MINUTES OF THE JULY 1969 MEETING OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

The eighteenth 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, July 9, 1969, and adjourned on Saturday, July 12, 1969. The following members were present during all or part of the sessions:

Phillip Forman, Chairman
Edward T. Gignoux
Asa S. Herzog
Charles A. Horsky (absent on Thursday)
G. Stanley Joslin
Norman H. Nachman
Stefan A. Riesenfeld
Charles Seligson
Morris G. Shanker (absent on Wednesday)
Roy M. Shelbourne
Estes Snedecor
George M. Treister
Elmore Whitehurst
Frank R. 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; William E. Foley, Deputy Director of the Administrative Office of the United States Courts, and Secretary to the committees; Mr. Royal E. Jackson, Chief of the Division of Bankruptcy of the Administrative Office of the United States Courts; Mr. Thomas E. Beitelman, Jr., an attorney in the Division of Bankruptcy.

Judge Forman welcomed the members and announced Professor Morris Shanker had been reappointed as a member to the committee.

Judge Forman read a letter he had received from Chief Justice Earl Warren regarding his receipt of the committee picture.

A new page 41 of the Minutes of the December 1968 Meeting of the committee was distributed to replace the "old" page 41 (which had an omission at the bottom of the page).

Professor Kennedy explained the contents of the deskbooks.

RULE 8.1.

Professor Kennedy stated he did not desire to discuss the drafts for the shelf, save Rules 8.1 and 9.1.2. Rule 8.1 deals with appeals from the referee to the district judge (district court). Subsection (g) deals with the time for transmitting the record on appeal from the referee to the clerk of the district court. During the meeting of the Subcommittee on Style held in New York City in March, 1969, it was decided that the time allowed for transmitting the record on appeal should start to run from the date of filing the statement of the issues instead of from the date of filing the notice of appeal. This makes the time allowed the referee comparable to the time allowed by the Federal Rules of Appellate Procedure for transmitting the record on appeal to the court of appeals, i.e., 40 days after the filing of the notice of appeal.

Referee Herzog questioned the Note to Rule 8.1. The Note stated the 20-day period allowable for an extension of time for filing a petition for review runs from the date of the judgment or order appealed from. He felt this to be contrary to the rule, under which the period runs "from the expiration of the time otherwise prescribed by this subdivision." Professor Kennedy stated he would "look into it".

RULE 9.1.2.

Professor Kennedy objected to the insertion by the Subcommittee on Style of "or to dismiss a petition" in Rule 9.1.2. He felt the phrase to be an unnecessary elaboration. The Style Subcommittee yielded to Professor Kennedy's objection. The phrase was, therefore, deleted.

Drafts for the Shelf.

Referee Whitehurst then moved the drafts for the shelf be placed "on the shelf". The motion carried.

Appointment of Corporations as Attorneys.

Professor Kennedy drew the attention of the members to his memorandum dated June 19, 1969, entitled "(1) Appointment of Corporations as Attorneys" and "(2) Representation and Appearance for Corporations". The first division of that memorandum dealt with the problem of allowing individual members of a corporate law firm to appear in a court of bankruptcy when only the corporation or another member on behalf of the corporation had been employed under Rule 5.44. Professor Kennedy's memorandum suggested the addition of a sentence to Rule 5.44, and Mr. Treister suggested an amendment to the proposed new sentence by the insertion of "or a named attorney or accountant is appointed on behalf of such professional partnership or corporation, any" to follow "or corporation is appointed as an accountant," and the deletion of "only a". Also at the end of the proposed new sentence, Mr. Treister suggested adding a comma and the phrase, "without further order of the court." After discussion, Professor Kennedy stated the committee seemed to be in agreement with Mr. Treister's suggestion in principle, but that there should be no effort to enable an attorney who is "of counsel" to a firm employed as attorney, to appear for the attorney so employed "without further order of the court." A question remained as to how to clarify the purpose to make the services rendered by a member or associate of an employed firm compensable, and the question was to be further considered by the reporter.

Representation and Appearance for Corporations.

Judge Daniel R. Cowans of San Jose, California, was troubled as to who can represent a corporation in the bankruptcy court otherwise than as its attorney. Professor Kennedy drew the attention of the members to page 2 of his memorandum of June 19, which set out provisions already in the rules dealing with Judge Cowans' questions. The consensus of the committee was that the questions of Judge Cowans were adequately covered by Rules 9.10(a) and (c), Rule 9.1(6), and Rule 2.25(c)(5).

Revisions of Rules on the Shelf.

Professor Kennedy stated there had been some minor changes made in some rules previously shelved. The changes simply correlated rules with subsequent decisions made by the committee.

Regarding Rule 1.6, Professor Riesenfeld felt that a petition against a corporation and a separate petition against a principal stockholder should be amenable to consolidation. It was decided the Note would be changed to state that consolidation is "dealt with or precluded" by this rule rather than that it "is not authorized" by the rule.

Mr. Horsky moved the revisions be made to the drafts previously shelved and that they be re-shelved. The motion carried.

Rule 2.10 Notices to Creditors.

This rule was on the shelf. It was reconsidered by the Style Subcommittee to make some minor changes: a minor modification of clause (6) of subdivision (a); the numbering of the three clauses in subdivision (b); and the insertion of a new sentence in subdivision (a) ("The notice of a proposed sale of property, including real estate, is sufficient if it generally describes the property to be sold.") This additional sentence will alleviate the referees' offices of the burden of including legal descriptions in notices of sales in order to avoid the problems which opinions of title examiners now generate.

Professor Kennedy suggested the addition of some language to cover a "private sale". Judge Whitehurst agreed. Professor Kennedy suggested that clause (2) of Rule 2.10(a) be revised to read, "any proposed sale of property, including the time and place of any public sale, unless the court upon cause shown . . .." The word "immediate" was deleted from line 6. These changes were approved. The rule was to be restored to the shelf.

Revisions of Rules 1.8 and 1.9.1.

Professor Kennedy recommended the following addition at the end of Rule 1.8: "The answer to a petition may include the statement of a counterclaim for the purpose of defeating the petition. No other responsive pleadings shall be allowed, except that the court may order a reply to an answer and prescribe the time for it to be served and filed." His suggested language was amended by striking "counterclaim" and in place thereof adding: "claim against a petitioning creditor only". Mr. Horsky moved the approval of the amended suggested language. The motion carried.

Counterclaim and Cross-Claim: Rules 3.14 and 7.13.

Regarding Rule 7.13, Professor Kennedy presented three alternative "except clauses" to be added as a qualification on the applicability of Rule 13 of the Federal Rules of Civil Procedure in adversary proceedings. Judge Snedecor questioned whether any of the alternatives was necessary. Professor Kennedy stated that if none of the alternatives was used, the trustee would be enabled to "drag" all the secured parties and compelled to foreclose in the bankruptcy court, at least where that has possession of the property. Professor Countryman was in favor of Alternative No. I. Mr. Horsky moved the adoption of Alternative No. I. Mr. Treister seconded the motion. Professor Seligson preferred Alternative No. II, if any alternative was necessary in the case of the failure of a mortgagee to ask permission to foreclose. He felt Alternative No. I was too broad. Mr. Nachman also favored Alternative No. II. Professor Riesenfeld suggested "or the estate" be added in Alternative No. I. The votes on the two alternatives were 6 for Alternative No. I with Professor Riesenfeld's suggestion, and 4 for Alternative No. II. Mr. Horsky moved the adoption of Alternative No. I with Professor Riesenfeld's suggestion. The motion carried.

Regarding Rule 3.14, Professor Kennedy stated that Professor King's article in 37 N.Y.U.L. Rev. 250 made the point that there is no difference between a compulsory counterclaim and a permissive counterclaim against a creditor-claimant so far as the effect that ought to be given a failure by the trustee to assert the counterclaim in the bankruptcy proceeding is concerned. Professor Kennedy then stated he did not feel he could deal in a procedural rule with the question whether a discharged claim could still be used as defense.

There was a motion to delete Rule 3.14. The motion carried. Professor Seligson stated he felt there must be some way to help the creditors. Professor Kennedy thought this would require an amendment of the Act. No further discussion was held on this rule.

Allocation of Powers to Referee Under Chapters X and XII.

After the luncheon recess, Professor King opened the afternoon session by drawing the attention of the members to his memorandum of June 19, 1969, on the "Allocation of Powers Between Judge and Referee in Chapter X and Chapter XII Proceedings." Professor King stated he felt that if a referee is capable in what he is already doing, he should not be treated differently in a Chapter X or Chapter XII proceeding.

The decision whether to permit under the rules an automatic reference in a Chapter X proceeding -- giving the referee the wide range of power he now has under Chapter XI -- has a very important bearing on how these rules are drafted.

Professor Seligson stated the first question to be considered was whether the committee had the power to take away from a judge the jurisdiction which has been expressly reserved to the judge. Mr. Treister stated the committee had in the past changed the allocation of power between referees and judges. Professor King drew the attention of the members to page 3 of his memorandum setting forth some of the power changes the committee has previously made.

Judge Forman took a vote on the allocation of power to the referee. The motion for making such an allocation carried. Professor King will do more research and submit memoranda to the committee.

Applications and Motions.

Professor Kennedy drew the attention of the members to his Note to Rule 9.1. This Note referred to the definitions of both "application" and "motion" in Rule 9.1. He stated the justification for having both these terms was that if the rules require both applications and motions to conform to the procedural formalities proposed for motions, the result would be to complicate the paperwork and procedures. Judge Maris felt that instead of using the term "application or motion", only "application" was necessary unless a request was clearly a "motion". Judge Maris suggested the definition of "application" include a provision that "An application in certain cases shall be made by motion".

Mr. Treister questioned the requirement of an attorney's signature on an application. Professor Kennedy stated this was a policy question. Judge Forman stated as he understood the discussion, it was suggested that "motion," be deleted from Rule 9.1(4). Referee Herzog wanted to retain the second sentence. There was no objection to its retention. Judge Maris suggested that Rule 9.1(8) should begin "'Motion' means an application . . .."

Captions: Rules 1.4.1, 2.10(h), 7.10, 9.2, and Official Form No. 6A.

Professor Kennedy drew the attention of the members to Official Form No. 6A, Caption for Adversary Proceeding. Also considered at the same time was Official Form No. 46A, Notice of Appeal to a District Court, which was a new form for appeals to a district court. The latter form switched the positions of the names of the bankrupt and of the parties to the adversary proceeding. The referees preferred having the name of the bankrupt first because of their filing system. It was the consensus of the committee that Form No. 46A should be changed to conform with Form No. 6A. Mr. Horsky so moved. The motion carried. Professor Kennedy stated there was a general approval of Rule 7.10 along with the approval of Form 6A.

Professor Kennedy stated that Rule 1.4.1 Caption on Petition, was new. It was decided "such other" be in place of "the" in line 6. In the Note, "other names" was put in place of "aliases". The general feeling was that "aliases" had a bad connotation. This rule was approved as amended.

Professor Kennedy stated he felt the only way to deal with the matter of including "other names" of bankrupts in notices was to have a new subdivision in Rule 2.10. In the accompanying Note, "aliases" was changed to "other names". The subdivision was approved.

RULE 9.2, General Requirements of Form, was previously on the shelf. Professor Kennedy presented it to the committee because of the deletion of subdivision (c) therefrom in anticipation of approval of Rule 9.20, which would render the subdivision superfluous. Subdivision (c) said in substance that whenever there was an erroneous designation, it could be corrected. It was merely an illustration of harmless error. Professor Countryman stated that in the second paragraph of the Note, "The first sentence of" should be deleted when referring to subdivision (b), since the subdivision now contains only one sentence. This rule was generally approved as drafted.

Time: Rule 9.6.

Professor Kennedy stated that after the lengthy discussion held on this rule at the December meeting, he would have "shelved" it but for a substantial change in subdivision (d) suggested by the Subcommittee on Style, viz., the substitution of a 10-day limitation for the 5-day limit in the corresponding rule of the Federal Rules of Civil Procedure (Rule 6(d)). This rule was approved.

Books and Records Kept by Clerks: Rule 5.2.

Professor Kennedy stated that Rule 5.2 was previously placed on the shelf but was being presented for the approval of proposed new language in the parentheses.

The decision to be made with regard to subdivision (c), was whether the committee wanted to incorporate a specific requirement that the clerk shall keep an index of discharges. It was decided in line 13 the first "and" should be changed to "or". Referee Whitehurst moved the language of subdivision (c) be adopted with the parenthetical phrase. The subdivision was approved as amended.

In subdivision (d), the "(es)" was stricken. The subdivision was approved as amended.

The parenthetical phrase at the end of subdivision (e) was stricken. The consensus of the committee was that the phrase was completely unnecessary. The subdivision was approved as amended.

Zip Code Numbers.

Referee Herzog stated that a requirement of zip codes to be entered in schedules would be fine in the smaller districts, but, it would be an added burden on the attorneys to make such a requirement in the larger ones. Referee Whitehurst agreed. Mr. Treister moved that the committee neither by rule nor suggestion in the official forms require zip codes to be entered in schedules. The motion carried.

[At this point, the meeting adjourned (5:05 p.m.), to reconvene at 9:30 a.m. on Thursday, July 10, 1969.]

RULE 9.3 - Forms.

Two versions of Rule 9.3 were presented to the committee. The members preferred the second version dated 5/31/69. The parenthetical words on line 4, "their contents", were accepted. Judge Gignoux was against including "and may approve supplementary provisions for official forms." in the last sentence. Professor Kennedy stated his purpose for this phrase was to accommodate Judge Lee's thought that other questions should be asked in the Statement of Affairs. Professor Seligson questioned whether the supplementary provisions ought to be part of an official form. Professor Kennedy stated he was against that understanding. Professor Seligson then stated the phrase was not needed. It was decided a period would be placed after "Act" in line 7 and the remainder of the sentence would be stricken.

Proposals for Revision of Schedule A and Referee's Claim Register.

Professor Kennedy then directed the attention of the members to his memorandum of June 17, 1969, enclosing Mr. Beitelman's proposal for placing all of the debts in one sequence on Schedule A. One copy of the schedule would become the claims register. Professor Kennedy compared the schedules the committee had previously approved to the schedule of Mr. Beitelman's proposal. Judge Snedecor moved to eliminate any requirement for the keeping of the claims register. Professor Kennedy stated that meant a deletion from Rule 5.3 of the words in line 3, "and a list of claims filed against each estate", and from Rule 5.3.1 the deletion of the words in line 3, "and list of claims". These deletions would make the rules read so as to leave to the Administrative Office the authority for prescribing, if it should so choose, what claims list should be kept, if any. Judge Snedecor amended his motion to limit the requirement for a list of claims to include "each asset case". The chairman stated that the reporter would provide appropriate language to correlate the requirement for a claims register to the requirement for the appointment of a trustee except where there are no assets. There were no objections to the approval of Judge Snedecor's proposal. Professor Kennedy stated his understanding that in any event the committee would not require the filling out of a copy of Schedule A which might become a claims register.

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

This form was approved as drafted.

Official Form No. 38A. Trustee's Application for Leave to Abandon Property and Order Granting Application.

There was a motion to eliminate this form. The motion carried.

Official Form No. 39. Report of Exempt Property and Order Approving Report.

It was suggested the third line of the draft of Form No. 39 dated 11/24/68 be deleted. Mr. Treister suggested a new paragraph, "The following property claimed as exempt is not set apart:", be added after placing a semicolon after "law" in line 2. Professor Kennedy suggested: "The following property is set apart under the Bankruptcy Act as exemptions allowed by law:

(BLANK)

"The following property claimed as exempt is not set apart:

(BLANK) ".

An instruction will state that the blanks should be filled by a reference to the statute creating the exemption, the description of the property, and the estimated value or amount.

Referee Herzog questioned who signed the form is no trustee was appointed. Professor Kennedy stated that he would include in the Note that if no trustee is appointed, the bankruptcy judge shall fill out the report.

Professor Seligson moved to make a separate form for an order. The motion carried. Professor Kennedy stated he wondered whether the committee really wanted a separate form or whether to include as a part of Form No. 39 an approving order. The order approving a report is so simple, the reporter stated, that it ought not to be necessary to have a separate form. Judge Herzog stated that if the order was separate, all the property would have to be listed again. Professor Riesenfeld suggested that some provision should be made for giving the reasons for disapproval of claims to exemptions. It was suggested that reference to the reasons for rejecting or not setting apart exemptions on Form No. 39 should be put into the instructions. Professor Kennedy stated if the reasons were required to be given, the requirement should be in the body of the form; e.g., "The following property claimed as exempt is not set apart for the reasons indicated:". His suggestion was approved.

Official Form No. 45. Discharge of Bankrupt.

After Mr. Nachman suggested the deletion of "by mail" from the parenthetical phrase in the third line of the draft of Official Form No. 45, Mr. Treister proposed striking out the entire parenthetical phrase, "after due notice by mail." There was approval. The bracketed language was left in. There was a motion to approve the form as amended. The motion carried.

Form for Trustee's List of Property.

Professor Kennedy stated that a form entitled "Trustee's List of Property", which had not been duplicated for distribution to the members, had been prepared and used by Mr. Claude Rice of Kansas City. The reporter asked for an expression of sentiment as to whether there would be any virtue in the provision of a form for a trustee in preparing his inventory. There was no support from the members for including such a form.

Abrogation of Official Forms.

Professor Kennedy stated a number of official forms had been abrogated, as listed in his memorandum dated November 23, 1968. He was suggesting the abrogation of Official Form No. 4, Partnership Petition, which had previously been renumbered No. 5 by the committee. The form was prepared for a joint petition, but the committee had since decided, in approving Rule 1.4, not to have joint petition in partnership cases. Therefore, the form was no longer needed. The committee approved the reporter's suggestion.

The reporter also suggested the abrogation of Official Form No. 10, Adjudication That Debtor Is Not a Bankrupt. The reporter stated this form was just no longer needed. The committee approved.

The reporter suggested Official Form No. 13, Order of General Reference, be eliminated, since the automatic reference required by Rule 1.5.1 eliminates its function. The committee approved.

Official Form No. 15, Oath of Office for the Referee, was also suggested for abrogation. Referee Herzog stated the oath of office for judges was exactly the same but not set out in the Civil Rules. It was noted the oath of office prescribed for justices and judges of the United States is set out in 28 U.S.C. § 453, and that referees are required to take the same oath by § 36 of the Bankruptcy Act. The reporter stated it was better to leave this matter in the Act than in the rules or the forms. The abrogation of the form was approved.

The reporter suggested abandonment of Official Form No. 37, Application for Redemption of Property, and Official Form No. 38, Order for Redemption of Property, but Professor Riesenfeld preferred waiting action on these two forms until the related rule had been acted upon. The reporter and chairman agreed.

The reporter suggested abandonment of Official Form No. 41, Application for Discharge, because there was no longer an application for discharge. The committee agreed.

Official Form 42A, Order Fixing Time for Filing Objections to Discharge, and Official Form 43A, Order for First Meeting of Creditors and Order Fixing Time for Filing Objections to Discharge, deal with situations where filing fees are paid in installments. They were abandoned because since the amendment of § 14(b) of the Bankruptcy Act in 1965, there is no differentiation in the procedure when the filing fees are paid in installments and when they are not.

Official Form No. 44, Specification of Objections to Discharge, is to be superseded by a complaint. The reporter stated maybe there should be a form for the complaint, but his recommendation was to abolish Form No. 44 and to have no substitute. His suggestion was approved.

Official Form No. 70, Bankruptcy Docket, and Official Form No. 71, Referee's Claim Register, were abolished because they are both matters which should be handled by the Administrative Office under Rule 5.3 where there can be more flexibility.

Official Form No. 72, Order Allowing Claims, was abolished due to the automatic allowance provided by Rule 3.5.

Proposal to Eliminate Piddling Dividends to Creditors.

The reporter stated that Professor Seligson had raised the question whether it was even legal to issue a check for less than $1. He read 18 U.S.C. § 336: "Whoever makes, issues, circulates, or pays out any note, check, memorandum, token, or other obligation for a less sum than $1, intended to circulate as money or to be received or used in lieu of lawful money of the United States, shall be fined not more than $500 or imprisoned not more than six months, or both." Construction of this statute, however, had not raised any serious doubts about the legality of a commercial check for less than $1. It was nevertheless decided to eliminate small dividend.

A "small dividend" was decided to be "99¢ or under". The reporter then asked if the committee only wanted to authorize referees to eliminate small dividends; i.e., if they want to permit dividends in small amounts, there would not be a prohibition on it. There was a motion the elimination of small dividends not be mandatory. The motion carried.

Referee Herzog moved the unpaid dividends be turned over to the clerk of the court as unclaimed dividends. Judge Gignoux moved the amounts be treated the same as unclaimed dividends under the Bankruptcy Act. The motion carried.

Professor Seligson suggested that whether a mandatory or authorization provision is to govern how the referees handle the lesser amounts of dividends should be reconsidered. Professor Kennedy stated a question had arisen on whether § 66 of the Bankruptcy Act on unclaimed moneys should be a guide as to where the money representing small dividends should go. He questioned whether the committee should deal with the question of whether the bankrupt might be a legitimate claimant. Professor Riesenfeld stated that after five years the bankrupt should be able to file a claim for the money not paid out under this rule. Professor Seligson moved to reject the notion that after any period of time the unclaimed money should go back to the bankrupt. He stated the committee should adhere to its original position that the money should be handled the same as unclaimed dividends. Professor Seligson's motion carried. Professor Seligson then waived his previous suggestion of reconsideration of whether the rule on small dividends should be mandatory or merely permissive.

Chapter XIII Rules.

After the luncheon break, Professor Vern Countryman, Associate Reporter, discussed his memorandum of June 30, 1969, on "Policy Questions on Chapter XIII Rules". He stated that he had presented his policy questions to the Subcommittee on Style for their views. Professor Kennedy asked Professor Countryman at that time to write a memorandum presenting the policy questions to the whole Committee for comments.

Professor Countryman questioned whether the Committee desired his writing a complete set of rules regarding Chapter XIII, even if some are exactly the same as other rules. He thought the rules in Parts VII and VIII could apply directly to chapter proceedings without any necessity for adaptation or duplication for such proceedings. Judge Gignoux

questioned whether Part V wasn't pretty much the same category as Part VIII. Professor Countryman stated they were pretty close, but there would be instances where the administration would be different.

Professor Countryman stated the second question regarded payments by the debtor in advance of confirmation of the plan. Some referees already require the bankrupt to begin making payments in the amount proposed in the plan on the first payday following the filing of the petition. Some referees require payments be made to the attorney, some require payments to be made to the referee, and some require payments be made to a standing trustee, if any. At least one referee issues a wage order on the employer at the time the petition is filed. Professor Countryman questioned whether a rule should make the practice uniform and require the debtor to begin making payments with the filing of the petition or the first payday thereafter. Judge Snedecor was in favor of requiring advance payments, but he wasn't sure whether the payments should be started on the first payday. He noted that the debtor may receive only monthly payments. Professor Countryman stated he had "tinkered" with a rule giving the referee some discretion as to the "time" and "amount" of the payments. Judge Forman stated he felt the Committee was in agreement with the Subcommittee decision to see a draft rule.

Professor Countryman stated he had sent (with the approval of the Administrative Office) a questionnaire to the sixty-one referees who had 100 Chapter XIII cases pending at the end of the last fiscal year to ascertain whether they ever used the authority to authorize the installment payment of fees. He stated he had a very good response. In summary, the replies showed that only two out of the forty-nine referees who replied ever authorized the debtor to make installment payments on the first filing fee out of his own funds. Only one of those authorized the installment payment from that source on the second fee, because he had not read Paragraph IV of General Order 35 to authorize installment payments of the second fee. Fifty-seven percent of the referees authorized payments of the first filing fee out of funds paid in by the debtor under the plan, and even more referees (sixty-seven percent) authorized payment of the second filing fee out of the funds. Professor Countryman then stated he would like to prepare a rule that confirmed the practice of most referees -- authorizing the payment of both fees out of payments by the debtor but requiring the payments to start when the debtor files the petition instead of waiting until the plan is confirmed. Judge Gignoux stated he would like to see a draft of such a rule. Judge Forman concurred.

Professor Countryman proposed that, in order to avoid confusion and duplicating work, where both husband and wife are eligible to and do file under Chapter XIII, they be allowed to file a single joint petition. He stated he had been told that the question of a joint petition for a straight bankruptcy proceeding had been considered by the Committee and resolved in favor of a joint administration on separate petitions. After reading previous Committee minutes, he found there seemed to have been problems arising out of estates by the entireties and community property where different debts would have exclusive or prior claims on some property. He felt that in Chapter XIII proceedings, entireties would not present a problem because a plan deals only with future earnings. On the other hand, under joint administration of spouses' estates in bankruptcy, the problems engendered by the special rules applicable to estates by the entirety and community property still arise.

Professor Countryman's fifth point, discussed on page 7 of his memorandum, related to the matter of proof of claim. Nothing in Chapter XIII says that a creditor has to prove a claim in order to participate under the plan. Some referees require claims to be proved before a creditor can participate under a Chapter XIII plan and others do not. His proposal was to make the practice uniform by a rule that expressly requires proof of claim under Chapter XIII proceedings. When Professor Countryman spoke to the Subcommittee on this, he also proposed that the time for proving claim be cut down, because six months didn't seem to him to be necessary for proving a claim in the usual wage-earner proceedings. Since then, Professor Countryman had spoken to a number of referees and they were all uniformly opposed to a reduction in the time because the debtor in Chapter XIII proceedings, like most debtors in bankruptcy, do a "sloppy" job of scheduling his claims. If a claim is not scheduled in time for proof and allowance and the creditor doesn't learn of the proceeding, then the claim is not covered by the discharge, even though the debtor fully performs under the plan. Professor Countryman then stated the opposing referees had convinced him that the time for proving claim should not be shortened. He did, however, wish to propose a rule in effect to incorporate the requirements of § 57n in Chapter XIII proceedings.

The last point brought out by Professor Countryman, referred to in his memorandum on page 9, related to post-petition claims. He stated that Chapter XIII does not say whether post-petition claims may or may not participate under the plan. All Chapter XIII says is that " 'claims' shall include all claims . . ., whether or not provable as debts" in straight bankruptcy. Some of the referees won't let any post-petition claims participate under the plan, others will. The referees who do, try to impose some limits on it. In the first place, however, they try to stop the debtor from incurring any post-petition debts without prior approval but are not always successful. Some of them allow a post-petition claim to participate in the plan if it's approved by the court before it is incurred. Others approve after it's incurred. These referees seem in general to try to limit post-petition claims they let in under the plan to those which they think are really necessary. Professor Countryman stated if the debtor in a Chapter XIII proceeding really needed credit or some service or property that is essential to enable him to perform under the plan, and if he can't get it without bringing the creditor under the plan, it makes good sense to bring the creditor under the plan. He also stated he did not mean for these creditors' claims to be treated as priority claims, but suggested that there should be a rule which says that post-petition claims for services or property essential to enable the debtor ~~to~~ perform under the plan, if approved in advance by the referee, may be allowed to participate in the plan. Judge Forman stated that from the short discussion held on Professor Countryman's last point, there were no objections to his proposal.

Contempt Proceedings: Rule 9.41.

The reporter stated that a rule on contempt had been previously considered by the committee. A draft of the rule was presented at the Meeting of November 1967. At the meeting of June 1968, a motion that the referee should have some power over contempt carried; the draft of a subdivision modeled on § 41a of the Act was approved; a motion was made and passed that the extent of the punishment that could be imposed by a referee be a fine; and a $250 limit was put on the fine. Professor Kennedy stated he ran into a considerable amount of difficulty with the Subcommittee on Style on the question of whether the committee can by rule give the referee power to impose any punishment for contempt. Professor

Kennedy stated the question of giving power to the referee is a procedural matter. There is not, he said, any substantive right to a trial by a judge on the issue of whether contempt was committed before a referee. He stated the question now was whether the committee wanted to adhere to the policy decision made earlier. The drafted rule he was submitting for consideration attempted to incorporate both civil and criminal contempt.

Judge Gignoux stated that in view of some recent decisions of the Supreme Court, he questioned as a matter of policy whether the committee should attempt to give a referee such power. The committee decided to defer any definite action on this rule until the next meeting [November 1969] and give the members more time to consider Professor Kennedy's memorandum of June 24, 1969, and also to have Judge Maris present to give his views.

RULE 2.30 - Habeas Corpus for Performance of Duties Under the Act.

The shelved version of Rule 2.30, dated 5/8/67, dealt only with bringing the bankrupt into the court. The revised version, dated 11/4/67, enlarges its scope to authorize bringing "any" prisoner into court and to use the writ of habeas corpus for that purpose. There were suggestions to add "when appropriate" at the end of line 1, and change "prisoner" to "person" in line 2 of the version dated 11/4/67. Mr. Treister moved the adoption of the rule as amended. The motion carried.

[At this point, the meeting adjourned (5:00 p.m.), to reconvene at 9:30 a.m. on Friday, July 11, 1969.]

Early Publication of Rules for Straight Bankruptcy.

Professor Kennedy called attention to the summary of considerations in favor of and opposed to early publication of the rules and forms for straight bankruptcy as set forth in his memorandum of July 7, 1969. Professor Seligson asked how many rules had already been approved by the committee and how many were remaining. Professor Kennedy answered that 108 rules had been approved with 55 remaining.

Professor Seligson stated he was in favor of early publication of the rules for straight bankruptcy if the chapter rules which Professor Vern Countryman and Professor Larry King are working on, take a considerable length of time. He did state, however, that if the "chapter" rules require only a matter of a few months to complete, he felt the rules for straight bankruptcy should await the completion of the "entire package". He further stated it was a little early to decide what will or will not be ready by the summer of 1970.

A discussion was held as to a possible meeting of the committee in November 1969. Referee Herzog asked if the matter of releasing rules could be reconsidered at that meeting. In that way, the committee would have a better idea of "where the rules stand", and how far the two associate reporters had progressed on their projects. It was decided the next meeting of the Committee would be November 12 through 15, 1969. There will be no Style Subcommittee meeting in the interim.

Modification of Claim-Filing Procedure in No-Asset and Nominal Asset Cases.

Professor Kennedy asked the committee if it would like to move in the direction of modifying claim-filing procedure in no-asset and nominal asset cases. This proposal was discussed in the memorandum of June 17, 1969, and its enclosures. Referee Snedecor stated that he did not think the committee should try to eliminate the routine work of filing claims. He then moved that absolutely nothing be done in this regard. The motion carried.

Proposal to Dismiss Case for Nonappearance of Bankrupt.

The reporter presented a proposal by Referee Harold Bobier of Flint, Mich., to authorize dismissal of a case for failure of a bankrupt to appear at the first meeting of creditors, especially when such failure is attributable to advice from the bankrupt's attorney who has not been paid his fee. Professor Kennedy stated that two rules dealt with the question of what can be done in such a situation. One of the rules, 4.12.1 on Implied Waiver of Discharge, contains provisions authorizing nondischarge on account of such conduct as non-appearance at the first meeting of creditors. The other rule, 1.50(b)(1), permits dismissal of a case for nonpayment of filing fees. He felt the problem of the delinquent bankrupt was well taken care of by these rules. Referee Whitehurst moved to adhere to the present rules. The motion carried.

Proposal to Abolish Reference.

The next discussion was on a letter from Referee Daniel Cowans, dated April 10, 1969, which recommended abolishing the concept of reference. Professor Kennedy stated the committee had already provided for automatic reference without any discretion to the judge to retain it for direct reference of an application to reopen cases and for an automatic stay. In other words, just about everything suggested by Referee Cowans' letter was already taken care of. The consensus was that no further rule was needed.

RULE 7.42. Consolidation: Separate Trials.

Professor Kennedy stated that, in order to avoid confusion with Rule 1.6, he would re-title Rule 7.42, "Consolidation of Adversary Proceedings; Separate Trials". Judge Gignoux moved the approval of the rule as amended by the reporter. The motion carried.

RULE 7.52. Findings By the Court.

There were two alternative drafts of Rule 7.52. An advantage of Alternative #2 was that it could also fit in Part IX. Professor Kennedy, however, stated he preferred Alternative #2 be adopted as part of Part VII. Judge Gignoux moved Alternative #2 be adopted subject to decisions on the parenthetical material. His motion carried.

The first parenthetical phrase, "without a jury or with an advisory jury" was left in the rule without the parentheses because there might be an advisory jury. In line 4, "[or his]" was stricken; the pronoun "his" would be appropriate only if "referee" or "bankruptcy judge" were used.

Judge Gignoux questioned the necessity of the words, "thereon, and the judgment or order thereon shall be entered pursuant to Rule 9.58," in lines 4 through 6. He stated Rule 7.58 would provide for the judgment. The reporter agreed and the phrase was stricken. A period was placed after "conclusions of law" in line 4. The parenthesized sentence, "Requests for findings are not necessary for purposes of review," was retained with the deletion of the parentheses.

As to the last parenthesized sentence of subdivision (a), Judge Gignoux suggested that under Rule 12 of the Federal Rules of Civil Procedure no findings were required on motions. Also, he suggested deletion of the clause, "unless the court renders judgment on the merits against the plaintiff on a motion to dismiss," because Bankruptcy Rule 7.41(b) took care of it. He suggested the phrase be replaced with "except as provided in Rule 7.41(b)." Mr. Treister suggested the entire sentence be stricken. He thought referees should be required to make findings of fact on summary judgments. The referees have to report to the judge something of what they find. Judge Gignoux moved the deletion of the phrase. The motion carried.

Professor Riesenfeld, after further consideration of the subdivision, moved that the parenthetical language on lines 4 through 6 be reinstated. He stated he wanted to follow the federal rules exactly. In practice the referee has two ways of stating his conclusions of law and findings, and he must write his judgment on a separate document. The referee can state his conclusions and findings on the judgment, or he can have a separate opinion. So as to make these two choices clear, Professor Riesenfeld wanted the parenthetical language reinstated.

Professor Kennedy stated he would not oppose Professor Riesenfeld's motion of reinstating "thereon, and judgment shall be entered pursuant to Rule 9.58." The motion carried.

(b) Amendment. - The reporter stated this subdivision was a rephrase of Rule 52(b) of the Federal Rules of Civil Procedure. In reading the subdivision, the reporter stated "bankruptcy judge" in line 23 should be "court". Professor Riesenfeld stated he felt "actions" in line 19 should be changed to "matters" as in subdivision (a). There was a motion to approve the subdivision as amended. The motion carried. The rule remains Rule 7.52 rather than 9.52.

RULE 7.54. Judgments; Costs.

Professor Riesenfeld was against the wording in subdivision (b) on Costs. He felt the way the subdivision was worded it was mandatory for one day's notice. He feared other persons would read it incorrectly. It was decided to place a period after "court" in line 5, and add a new sentence, "At least one day's notice is required." It was left to the reporter to improve the language if he could.

The note to the rule is to be incorporated into one paragraph, stating that while costs have generally not been taxed in contested proceedings in bankruptcy, the power is there if the court wishes to exercise it.

Mr. Treister, speaking with regard to subdivision (a), stated that "judgment" is defined in Rule 54 of the Federal Rules of Civil Procedure to include any order from which an appeal lies, and an appeal there means appeal to the court of appeals; therefore, literally the only kind of order which is a judgment is one which is appealable to the court of appeals. It was agreed that the judgment in Rule 7.54 should include an order appealable to the district judge. Mr. Treister had no objection to the way the rule was written, but he wanted a translation of the meaning of "appeal" in Rule 9.1.2.

RULE 9.58. Judgments and Orders.

In order to correlate Rule 9.58(a), Entry on Referee's Docket, to provisions previously approved by the committee, it was proposed that the subdivision be amended to read: "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 when entered." It was approved as amended.

(b) Notice of Referee's Judgment or Order. Since it had been determined that "judgment" included "order", "or order" in line 8 was suggested to be deleted from subdivision (b), Notice of Referee's Judgment or Order. Professor Kennedy answered that this subdivision was an adaptation to Rule 77(d) of the Federal Rules of Civil Procedure, which speaks of "judgment or order". Referee Herzog then questioned the

reference to "order" in line 11. Professor Kennedy stated "judgment or" should be inserted. There was a motion to delete the parenthesized sentence on lines 12 through 14. The motion carried. Judge Gignoux suggested this subdivision be put into Part V of the Bankruptcy Rules, since Rule 5.7 incorporates the other subdivisions of Rule 77 of the Federal Rules of Civil Procedure. Professor Kennedy stated that Rule 5.7 having not yet been considered, he would keep the suggestion in mind.

After reading subdivision (c), Entry of Referee's Judgment or Order on Civil Docket, the reporter stated its point was to make it clear that a referee's judgment could be a lien on real property and registrable throughout the United States (like any other civil judgment of the federal district court). Professor Seligson questioned if the point was clear in the way the subdivision read. Professor Kennedy stated he would try to say so in a note, if the subdivision was adopted. Professor Seligson wanted to follow what was in the statute. The statute, 28 U.S.C. § 1963, says, "A judgment so registered shall have the same effect as a judgment entered in the district court . . .".

Referee Whitehurst questioned the reference to "civil docket" in line 24. He felt it ambiguous if the term is used in bankruptcy cases. Professor Seligson stated all cases would be entered in the civil docket with a different number. Professor Seligson moved the incorporation of the provisions of 28 U.S.C. § 1963, Registration in other districts, into the subdivision. Professor Kennedy suggested the parenthetical phrase on line 24 "of the district court", be retained in the rule for clarity.

Judge Gignoux felt the proposed subdivision (d), regarding district judges, judgments and orders was unnecessary. The members agreed. It was deleted.

RULE 7.69. Execution.

Professor Kennedy stated what he wanted to determine with regard to Rule 7.69 was whether the committee wanted the execution to issue directly on the referee's judgment without any certification, or whether the committee wanted the judgment first to be certified and entered on the civil docket. The implication of the proposed rule was that the marshal of the United States District Court will levy execution of the referee's judgment without any further steps. Professor Selgison moved the committee adopt a rule that would let the

referees (1) have the authority to execute judgments entered by them, and (2) reserve the right and jurisdiction to stay executions on such judgments. He further added that other actions may be appropriate in connection with judgments which have been entered by referees, whether docketed or not in the office of the clerk of the district court. His motion carried. Judge Gignoux moved that Rule 7.69 be approved with the deletion of the bracketed language. The reporter agreed. The motion carried.

Professor Kennedy stated a Bankruptcy Rule 7.70 would read exactly as Rule 7.69 but make Rule 70 of the Federal Rules of Civil Procedure applicable.

RULE 5.3. Books, Records, and Reports of Referees.

Professor Seligson moved that the following two sentences of Rule 79(a) of the Federal Rules of Civil Procedure be adopted and incorporated into Rule 5.3: "All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process." The motion carried.

RULE 9.20. Harmless Error.

This rule was approved as drafted.

RULE 9.46. Exceptions Unnecessary.

This rule was approved as drafted.

RULE 9.59. New Trials; Amendment of Judgments.

There were two alternative drafts of Rule 9.59. The first alternative was preferred by the members. Professor Kennedy stated if the first alternative (the simpler rule) was adopted, he felt an exception for Rule 3.10 should be included. Rule 3.10 deals with the reconsideration of claims. Judge Gignoux moved the adoption of the simple rule with the exception of Rule 3.10. At the end of the alternative "except as provided by Rule 3.10" was added. The rule was approved as amended.

RULE 9.82. Jurisdiction Unaffected.

This rule is an adaptation of Federal Rule of Civil Procedure 82. It was adopted as drafted.

[At this point, the meeting adjourned (5:30 p.m.), to reconvene at 9:00 a.m. on Saturday, July 12, 1969.]

RULE 9.7. Procedure in Contested Matters Not Otherwise Provided For.

Professor Kennedy stated that Rule 9.7 made the rules in Part VII applicable to contested proceedings. While reading the rule, the reporter changed the rules listed in line 6 to the following: "7.26-7.37, 7.41-7.44, 7.52, 7.54-7.58, 7.62, and 7.71". Professor Joslin asked if this rule was necessary since the Federal Rules of Civil Procedure have no comparable rule. Professor Kennedy stated definitely yes, since the Bankruptcy Rules have no procedural rules governing contests that are not adversary proceedings. Professor Seligson suggested "proceedings" be changed to "matters" in line 5 and "proceeding" be changed to "matter" in line 9. The reporter was in complete agreement since the rule refers to "contested matters". Mr. Treister suggested "served" in line 11 be changed to "given". There were no objections to his suggestion. The rule was approved as amended.

RULE 1.9.1. Applicability of Rules in Part VII.

While reading Rule 1.9.1, Professor Kennedy stated "7.59" on line 6 should be deleted because that rule was now "9.59", which applies to all proceedings in a bankruptcy case. In line 7, "7.61" was also deleted, there being no such rule. There was a motion to approve the rule with the deletions suggested by the reporter. The motion carried.

RULE 5.7. Courts of Bankruptcy and Referees' Offices.

The reporter stated Rule 5.7 was based on the assumption that Rule 77 of the Federal Rules of Civil Procedure should have a counterpart in the bankruptcy rules.

Subdivision (a), Courts of Bankruptcy Always Open, allows the filing of any pleading or other paper at any time. Judge Gignoux moved the approval of the subdivision. The motion carried.

With respect to subdivision (b), Trials and Hearings; Orders in Chambers, Mr. Horsky questioned the deletion of "without the attendance of the clerk or other official" from subdivision (b) of Rule 77. The reporter stated the referee has no clerk of court. Referee Whitehurst moved the approval of subdivision (b). The motion carried.

Mr. Treister questioned the necessity of this subdivision. He felt it would be "pretty hard" to get the consent of all the parties affected thereby to a hearing of a bankruptcy matter outside the district. Professor Kennedy questioned whether there should be a cross-reference in the rule itself to Rule 2.1. Judge Forman stated this rule having already been approved, there would be a cross-reference put into the Note. Mr. Treister stated this rule was misleading. The reporter suggested "except as otherwise provided in these rules". It was then decided subdivision (b) would be qualified by a reference to § 55(a) of the Act and reviewed by the reporter.

With respect to subdivision (c), Referee's Office, Referee Whitehurst suggested "regular place of" precede "office" in line 16 since the referee does not have a clerical assistant in all of his offices. This was agreeable with the members. The phrase was not added in line 21 because there appeared to be no need to circumscribe the authority of courts to keep any referee's office open on Saturdays and the legal holidays referred to therein. The subdivision was approved as amended.

RULE 5.61. Designated Depositories.

This rule was an adaptation of § 61 of the Bankruptcy Act and General Order 53. Subdivision (a) Designation, was an adaptation of Rule 61. It changes the duty of designating the depositories from the judges to the referee. There was a motion to approve the rule as drafted. Professor Seligson moved as a substitute that (1) authority be conferred upon referees to designate depositories for moneys of estates under the Bankruptcy Act; (2) where there are multiple-referee courts, the determination as to depositories be made by a concurrence of the majority of the referees in the district; (3) regular reports be made to the clerk of the district court by the designated depositories and there be imposed upon the clerks the duty to see that the limits fixed by the referees for deposits in these designated depositories are not exceeded; and (4) an individual referee be given

authority to designate a depository without the concurrence of the majority in multiple-referee courts, provided that the amount deposited in such account shall not exceed the amount for which the account is insured under the Federal Deposit Insurance Company. Professor Seligson's motion was approved in principle. The original motion to approve was withdrawn.

RULE 6.8. Redemption of Property from Lien or Sale.

The draft of Rule 6.8 not appearing in the deskbooks, the reporter read it: "On application by the trustee and such hearing and notice as the court may direct, the court may authorize the redemption of property from a lien by payment of the debt secured by such property, or redemption from a sale on execution or foreclosure in accordance with the applicable law." This rule was an adaptation of General Order 28. Professor Seligson stated he interpreted the rule as saying that if it is beneficial to the estate to redeem property, the trustee must go to the court and get an order authorizing it. He saw no harm in this rule and moved its adoption. The motion carried.

Official Form No. 37, Application for Redemption of Property, and Official Form No. 38, Order for Redemption of Property, were suggested by the reporter for abrogation. A motion for their abolition was carried.

RULE 6.20. Abandonment of Property.

The purpose of Rule 6.20 was said to be to focus on the need for court approval of the abandonment of assets of the bankrupt. Mr. Nachman moved approval of the rule. The motion carried. After further consideration, "of" in line 2 was changed to "to".

RULE 9.8. Compromise and Arbitration.

With respect to subdivision (a), Compromise, Referee Whitehurst thought it was necessary to authorize the court to dispense with a notice on cause shown. Professor Seligson was against the language, "controversy arising in the administration". The reporter suggested, "the court may approve a compromise or settlement". Judge Gignoux moved the approval of the language as suggested by Professor Kennedy. The motion carried, striking the remainder of the subdivision.

With respect to subdivision (b), Arbitration, there was objection to the parenthesized sentence on lines 10 through 15. It was deleted. The first sentence was amended to read: "On stipulation of the parties to any controversy affecting the estate, the court may authorize the controversy to be submitted to final and binding arbitration." The subdivision was approved as amended.

After reading subdivision (c), Contents of Application, the reporter stated it was unnecessary. It was deleted.

RULE 5.13. Selection and Qualification.

Subdivision (c) of Rule 5.13, entitled Qualification, was replaced by a new subdivision incorporating General Order 16 and entitled Notice To Trustee of His Election or Appointment; Qualification. Referee Herzog moved the approval of the new subdivision. The motion carried.

RULE 7.25. Substitution of Parties.

The previously approved Rule 7.25 made a general incorporation of Rule 25 of the Federal Rules of Civil Procedure. The reporter thought the applicability of Rules 7.4 and 7.5 should be recognized in the rule. Referee Herzog moved approval of the new Rule 7.25 including the parenthesized phrases. The motion carried.

Applicability of Federal Rules of Evidence in Bankruptcy Cases.

Professor Kennedy, in closing, stated that Rule 11-01 of the Federal Rules of Evidence provides that these rules apply generally to civil proceedings, including inter alia proceedings under the Bankruptcy Act. Since the Evidence Rules so state, the reporter said the Bankruptcy Rules need not repeat that declaration.

[The meeting adjourned at 12:00 noon.]