ABM

MINUTES OF THE JUNE 1970 MEETING OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

The twentieth meeting of the Advisory Committee on Bankruptcy Rules convened in the Conference Room of the Administrative Office of the United States Courts, 725 Madison Place, N.W., Washington, D.C., on Wednesday, June 10, 1970, and adjourned on Friday, June 12, 1970. The following members were present during the sessions:

Phillip Forman, Chairman, presiding.
Edward T. Gignoux
Asa S. Herzog
Charles A. Horsky
G. Stanley Joslin
Norman H. Nachman
Stefan A. Riesenfeld
Charles Seligson
Morris G. Shanker
Estes Snedecor
George M. Treister
Elmore Whitehurst
Frank Kennedy, Reporter
Vern Countryman, Associate Reporter
Lawrence P. King, Associate Reporter

Others attending all or part of the sessions were Judge Albert B. Maris, Chairman of the Standing Committee on Rules of Practice and Procedure, Professor James W. Moore, a member of the Standing Committee, and Messrs. Royal E. Jackson, Thomas A. Beitelman, Jr., Berkeley Wright, and Joseph F. Spaniol, members of the staff of the Director of the Administrative Office of the United States Courts.

Judge Forman welcomed all present, and expressed regret that Judge Shelbourne was still ill and unable to attend.

I N D E X

Agenda Item

Agenda Item 1. Drafts for the Shelf

Professor Kennedy called the attention of the members to the organization of the Desk Books and to the memoranda to be found in the last division of the desk books, which included some memoranda received previously and some not received.

Rule 5.7. Courts of Bankruptcy and Referees' Offices.

Professor Kennedy noted that the second page of Bankruptcy Rule 5.7 was erroneously headed 5.71.

He then proceeded to consider:

(a) Courts of Bankruptcy Always Open. There being no objection, this subsection was approved.

Later in the meeting, Professor Joslin recommended that the words "mesne and final" be deleted as being obsolete, but on Judge Maris' suggestion that they serve a purpose, the phrase was retained. In response to an inquiry from Professor Riesenfeld, Judge Forman proposed that the language in Rule 5.7(a) be checked to see if it is broad enough. Professor Kennedy agreed to check it.

(b) Trials and Hearings; Orders in Chambers. A motion made by Mr. Nachman that the words on lines 8 and 9, "at which testimony is taken" be stricken was seconded and carried.

Rule 5.61. Designated Depositories.

(b) Security Required. A suggestion was offered by Mr. Royal Jackson that the words "or individual surety" on line 14 be deleted. A motion to that effect was made, seconded and passed.

(e) New Bond: When Required; Its Effects. A motion made by Mr. Horsky was seconded and carried that the words on lines 40 through 44 be deleted, "(1) not later than 5 years after the giving of the last previous bond as a depository under this rule unless the depository has deposited securities pursuant to subdivision (b) adequate for existing and expected deposits; or (2)." There was general agreement that the parentheses be deleted from lines 48 and 53 of subdivision (e) of this Rule.

(h) Reports Required of Designated Depositories. It was generally agreed that subdivision (h) of this Rule be approved.

Rule 7.64. Seizure of Person or Property.

On the suggestion of Professor Kennedy a motion was made, seconded, and carried that this Rule be changed to read, "Rule 64 of the Federal Rules of Civil Procedure applies in adversary proceedings, except that an adversary proceeding in which any of the remedies referred to in that rule is used shall be commenced and prosecuted pursuant to these rules."

There was general agreement that the last sentence in the Note to this Rule should be deleted.

Thereupon the rules in Item 1 of the Agenda were placed on the shelf.

Agenda Item 2. Revision of Drafts Previously Placed on Shelf:

Rule 5.21. Transfer or Revocation of Reference.

Professor Kennedy called attention to the fact that Bankruptcy Rule 5.21 was distributed on 5/13/70 and 6/5/70 in two different forms. In the 5/13/70 draft "in whole or in part" was added to Rule 5.21(b) to correlate 5.21 and 9.41, while the draft of 6/5/70 consolidated subdivisions (a) and (b) of Rule 5.21 as previously drafted.

A motion made by Mr. Horsky to combine the two drafts of this Rule was seconded. After a general discussion about the power of judges to assign or transfer cases to referees and the meaning in Rule 5.21(a) of "convenience of parties," Mr. Horsky amended his motion to include eliminating the parentheses around "district," to change the word "transfer" in line 4 to "assign," and to eliminate the bracketed materials and the last parentheses. After a general discussion, the motion of Mr. Horsky was carried.

Professor Kennedy agreed to revise the Note to this Rule.

Rule 9.12. Objection to Jurisdiction of Court of Bankruptcy.

Professor Kennedy explained that he had altered Rule 9.12(b) to read, "If an objection to the jurisdiction of an adversary proceeding, a contested matter, or a severable part thereof, is sustained, the bankruptcy judge shall dismiss such proceeding, matter, or part thereof, or transfer it to a civil docket of the district court, as may be appropriate. On transfer pursuant to

this rule, the proceeding, matter, or severable part shall continue as if filed as a civil action in the district court on the date it was filed in the court of bankruptcy." The changes, he said, would correlate with Rule 7.9, "Joinder of Persons Needed for Just Determination."

Mr. Treister moved the adoption of Rule 9.12 as appearing in the draft of 5/11/70 with the understanding that Professor Kennedy would look into the avoidance of possible repetition. The motion was seconded and carried.

Thereupon the rules in Agenda Item 2 were ordered returned to the shelf.

Agenda Item 3. Consideration of Communication of April 23, 1970, from Board of Directors of National Conference of Referees in Bankruptcy re Early Publication of Rules for Straight Bankruptcy.

Judge Gignoux explained his statement (in the attachment to the communication of April 23, 1970, from Board of Directors of National Conference of Referees in Bankruptcy), saying that he believed the Bankruptcy Rules could be completed at the present meeting, since the Agenda contained all the essential items for their completion.

Professor Kennedy suggested that the issue raised in Item 3 is whether, when the Committee does finish with the straight Bankruptcy Rules, these Rules should be put out for comment rather than wait for Professor King and Professor Countryman to complete their work on Chapters X-XIII. He added that he is in favor of promulgating the Rules for comment rather than waiting to go over the whole of Chapters X-XIII.

In answer to Judge Forman's inquiry, Professor Countryman said he believed two meetings would complete the Committee's work on Chapter XIII. Judge Forman said the Committee could look foward to four meetings within the next year, and that the straight Bankruptcy Rules should be completed by the November meeting.

Professor Riesenfeld expressed the feeling that the straight Bankruptcy Rules would need revision if they were held until Chapter XIII is completed.

Mr. Horsky explained that the thrust of the referees is to get the Rules into effect so that they can use them, and inquired as to the timetable of procedures after the Committee gives approval to all the Rules.

Judge Forman stated that the Committee would recommend to the Standing Committee the approval of the Rules and their distribution, and Judge Maris explained that the procedure would be to say to the Standing Committee, "Here is a tentative set of rules we're willing to unveil to the public, and we ask you to publish them." The Committee would then have to have another meeting to go over comments and changes, and could then prepare a definitive draft to submit to the Standing Committee with the recommendation it be adopted and sent to the Supreme Court. If the draft could be submitted to the Standing Committee in about a year, the Committee would go over the draft, perhaps making some changes, would approve it and send it to the Judicial Conference in the fall of 1971, which in turn would approve it and send it to the Supreme Court in the fall of 1971; the Court presumably would adopt it in the beginning of 1972, and it would go into effect on July 1, 1972.

Judge Forman observed that the year required to publicize the straight Bankruptcy Rules could be used to complete the work of Professors Countryman and King.

Judge Maris suggested that if the Committee wanted to get the straight Bankruptcy Rules in force, corrective amendments to them could be included with the proposed rehabilitative Chapter Rules.

Mr. Horsky reminded the Committee that it should have in mind that a timetable that would get the Rules to the Judicial Conference by November would be desirable, so that it would be unnecessary to wait a whole year. Judge Maris explained that the Rules have to go to Congress between the opening of its session in January and the first of May. Therefore, in order to give the Supreme Court a chance to pass on them and send them to Congress at the opening of the session, the Rules should be sent to the Standing Committee early in July.

Judge Herzog stated he believed the Bankruptcy Rules should be released for study before the other rules come out and observed that if the Bankruptcy Rules were released early, the time could probably be shortened as far as the Chapter Rules were concerned.

Professor Kennedy stated he believed that the referees are troubled

by the notion that there may be one set of rules for straight bankruptcy, while the old system would be applicable to Chapter proceedings.

Judge Maris believed another possibility was that it could ultimately be decided that all the Rules should be held, as far as sending them to the Supreme Court would be concerned, until they were all completed, and there would not be any prejudice in sending out the Bankruptcy Rules early. Mr. Horsky said he could not see any reason why the Bankrupty Rules should not be sent out early for comment. Judge Herzog stated that the public would assume that a lot of changes would be made in line with what they suggested.

Judge Maris approved Judge Herzog's motion that as soon as the Bankruptcy Rules were finished, they should be transmitted to the Standing Committee.

Judge Forman restated the motion to be that the Advisory Committee ask the Standing Committee to permit the Bankruptcy Rules to be distributed for comment, and Judge Maris suggested that the motion should provide that the Committee distribute the straight Bankruptcy Rules before completing the Chapter Rules. The motion was seconded and carried.

Professor Judge Riesenfeld observed that the Civil Rules were not being adapted to the Bankruptcy Rules, and Judge Maris stated that it is perfectly proper to make suggestions for the possibility of amendment to the Civil Rules Committee, but that that Committee had completed its work, and there was no Reporter at the moment, although there would be one in the future.

It was suggested by Judge Gignoux that the Bankruptcy Rules should be distributed in as attractive a package as possible, and that the Reporter should consider some numbering system which would be less cumbersome than the present system. Professor Kennedy replied that he contemplated doing all the numbering at one time, since all the cross-references in the Rules themselves and in the comments would have to be checked. He also said he believed the Committee should consider whether the Rules should still contain the separate nine parts, or whether a number of the parts should be consolidated.

Judge Forman stated he believed that at least one more meeting would be required to finish the many details, and that before the end of this meeting another meeting would be considered.

It was the opinion of Judge Gignoux that if the Committee could get through the substance at this meeting, then the Editorial and Style Committee could be authorized to put the Rules in final form.

Professor Countryman stated that the Chapter XIII material would be ready in October, and Judge Forman suggested that no decision should be made as to what would be done in October until the end of the meeting, and asked what reply should be made to the Conference of the Referees in Bankruptcy. After discussion, it was decided that the Conference should be told that the straight Bankruptcy Rules would be promulaged in advance of the Chapter Rules.

Agenda Item 4. Rule 5.14. Trustees for Estate When Joint Administration Ordered.

Professor Kennedy stated that a memorandum dated June 5, 1970 had been mailed to all members, that Rule 5.14 had been approved at the last meeting, and that the Subcommittee on Style had also approved the draft through subdivision (d). He also stated that a new subdivision (e) had been added, which related to the selection of a trustee for partnerships and partners' individual estates because of the concern at the last meeting that he add some provisions requiring the referee to consider conflict of interest before he approved the selection of a trustee for two or more estates. He asked the Committee to look at proposed subdivision (e), although he felt it was a bit out of harmony with the rest of Rule 5.14, to see whether it should be added:

"(e) Trustee for Partnership and Partners' Individual Estates:

"Notwithstanding the foregoing provisions of this rule, the trustee of a bankrupt partnership shall be the trustee of the individual estate of any individual partner, ordered pursuant to Rule 1.6(b)" - the rule on joint administration - "to be administered jointly, unless the court, for cause shown, either (1) permits the creditors of a general partner to elect a separate trustee or (2) appoints a separate trustee for the individual estate."

Professor Seligson called attention to a case decided recently by the Second Circuit Court of Appeals proposing that

a single trustee for more than one corporation be appointed, unless cause could be shown for the appointment of a separate trustee, and moved the adoption of Rule 5.14(e).

Mr. Treister stated he believed the first four subdivisions of Rule 5.14 covered the subject, that Subdivision (e) just changed the emphasis, and believed conflict of interest to be a more important emphasis. He added that he believed that an extra subdivision was unnecessary.

Professor Seligson said that he is trustee for fourteen individual trusts, that a settlement had just been worked out, and that it would have been impossible with fourteen different trustees.

After further discussion, the motion to adopt Rule 5.14(e) was seconded and carried.

In response to Professor Riesenfeld's comment that he felt the language in Rule 5.14(e): "the trustee of a bankrupt partnership shall be the trustee of the individual estate of any general partner" was ambiguous, Professor Kennedy replied that perhaps "shall also" would be clearer and that he would give such a change consideration.

Agenda Item 5. Rule 5.51. Examination of Bankrupt's Transactions With His Attorney.

Professor Kennedy called attention to his memorandum of June 5, 1970 dealing with examination of bankrupt's transactions with his attorney, which included two drafts of subdivision (b). Professor Kennedy read the first one:

"Agreement to Pay or Transfer Property to Attorney After Bankruptcy.

"Upon motion by the bankrupt or upon the court's own initiative, the court may examine any agreement by the bankrupt, whether made before or after the filing of a petition by or against him, to pay money or transfer property to an attorney after bankruptcy."

He then left subdivision (b), to read subdivision (c).

In accordance with Mr. Treister's suggestion that subdivision (b) ought to deal not only with agreement to pay but also payments and transfer after the bankrupt's agreement to pay or transfer,

Professor Kennedy reworded (b) in the alternative draft as follows:

"Upon motion by the bankrupt or upon the court's own initiative, the court may examine any agreement by the bankrupt to pay money or transfer property to an attorney after bankruptcy, or any payment or transfer made pursuant to such an agreement."

Professor Kennedy said he considered Mr. Treister's suggestion to be entirely logical, but to involve a departure from the statutory language of §60d of the Act, and Professor Seligson expressed the belief that the language of §60d should not be extended.

After a discussion concerning agreements made before and after bankruptcy and whether agreements not concerned with the bankruptcy should be inquired into by the referee, Professor Seligson suggested rephrasing (a) and striking (b), and after further discussion, Professor Seligson then proposed that agreements before and after bankruptcy be included and payments made before or afterward that relate to the bankruptcy proceedings.

There followed further discussion as to how (b) should be worded and whether the Rules should contain rules of ethics.

Judge Whitehurst made a motion to accept the substance of Professor Seligson's motion and leave the final draft of (b) to the Committee on Style, which was duly seconded.

In answer to Professor Riesenfeld's inquiry as to the substance of Professor Seligson's motion, Professor Kennedy restated proposed Rule 5.51(b) as follows:

"Upon motion by the bankrupt or upon the court's own initiative, the court may examine any agreement by the bankrupt to pay money or transfer property to an attorney after bankruptcy, or any payment or transfer made pursuant to an agreement, which payment or transfer is made directly or indirectly or to be so made for services rendered or to be rendered in relation to the bankruptcy."

The question was called for, voted upon and carried.

Agenda Item 6. Rule 6.4. Assumption, Rejection, and Assignment of Executory Contracts.

Professor Kennedy called attention to his memorandum of June 6, 1970, and questioned whether the time schedule in Rule 6.4 should be adhered to. He was particularly concerned with the language of the Rule beginning on line 5, "Any such contract not assumed within 60 days after qualification, or within such further time as the court may have allowed the trustee, shall be deemed to be rejected," since §70b of the Act provides only 30 days to elapse between the date of qualification and of presumed rejection of the contract.

Mr. Treister made a motion that "30" in line 1 be changed to "15" and "60" in line 6 to "30." Following a general discussion, Professor Seligson expressed the opinion that the change to 15 days in line 1 would not allow sufficient time for paper work. The motion was lost.

Judge Gignoux made a motion that the language in line 7 be changed to read: "within such further or reduced time as the court may allow." After a general discussion, the motion was seconded and carried.

Professor Kennedy inquired of the members whether the "30 days" in line 12 should be reduced or extended. A general discussion of time period in Rule 6.4 followed but no other action was proposed.

(Recess for lunch)

Wednesday Afternoon Session

Agenda Item 7. Service of Summons, Complaint, and Notice of trial. Rule 7.4.

Professor Kennedy called attention to the memorandum of June 6, 1970, containing a revision of Rules 7.4 and 9.28, together with a Notice and Official Form 6B, and commented that a new Rule 9.28 had been distributed in a form different from the one heretofore considered. Professor Kennedy explained that 7.4, which is adapted from Civil Rule 4, had been broadened to include the term "process" as Civil Rule 4(c). The revision was originally suggested by a question of Professor Seligson in connection with Rule 22, which deals with interpleader, as to whether nationwide service of injunctive process is clearly permitted by our Rules.

After a thorough review of pages 1 and 2 of the memorandum of June 6, 1970 and supplementary discussion and remarks, Professor Kennedy requested the members of the Committee to consider whether Rule 7.4 should contain a subdivision such as 7.4(b): "Requirement of Service of Summons, Complaint and Notice of Trial: The summons, complaint and notice of trial shall be served together on the defendant in one of the modes authorized by this rule." Mr. Horsky proposed that the addition be made as the last sentence of 7.4(a) instead of as a new subdivision, which proposal was accepted by Professor Kennedy.

In answer to an inquiry, Professor Kennedy stated that the summons, complaint and notice of trial should all be included in one package and go out together, and the date of the trial has to be set in advance of the issuance of the summons.

After discussion, Professor Kennedy made a suggestion that "and shall be served together with the complaint on the defendant in one of the modes authorized by this rule" be added to subdivision (a) of Rule 7.4, which was moved, seconded and carried.

Professor Kennedy then asked the members to disregard paragraph two on page 2 of his memorandum of June 6, as it dealt with the relettering of Rule 7.4, which would not now be necessary, and then referred to the portion of page 2 that dealt with subdivision (g). After reading through the first paragraph on page 3 of his memorandum, he inquired whether the members agreed with the includion of the words "all process" in lines 107 and 108 of Rule 7.4(g)(2) and with changing "§60d of the Act" to "Bankruptcy Rule 1.51" in lines 118 and 119 of Rule 7.4(g)(2). Professor

Kennedy also suggested the possible addition to Rule 7.4(g), as paragraph (3), "A subpoena may be served within the territorial limits provided in Rule 45 of the Federal Rules of Civil Procedure," and stated the primary question to be dealt with is whether an injunction may be served nationwide with respect to other kinds of process. In answer to an inquiry, Professor Kennedy stated his definition of "process" came from 2 Moore 929 and 7 Moore 2602.

After discussion as to the meaning of "associated countries, a motion was made that the phrase "or associated countries" be deleted from Rule 7.4(g)(1), and Judge Forman read the proposed change as: "...includes the Commonwealth of Puerto Rico and the territories and possessions to which the Act is or may hereafter be applicable." The motion was passed by general agreement.

Judge Gignoux made a motion to change lines 107 and 108 and 113 and 114, which was seconded. Mr. Treister suggested that the words in the parentheses on lines 107 and 113: "The summons, complaint and notice of trial and" be included, and Judge Gignoux amended his motion to include those words, which was passed by general consent.

Professor Kennedy called attention to subdivision (3) of Rule 7.4(g), and after discussion Mr. Horsky moved its adoption by striking the parentheses. The motion was passed by general consent.

Professor Kennedy called the members' attention to his memorandum of June 6, 1970, beginning at the bottom of page 3, referring to Rule 7.4(g)(2)(B). He then inquired whether the Committee intended to authorize service when the property is located in a foreign country. After a general discussion of the question, Mr. Horsky moved to delete the words in line 121 "(and located in this country") from Rule 7.4(g)(2)(B). The motion was seconded and carried.

Professor Kennedy again referred to his memorandum of June 6 at page 4, calling attention to his insertion of a reference to Civil Rule 4(d)(7) in Rule 7.4(g)(2)(C), and suggested that if a reference to 4(d)(7) is made in line 123, a needless limitation on the service of process would be eliminated. It was moved, seconded and carried that the reference suggested by Professor Kennedy be added at line 123.

Professor Kennedy called attention to the paragraphs on page 4 of his memorandum of June 6 dealing with Rule 7.4(h) and (i), and questioned whether the first sentence of Rule 7.4(i) is

necessary: "Service under this rule shall be effective notwithstanding an error in the papers served or the manner or proof of service if no material prejudice resulted therefrom to the substantial rights of the party against whom the process issued." He stated that Rule 9.20 is so broad that he thought this sentence to be unnecessary. Judge Gignoux moved to eliminate the parentheses on lines 136 and 141 and to retain the first sentence of Rule 7.4(i), which was seconded and carried.

Professor Kennedy called the members' attention to the added words on line 141, "of process or proof of service thereof." Mr. Treister moved to remove the parentheses on line 141 and retain the words, and the motion was seconded and carried.

Professor Kennedy directed the members' attention to his suggestion in the memorandum of June 6 to include a reference to subdivision (j) in Rule 7.4(f) on line 101 and eliminate the last sentence of (j). A motion was made to add "or (j)" to line 101 of subdivision (f) and to strike the words "Service under this subdivision shall be made within the time fixed by the court" on lines 149 through 151, which was seconded and carried.

Professor Riesenfeld called the attention of the members to the fact that Rule 7.4(e) and (j) only set forth where and when process is made and not how it is made. Professor Kennedy pointed out that Rule 7.4(c) states that service of all process shall be made by mail, although process may be served in other ways. He agreed to try to include in the Note to the Rule comments reflecting Judge Riesenfeld's observation.

Rule 9.28. Publication.

Professor Kennedy then called attention to the two drafts of Rule 9.28 dated May 13 and June 6, 1970, and recommended the words "to the extent not otherwise specified herein" be added on line 2 following the words "the court shall," in order to resolve any conflict with Rule 7.4, to which no objection was made.

Mr. Horsky made a motion that the words "not otherwise specified in these rules" be added to line 3 of Rule 9.28 as set forth in the June 6 draft, which was seconded and carried.

Agenda Item 8. Default: Rule 7.55 - Judgment by Default.

Professor Kennedy called attention to his memorandum of

June 2, 1970, and to a new draft of Rule 7.55 included with the memorandum, incorporating some changes approved at the last meeting of the Subcommittee on Style. Professor Kennedy pointed out that the new rule set forth that any claim for relief may be the basis for a judgment by default when the adverse party has failed to plead or otherwise defend or is not ready to proceed on the trial date if three qualifications are satisfied: (1) that the adverse party has no sufficient excuse; (2), that no hearing is necessary to enable the court to enter judgment or carry it into effect; and, (3), that the adverse party is not an infant or an incompetent person. He also stated this draft eliminated the necessity of an application for a judgment by default.

Judge Gignoux commented that Rule 55 does not refer to the Soldiers' and Sailors' Civil Relief Act, and Professor Kennedy called attention to the portion of his Note stating: "The operation of subdivision (a) of this rule is subject to the Soldiers' and Sailors' Civil Relief Act of 1940,...in the same way as is Rule 55(b) of the Federal Rules of Civil Procedure."

Mr. Nachman moved ", without sufficient excuse," be added to line 4 of Rule 7.55. After a second and general discussion, the motion was lost.

Professor Joslin moved to eliminate from lines 16-18 of Rule 7.55(a) "general guardian, committee, conservator, or other such representation" and substitute "legal representative." After a second and general discussion, the question was called for and lost.

After a general discussion of subdivision (a), Judge Whitehurst moved that the words "upon request therefor" be inserted on line 6 of subdivision (a), following the words "the court." The motion was seconded and carried, and subsection (a) was approved by general agreement.

Professor Kennedy then explained that subdivisions (b), (c) and (d) were taken directly from the Rules of Civil Procedure, and these subdivisions were approved by general consent.

Agenda Item 9. Summary Judgment in Adversary Proceedings: Rule 7.56.

Professor Kennedy called attention to his memorandum of June 3, 1970 and stated that this Rule was approved at the last meeting. He reported that at the last meeting of the Subcommittee on Style Mr. Treister made the point that the time sequence in Rule 56 does

not jibe with Rules 7.4 and 7.12, and that the purpose and effect of filing a motion for summary judgment in an adversary proceeding will be to delay rather than to expedite the disposition of the adversary proceeding. Professor Kennedy pointed out that under the Civil Rules a motion for summary judgment could also be used to delay and that a party seeking a prompt disposition must consider the effect on the time schedule in filing a motion for summary judgment. Mr. Treister recommended that the members should not just ignore the problem, but should take some action so that the Bench and Bar would be aware that the Committee recognized that a problem existed.

Professor Kennedy called attention to Alternative II, which he submitted for possible consideration. After a discussion of possible time periods to be applied in II, Mr. Treister suggested revising Alternative I, in line with which Professor Kennedy proposed the words "except that the motion for summary judgment shall be served at least 5 days before the date fixed for the hearing" be added to I. Following further discussion, Mr. Treister moved to add the words as offered by Professor Kennedy to Alternative I, so that it would fit in with Civil Rule 56. There was no second.

Professor Kennedy read Alternative I, including the added words, "Rule 56 of the Federal Rules of Civil Procedure applies in adversary proceedings except that the motion for summary judgment may be served 5 days or more before the time fixed for the hearing on the motion for summary judgment." Following further discussion, a motion made by Mr. Nachman to adopt Alternative I without any addition was seconded and carried.

Agenda Item 10. Contempt Proceedings: Rule 9.41.

Professor Kennedy called attention to his memorandum of May 29, 1970, and the draft of Rule 9.41 of May 13, 1970, which included changes approved at the last meeting. He read proposed (a)(1), calling attention to the fact that the summary disposition power of the referee was narrowed thereby to misbehavior that occurs during the hearing before the referee, and that contempt other than misbehavior could be punished only after notice and hearing.

Judge Herzog moved to adopt subdivision (a)(1) as proposed by Professor Kennedy. Mr. Nachman inquired as to whether this subdivision instructs the referee as to when he may punish for contempt, or whether it is left up to him. Professor Kennedy

called attention to page 4 of his Note, and inquired as to how much more should be said.

Mr. Horsky stated he believed the Note was not clear as to whether the referee could punish immediately or whether he has to wait until the hearing is over. Professor Kennedy then read from page 6 of the Note, and said he believed it is a controversial question whether there can still be summary disposition at the close of the trial.

In answer to Judge Forman's inquiry, Professor Kennedy stated that the only penalty to be imposed by a referee would be a monetary penalty. Following further discussion, Mr. Horsky suggested that the last paragraph on page 6 of the Note begin, "Referees should note that it has been held..."

Judge Maris observed that perhaps the power should come from Congress and not from the Committee. Following a discussion as to whether the proposal was substantive or procedural, Judge Maris commented that if the Supreme Court adopted the Rule and Congress said nothing, there would be a presumption that the proposal was within the limits of the rule-making grant, at least until the Supreme Court said otherwise, but that there might be some question raised from the country as to whether or not the proposed rule exceeded the power of the Committee.

Following further discussion, Judge Gignoux moved that Rule 9.41(a)(1) read as follows: "Misbehavior that is prohibited by §41a(2) of the Act may be punished summarily by the referee as contempt if he saw or heard the conduct..." The motion was seconded and carried by general approval.

Professor Kennedy explained that all other changes by the Subcommittee on Style in Rule 9.41 were stylistic, and there was general agreement that the Rule did not need further review.

It was called to Professor Kennedy's attention that he had also suggested that "may" be substituted for "shall" in line 32 of subdivision (a)(4). Mr. Horsky suggested that lines 32 and 33 should be changed to read "On such certification the judge shall proceed as for a contempt not committed in his presence," which was adopted by general consent.

Following discussion about agenda and schedules, the meeting was adjourned at 4:45 P.M. to reconvene at 9:30 A.M. on Thursday, June 11, 1970.

Thursday, June 11, 1970

Morning Session

Judge Forman called the meeting to order and introduced Mr. Joseph Spaniol and Mr. Berkeley Wright.

Agenda Item 13. Proposal for Streamlining Administration of No-Asset Cases.

Mr. Spaniol presented to the Committee a proposal for streamlining administration of no-asset cases, and recommended the adoption of a procedure for ascertaining no-asset cases at an early date by permitting the bankrupt and his attorney to file a petition or declaration stating no assets were involved; a copy of the petition could be sent to each creditor. If any of the creditors objected, a trustee could be appointed; but if no creditor objected, the bankrupt could appear before the referee, be examined briefly, and, if no problems developed, be discharged in 30 days. Mr. Spaniol then distributed a proposed form of petition for a voluntary bankruptcy and a declaration of no assets prepared by Mr. Wright.

Following a review of the proposed form, Judge Forman called the members' attention to Professor Kennedy's memorandum dated June 1, 1970, referring to the subject: Proposal for Streamlining Administration of No-Asset Cases. Professor Kennedy suggested that no amendment of the Act was necessary and that changes could be made by rule. He stated that the consensus of the Style Subcommittee was that it was preferable for a governmental agency to mail notices.

According to Mr Spaniol's suggestion, all bankrupts would appear before a referee, although there would not necessarily be a meeting of creditors. Professor Kennedy stated the Style Subcommittee members questioned whether a separate informal discharge procedure should be designed for the no-asset bankrupt. In answer to Judge Snedecor's question regarding time for hearing, Mr. Spaniol replied that this was open and a variety of ways could be developed to resolve it.

Mr. Royal Jackson reminded the members that about 92% of all cases filed in the past four or five years have involved consumer bankrupts, and that if Mr. Spaniol's suggested procedure would work for half of these, close to 100,000 bankrupts could

use it each year. Mr. Jackson believed that the referees would be relieved of a great amount of paper work by this system.

Mr. Treister stated he believed that the processing of claims would be greatly simplified under the proposed Rules, and that it might be unconstitutional for the attorney for the bankrupt to mail notices. He also estimated that in about 25 to 30% of the cases there is no attorney for the bankrupt, and that creditors would receive more papers under the suggested system than under the system proposed in our Rules.

In answer to Professor Joslin's question as to how many no-asset cases are being handled by Legal Aid, Judge Forman stated that the referees in New Jersey say more and more cases are being handled by Legal Aid, who do not appear as attorneys but have the clients file the papers pro se. After discussion, it was the consensus that pro se cases constitute a very small percentage, and were generally discouraged.

Mr. Spaniol explained that the proposed procedure is an optional one. Judge Herzog said he believed many parts of the proposed procedure could be adopted, and suggested that consideration should be given to taking from Mr. Spaniol's plan whatever could be used in the Rules. He also suggested that if creditors were notified that there apparently were no assets, they would not appear at the first hearing.

Professor Shanker stated he believed that under the Rules bankruptcies would be conducted more cheaply and efficiently than under Mr. Spaniol's plan, and that the burden of work would simply be shifted by his proposal.

Judge Whitehurst said he agreed with Judge Herzog's remarks and that notices should be sent from the referee's office. He suggested that there should be further discussion at the time of the examination of Chapter XIII.

Professor Riesenfeld said he believed it to be important to reduce the number of proceedings and that the discharge of the bankrupt should not be delayed. He stated he believed Mr. Spaniol's proposal had many good features, but that assuring that a bankrupt gets a lawyer does not take care of the fundamental social problem of why so many consumers are over-committed and what should be done about it, and that the whole problem should be examined. Mr. Spaniol stated he believed the Judicial Conference would question as to why there is such a large deficit in the salary-and-expense account in bankruptcy proceedings and whether bankruptcy procedures are processed as efficiently as

possible.

Professor Joslin said he believed that a bankrupt who states he has no non-exempt assets should be granted a discharge upon notice to creditors that he is applying for one, but that if a creditor can prove that the bankrupt has non-exempt assets within a period of two years, the burden should then be on the bankrupt to prove he acquired them after the petition.

Judge Gignoux said he had great difficulty understanding how the proposed plan would effect any economy of judicial or clerical time, and felt that the referee should schedule a hearing in order to determine no-asset cases. In view of the small number of creditors that are usually involved in no-asset cases, Judge Gignoux believed that only a small economy would be effected by Mr. Spaniol's proposal.

Professor Countryman said he believed the early identification of a no-asset case to be beneficial, and that a statement by the bankrupt's attorney that he could find no assets should be sufficient to treat the case as a no-asset case and that a more simplified schedule could be filed. He stated that he believed a lot of paper work could be saved and that the bankrupt could supply addressed envelopes for mailing notices to creditors.

It was Judge Maris' opinion that the first meeting of creditors could be combined with the hearing on discharge, and that unless assets were discovered, it would not be necessary for creditors to file a claim, thereby disposing of 50% of the cases in one meeting.

Mr. Treister said he believed that the economies that would result from Mr. Spaniol's suggestion as modified by Judge Herzog were that the creditors wouldn't have to file proofs of claim and that the file would be closed about two months sooner, but that to accommodate the whole plan would mean rewriting at least half of the Rules.

Professor Countryman said he believed that no saving of time would be accomplished by adopting the proposed plan, especially view of the fact that the form for no-asset cases is very simple to fill out.

Mr. Wright said he believed that if the bankrupt's attorney filed a form listing creditors' names and addresses that could be Xeroxed, there would be a large saving of clerical time.

In answer to Professor Riesenfeld's question as to

percentages of expenses contributing to the bankruptcy deficit, Mr. Jackson stated that he believed two big items are increases in referees' salaries and the salaries of the staffs.

In answer to Professor Seligson's question as to how no-asset cases in which no trustee is appointed would be handled, Professor Kennedy said two rules would apply to no-asset cases, one stating that no schedule is required to be filed and the other that no trustee need be appointed.

Following a discussion as to whether the proposed plan would save paper work, Judge Herzog stated that telling creditors there are no assets in the estate of a bankrupt would save thousands of telephone calls.

Mr. Horsky observed that Congress may set up a commission to study the entire bankruptcy system within the next few months and that the proposed commission may make the decisions before the Rules become effective. He suggested that the Rules should be looked at to see whether further simplifications could be effected, especially whether some way could be devised to discourage the filing of unnecessary claims, and that Mr. Spaniol should recommend to Congress that a commission, rather than the Committee, would be better-equipped to solve the problem of the deficit. He also suggested that Professor Kennedy and Mr. Spaniol review what has been done rather than attempt to write a new set of no-asset rules and make suggestions concerning no-asset cases, and Judge Forman observed that Professor Kennedy and Mr. Spaniol had already begun work on this problem.

Mr. Jackson stated that the commission to study bankruptcy procedures should be appointed very soon and that he is hopeful they will do a good job.

Professor Kennedy suggested that the Style Subcommittee should look at Mr. Spaniol's proposed form to see whether or not a short form would be feasible and whether it should be recommended to the Committee. Professor Seligson made a motion to authorize the Subcommittee to screen suggestions and to formulate findings to submit to the Committee for a mail vote, which was seconded and carried.

Judge Forman thanked Mr. Spaniol and Mr. Wright for their presentation.

Agenda Item 11. Judgments of Referees. Rule 9.58.

Professor Kennedy called attention to his memorandum of June 4, 1970, and stated that this Rule was considered and the changes approved at the July 1969 meeting, but that at the last Subcommittee meeting Mr. Treister raised a question about the extra paper work generated by the words in subdivision (a): "Every judgment of a referee shall be set forth on a separate document and shall be entered forthwith on the referee's docket and shall be effective only when so set forth and entered." To keep the paper work at a minimum, Professor Kennedy suggested (a) be changed to read: "Every judgment of a referee rendered in an adversary proceeding or contested matter shall be set forth on a separate document. Every judgment shall be entered forthwith on the referee's docket and shall be effective only when so set forth and entered." Although it departs slightly from Civil Rule 68, Professor Kennedy asked whether the members concur with the suggested language.

Mr. Horsky stated the second sentence didn't seem to him to be correct because when read literally it says that a judgment which is endorsed "so ordered" can never become effective since it has to be set forth, although every judgment which has to be set forth on a separate document is what was meant.

Judge Gignoux moved to strike "set forth and" from lines 5 and 6 of Rule 9.58(a), and Professor Riesenfeld amended the motion to include the striking of the word "rendered" in line 2 of the Rule, which was seconded and carried.

Professor Joslin moved to substitute "A" for "Every" in line 1 of the Rule. The motion was seconded and carried by general consent.

Judge Gignoux moved to accept Rule 9.58(a) as modified. It was seconded and, following discussion, was carried.

Professor Kennedy agreed to add that "shall" means "mandatory" in the Note to this Rule, as suggested by Professor Riesenfeld.

Agenda Item 12. Order for First Meeting of Creditors and Fixing Time for Filing Objections to Discharge Combined with Notice Thereof and Automatic Stay: Form No. 17Z.

Professor Kennedy explained that Form 17Z is a combined form

and called the members' attention to the alternative last paragraph of the form, "The adjudication of the bankrupt named above operates as a stay of any in personam action then pending or thereafter commenced against the bankrupt and of the enforcement of any judgment against him except as provided by Bankruptcy Rule 4.5. The filing of the petition as described in the first paragraph of this notice also operates as a stay of the commencement or continuation of any proceeding or act to enforce a lien against property of the bankrupt in the custody of this court or to enforce a lien against the property of the bankrupt obtained within four months before the filing of such petition by attachment, judgment, levy or other legal or equitable process or proceedings." He then suggested as a simpler alternative: "As a result of this bankrupty, certain actions and proceedings against the bankrupt and his property are stayed as provided in Bankruptcy Rules 4.5 and 6.5."

Mr. Nachman suggested that the language "As a result of this bankruptcy certain actions and proceedings which may have been commenced by creditors prior to this bankruptcy against the bankrupt and his property and which are still pending are stayed as provided in the Bankruptcy Rules" be incorporated in the paragraph proposed by Professor Kennedy. Mr. Horsky suggested the change "certain actions and proceedings against the bankrupt and his property now pending or which may be contemplated are stayed," which was accepted by Mr. Nachman.

After discussion, Professor Joslin moved to adopt Professor Kennedy's proposed alternative without modification.

In answer to Professor Seligson's inquiry, Mr. Nachman explained his suggestion as referring to pending actions against this bankrupt being stayed under the Rules. Judge Gignoux suggested that "pending" be inserted following "certain" in Professor Kennedy's proposed paragraph.

Following discussion, Mr. Horsky suggested the word "acts" be substituted for "actions" in the proposed paragraph. Professor Riesenfeld moved to strike the word "certain" from the paragraph, while Mr. Horsky said he believed if "certain" were striken, it would seem that Rules 4.5 and 6.5 provide that all actions are stayed. Professor Riesenfeld then suggested that "to the extent and in the manner provided for" be substituted for "certain" in the proposed rule, but Professor Joslin and Professor Kennedy expressed their preference for "certain."

Professor Joslin renewed his motion with the word "acts" substituted for "actions" as follows: "As a result of this bankruptcy, certain acts and proceedings against the bankrupt

and his property are stayed as provided in Bankruptcy Rules 4.5 and 6.5," and Mr. Nachman then seconded it. After discussion, the motion carried.

Judge Herzog moved to eliminate from the notice to creditors any reference to a stay of action, and Judge Forman restated it as a motion to eliminate both alternative paragraphs. The motion was seconded and lost.

Agenda Item 14. Compensation of Trustees, Receivers, Marshals, Attorneys, and Accountants: Rule 5.50.

Professor Kennedy referred to his memorandum of June 5, 1970, and stated that Judge Herzog had called his attention to the new Code of Professional Responsibility, DR 2-107, which makes certain changes in Canon 34 of the Canons of Professional Ethics, on which Rule 5.50 is based. He reminded the members that Rule 5.50 changed the law that dealt with the sharing of compensation by an attorney with a forwarding attorney and prohibited fee-sharing except within the limitations of subdivision (d). Professor Kennedy called attention to DR 2-107, Division of Fees Among Lawyers, and stated he believed it to be more restrictive than Canon 34. Nevertheless he felt that Rule 5.50(b) and (d) should be retained unchanged, although he recommended changing the Note reference to DR 2-107 to say that it supplements, reinforces and supports the proposed Rule 5.50. Judge Gignoux moved to approve Professor Kennedy's recommendation. The motion was seconded and carried. Professor Countryman suggested that the Note to this Rule should refer to both the Code of Professional Responsibility and the Canon of Professional Ethics, with which Professor Kennedy agreed.

Agenda Item 15. Problems Involving Rules of Evidence.

Professor Kennedy stated that after he had given consideration to the proposed draft of the Advisory Committee on Rules of Evidence, and after having conferred with Professor Cleary, its reporter, he was of the opinion that the correlation of the Bankruptcy Rules with the proposed Rules of Evidence would present no problem.

Rule 2.22.2. Privileged Communications.

The last meeting of the Advisory Committee considered a Rule 2.22.2 based upon §22i of the Bankruptcy Act, but its

adoption was defeated. Professor Kennedy, however, was requested to report upon the matter of privileged communications. He gave it as his opinion that §21i, which remains in the Bankruptcy Act, and the proposed Rule 2.22.2 upon which it was based, did not create a testimonial privilege, but was simply operative in the area of tort law. Hence it was unnecessary to deal with it in the Bankruptcy Rules, nor was there any necessity to reconsider the action in which proposed Rule 2.22.2 was rejected.

Rule 7.44.1. Determination of Foreign Law.

Professor Kennedy stated that at the last meeting it was now known whether the Federal Rules of Evidence would supersede Civil Rule 44.1, but Professor Cleary advised him that CR 44.1 will be retained, and since this rule applies to adversary proceedings, he suggested the adoption of Rule 7.44.1, and Mr. Treister moved its adoption. The motion was seconded and carried.

Rule 9.43. Evidence.

It was proposed to correlate this Rule with the Federal Rules of Evidence, but Professor Kennedy believed that there may be certain words in the Federal Rules of Evidence that may need explanation in a Note to Rule 9.43. Mr. Horsky observed that since the Federal Rules of Evidence will be promulgated before the Bankruptcy Rules are finalized, there will be a later opportunity to resolve any problems. Professor Kennedy therefore agreed to give this Rule attention at a later date.

Rule 7.37. Failure to Make Discovery: Sanctions.

Professor Kennedy stated this Rule is to correlate with Civil Rule 37, which had been held to be incompatible with §3(d) of the Act, but that Rule 7.37 is needed to cover sanctions in the case of a bankrupt who fails to provide his books and give testimony. Professor Kennedy posed the question whether or not the burden of proof provision should be retained as set out in §3(d) in the case of a bankrupt who fails to comply with the provisions of §3(d) at the hearing on the petition and the answer, and he stated it was Mr. Treister's opinion the provision should not be retained.

Mr. Treister said he was concerned with the case where the examination on a bankrupt's solvency is not one of the issues at meetings of discovery as provided by the Federal Rules of Civil Procedure, and would like Rule 7.37 to cover that situation, too.

Mr. Horsky suggested that Rule 7.37 be amended by saying it

applies in adversary proceedings, and Professor Kennedy believed a new rule in Part I would be required, which would be an adaptation of §3(d) of the Act. After discussion, Mr. Horsky moved a rule adapting §3(d) of the Act with a cross-reference to Civil Rule 37 be prepared by the Subcommittee on Style. The motion was seconded and carried.

Professor Kennedy stated that this was a rather abbreviated report on the Rules of Evidence and he had touched on questionable situations only. He was confident that he would have no trouble working others out.

Agenda Item 16. Reconsideration of Rules on Shelf: Rule 5.12: Ancillary Proceedings. (In lieu of Rule 5.21).

Professor Kennedy referred to his memorandum of June 8, 1970, and called attention to the second sentence of Rule 5.12(a) which he desired to have reconsidered: "Unless it is inconsistent with the order appointing him, a receiver appointed in a bankruptcy case has capacity to represent the bankrupt estate in any court," which appeared to him to indicate that the receiver is given the capacity to sue in a state court as well as a federal district court, even though the last sentence of the first paragraph of the Note stated that this second sentence is not intended to declare a rule binding on the courts of a foreign jurisdiction. Since Judge Maris has said that the Committee should not appear to be prescribing procedures for state courts and the scope of the sentence in (a) would seem to be doubtful, Professor Kennedy suggested "in any district" should be substituted for "in any court" in line with the intent of Civil Rule 66, which refers to 28 USC 754(e), and recommended its adoption. After discussion in which the bankruptcy jurisdiction was emphasized, Mr. Nachman moved to retain the present rule. The motion was seconded and following further discussion, was carried.

In answer to an inquiry by Judge Forman, Professor Kennedy stated the Agenda Items still remaining to be discussed were Items 17, 19 and 20, and that Items 18 and 21, Forms, could be handled by the Subcommittee on Style, with comments from the members of the Committee, if they so desire. He also said there remained ten Official Forms to be discussed and disposed of as appear in Agenda Item 22: 7, 8, 9, 23, 25, 26, 27, 32, 34, and 40, although no memorandum on this Item had been distributed to the members.

Judge Forman proposed a meeting of the Subcommittee on Style be held on June 12.

There followed a discussion of a timetable for the next meetings of the Style Subcommittee and the Advisory Committee. November 18, 19, 20 and 21, 1970 was fixed as the time of the next Advisory Committee meeting and September 25, 26 and 27, 1970 as the time of the next meeting of the Subcommittee on Style.

(Recess for lunch)

Thursday Afternoon Session

Judge Forman announced that Judge Shelbourne's condition had not improved to the point where he was able to go to his office.

Item 17. Depositions Before a Contested Matter: Rule 9.27.

Professor Kennedy called attention to his memorandum of June 5, 1970, and stated that he had drafted a new rule, the purpose of which was to adapt the principle of Rule 7.27 to a situation where a contested matter rather than an adversary proceeding is contemplated by the person desiring the perpetuation of testimony. He said that Rule 7.27 is an adaptation of Civil Rule 27, which deals with depositions before a civil action, and proposed Rule 9.27 adapts 7.27 for the purposes of a contested matter. Professor Kennedy then read proposed Rule 9.27 and the Note as follows:

"A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable and relevant in a contested matter in a pending bankruptcy case may proceed in the same manner as provided in Rule 7.27 for the taking of a deposition before an adversary proceeding.

"Note. Rule 7.27 may be applied in a situation where a person expects to be a party to a contested matter by reading each reference therein to 'adversary proceeding' as a reference to a 'contested matter.'"

Professor Kennedy stated that Rule 9.7 could be adapted, but he believed Rule 9.27 as drafted would cover not only contested matters but things arising before the contested matter had been instituted.

Mr. Horsky observed that a cross-reference to Rule 9.27 could be made in the Note to Rule 9.7, and Professor Kennedy agreed.

Judge Herzog moved adoption of Rule 9.27 as drafted, which was seconded. Mr. Treister suggested that Rule 7.27 be inserted in Rule 9.7, but Professor Kennedy pointed out that the title would have to be revised to "Procedure in Connection with Contested Matters and Proceedings Not Otherwise Provided for," and concluded that Rule 9.27 would be simpler.

Mr. Horsky suggested the "Procedure in Contested Matters" would be a comprehensive title and a subdivision (b) or an extra

sentence could be added.

Judge Herzog's motion was adopted by general approval.

Professor Shanker suggested a numbering system so that a superficial reading of the Rules would not suggest an omission, with which Professor Kennedy agreed.

Item 18. Forms No. 11, No. 20, No. 22, No. 24.

Professor Kennedy called attention to his memorandum of May 31, 1970, and stated that the Subcommittee on Style had already discussed these Forms, and there has been general agreement that the Forms are necessary.

Form No. 11. Adjudication of Bankruptcy.

Professor Kennedy read the portion of his memorandum of May 31 dealing with this Form, and called attention to the proposed Form 11. After a discussion of the various forms that could be used, Judge Gignoux suggested that the Form read: "A petition filed on ..... having been duly considered, it is adjudged that ..... is a bankrupt.

Mr. Nachman moved that Judge Gignoux's suggestion be adopted. The motion was seconded.

Judge Maris suggested that the Form read: "On consideration of a petition filed on ..... it is adjudged that ..... is a bankrupt." Mr. Nachman and the seconder accepted the amendment, and the motion carried.

It was suggested that this Form be accompanied by a Note stating that it is an adaptation of Official Form No. 11, with which Professor Kennedy agreed.

Form No. 20. Order Approving Election of Trustee or Appointing Trustee and Fixing the Amount of His Bond.

Professor Kennedy stated this is a revision of Official Form No. 20, and called attention to his memorandum of May 31 ~~and proposed Rule 20~~. in regard to this form,

Professor Kennedy's attention was directed to the fact that in paragraph 1 the Form says "as trustee of the estate" and in paragraph 2 it says "as trustee of the estate of the above-named bankrupt," and he said "of the above-named bankrupt" was inadvertently left out of paragraph 1.

It was moved that the Form as modified be approved, which was seconded and carried.

Form No. 22. Notice to Trustee of His Appointment and of Time Fixed for Filing a Complaint Objecting to Discharge.

Professor Kennedy stated this Form is an adaptation of Official Form No. 22 and that the title of the proposed draft should be revised to read "Notice to Trustee of His Election or Appointment and of Time Fixed for Filing a Complaint Objecting to Discharge," that the first sentence should read, "You are hereby notified of your election [or appointment]..." and that the fourth line should read "...the undersigned forthwith..."

Professor Kennedy called attention to the Note to this Form, "This form is a revision of Official Form No. 22. It is to be used in giving the notice required by Rule 2.12(b) and 5.13(c)."

After discussion, Judge Herzog suggested that the words in the third line, "...your bond is fixed at..." be changed to read "...has been fixed..." so that this Form will not be presumed to be the order fixing the bond.

Mr. Nachman moved that the proposed Form No. 22 with the modifications be approved, which was seconded and carried.

Form No. 24. Order Approving Trustee's Bond.

Professor Kennedy stated this Form is adapted from Official Form No. 24, and reads, "The bond filed by ..... of..... as trustee of the estate of the above-named bankrupt is hereby approved."

After discussion, it was moved and seconded that the proposed Form No. 24 be approved, which carried.

Item 19. Cross-References in Federal Rules of Civil Procedure Incorporated by Reference in Bankruptcy Rules.

Professor Kennedy stated that no Memorandum had been prepared on Agenda Item 19. He called attention to the fact that many Bankruptcy Rules had incorporated in them references to Civil Rules, many of which contain within them cross-references to other Civil Rules, including some that have not been adopted by the Committee or have been revised. Specifically, Civil Rule 4 has been referred to in some Bankruptcy Rules that have been adopted, although Bankruptcy Rule 4 differs from Civil Rule 4. Professor Kennedy inquired as to the handling of an adopted Rule which in turn refers to another Civil Rule not incorporated by reference.

In answer to a question by Judge Gignoux, Professor Kennedy stated there are not too many instances where the reference would not be applicable and he proposed to make specific ad hoc references in the Bankruptcy Rule and that each cross-reference should be dealt with individually, and referred to Rule 7.25 as one example. He also stated that a table of cross-references of the Rules, the Bankruptcy Act, and the Civil Rules would be prepared with an indication of the changes. Following discussion, Professor Kennedy's ad hoc approach was adopted by general agreement.

Professor Kennedy suggested that the mode of the carrying out of the ad hoc approach be submitted to the Style Subcommittee.

Item 20. Judgments and Orders.

Professor Kennedy referred to his memorandum of June 10, 1970, which suggested an additional definition be inserted in Rule 9.1 between the definitions of "bankruptcy judge" and "motion" as follows:

"(8) 'Judgment' includes any order appealable under §2a(10) of the Act." The definition is nearly identical to that in Rule 9.1.2, which defines certain words used in the Federal Rules of Civil Procedure where these Rules are made applicable to proceedings in bankruptcy cases. When there is need to refer to orders that are not appealable under §2a(10) as well as orders that are appealable, "judgments" and "orders" should both be referred to as they are in the Federal Rules of Civil Procedure. Thus Bankruptcy Rule 9.58.1 should include a reference to "judgment" or "order" as does Civil Rule 77d.

Following discussion, Mr. Horsky moved the insertion of the proposed subsection (8) in Rule 9.1. The motion was seconded and carried.

Item 21. Forms No. 1, No. 1A, No. 1B, No. 1C, No. 1D, No. 2, No. 3, No. 4, No. 5, No. 18, No. 19, No. 28 and No. 29.

Form No. 3. Statement of Affairs.

Professor Kennedy suggested revising Question 11, "Loans Repaid" in Form 3 as follows: "What repayments on loans in whole or in part and what payments on installment purchases of goods and services have you made during the year immediately preceding the filing of the original petition herein?" (The underlined words were suggested by Professor Countryman.) A lengthy discussion followed. It was observed that the information concerning installment purchases would be valuable perhaps in Form 4 (addressed to business bankruptcies), but not in Form 3. This led to a motion by Mr. Treister that Question 11 in Form 3 should be eliminated entirely. The motion was seconded but the vote being five to five, the Chairman voted against the motion and it was declared lost. Mr. Treister then moved to retain only the original main Question 11 on Form 3 without any expansion. The motion was seconded and carried.

Mr. Nachman inquired whether the word "related" was adequate, and Professor Kennedy replied that he would change it to read "If the lender is a relative, the relationship."

Form No. 4. Statement of Affairs For Bankrupt or Debtor Engaged in Business.

Professor Kennedy called attention to Question 13 on Form No. 4, as suggested by Professor Countryman.

Professor Seligson moved proposed Question 13 be adopted. The motion was seconded. In answer to Judge Gignoux's question, Professor Kennedy said he believed the words below the lines

in this question should be revised. Judge Gignoux and the seconder accepted the revision as stated, and the motion carried.

Item 22. Forms No. 7, No. 8, No. 9, No. 23, No. 25, No. 26, No. 27, No. 32, No. 34 and No. 40.

Professor Kennedy called attention to the Forms in the Appendix to the Bankruptcy Act and said there were ten Forms that had not been discussed, and inquired whether such Forms should be retained, and if so, the members' ideas about them.

Form No. 7. Answer of Alleged Bankrupt.

Professor Kennedy asked whether Official Form 7 was necessary, and referred to Form No. 20 accompanying the Civil Rules. He believed the form to be unnecessary. Following discussion, Judge Gignoux made a motion to eliminate Official Form 7. The motion was seconded and carried.

Form No. 8. Bond of Applicant for a Receiver or Marshal.

Form No. 9. Counterbond to Receiver or Marshal.

Professor Kennedy called attention to Official Forms 8 and 9, which are pursuant to §69a of the Bankruptcy Act and Rule 5.11(d). He recommended striking "Know all men by these presents:" and the second paragraph in each. Following discussion, Professor Seligson suggested that Professor Kennedy prepare a simpler form; it was further suggested that the form first be offered to a bonding company for approval.

Following further discussion, Judge Gignoux moved to strike Forms 8 and 9. It was seconded by Judge Herzog and carried.

Form No. 23. Bond of Receiver or Trustee.

Professor Kennedy called attention to Official Form No. 23 and Rule 5.48(a), Bond of Receiver or Trustee. After discussion, Professor Seligson moved that a form of bond such as Official Form 23 should be provided. The motion was seconded and carried. It was suggested that the form of the bond be referred to the Style Committee.

Form No. 25. Order That No Trustee Be Appointed.

Professor Kennedy called attention to Official Form No. 25 and Rule 5.18 and inquired as to whether the members wanted to retain Form 25.

In answer to Professor Seligson's inquiry, Professor Kennedy said that no trustee would be appointed if (1) there is no property in the estate other than that which can be claimed to be exempt; (2) no circumstances indicating the need for a trustee; and (3) if the creditors have not elected a trustee.

Judge Whitehurst moved that a form providing that no trustee be appointed be retained. The motion was seconded and carried.

Form No. 26. Order for Examination of Bankrupt.

Professor Kennedy called attention to Official Form 26 and Rule 2.21(a) and inquired as to whether the members wanted to retain Form 26. He recommended that such form is not necessary, since it had been the consensus of the Committee expressed while discussing Rule 2.21 that the examination of the bankrupt would usually be made at the first meeting. Judge Whitehurst moved to eliminate Form 26. The motion was seconded and carried.

Form No. 27. Subpoena to Witness.

Professor Kennedy called attention to Official Form No. 27, Rule 9.45 and Civil Rule 45 and explained that Rule 9.45 has special provisions in regard to the issuing authority and in whose name a subpoena is issued. The subpoena need not be under the seal of the court but can be issued by the bankruptcy judge. He suggested that a form of the subpoena should be provided which would indicate that it is different from present Form No. 27. Mr. Treister moved to provide a standardized official form. The motion was seconded and carried.

Form No. 32. Affidavit of Loss of Negotiable Instrument.

Professor Kennedy called attention to Rule 3.2(c), which eliminates the necessity for an affidavit and requires only a written statement, and he recommended the elimination of Form No. 32. Judge Gignoux moved that the form be eliminated. The motion was seconded and carried.

Form No. 34. Order for Payment of Dividends.

Professor Kennedy called attention to Form No. 34 and Rule 3.20 and inquired whether the referees believed this form to be beneficial. It was moved that the publication of Form 34 be eliminated. The motion was seconded and carried.

Form No. 40. Report of Trustee in No Asset Case.

Professor Kennedy suggested that this form would be of great help to trustee in no-asset cases and called attention to Rule 5.13.1(5). After discussion, Judge Herzog moved that a form of report of the trustee in no-asset cases be promulgated. The motion was seconded and carried.

Professor Kennedy announced that the discussion of all items on the Agenda had been completed. On motion made, duly seconded and carried, the meeting of the Advisory Committee was suspended pending the meeting of the Subcommittee on Style, to commence on Friday, June 12, 1970.

The meeting of the Subcommittee on Style was convened at nine o'clock A.M. on Friday, June 12, 1970, and continued in session until 1:30 P.M., whereupon it was adjourned to the time of its next meeting as fixed heretofore. Thereafter, on motion made and seconded, the meeting of the Advisory Committee on Bankruptcy Rules was formally adjourned to the time of its next meeting as fixed heretofore in these minutes. (See p. 25).