter of a duty of confidence — and are the staple of the duties of confidence of doctors, bankers, lawyers, etc.

Secondly, if one is concerned to emphasize that the duty of confidence is not confined to cases of express and implied contractual stipulation one will, of course, focus on those cases where such a duty has been imposed absent any contract between the parties. It is, however, incorrect to imply that where parties are in a contractual relationship and where confidential information is communicated or acquired in that relationship, that the courts have shown irritation with implying at least a contractual duty of confidence: § 4.7. *The Moorcock* undoubtedly has it fashions. And true, the court refused to imply quite an unusual warranty covering a confidant's ex employee's disclosures in *Easton* v. *Hitchcock*; § 4.7. But one must, nonetheless, acknowledge that there are a significant number of relationships ordinarily based on contract where the law automatically will imply a wide ranging con-

[5] [1979] 1 Ch. 248.
[6] [1967] R.P.C. 149 at 153 *per* Cross, J.

tractual duty of secrecy, e.g. with the "professional man" and client: see *Parry-Jones* v. *Law Society*,[7] *Tournier* v. *National Provincial & Union Bank of England*.[8] And if it be thought that this "irritation" might exist in commercial contexts, the speeches in the House of Lords in *Mechanical & General Inventions Co.* v. *Austin*[9] are, perhaps, a little instructive. The difficulty in confidence law for the last 100 years has *not* been in inducing courts to imply a contractual duty where parties are in a contractual relationship. Rather it has been in inducing the courts to impose a duty where they are not.

Thirdly, in discussing when Equity will impose an obligation of confidence mention must, of course, be made of the "reasonable man" test of *Coco* v. *A. N. Clark (Engineers) Ltd.* § 4.10. One would, however, have hoped that there would be at least some discussion of the test most favoured in the courts: Has the confidential information been disclosed for a particular purpose only? If so, its use will be limited to that purpose: see *Interfirm Comparison (Australia) Pty. Ltd.* v. *Law Society of New South Wales*;[10] *Castrol Australia Pty. Ltd.* v. *Emtech Associates Pty. Ltd.*[11] Such discussion would have been more useful than the general assertion that a duty of confidence will usually be imposed on confidential information passed between parties in a business relationship and on the basis of "notions of the need to maintain the sanctity of the concepts of trust and good faith for the preservation of commercial life": § 4.13.

Fourthly, when discussing disclosure or use of information relating to personal affairs the authors consider that "[t]he limits of permissible disclosure in the category are the most susceptible to changes in perceived levels of public morality": § 5.16. Again one questions the width of the author's perceptions of confidence. If one merely sees "personal affairs" as related to communications about the private lives of spouses, lovers and pop stars one may find support for the above observation in *Argyll* v. *Argyll*[12] and in *Woodward* v. *Hutchins*.[13] If, however, one believes that "personal affairs" covers communications to accountants, bankers, doctors, lawyers, social workers, governmental agencies, etc., the observation is at marked variance with the approach of the courts.

The authors have in their work introduced a new person to the literature on confidence — "the attentive reader": § 2.6. In this reviewer's opinion, that reader will not be well rewarded in this book.

P. D. FINN*

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[7] [1969] 1 Ch. 1.
[8] [1924] 1 K.B. 461.
[9] [1935] A.C. 346.
[10] (1975) 5 A.L.R. 527.
[11] (1980) 33 A.L.R. 31.
[12] [1967] Ch. 302.
[13] [1977] W.L.R. 760.

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