fession is not ready for so radical a reform) by the Uniform Rules of Evidence lately approved by the American Law Institute and the American Bar Association.

The excellence of Mr. Morgan's treatment of the problems of evidence does not lie altogether in the proposals he makes for reform. Even if one should disagree with every one of such proposals, he would find the book valuable for the keen and well thought out analyses to be found at every turn. Examples which appealed to me particularly would include his examination of the precise nature of the proposition that is the subject of judicial notice; of Thayer's familiar proposition that the risk of persuasion never shifts; of the problem of communication between witness and the trier of fact; and of the adversary theory of litigation, its justification and its relationship to the protection of the hearsay rule.

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MOORE'S FEDERAL PRACTICE, Volume 7, 2d ed. By James William Moore. Albany: Matthew Bender & Co., 1955. Pp. xxiv, 912 (unused pages reserved). $18.50.

THE publication of Volume 7 of the second edition of Professor Moore's *Federal Practice* brings to a conclusion his revised treatment of the Federal Rules of Civil Procedure. The profession now awaits only Volume 1, to deal with federal jurisdictional matters, for completion of this monumental work. The review of a second edition, especially an advanced volume of a second edition, is essentially supererogatory—particularly when the volume is Professor Moore's. His profound scholarship, his comprehensive and exhaustive coverage, his fine analysis, his courageous willingness to be definite and specific, his sense of prophesy as well as of history, and above all his eagerness to plunge into difficult waters and swim in strong currents, are too well known to bench and bar to require repetition. Justice Holmes thought the word "valour" a little strained as used in the title of Pollock's lecture "Judicial Caution and Valour,"[1] but the word is an accurate one to characterize Professor Moore's work in federal practice.

This volume covers rules 60(b) through 86, thereby including some of the intrinsically, universally and perenially most difficult problems of judicial administration: reconciliation of the law's often opposing goals of finality and more complete justice (rule 60(b)); the procedural law of the entire injunctive process (rule 65); condemnation (rule 71(a)); the whole gamut of appellate practice (rules 72-76); besides such peculiar offspring of a complicated federalism as the enigma of a quasi-in rem action precluded as a matter of original federal jurisdiction but allowed when the case has been removed to federal

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1. 2 HOLMES-POLLOCK LETTERS 239 (Howe ed. 1941).

court (rule 64) and the conflicts between state and federal courts in receivership matters (rule 66). The perhaps drier but no less significant rules on harmless error, stays, disability of the judge, execution and the others all get the author's usual careful treatment.

Most of the thoughtful members of the teaching profession no longer depreciate procedural law; they are now well aware of the profundity of Chief Justice Taft's observation:

> "I am especially interested in the matter of procedure, because procedure stands between the abuse of the principles of law and their use for the benefit of mankind. You can have as high and as sound principles of law as possible, but if you have not the procedure by which you can apply them to the ordinary affairs of men, then it does not make any difference what the principles are or how erroneous they may be."[2]

Nevertheless, it takes a treatise like Professor Moore's to teach us that procedural law is not only of vital importance, but also often fascinating and profound—it can, in fact, be the most truly jurisprudential subject in the curriculum. (I don't except even "jurisprudence" itself!) Indeed, the inherent intricacy of many of the problems tackled by Professor Moore results in so elaborate a treatment as to make this reviewer feel the need for a condensed version, especially for the busy trial lawyer and judge; use of Moore during the pressure of trial in search of the "quick answer" can be as nerve-racking as similar use of Wigmore. Perhaps the forthcoming revision of Moore's *Federal Rules and Official Forms* will help fill this need.

The writing of this review substantially coincides with the discharge by the United States Supreme Court of its Advisory Committee,[3] first appointed in 1935. The discharge focuses in this reviewer's mind two lines of thought: the first, earthy and hard-headed, is that such discharge will doubtless further enhance the permanent significance of Professor Moore's treatise. The second, nostalgic and almost melancholic, is that with the Committee's discharge, an epoch has closed. And the end of even a glorious era has the sadness of farewell about it. Because they were primarily responsible for the success of the Federal Rules, it is fitting again to pay tribute to the giants of procedural reform who first served on the Advisory Committee, so many of them drawn from the teaching branch of the profession: Charles E. Clark, Armistead M. Dobie, Edmund M. Morgan, Edson R. Sunderland, and this reviewer's own respected and beloved teacher, Wilbur H. Cherry; and to their worthy successors, also from teaching ranks, Professor Moore and Maynard E. Pirsig.

These founders and their colleagues built well a solid edifice. But in their hopes and expectations for simplification of procedure, were they overly optimistic? How simple can procedural law be, and still be law? Professor Moore's

2. Address before the Boston Bar Association, June 16, 1923, 8 MASS. L.Q. No. 5, at 3 (1923).

3. The writer has been informed that the discharge, announced by letters to members of the Committee in June, 1956, will be formally ordered after the Court convenes for its October, 1956 term.

treatise, as intensive as it is extensive, and the already long and rapidly lengthening procession of cases construing the Rules which it cites, demonstrate anew that the quest for simplicity in procedural law is an endless one—until we become willing to equate simplicity with arbitrary will.

But there is too much for the procedural reformers of tomorrow to do to pause long in melancholic dallying with the past. Perhaps, in taking the torch from their illustrious predecessors, tomorrow's reformers can profitably ask these two questions: (1) Could the rule-making power more logically, sensibly and efficiently be lodged, so far as the federal courts are concerned, in a Judicial Conference augmented with district judges and an adequate staff, aided of course by an Advisory Committee, rather than in the United States Supreme Court? And would a state's Judicial Council similarly be a more suitable repository of the rule-making power than its Supreme Court? The California experience is significant as possibly indicating an affirmative answer.[4] (2) Can the rule makers be too ambitious? Can they stake out for themselves too large a claim amounting to trespass on the public domain? The deficiencies of legislative code-making in the field of lawyer-law have been so notorious and glaring, that it is easy to understand the rule makers' urge to grab the ball of reform and play the game alone. But that is not the democratic way; it is not the right way; and ultimately it will prove to be an impossible way. For some of the problems that are garbed in the semantics of procedure are nevertheless deep sociological, political and jurisprudential problems, in the solution of which the public is entitled to participate. Lawyers, judges and law professors will do well to perform carefully their part of the task of formulating lawyer-law rules of procedure, and to provide leadership, but not monopoly, for that part of the task that is truly in the public domain.[5]

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4. In California, the Rules for the Supreme Court and District Courts of Appeal, and the Rules for the Superior Courts were promulgated by the California Judicial Council pursuant to CAL. CONST. art. VI, § 1a; see CAL. CODE CIV. PROC. § 961 (Deering 1955), and CAL. PENAL CODE § 1247k (Deering 1955). See Witkin, *New California Rules on Appeal*, 17 So. CALIF. L. REV. 79, 232 (1944). The success of Judicial Council rule-making in California, see Witkin, *Four Years of the Rules on Appeal*, 35 CALIF. L. REV. 477, 505 (1947), may in part be due to the prestige of the Judicial Council that results from its constitutional status. CAL. CONST. art. VI, § 1a. *Cf.* Wright, *Rule 56(e): A Case Study on the Need for Amending the Federal Rules*, 69 HARV. L. REV. 839, 857 (1956).

5. For example, the evidentiary privileges. See Louisell & Crippin, *Evidentiary Privileges*, 40 MINN. L. REV. 413-14 (1956); *cf.* Holtzoff, *Institute on Practical Evidence*, 18 F.R.D. 367, 378 (1956).

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