MINUTES OF THE NOVEMBER 1964 MEETING OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

The seventh meeting of the Advisory Committee on Bankruptcy Rules convened in the Supreme Court Building on November 18, 1964, at 9:15 a.m. The following members were present during the session:

Phillip Forman, Chairman
Edwin L. Covey
Edward T. Gignoux
Norman H. Nachman
Stefan A. Riesenfeld
Charles Seligson
Roy M. Shelbourne
Estes Snedecor
George M. Treister
Elmore Whitehurst
Frank R. Kennedy, Reporter

Others attending the meeting were Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure; Professors James W. Moore and Charles A. Wright, members of the standing Committee on Rules of Practice and Procedure, who attend the first day of the meeting; and William E. Foley, Royal E. Jackson, Joseph F. Spaniol, Jr.; and Berkeley Wright, Jr., of the Administrative Office.

Judge Forman announced that the Style Subcommittee had met twice in New York since the last Committee meeting to work on the rules. He also stated that the meeting would begin with consideration of Public Law 88-623 and its effect on the rules.

Professor Kennedy stated that as a result of this new legislation he ~~presumed~~ we ~~would~~ might try to formulate bankruptcy rules by using one of the

following approaches:

1) Begin with the Federal Rules of Civil Procedure as the basic body of procedural rules for bankruptcy;

2) Begin with the Bankruptcy Act and proceed through it section by section, identifying those sections that should be superseded and prepare rules and forms to supersede the procedural sections;

3) Begin with the General Orders and Official Forms that we now have and revise them in the light of the new freedom which has been given from the bankruptcy legislation; or

4) Formulate a new system of procedure and practice for bankruptcy that is not tied to any preconceptions embodied in existing collections of statutes, rules, orders, and forms.

Professor Kennedy stated that he thought the approach would have an influence on the organization and body of rules to be formulated, but that regardless of the approach, there are several questions which the Committee must face at the outset and throughout its work.

1) The distinction between summary and plenary proceedings and summary and plenary jurisdiction;

2) Whether the rules should be drafted on the assumption that Congressional allocation of functions to judges and referees should not be disturbed;

3) How far the Committee's responsibility embraces the matters of administration.

Professor Kennedy stated that these questions would have to be resolved before he could go very far in drafting rules. He also brought up the matter of deference to Congress and asked the Committee for its views on the matter of deferring to rather than to disregard Congressional policy judgments. If the decision is to defer, how far should the Committee go in attempting to leave statutory language intact, supplementing the Act only to the necessary extent, or whether it should undertake to cover a subject by a rule superseding the statute? Judge Maris stated his views as follows: This new legislation was passed to relieve the Judiciary Committees, as well as Subcommittees that deal with bankruptcy, of a lot of detailed consideration of the procedural amendments of the Bankruptcy Act which heretofore they had to deal with, and that in a sense it is the duty of the Advisory Committee to relieve the Judiciary Committee of this function. The Committee is expected to make a comprehensive set of rules that will cover procedural matters which ordinarily had to be committed to Congress. He also stated there is a pragmatic test which should apply as to the extent of coverage the Committee desires regarding areas defined as procedural; areas where the Conference has made definite judgments; and areas where perhaps the Committee may invade Congressional prerogatives. He felt that there are some areas which the Committee should not try to exercise authority which

~~has been~~ given to it, but that there are other areas which the Committee should try to cover extensively.

There were many differing views of the Committee members as to the approach which should be used. However, the consensus was that ~~in~~ proposing rules under the new legislation ~~it~~ would require working with the Federal Rules of Civil Procedure, the Bankruptcy Act, and the General Orders and Official Forms. All three must serve as a basis for the rules. Professor Kennedy said he would like to start with the Federal Rules of Civil Procedure and ~~then~~ to draft supplemental rules only ~~if~~ insofar as the Committee comes to the conclusion that ~~the rule is so different that~~ a distinctive bankruptcy rule ~~must be proposed and that he presumed both should be used in conjunction with the General Orders and Official Forms.~~ are required. The Committee also decided that ~~Chapter X should be dealt with as a part of~~ the Congressional assignment of functions ~~as this~~ Chapter, ~~states that the judge has certain assignments and the referees others. Apart from Chapter X he did not feel that there are too many matters that would be greatly controversial.~~ To judges alone. X should be discussed in the rules.

ITEMS 2, 3, and 4 - PROPOSED REVISION OF §§ 18, 68, 133, and 136 of THE BANKRUPTCY ACT

Professor Kennedy stated that in anticipation of the enactment of 28 U.S.C. §2075, the National Bankruptcy Conference submitted to the Advisory Committee in 1961 proposed revisions of Sections 18, 68, 133, and 136 of the Bankruptcy Act. Discussion was held on whether the Committee can,

by the rule that superseded Section 18 of the Bankruptcy Act, authorize registered or certified mail as a general mode of service. A variety of opinions ~~or views were stated~~ on this subject; ~~such as:~~ that the mail would be sufficient for service of a writ; that in involuntary bankruptcy cases certified mail was not sufficient; that we should not stray from the Federal Rules; that if some form of mail is going to be permitted for bankruptcy, then it should be used generally, ~~and should also be considered for~~ under the Civil Rules; that the existing draft is inadequate inasmuch as it calls for personal service or publication and does not recognize other ways of service; that the Committee develop Civil Rule 4 by supplementing it to add service by certified mail. The Committee was in agreement that it needs to deal with extra territorial service of process in supplemental rules because FRCP doesn't handle the extra territorial service of process either as to the involuntary petition in bankruptcy or as to a controversy which may be heard by the bankruptcy court. Professor Kennedy stated he thought he had the views of the Committee in mind and that he would draft alternate rules on this subject for presentation at the next meeting. He also asked for the Committee's views as to whether a rule should be drafted to eliminate the necessity for verification of voluntary petitions or involuntary petitions, or whether it would be considered substantive to make Section 68(a) broader by rule. It was the consensus of the Committee that Section 68(a) is too troublesome for the Committee to deal with at

this time. However, discussion was held as to whether ~~or not~~ the Committee ~~could~~ can deal with jurisdiction of the court to enter judgments on counterclaims, and as to whether ~~or not~~ Rule 13 of the Federal Rules of Civil Procedure ~~applies~~ should apply so that ~~A~~ the failure of a trustee in bankruptcy to file a compulsory counterclaim results in a bar binding on the bankrupt or ~~bankrupt's~~ his estate. Professor Seligson thought that if we decide this is procedural rather than substantive, then we should promulgate a rule saying Rule 13 of the Federal Rules of Civil Procedure does apply ~~to the trustee or bankrupt's estate~~ so as to bar the estate if there is a failure to file a compulsory counterclaim. Professor Riesenfeld agreed that we should have a rule but was not sure it should be Rule 13. Judge Maris thought this is a case where a Civil Rule could be applicable. The consensus was that the Committee should make it clear by rule that the referee can render a decision which may be entered by counter judgment. Professor Kennedy inquired whether the Committee wanted to rule that a referee can render affirmative judgment against a creditor under specific circumstances. ~~It was established to~~ the Committee was satisfied ~~satisfaction~~ that this can be done. However, Professor Kennedy stated he still doubted that ~~FRCP~~ Rule 13 of the Federal Rules of Civil Procedure ~~could~~ can be made applicable to summary proceedings. ~~He stated~~ he thought Rules 18, 57(g), and 13 had been discussed enough and ~~we would pass~~ (suggested the Committee bypass setting) 133 and 136 as there ~~were~~ are no ~~new~~ problems ~~arising that hadn't been~~ not covered in the prior conversation.

The meeting recessed at 5:15 p.m.
Reconvened at 9:30 a.m., November 19th.

The morning session of the second day was called to order by Judge Forman, ~~at which time he~~ when Dean stated that Professor Riesenfeld had given additional thought to the ~~matter of the~~ "Approach Problem," and would like to discuss this further. Judge Maris stated that he felt this matter was one that would repeatedly be ~~appearing~~ coming before the Committee and that all views should be considered.

Professor Riesenfeld expressed the following ideas regarding a proposed rule on counterclaims: He ~~felt~~ identified ~~there were~~ four main issues that should be raised. ~~First~~ One is the outline raised by Section 23(d). ~~That~~ b there ~~are some ancillary problems occurring~~ is a preliminary question as to whether ~~petitions are to~~ a counterclaim should be filed with the referee or the judge ~~with whom it is filed.~~ He felt it ~~could~~ may be filed either with the judge or the referee, but the only problem he anticipates is with the ancillary court. If the manner of transfer is simple, then it ~~could~~ may be filed with the judge instead of the referee. Second, is the absence of jury trials; third, whether Rule 23(b) is really important; and fourth, whether the real obstacle is the jury. He stated that the tendency in the Supreme Court is to strengthen the right to jury trial, and he didn't see any reason why we ~~couldn't~~ cannot strengthen the right to jury trial in real controversies before the referee, since there is no objection in the Constitution and there ~~should be~~ is no reason why this ~~could~~ should not be done. He did not think there ~~was~~ is anything, with the exception of the implications of 23(b), which ~~could~~ cannot not be overcome and ~~could~~ can not be accommodated by the proper rule. He felt the real issue is whether under ~~Rule~~ Section 23(b) there is really an obstacle ~~or whether we could not draft~~ to the drafting of rules,

including Rule 13, to provide an easy manner of transfers to ancillary courts. He did not feel that when a man files a claim in one district, that the trustee should be compelled to try a claim in that district. When a claim is once filed in the bankruptcy court, it should be compelled to stay in the bankruptcy court. Professor Riesenfeld suggested that the Reporter draft rules which would permit transfers to ancillary courts of bankruptcy.

Mr. Treister stated that he agreed generally with Professor Riesenfeld's analysis but was concerned about the jury trial. He questioned whether an additional jury trial ~~would have to be provided for or whether other problems would occur that could not be overcome. Would it be possible to create an additional jury trial right by rule where one does not exist now, nor if there is summary jurisdiction in a bankruptcy court now, will there be new rights to a jury trial.~~ Professor Kennedy said he gathered from the discussion that the Committee thought the rules should be specific ~~rather than try to relegate this matter to the law~~ as it has existed heretofore. Professor Riesenfeld stated that the Committee should consider the ~~draftability of~~ Rule 13 and allied problems ~~which should be considered~~ in ~~light of the issues of the~~ jury trial and transfers and ~~see if~~ Professor Kennedy ~~could~~ draft such rules. Professor Riesenfeld's comments were endorsed, and the Reporter was directed to see what he could draft along these lines.

Professor Kennedy called to the attention of the members the matter of the Official Forms to see if there are some forms that are susceptible to the treatment we would accord in large part to General Order 53. After discussion, Professor Kennedy stated he felt he understood the attitude of the approach to be taken in the forms and he would suggest the elimination of a good many of the Official Forms and the delegation of a good deal of responsibility to the Administrative Office. Judge Maris suggested that the forms which are handled by the Administrative Office be referred to as "illustrative" rather than "official."

ITEM 5 - GENERAL ORDER ON SOLICITATION AND VOTING OF PROXIES

This matter was discussed at length at the last meeting of the Committee, but the question of whether every proxy holder -- whether he holds one or two or more proxies -- should be required to disclose or divulge information that no consideration has been paid or promised by the proxy holder still remains. Also, he inquired whether should include information about employment, sharing compensation with anybody who is employed as an attorney, accountant, appraiser, or auctioneer, etc., or is it enough, as contemplated by Enclosure (1) to the Reporter's Memorandum of October 23, 1964, to get these disclosures from the people who have two or more proxies. Judge Gignoux moved that we adopt the version applying to two or more proxy holders, rather than one proxy holder. Discussion was had, and Judge Gignoux's motion was adopted by a vote of 6 to 3, Judge

Shelbourne, Mr. Nachman, and Professor Reisenfeld voting against the motion.

Professor Riesenfeld inquired whether ~~or not~~ a rule should be fashioned in a case where a single claim is dominant. It was the decision of the Committee that Professor Kennedy should give attention to this matter. Professor Kennedy inquired whether the Committee thought it feasible to apply ~~to this~~ a requirement (of disclosure to) the holder of one claim who holds more than 50 percent of the claim or less than that. Mr. Treister did not feel this rule is needed because he thinks the situation may occur where ~~the~~ a general practitioner may get his vote disqualified because he did not ~~think~~ realize he needed this (to provide information). Professor Seligson stated that a clause is needed stating nothing contained in this rule shall preclude the court from conducting an inquiry in a single instance. It was the consensus of the Committee that ~~this~~ such a clause should be included. Professor Kennedy stated ~~A~~ d this could go in the last paragraph or in a separate paragraph -- perhaps in ~~paragraph~~ section (5) of Enclosure (1). ~~Upon~~ At Professor Kennedy's ~~recommendation~~ suggestion, the Committee approved the adoption of the alternative (contained) in Section (5) on the last page of Enclosure (1), which is the more general provision, rather than the version shown as Enclosure (2). Judge Gignoux inquired ~~if~~ whether there was a reason why in (5)(a) (section) as set out in Enclosure (1) it is provided that the court may (require a proxy) after hearing, the alternative, whereas

proposal set out for "opportunity for hearing" ~~and whether we would require a hearing or simply furnish the opportunity for hearing~~. It was agreed by the members to ~~add a clause for the~~ insert the words "opportunity for hearing" before Judge Gignoux also called attention to the fact that under 5(b) there is no provision for hearing. The Committee agreed that ~~this~~ should be added. Professor Reisenfeld called attention to the fact that in (a) there are more words than in (b). Professor Kennedy stated that it may be well to have an introductory clause followed by (a) and (b). It was decided that this is a matter of drafting and the Reporter could take care of it.

~~The matter of the~~ There was discussion of the impact of the recent decisions of the Supreme Court ~~regarding solicitation in other kinds of circumstances (referring to~~ in the Brotherhood of Railway Trainmen and the Button cases) ~~where~~ in which the Supreme Court has accorded hospitality ~~to the~~ on constitutional ~~protection~~ grounds to certain kinds of solicitation. The conclusion was that these Supreme Court decisions really involve sufficiently different matters that we should not be deterred from going forward with ~~this recommendation by~~ the proposed general order on solicitation. Professor Kennedy inquired whether anyone thought the Supreme Court would be inclined to reject ~~this~~ the proposal because of the Brotherhood case or the Button case. Mr. Nachman suggested that, because of the merit of the rest of this proposed order, if it will make it easier to get approval from the Supreme Court, the language after the semicolon on the second line of the second page of the order should be eliminated. There were differences of opinion, and Professor Reisenfeld offered an amendment to the motion ~~accordingly~~ which would retain clause (4) but would authorize solicitation by a

bona fide, nonprofit trade or credit association ~~with members in good standing~~ on date of filing of petition ~~with respect to its members.~~ Professor Joslin did not concur with the amendment and moved that the Reporter's draft, without any proposed amendments from the floor, be adopted. The motion was approved with a vote of 7 for and 2 against. The Committee later decided to insert the word "bona fide" before "nonprofit" ~~to read "(4) a bona fide nonprofit trade . . ."~~

Professor Kennedy called attention to a letter from August B. Rothschild of San Francisco, dated November 10th, 1964, and ~~also mentioned a letter which he had received~~ from ~~Mr. Finn~~ James Connor, Counsel for the San Francisco Board of Trade, where both expressed the ~~views that they~~ hoped that any General Order or Rule which may be adopted would in no way affect the rights of creditors or organizations representing creditors or persons experienced in the liquidation of bankruptcy estates from exercising the right to vote for a competent and qualified trustee in bankruptcy. Professor Kennedy asked the Committee for views as to whether there is any difficulty presented by the proposal under the limitation ~~of the rulemaking power so~~ that rules ~~doesn't~~ abridge, modify, or enlarge substantive rights. In essense the proposed ~~general order~~ says that certain people ~~can~~ solicit and this rule is not to be construed to permit solicitation by others who are rather clearly prohibited from solicitation. ~~Also, he wondered if there is ground for attack because this may be abridging substantive rights.~~ He said there was not doubt in his mind that in the previous authority of the Supreme Court that

this was permissible. Professor Joslin thought that the Act in granting the right to vote claims says that creditors shall have a right to vote and the definition says "may include proxy." He feels this language is broad enough to take care of the problem. Judge Maris said he does not see how this proposal would take care of these trustees. After discussion, Judge Forman stated that he understood there is no constitutional bar here as far as the public trustees are concerned and that there is no disposition to think that substantive rights are being infringed, abridged, or modified in the draft that is under consideration.

Professor Kennedy ~~also stated that he had been~~ noted a requested by Mr. Rothschild to send him a copy of the proposed ~~order for this~~ rule and inquired ~~of the Committee~~ whether the ~~ruling~~ policy of not sending out any material until released for publication ~~still stands~~ should not apply. Judge Maris confirmed the prevalence of this policy ~~this~~ and stated that this material is considered confidential and not for publication until released by the standing Committee.

Professor Reisenfeld asked what the procedure would be if a trade association solicits a proxy from a creditor who becomes a member after the date of filing, and ~~if this~~ whether such solicitation would invalidate all the proxies ~~which were~~ held by the association. Judge Gignoux stated that as he understood Section (5)(a and b) ~~it would~~ To pertain only to the one proxy and ~~would~~ not to invalidate all proxies. It was Mr. Treister's opinion that where a solicitor

violated a proxy in bad faith, that the referee should be able to disqualify him for all proxies. Mr. Nachman thought the referee should have such jurisdiction. After full discussion, the Committee approved the following wording for Section (5)(a) to read as follows:

> "The court, on its own motion or on application of any party in interest, may after hearing, reject a proxy if there is a failure to comply with the provisions of this rule. Upon rejection of a proxy, the court shall take such action as may be appropriate. If after opportunity for hearing the Court finds that a proxy should have been rejected because of noncompliance with this rule, the court shall take such action as may be appropriate."

Mr. Treister suggested that this sentence should include before and after elections, and the Committee asked the Reporter to develop the proper language to include this suggestion. Professor Kennedy discussed with the Committee the fact that the proposed rule is quite long, with a great deal of detail and repetition of wording, especially in Section 4(d), (e), and (f) but stated this was necessary in order to make the rule clear.

The question of whether the definition of solicitation in Section (1)(b) is too specific. Mr. Nachman called attention to the fact that if there is

solicitation of a proxy holder, who has power to substitute, that solicitation isn't covered by our definition. ~~Also,~~ Further Professor Kennedy pointed out that the proposed rule would not cover indirect solicitation. After full consideration of the matter, Professor Seligson moved that the words "directly or indirectly" be inserted after the word "asked." The motion was seconded and approved.

Professor Kennedy asked for the views of the Committee as to whether ~~or not~~ a rule on solicitation for bankruptcy cases should include the subject of solicitations and under Chapter X, Section 77. Referee Whitehurst moved that we eliminate Section 77 from our consideration. After discussion, it was stated by Professor Kennedy that his understanding of the Committee's views was that the Committee wanted to adopt Section 176 of the Bankruptcy Act in substance but that Section 77 would not be included and that he would draft the rule accordingly.

Referee Snedecor referred to Section (3), "A proxy may be solicited only in writing," and stated that he thought sections 1(b) and (3) were inconsistent. It was pointed out that solicitation in (1)(b) should be broader than proxy in (3). Professor Riesenfeld suggested perhaps it would be well to change paragraph (3) to 2(b) and 2(b) and (c) to 3(a) and (b). Judge Maris pointed out that this was drafting work and should be done by the Reporter.

Mr. Treister questioned whether subsection (c) "This general order shall not apply to the solicitation of acceptances of a plan or arrangement by a debtor or his attorney," should refer to acceptances solicited by anyone - debtor, creditor, or attorney. Professor Riesenfeld moved that subsection (c) be deleted. Professor Kennedy asked if the matter would be taken care of by saying this rule cannot apply to solicitation of acceptances of a plan or arrangement. Referee Whitehurst made a substitute motion that the words "by a debtor or his attorney" be striken. After discussion, Referee Whitehurst withdrew his motion. Professor Riesenfeld's motion was restated and the Committee unanimously approved that this subsection be deleted and that a comment explaining this action be included as a Note.

ITEM 6 - PROPOSAL TO AUTHORIZE FILING OF PROOFS OF NON-DISCHARGEABLE CLAIMS BY BANKRUPT

This item was discussed at the last meeting and the Reporter was asked to draft a General Order that would authorize the filing of a proof of a nondischargeable claim by the bankrupt. Professor Kennedy presented three alternative drafts as enclosures to his memorandum of March 27, 1964. He stated that he thought Enclosure 1 best expressed what the Committee wanted, and thought that in light of the new legislation the Supreme Court could promulgate this order. Referee Whitehurst moved that Draft No. 1 of Professor Kennedy's memorandum, as amended from the floor, be adopted. Judge Gignoux seconded the motion but Referee

Snedecor thought we should not adopt Enclosure No. 1 without considering the other two alternatives. He stated that he would prefer Enclosure No. 2, which would solve the problem to a large extent, and offered a substitute motion that Enclosure No. 2 be adopted. Mr. Nachman moved the adoption of the following wording for this rule:

> "If a creditor having a provable claim for taxes or wages which is not dischargeable under the act fails to file his proof of claim on or before the first day set for the first meeting of the creditors, the bankrupt may execute and file a proof of such claim in the name of the creditor. The court shall forthwith give notice by mail to the creditor and trustee if any of the filing of such proof."

Referee Snedecor seconded the motion, ~~at which time~~ Referee Whitehurst thereupon withdrew his motion. Mr. Nachman's motion was approved by a vote of 6 for and 4 against. It was agreed that nothing further be done on the res adjudicata phase of the rule. Mr. Treister suggested the phrase, "which is entitled to priority and is not dischargeable," should be added after the

word "claim" in the first sentence of the previous motion. The Committee further decided that this rule need not be taken before the Bankruptcy Committee of the Judicial Conference, as proposed at the last meeting, in light of the action taken at this meeting.

ITEM 7 - VERIFICATION OF PAPERS

Mr. Treister had presented a proposed rule to eliminate requirements for verification and affidavits in as many instances as possible. This proposal was set out in Professor Kennedy's memorandum of July 9, 1964. After discussion of this proposal the Committee adopted the following wording for the rule:

> "Except as otherwise specifically provided by Section 77(p) of the Bankruptcy Act or ~~which may otherwise be provided~~ by these rules, pleadings and other papers need not be verified."

The suggestion to add a clause to this rule, as is done in the California Code of Civil Procedure, making a certification or declaration of this kind the basis for perjury prosecution was disucssed. Judge Maris thought the subject was too broad to be discussed at this meeting, and the

Committee decided to hold this matter in abeyance.

The next point for consideration was Professor Seligson's inquiry as to whether a ~~general order~~ rule should require that an attorney's authority to sign and verify a petition on behalf of a client ~~of~~ under the Bankruptcy Act be in writing. He was mainly concerned about the voluntary bankrupt. It was the consensus of the Committee that this ~~was~~ is not a problem of general concern and that perhaps it ~~could~~ may perhaps best be handled by a local rule, as apparently is in some districts. ~~states have.~~ No formal action was taken by the Committee.

ITEM 8 - GENERAL ORDER ON NOTICE OF FAILURE TO OBTAIN DISCHARGE

Professor Kennedy stated that a draft had been prepared for this rule and presented as Enclosure 1 of his Memorandum of September 25, 1964. He further stated that this draft has been reviewed by the Subcommittee on Style and that the National Bankruptcy Conference has approved the same language to amend the Act. Referee Snedecor moved the adoption of the draft. The motion was seconded and approved.

ITEM 9 - GENERAL ORDERS 41 and 44A

Professor Kennedy ~~This is a~~ the proposed rule on disclosures of payments and promises of payments outside the arrangement, plan, or deposit ~~Professor Kennedy stated that this is a~~ would strengthen ~~ing of a~~ General Order 41, which deals with ~~we~~ already ~~have on~~ the subject of waiver of ~~rights~~ the right to share ~~and~~ in deposits or payments under an arrangement or plan, ~~requiring disclosure and this includes getting~~ affidavits by the debtor stating relationship of the The proposal would add requirements for an

debtor and whether it is contemplated the person making such payment or promise will be reimbursed in whole or in part by the debtor. Professor Kennedy stated this is a connected ~~proposal to 44(a) and that 44(a) is a proposal dealing~~ with attorneys and accountants and agents for creditors' committees. In large part it is an adaptation of General Order 44 to the subject of attorneys, accountants, and agents for creditors' committees, but it also embodies ideas that are in Sections 210 and 211 of the Bankruptcy Act. Professor Kennedy further stated this was drafted before the new legislation was passed, but, if adopted, the ~~body of the~~ statute could be the basis for the rule with an elaboration which would carry out the same ideas. At the time of the drafting, Chapter XI was primarily in mind but as drawn it covers Chapter X and all chapters. Referee Snedecor called attention to the fact that there are allowances in Paragraph 2 of the ~~second~~ Enclosure to creditors' committees for attorney's fees if this isn't qualified. Upon Referee Snedecor's suggestion, the Committee approved the addition of the words "under Section 77 or Chapter X, XI, or XII" after the word "petition." Professor Seligson thought a great deal more consideration should be given to the preparation of this rule before deciding anything definitely. He suggested that the Committee should come to a decision whether it wants separate rules for Chapter X and XI. Upon further discussion, it was the consensus of the Committee that this rule does require additional work, and Professor Kennedy stated he understood the views of the members and that Chapter X would be dealt with

individually. He intends to work with the idea of withdrawals and acceptances in the light of disclosures which ties in with disclosures that have to be made earlier.

The meeting recessed at 5:15 p.m. and reconvened at 9:30 a.m. on November 20, 1964.

ITEM 11 - NEPOTISM IN APPOINTMENTS OF ATTORNEYS, ACCOUNTANTS, AUCTIONEERS, APPRAISERS, ET AL.

At the last meeting of the Committee ~~the~~ rule was discussed, and the Reporter was asked to undertake a study of the sources of legislative intent animating 28 U.S.C. §, 18 U.S.C. § and 11 U.S.C. § In particular the Committee desired information as to whether Congress intended by the provision in the Judicial Code to restrict employment of such ad hoc officers as receivers, trustees, attorneys, accountants, auctioneers, and appraisers in bankruptcy proceedings.

Professor Kennedy stated that the statute literally appears to restrict the choice of a trustee in bankruptcy by the creditors under Section 44 of the Act, but it has never been so construed. Secondly, if it already prohibits appointment of receivers and trustees related to a judge making the appointment, the second sentence of ~~the Act~~ prohibiting the appointment is redundant. Thirdly, the vagueness of the word "duty" is confined to some extent, by its association with the word "office."

Judge Maris stated that his experience with the work of the courts has led him to believe that this rule should be as broad as possible. Since it is covered in the statute, he questioned whether the Committee would need to adopt a rule. He stated, however, that the Committee may feel a rule essential in bankruptcy to clarify the matter of the referee in relationship to the judge.

Judge Gignoux suggested that we use the Reporter's Enclosure No. 2 to his Memorandum of April 21, 1964, with certain revisions as suggested by the members, and the language should read as follows:

"(1) No person shall be appointed as trustee, receiver, custodian, marshal, appraiser, or distributing agent, or employed as accountant or auctioneer in any proceeding initiated under the Bankruptcy Act if he is related by affinity or consanguinity within the degree of first cousin to any judge or referee of the court making the appointment or authorizing the employment.

"(2) Any judge or referee shall disqualify himself from acting upon any application for approval of the appointment of an attorney for a trustee, receiver, or debtor in possession of a person to whom the judge or referee is related by affinity or consanguinity within the degree of first cousin.

~~Par.~~ "(3) "No person shall be appointed to these various offices who is so connected with any judge or referee of the court making the appointment or authorizing the employment as to render the appointment improper. ~~and would say that~~ A judge or referee shall disqualify himself in any case in which he is so connected with any party or attorney as to render it improper for the judge or referee to sit on the case."

Professor Kennedy inquired why Judge Gignoux's suggested motion deals only with employment of attorneys for receiver, trustee, or debtor in possession. He did not think it necessary to name these people but to say that any authorization of employment as attorney under the Bankruptcy Act. Judge Gignoux stated this was an oversight and concurred with Professor Kennedy. Professor Seligson moved adoption of Paragraph 1. This motion was seconded and passed.

Professor Seligson moved adoption of Paragraph 2 having in mind that paragraph 3 amplifies this and that paragraph 2 deals with parties and attorneys. The motion was seconded with the rephrasing by Professor Kennedy as follows:

~~Par~~ "(2) "Any judge or referee shall disqualify himself in any case in which he is related by affinity or consanguinity of degree of first cousin to any party or his attorney, and

any judge or referee shall disqualify himself from authorizing employment of an attorney under the Act who is so related to the judge or referee."

Professor Riesenfeld thought the word "judge" should be taken out of Paragraph 2 as the statute already covers the judge. Judge Gignoux stated that he would have no objection to taking the word "judge" out of this rule and making it mandatory for referees in bankruptcy. Inasmuch as the statute covers the "judge," Professor Seligson said he would accept the amendment. Therefore the Committee approved the deletion of the word "judge" in the motion, and stated that there should be an explanatory note to this effect.

Mr. Treister thought the Committee was being inconsistent in adopting a rule saying referees "must" disqualify and judges "may disqualify." After discussion of this issue a motion was presented to reinstate the word "judge" in the rule and it was carried.

Professor Seligson then moved the adoption of Paragraph 3, which was restated by Judge Gignoux as follows:

"(3) No person shall be appointed as trustee, receiver, custodian, marshal, appraiser, or distributing agent, or employed as accountant or auctioneer in any proceeding initiated under the Bankruptcy Act if he is so connected

with any judge or referee of the court making the appointment or authorizing the employment as to make such appointment or employment improper. Any judge or referee shall disqualify himself in any case in which he is so connected with any party or his attorney as to render it improper for the judge or referee to sit in the case."

Mr. Treister called attention to the fact that attorneys had been excluded in the first part of the paragraph only on the basis of consanguinity, whereas the second sentence excluded the attorney on the basis of impropriety. He felt the Committee should not use an inflexible word such as "improper." After discussion of the terminology of this paragraph, it was moved and seconded that the paragraph be adopted, but that the Reporter should rephrase it in accordance with the discussion. Professor Joslin inquired whether in drafting the nepotism rules if there was any reason why the phrase "related by affinity or consanguinity within the degree of first cousin" was used instead of "relative." Professor Kennedy stated he used this language because it is used in 28 U. S. C. §458. Professor Kennedy said it would simplify the drafting ~~xxx~~ if ~~this could be done~~ the word "relative" can be used and the Committee asked him to look into this matter, ~~to see if the word "relative" could be used.~~

ITEMS 11, 12, and 13 - OFFICIAL FORMS

Item 11 - Official Forms for Order and for Notice of Final Meeting of Creditors

Professor Kennedy suggested that both of these forms, as shown in his Memorandum of September 25, 1964, inadvertently numbered Enclosures (2) and (3), ~~and which should be Enclosure (1) and (2),~~ be included in ~~the~~ a delegation to the Director of the Administrative Office, and that the Committee might appropriately turn over to the Administrative Office the proposed drafts. Judge Maris suggested that the appropriate procedure might be to postpone all matters of forms ~~until~~ until the Committee makes a decision on how to set out these rules as the forms are dependent on the rules. He felt that the proper procedure would be to draft the rules first and then consider the forms. Judge Forman expressed the opinion that since so much work had been done on the forms, ~~that~~ all drafting suggestions should be turned over to the Administrative Office. He stated that inasmuch as these particular forms had been before the Committee on several occasions, ~~that~~ he would like for the Committee to consider them today to see if they need additional work. Mr. Nachman inquired about the last sentence in Enclosure 2, Notice of Final Meeting of Creditors, "The bankrupt has [not] been discharged." He wondered if the word "[not]" implies the discharge has been denied or (that the bankrupt) has not yet been discharged.

Mr. Covey ~~stated this would normally be all right but~~ noted that there could be a case where ~~this~~ the right to a discharge is still pending ~~beyond~~ on review and that ~~would be the rare exception.~~ it could not then be stated that the bankrupt has been discharged or denied his discharge.

It was decided by the Committee that the word "[not]" should be left in

with a question mark beside it so that when it goes to the Administrative Office attention will be called to this point . There being no suggestions for additions or changes in the two forms, they were ordered for storage or for whatever purpose the Committee decides.

Item 12 - Questionnaire Regarding the Use of Multiple Notices to Creditors and Use of Multiple Case Orders

Professor Kennedy stated that the Bankruptcy Division of the Administrative Office had conducted a study at the request of the Advisory Committee and that a questionnaire was sent to each referee and the information had been turned over to him. The result of the study was stated in a Memorandum to Mr. Jackson ~~by~~ from Mr. Wright, dated October 21, 1964. Professor Kennedy suggested that the Committee not spend any more time on ~~this form~~ this form ~~these forms~~ as he ~~does~~ did not have any specific proposal to make at the present time. Judge Forman stated that the result of this study confirms the fact that the forms are properly the work of the Administrative Office. The form will be put into storage for further disposition.

Item 13 - Abrogation of Official Forms No. 35 and No. 36

These forms will also be put into storage for further disposition.

ITEM 14 - SCHEDULES OF DEBTS AND PROPERTY

Professor Kennedy stated that the Style Subcommittee had gone over these Schedules at their last meeting and that considerable time had been spent on the discussion of these forms. He did not think the new legislation would cause any drastic revisions.

He also stated that he had received a letter of suggestion that the words "claims" and "debts" as used throughout the forms should be consistent and the word "debts" used exclusively. The Committee discussed this point, but inasmuch as this terminology has existed heretofore and caused no particular problem, Referee Snedecor moved the forms be approved with out change of the usage of the words "claims" and "debts." The motion was approved.

The abolition of Schedules A-4 and A-5 was discussed and the question arose whether Schedule A-3 required the pertinent information which had heretofore been required in A-4 and A-5. After further discussion, the Committee decided A-3 would sufficiently cover the necessary required information but that ~~the~~ a comment should be included in the draft showing the reason for the abolition of A-4 and A-5.

Schedule B-2 - Discussion was held on Item b of Schedule B 2 and the Committee adopted the following language for this item: Deposits of money in banking institutions, savings and loan associations, credit unions, public utility companies, and elsewhere. It was also approved that Item o of the same shall read: Government bonds, corporate bonds, and other debts owing the bankrupt or debtor on negotiable and nonnegotiable

instruments. Item k was amended to read: Machinery, fixtures, equipment, and supplies [other than those listed in Items j and l] used in business.

The Committee approved the insertion of the figures to indicate the date "19__" to appear in three instances on the Oath of Individual to Schedules A and B, at the end of each sentence which shall now read: "Subscribed and sworn to before me _____, 19__."

ITEM 15-STATEMENT OF AFFAIRS

Professor Kennedy stated that the Director of the Administrative Office had received a letter from the Director of the Collection Division of the Internal Revenue Service requesting that the bankrupt's social security number or employer identification number be shown on the petition. In the past,only the name and address of the bankrupt were required; however, with automatic data processing the number is necessary to correctly identify the taxpayer. If the identifying number is not provided, a time-consuming search of records would be necessary and costly to the Government. The matter was discussed and it was the consensus of the Committee that the courts should cooperate with the Government in supplying this number and that the number shall be included in the petition for voluntary cases and also on the schedules.

Professor Kennedy called attention to Paragraph 18 of the Statement of Affairs for Bankrupty or Debtor Engaged in Business in

requesting information from

~~regarding~~ the sole proprietor about withdrawals from his own funds. He stated he had discussed this question with a certified public accountant and a tax attorney, both having been of the opinion that there is nothing in the tax law or practice that tends to make the question less vague or more answerable. After discussion, the Committee approved deletion of the words "the owner of the business or by" from Paragraph 18.

In Paragraph 10(c) of the Statement of Affairs for Bankrupt or Debtor Not Engaged in Business, the Committee approved the deletion of the words "levied upon" and the insertion of the word "garnished."

In Paragraphs 14 and 17 of both forms concerning "Losses" the Committee approved the insertion of the words "names and places" in the information shown in parenthesis, which shall read: "(If so, give particulars, including dates, names and places, and the amounts of money or value and general description of property lost.)"

Professor Riesenfeld moved that the Statements of Affairs be adopted with the modifications approved. Professor Seligson seconded the motion, and it was carried.

ITEM 16 - OFFICIAL FORM NO. 39

Professor Kennedy stated that he thought this item should be passed over in view of the earlier decision to postpone work on the forms. The Committee concurred.

ITEM 17 - OFFICIAL FORM NO. 25

This item was passed over in light of the decision to postpone work on the forms.

ITEMS 18 and 19 - GENERAL ORDER 53

Professor Kennedy inquired whether the Committee thought there should be an official form for designation of depository and approving bond under Section 61. He also wondered whether this form should be delegated to the Administrative Office. Judge Maris stated that he thought this type of problem, if provided for in a rule, should be flagged to provide that the Director of the Administrative Office, with the approval of the Judicial Conference may assume this responsibility. After discussion the Committee instructed Professor Kennedy to work on a rule that will attempt to delegate a great deal of the responsibility for this type of problem to the Administrative Office.

ITEM 20-GENERAL ORDER 29 - PAYMENT OF MONEYS DEPOSITED

The Reporter had been asked at the last meeting to consider ways of ameliorating the burden now imposed on referees by the duty to countersign all official checks covering payments out of bankruptcy estates. Professor Kennedy covered this in his Memorandum dated April 9, 1964, and after consideration of the matter the Committee adopted the Reporter's draft (Enclosure 5 of his Memorandum) with certain additions as follows:

"Money of a bankrupt or debtor's estate in a depository subject to withdrawal shall be drawn by check or draft or other written request signed by a receiver or trustee, if any, or otherwise by the clerk of the district court, and countersigned by a judge or referee or, if designated by a judge, by the clerk of the district court or his deputy, or, if designated by a clerk of the referee. The countersignature may be manual or made by mechanical means approved by the Director of the Administrative Office of the United States Courts. A serial number, stating the date, the amount, the account on which it is drawn, and its purpose shall be shown on each check, draft, or other written request, and shall also be entered forthwith in a book kept for that purpose by the receiver or trustee. A copy of this rule and the names of persons designated by a judge or referee to countersign checks, drafts, or other requests for withdrawal, shall be furnished to the depository."

ITEM 21 - GENERAL ORDER 10 - INDEMNITY FOR EXPENSES

Professor Kennedy presented a revision of General Order 10, set out as Enclosure (1) to his Memorandum of April 29, 1964, to clarify the status of indemnity money and the fact that it is unnecessary for the referee to accept, deposit, disburse, and account for such money. It makes clear that General Order 10 is not to be used to provide a revolving fund out of which stenographic assistance or other expenses can be paid. An additional sentence imposing the duty to return excess indemnity was added. The Committee decided, however, to refer this proposed rule to the Administrative Office for recommendations and a report back to the Committee as to whether a rule is needed and if so the extent of the coverage.

The

ITEM 42 -

Mr. Charles Horsky had presented a letter on behalf of the National Bankruptcy Conference transmitting two resolutions of the Conference for consideration of the Advisory Committee. The resolutions are as follows:

"Resolution No. 13 - Bankruptcy Court as a Court of Record

"Resolved, that the Conference refers to the Committee on Procedure, for study and report, the proposal to make the Bankruptcy Court a court of record in order to permit use of minute orders, etc., so as to reduce the large number of formal orders in routine matters."

Resolution No. 32 - Official Court Reporter at Hearing in All Bankruptcy Cases

"Resolved, that the Conference refers to the Committee on Procedure, in connection with the proposal to make the Bankruptcy Court a court of record, the question whether an official court reporter should be present at all proceedings and hearings before the Bankruptcy Court, as is the practice before United States District Judges; with instructions that it decide whether the matter should be referred to the Advisory Committee on General Orders in Bankruptcy."

It was the consensus of the Committee that the abrogation of Rule 23 accomplishes the result needed for Resolution 13 and that Resolution No. 32 is beyond our province. Professor Riesenfeld did suggest that we look into the various practices of the court as to taking minutes, etc., and try to clarify this as much as possible. Judge Forman asked Professor Kennedy to make note of this for future use. Judge Maris also stated that when the Official Court Reporter Act was passed, and- it also authorized the courts, if they wanted to, to appoint an official court reporter to be the reporter the parties were required to use and pay the expenses in that particular court. Judge Maris thought this should be taken into consideration in regard to Resolution No. 32.

At the suggestion of Professor Seligson, and upon motion by Referee Whitehurst, the Committee approved the action to go through the items on the shelf that are ready for approval, with the idea of recommending them for promulgation at the June meeting.

Judge Forman appointed Referee Whitehurst and Referee Snedecor to act as a Subcommittee to bring up any urgent matters from the referees' standpoint that might not have occurred to the Committee or which might not be on the shelf. They are to communicate with Professor Kennedy in this regard. Professor Kennedy suggested that the other members of the Committee also go through matters for the shelf with the same idea in mind. Judge Maris thought this was a good idea but stressed the importance of recommending only those rules that are of an urgent nature. He further stated that the Committee should keep in mind that their recommendations should be purely procedural as the Supreme Court relies on the Advisory Committees to assure them that ~~this is being done when~~ only within the statutory grant of authority rules are recommended for promulgation.

The Committee decided that its next meeting will be scheduled for June 17 and 18, 1965.

There being no further business, the meeting was adjourned at 5:15 p.m.