MINUTES OF THE NOVEMBER 1967 MEETING OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

The fourteenth meeting of the Advisory Committee on Bankruptcy Rules convened in the Supreme Court Building on Wednesday, November 15, 1967, at 10:02 a.m., and adjourned on Saturday, November 18, 1967, at 11:55 a.m. The following members were present during the sessions:

Honorable Phillip Forman, Chairman
Edwin L. Covey
Edward T. Gignoux
G. Stanley Joslin
Norman H. Nachman (Wed. & Thurs. only)
Stefan A. Riesenfeld
Charles Seligson
Roy M. Shelbourne
Estes Snedecor (unable to attend on Saturday)
George M. Treister (unable to attend on Saturday)
Elmore Whitehurst
Frank R. Kennedy, Reporter
Morris Shanker, Assistant to the Reporter

Honorable Asa S. Herzog was unable to attend. Others attending all or part of the sessions were Professor James Wm. Moore, member of the standing Committee, Mr. Royal E. Jackson, Chief of the Bankruptcy Division of the Administrative Office of the United States Courts, and Mr. Joseph F. Spaniol, Jr., Chief of Procedural Studies and Statistics Division of the Administrative Office of the United States Courts.

Judge Forman welcomed the members and guests.

Agenda Item No. 1: - Drafts for the Shelf

In connection with proposed Rule 1.5.1, there was a short discussion concerning the rule of the Judicial Conference in the appointments of referees with concurrent jurisdiction. Professor Kennedy said he did not see any need for mentioning in the rule the Judicial Conference's responsibility for defining territorial jurisdiction. There seemed to be general agreement on that.

With respect to Bankruptcy Rule 4.12, Professor Kennedy said that in line 11 of the draft dated 10-8-67, there should be inserted "(c)" after "2.10". There was no objection to that insertion, nor were there any further comments on the drafts for the shelf. Judge Forman then stated that Bankruptcy Rules 1.5.1, 2.25, 3.4, 4.5, 4.12, 4.12.1, 4.13, 4.14, 5.1, 5.17, 5.18, 5.23, 5.44, 5.75, 5.80, 6.5, 7.1, 9.2, 9.3, and 9.10 would be placed on the shelf.

Agenda Item No. 2: PROPOSED BANKRUPTCY RULE 4.1 - EXEMPTIONS

Professor Kennedy read his memorandum of October 18, 1967, and the proposed subdivision (f) of Bankruptcy Rule 4.1 as drafted under date of 10-8-67. Judge Snedecor moved approval of subdivision (f) with the parenthetical language being left in. Professor Riesenfeld felt that the language following the word "exemptions" in line 37 was unnecessary, as time limits were not applicable. He was disturbed by the words "the court may excuse". Judge Snedecor suggested having the language read: "notwithstanding the time limits imposed on the bankrupt by this rule". Professor Seligson suggested the wording: "and shall not be subject to the time limits imposed on the bankrupt by this rule and Bankruptcy Rule 1.7". Professor Kennedy said he felt that the Committee was talking about a matter of style. Mr. Nachman suggested that the language be: "within such time as the court may allow". He said that he personally would like to see a bankruptcy rule which would give the person claiming the right the greatest liberality afforded to get that right. Professor Joslin wondered if the rule should not provide that a notice be sent to interested parties and that time limits then be imposed after the notice. Professor Kennedy felt that that would be putting quite a burden on the trustee or on the court. Judge Snedecor said he would accept the language "and shall not be subject to the time limits". Professor Kennedy said he thought that there had to be a little drafting done.

During the discussion which followed, Mr. Treister said he thought that the reference in subdivision (c) to beneficiary objecting to the report should come out and the language should be put into subdivision (f). Judge Gignoux suggested the following language: "A person, other than the bankrupt, who is a beneficiary of the exemption law entitled thereunder to claim exemptions, may, within such time as the court for cause shown may allow, (1) file a claim for exemptions not previously claimed by the bankrupt and (2) may object to the trustee's report."

Judge Snedecor said he liked the language as it was proposed by the reporter. Mr. Nachman moved that the reporter frame subdivision (f) along the lines suggested by Judge Gignoux. Professor Kennedy said that he did not think drafting could be done until the question whether there should be included in the language the words "within such time as the court for cause shown may allow" had been resolved. Judge Gignoux felt that all were in agreement on the principle involved and that it was just a matter of language.

After further discussion, Professor Kennedy proposed the following language: "The foregoing provisions of this rule shall not preclude the filing of a claim for exemptions or an objection to a report filed under subdivision (b) or (d) of this rule by a person, other than the bankrupt, who is a beneficiary of the exemption law and entitled thereunder to claim such exemptions. The time limits imposed on the bankrupt by this rule and Bankruptcy Rule 1.7 do not apply." Judge Snedecor accepted the reporter's wording and moved its approval. Mr. Nachman preferred a positive approach, and Professor Kennedy suggested: "Notwithstanding the foregoing provisions of this rule, the court may permit . . .". Professor Seligson suggested: "Notwithstanding the foregoing provisions of this rule, any person, other than the bankrupt, who is a beneficiary of the exemption law and entitled thereunder to claim such exemptions may file a timely claim for the exemptions or a timely objection." Following a short discussion, a vote was taken on Judge Snedecor's motion, and it was carried by 8 to 2. There was to be a note incorporating the cases, including the one where a court precluded a wife's belated application and the suggestion that undue delay will not be tolerated.

Professor Kennedy stated that the rest of Rule 4.1 had been fully considered by the Advisory Committee and the Subcommittee on Style and that lines 14 and 15 in subdivision (c) would be modified in light of what had just been approved.

Agenda Item No. 3: **PROPOSED BANKRUPTCY RULE 5.11 - APPOINTMENT OF RECEIVERS AND MARSHALS**

Professor Kennedy read his memorandum of October 29, 1967, and the proposed Rule 5.11 as drafted under date of 10-15-67. Mr. Nachman felt that the word "only" should be inserted before "(1)" in line 23. There was no objection. Professor Kennedy said that in line 32 of subdivision (e), there should be inserted "(e)" after "Rule 5.13".

Mr. Treister said he was a little confused as to the policy the Committee was trying to achieve. He felt that before adjudication notice was very important; after adjudication, the notice was not very important; but he did think that there was still a policy of limiting appointments after adjudication, because the court could use the appointment of a receiver to influence the election of a trustee. He felt that application should be required as the general rule. In agreement with Mr. Treister, Professor Kennedy said that the Committee had not indicated or decided what the policy of the rule is as to the power of the court to act on its own initiative with notice.

Professor Moore read the proviso of Section 2a(3) of the Bankruptcy Act and said that Bankruptcy Rule 5.11 probably should contain a similar precautionary measure. He thought that policywise the appointment of a receiver ought to be the exception. Judge Whitehurst thought there had to be flexibility in the appointment of receivers. Mr. Treister said that after adjudication it did not take much for the court to appoint a receiver. Mr. Nachman asked if a receiver should be appointed by the court when there was failure to make an application as required by subdivision (c). Professor Kennedy said that was the policy which had been adopted.

Mr. Nachman questioned the meaning of "thereunder" in line 28, and Professor Kennedy suggested using the phrase "under clause (1)" in lieu of "thereunder". This change was agreeable to all. Following a lengthy discussion concerning appointments of receivers, Professor Joslin moved for the adoption of subdivision (d) with the addition of "only" before "(1)" in line 23, and with the retention of clause (2). Following a general discussion, a vote was taken on Professor Joslin's motion. The motion was lost by a count of 8 to 2.

Mr. Treister moved that subdivisions (c) and (d) be reconstructed so that subdivision (c) would cover appointment before adjudication and subdivision (d) would cover appointment after adjudication, with the principle being that before adjudication a receiver could be appointed only upon application and after notice and hearing, except in emergency situations, and after adjudication the court could appoint a receiver on its own motion with such notice as it might choose to give. Professor Seligson seconded the motion, and it was carried by a vote of 9 to 1.

Mr. Nachman, with reference to the last sentence of subdivision (f), asked why should not the attorneys for petitioning creditors get copies of the order appointing a receiver in an involuntary bankruptcy when the order is made by the judge without application. Following a short discussion, it was decided that the language, which would provide copies be sent to all persons who had appeared in the proceeding, should be left to the reporter.

Mr. Nachman said he thought that notice before appointment should be eliminated in the case of a real emergency, whether before or after adjudication. Professor Kennedy asked if the Committee wished to reconsider the motion which had been passed and qualify the rule by saying that after adjudication appointment may be made without notice in the case of an emergency. Mr. Treister said that he contemplated that a copy of the order appointing a receiver would always be sent to the bankrupt and to all other interested parties. He said he would go for bankruptcy administration which says that the minute a petition is filed and there is an adjudication, some court officer should take custody of the property of the estate. Professor Seligson said he was in complete agreement that once there is an adjudication, there should be someone to take care of the assets. Judge Shelbourne felt that the marshal should be the one appointed, unless some interest of his disqualified him. Mr. Nachman moved that it be the sense of the Committee that after adjudication if an application is presented for the appointment of a receiver and there is no emergency existing, notice should be given of such application before a receiver is appointed. Judge Snedecor seconded the motion. Following a short discussion there was a tie vote of 5 to 5 on the motion.

After lunch, Professor Seligson suggested that resolution should be that before adjudication there must always be a hearing on notice to those who have appeared in the proceeding, except that in the case of a real emergency there could be appointment of a receiver without notice. He said if appointment is made without an application where it is found that irreparable loss to the estate would result, there would not be any bond. Mr. Treister said he thought the difference between the voters related to whether after adjudication notice of the appointment of a receiver should be required in other than emergency cases. He personally thought that notice after adjudication should be dispensed with, unless the court wanted to give notice in all appointment cases. Further discussion led the Committee to suspend consideration of the matter for awhile. [For further action on this matter, see the minutes *infra* following Agenda Item No. 4 - Rule 2.22.]

(e) Eligibility.

Professor Kennedy read Rule 5.11(e) as proposed in his draft dated 10-15-67. Judge Forman suggested that perhaps "(e)" should be put in after "Rule 5.13" in line 32. Professor Kennedy agreed. It was decided to return to this subdivision at the time of discussion on Rule 5.13(e).

(f) Order of appointment.

Professor Kennedy read Rule 5.11(f) as proposed in his draft dated 10-15-67. He said that "the" in line 36 should be changed to "every". He pointed out that at the last meeting of the full Committee, the words "are specifically enlarged" were not liked. However, the Subcommittee on Style thought it awkward to require an order of the court specifying the duties of a receiver, and as a result the Subcommittee on Style had changed the language which had been approved by the full Committee. Subdivision (f) was adopted subject to modification of the last sentence, which had not been approved by the Subcommittee on Style.

(g) Qualification.

Professor Kennedy read Rule 5.11(g) as proposed in the draft dated 10-15-67. Judge Gignoux asked if it could be provided in this rule that the receiver shall qualify in the same manner as a trustee and then in Rule 5.13(d) have the same language worked in. Professor Kennedy said he had separated receiver and trustee because of the time element. Judge Gignoux thought perhaps Rule 5.13(d) could be simply incorporated in Rule 5.11(g) and the language moved up to Rule 5.11(e) and have it read in substance: "Any person eligible to be trustee may be appointed as receiver and will qualify in the same manner as a trustee." Professor Kennedy asked if the parenthetical language would apply to either receiver or trustee. All agreed that the parenthetical language should be left in the rule. Professor Kennedy said that the language proposed by Judge Gignoux's suggestion would read something like the following: "Any person who is eligible to be appointed or elected trustee of an estate under Bankruptcy Rule 5.13(e) may be appointed receiver and shall qualify in the same manner as trustee may qualify under Rule 5.13(d)." Judge Gignoux said he would simply say: "Any person eligible to be a trustee may be appointed receiver. A receiver shall qualify in the same manner as a trustee." Judge Snedecor said he would like to keep eligibility and qualification separate. Professor Kennedy pointed out that there was some virtue in keeping them separate, because qualification has a special meaning in the Bankruptcy Act. It does not mean the personal qualification of the man but has reference to his putting up the bond. He said that for the uninitiated, it would be helpful to keep the two points separate. Judge Gignoux had no objection to keeping them separate and left the style to the reporter.

(h) Appointment of Marshal as Custodian.

There was a discussion of the provisions of §§ 2a(3) and 2a(5) of the Bankruptcy Act. Professor Seligson pointed out that to say an appointment of a marshal could be made without an application was superseding the Bankruptcy Act. Professor Kennedy agreed and said that the alternative would be to say: "receiver or marshal" everywhere within the rules. Mr. Treister said that he felt it unnecessary to refer to receiver or marshal because it was very rare that a marshal was appointed in a bankruptcy case, and Judge Gignoux agreed. Mr. Nachman suggested that the words "as Custodian" should come out of the heading of subdivision (h), and Professor Kennedy agreed. After a short discussion, it was decided that subdivision (h) should read: "(h) Appointment of Marshal. The provisions of this rule shall apply to the appointment of a marshal under § 2a(3) of the Act."

Following a discussion of supersession by the bankruptcy rules of § 2a(3) of the Bankruptcy Act, Mr. Treister suggested that the Committee have language which would read: "Subject to the provisions of this rule, the court may appoint a receiver to take charge of the property of the bankrupt and protect the interests of creditors and to protect the interests of the estate." At the very end to have the following: "Wherever a receiver may be appointed, a marshal may be appointed. The provisions of this rule shall apply." Professor Kennedy asked if there was a general feeling in favor of trying to put the essence of § 2a(3) as a first subdivision of Bankruptcy Rule 5.11. Professor Seligson moved approval of Mr. Treister's views for incorporating § 2a(3) into this rule, and Mr. Nachman seconded the motion. It was carried by a vote of 9 to 1.

Professor Kennedy suggested that there be a subdivision (h) which would read: "The court may appoint a marshal whenever a receiver can be appointed under this rule and the provisions of subdivisions (b), (c), and (d) shall apply to that appointment." Professor Seligson said he thought that was covered by his motion, and it was agreed that that would take care of the matter.

PROPOSED BANKRUPTCY RULE 5.13 - SELECTION AND QUALIFICATION OF TRUSTEE

Professor Kennedy read selected material from his memorandum of October 29, 1967. During the reading, he digressed for a discussion on whether local rules should permit the filing of bonds with clerks. He said that Bankruptcy Rule 5.11 provided for bonds to be filed with referee. There was general agreement that Bankruptcy Rules 5.11 and 5.13 should have language providing that bonds are to be filed with the referee unless local rules otherwise provide.

(a) Selection at First Meeting.

Professor Seligson moved that the parenthetical language in the first part of proposed Rule 5.13 be eliminated and put in to Rule 2.22(f). The motion was carried unanimously.

Judge Snedecor moved that the parenthetical phrase "or three trustees" be eliminated. Mr. Treister seconded. The motion was carried by unanimous approval.

Mr. Treister questioned the use of the word "shall" in line 8. Judge Snedecor moved that "shall" be left in. Professor Seligson seconded the motion, and it was carried by majority approval.

Judge Whitehurst moved that the parenthetical language in lines 12 through 17 be eliminated. There was unanimous approval.

(b) Filling a Vacancy.

Professor Kennedy read subdivision (b) of Rule 5.13 as proposed in his draft dated 10-29-67. Judge Snedecor moved its approval. The motion was carried unanimously.

(c) Trustee for a Reopened Case.

Professor Kennedy read subdivision (c) of Rule 5.13 as proposed in the draft dated 10-29-67 and gave its background. Professor Moore suggested that the words "and is available" be added after the word "case" in line 24. Following a short discussion, Professor Joslin moved that the first sentence read: "If a trustee is needed in a reopened case, the court shall appoint a trustee." Judge Snedecor seconded. The motion was carried by a vote of 6 to 2. It was suggested that language could be changed by the reporter so that the word "trustee" would not be used twice.

(d) Qualification.

Professor Kennedy read subdivision (d) of Rule 5.13 as proposed in the draft dated 10-29-67 and explained the background. Professor Seligson moved that the first sentence should begin: "Before entering upon the performance of." Judge Snedecor seconded the motion, and it was carried by majority approval.

Professor Kennedy understood that the parenthetical words "or reappointment" should not be used, and that "or within such further time of not more than 5 days as the court may permit" should be left in. He reminded the Committee of the earlier decision to provide that the bond may be filed with the clerk rather than the referee, if local rules so provided. Judge Snedecor moved approval of subdivision (d) as stated by the reporter. There was majority approval.

(e) Eligibility.

Judge Whitehurst moved approval of the alternative language as proposed in the draft of Rule 5.13(e) dated 10-29-67. Professor Joslin moved that the language be affirmatively stated. Professor Kennedy recommended the deletion of "(to be elected or appointed)" and there was no objection. There were several language suggestions, and Professor Kennedy said he then had the following language as moved by Professor Seligson: "A person who is a non-resident or whose office is not located in the district may be elected or appointed as trustee if he is otherwise competent to perform the duties of his office." The motion was lost by a vote of 5 to 4.

Professor Seligson then moved that the rule provide that the election or appointment of a trustee shall be limited to one who is a resident or has his office within the state or in any adjoining judicial district. Mr. Nachman seconded. The motion was carried by vote of 9 to 1.

Professor Seligson moved that the parenthetical clause in lines 46 and 47 be eliminated. There was no objection.

Professor Kennedy asked if there should be a provision in the rule concerning the approval of an elected trustee. Professor Seligson moved that the rule provide that the court shall approve the trustee elected by the creditors. There was unanimous approval.

PROPOSED BANKRUPTCY RULE 5.19 - (ELECTION OF) CREDITORS' COMMITTEE

After recess, Professor Kennedy read Rule 5.19 as proposed in the draft dated 11-6-67. Professor Seligson asked if the court should be able to appoint a committee when the creditors fail to do so. Following a short discussion, Professor Seligson moved the addition of "or at any special meeting called for that purpose" after the word "meeting" in line 3. The motion was duly seconded and was carried by unanimous approval.

Professor Kennedy said the simplest way was for the rule to start with the words: "The creditors entitled to vote for a trustee may, at their first meeting,". It was decided to leave out "(and advise)" in lines 4 and 5. Professor Seligson moved that Rule 5.19 be adopted to read: "The creditors entitled to vote for a trustee may, at the first meeting or at any special meeting called for that purpose, elect a committee of three or more creditors. The committee may consult with the trustee in connection with the administration of the estate, make recommendations to the trustee in the performance of his duties, and submit to the court any question affecting the administration of the estate." There was unanimous approval. It was agreed that the title should be "Creditors' Committee".

Agenda Item No. 4 - **PROPOSED BANKRUPTCY RULE 2.1 - MEETINGS OF CREDITORS**

Professor Kennedy read relevant portions from his memorandum of November 1, 1967. Mr. Treister felt that the parenthetical language at line 13 was unnecessary in this rule, but that it should be put into Rule 2.22. He moved that it be eliminated. Following a brief discussion, Mr. Treister's motion was lost by a vote of 7 to 3.

Mr. Nachman moved that the word "shall" in line 5 be changed to "may". Judge Shelbourne seconded. There was unanimous approval.

In line with Professor Moore's suggestion for a language change, Mr. Treister moved that the words "date of" be inserted before the word "adjudication" in line 4. Professor Seligson stated that the motion raised a policy question of whether the Committee wanted the administration to proceed in the absence of a stay. Professor Kennedy said that if the words "date of" were added, it would mean that there was no proceeding after the adjudication until there had been a disposition of the appeal. It was felt that the Committee should have time to think about the matter.

There was a discussion as to whether the word "may" in line 12 should be changed to "shall". It was the general feeling that the referee should not be required to pass on all of the claims at the first meeting.

With respect to Rule 2.1(a)(1), Judge Gignoux wondered if it would not be appropriate to have a very simple rule which would read: "The first meeting of creditors may be held at any place within the district which may be more convenient for the parties other than the regular place for holding court." Professor Kennedy pointed out that the language proposed by Judge Gignoux would supersede § 55a of the Bankruptcy Act.

[The meeting was adjourned on Wednesday at 5:32 p.m. and was resumed on Thursday at 9:40 a.m.]

With respect to the words "date of" being added before "adjudication" in line 4 of Rule 2.1(a)(1), Professor Kennedy said that he understood the Committee wanted a memorandum from him as to the present law, whether adjudication actually means adjudication, and perhaps a recommendation from him on the policy which the Committee ought to adopt. He felt that the Committee's appellate rules should incorporate features of FRCP § 62(g) and/or § 39c of the Bankruptcy Act, which would enable the appellate courts to stay proceedings without the necessity of a bond on such conditions as it deemed appropriate. Professor Kennedy felt that unless there was a stay, the proceedings below should continue.

Following a short discussion, Professor Kennedy read the language as finally proposed as follows: "The first meeting of creditors shall be held not less than 10 nor more than 30 days after the (date of) adjudication. The meeting may be held at a regular place for holding court or at any other place within the district more convenient for the parties in interest." Judge Snedecor moved approval of the language subject to the determination of the words "date of" being left in. There was unanimous approval.

(a)(2) Agenda.

Professor Kennedy read subdivision (a)(2) of Rule 2.1 as proposed in his draft of 11-1-67. Professor Joslin suggested the following: "The bankruptcy judge shall preside over the first meeting of creditors and then he may pass on claims." However, it was the general consensus that the fuller form proposed by the reporter was desired. Mr. Treister thought that perhaps the last sentence should read: "He shall determine which claims are entitled to vote." Judge Gignoux felt that

the rule should provide that the bankruptcy judge shall preside at the meeting, and that it should contain a very clear statement as to what the referee is to do with respect to allowing claims for the purpose of voting. Judge Snedecor moved the adoption of Mr. Treister's suggestion, which was that Rule 2.1(a)(2) read as follows:

> "(2) Agenda. At the first meeting of creditors, the bankruptcy judge shall determine which claims are entitled to vote at that meeting, shall preside over the election of a trustee, the examination of the bankrupt and, if one is held, at the election of a creditors' committee."

The motion was carried unanimously.

(b) Special Meetings of Creditors.

Professor Kennedy read subdivision (b) of Rule 2.1 as proposed in the draft dated 11-1-67.

Mr. Treister suggested that the word "motion" in line 16 should be changed to "application". Professor Kennedy agreed. There was no objection. Judge Shelbourne moved adoption of subdivision (b).

Professor Riesenfeld questioned the reason behind the usage of different terminology, such as "cause", "call", and "order" in Rule 2.1, where apparently the meaning is the same. There was a short discussion, and there was unanimous approval of subdivision (b) with the understanding that the wording would be handled by the reporter.

(c) Final Meeting.

Professor Kennedy read subdivision (c) of Rule 2.1 as proposed in the draft dated 11-1-67. Judge Snedecor said he would like to see the bracketed material adopted, but he would like the wording to be changed from "nonexempt property" to "net realization". Mr. Nachman asked if the following language could be used: "If it appears that there will be no more than ______ dollars available for distribution to the general unsecured creditors, then it is not necessary to call a final meeting of creditors." Following a general discussion, Professor Joslin moved that the language provide in substance that it not be necessary to call a final meeting of creditors unless there is a distribution of a substantial amount to be made to them. Mr. Nachman said he would like to have the rule read in substance

that the court shall order a final meeting of creditors in every case in which it appears that distribution is or will be made. Professor Riesenfeld seconded Professor Joslin's motion. However, since the sentiment seemed adverse, Professor Joslin withdrew his motion. Judge Snedecor moved that, subject to statistical examination, the first sentence of Rule 2.1(c) read as follows: "The court shall order a final meeting of creditors in every case in which the net realization exceeds $300." Mr. Covey seconded the motion, and it was carried by a vote of 8 to 2.

Mr. Treister said the words "net realization" apparently should be "net proceeds realized". Mr. Nachman suggested that if the rule was finally adopted with the words "net proceeds realized", a note would give the origin of the terminology.

Professor Kennedy read the last sentence of Rule 5.13.1 as proposed in the draft dated 11-3-67 and said the question before the Committee was whether it wanted the language to be retained in the rule on creditors' meetings or in the rule on records and reports of trustees. Professor Seligson felt that it belonged in Rule 5.13.1 - Records and Reports of Trustees. Professor Kennedy concurred. There was no objection to leaving to the reporter the decision of eliminating lines 22 through 24 of Rule 2.1.

In connection with the third sentence of proposed Rule 2.1(c), Professor Kennedy suggested that the word "cause" in line 25 be changed to "mail" and the words "to be mailed" in lines 25 and 26 be eliminated. There were no objections. Judge Whitehurst moved that the last two sentences of Rule 2.1 as amended be adopted. Mr. Treister seconded the motion, and it was carried unanimously.

PROPOSED BANKRUPTCY RULE 2.22 - VOTING AT (CREDITORS') MEETINGS

(a) Majority Vote.

Professor Kennedy read subdivision (a) of Rule 2.22 as proposed in the draft dated 11-1-67. He said that the parenthesized words in line 2 should be omitted; the words "their meetings" in line 3 should be changed to "a meeting"; and after the word "claims" in line 5, the following words were to be added: "have been proved and filed before or at

the meeting." Mr. Treister said he had trouble with the words "have not been disallowed", and Professor Kennedy suggested that the wording for lines 4 and 5 could be "vote in number and amount of claims of all creditors eligible to vote. Creditors eligible to vote are those who have proved and filed their claims before or at the meeting."

Professor Riesenfeld said that the language in line 3 sounded as though the matters were submitted to the creditors by a majority vote, and this was not what was meant. Mr. Nachman suggested the deletion of the words "submitted to them". Professor Kennedy proposed the following language as a solution: "Except as otherwise provided in this rule, creditors shall pass upon matters at a meeting by a majority vote in number and amount of claims of all creditors eligible to vote." When Mr. Treister pointed out that the only time a decision was made by a majority vote of creditors was on the election of a trustee or perhaps on the election of a creditors' committee, Professor Kennedy said that the language could read: ". . . creditors shall elect a trustee or creditors' committee, if any, by a majority vote in number and amount of claims of all creditors eligible to vote." Mr. Treister saw no reason for the words "except as otherwise provided in this rule" being used. Professor Kennedy agreed that they were not necessary.

Rather than have a separate subdivision on eligibility, Professor Kennedy thought perhaps the following could be put into subdivision (a): "Except as hereinafter provided, a creditor eligible to vote is one who has proved and filed a claim before or at the meeting, unless objection is made, and who is present or has given a proxy which is not rejected under Bankruptcy Rule 2.25." Judge Gignoux suggested avoiding the language "proved and filed." Professor Kennedy suggested using "filed a sufficient proof of claim." Mr. Treister moved that the wording be left to the reporter. The reporter then proposed the following language: "Creditors shall elect a trustee or creditors' committee, if any, by a majority vote in number and amount of claims of all creditors eligible to vote. Except as hereinafter provided, a creditor is eligible to vote if he has filed a sufficient proof of claim at or before the meeting, unless there is objection. A creditor may vote only in person or by proxy." There was concern over the fact that if the language was left as proposed, it might not be clear that the majority vote had to be that of those creditors present and voting. Judge Snedecor moved approval of the reporter's suggested language with additional words to cover the principle desired by the Committee. Professor Seligson seconded the motion and it was carried unanimously. The principle was understood and the language was left to the reporter.

[At this point, it was decided that the next meeting would be held on the dates of February 14, 15, 16, and 17, 1968 (Wednesday, Thurday, Friday, and Saturday). Judge Forman announced that the next meeting of the Subcommittee on Style would be held on January 5, 6, and 7, 1968.]

(b) Creditors with Security (or Priority) [or Creditors with Secured or Prior Claims].

Professor Kennedy read subdivision (b) of Rule 2.22 as proposed in the draft dated 11-1-67 and said that the parenthesized language in line 10 should be eliminated. In so far as subdivision (b) related to secured claims, Judge Snedecor moved its approval. Judge Whitehurst seconded the motion, and it was approved unanimously.

Professor Kennedy then summarized the material on page 2 of his memorandum dated November 1, 1967. Following a general discussion, Judge Snedecor moved that priority claimants not be allowed to vote. Mr. Nachman seconded the motion, and it was carried by a vote of 6 to 1.

Mr. Treister suggested that the phrase "the amount of his" be inserted before the word "priority" in line 15. There was no objection to that addition.

Mr. Nachman moved that the caption for subdivision (b) be "Creditors with Secured or Priority Claims". Professor Seligson seconded the motion, and it was carried unanimously.

Mr. Treister suggested that the phrase "except as otherwise provided in this rule" was unnecessary, and Professor Kennedy agreed. Mr. Nachman moved that subdivision (b) as amended be approved. Judge Shelbourne seconded the motion, and there was unanimous approval to have Rule 2.22(b) read as follows:

> "(b) Creditors with Secured or Priority Claims. A creditor holding a claim which is secured or has priority shall not be entitled to vote such claim, nor shall it be counted in computing either the number of creditors or the amount of their claims unless the amount of the claims exceeds the value of his security or the amount of his priority and then only for such excess."

(c) Temporary Allowance (for Voting Purposes).

Professor Kennedy read subdivision (c) of Rule 2.22 as proposed in the draft dated 11-1-67, and added the words "to be" before the word "owing" in line 26. He gave the background of the rule and read the second paragraph of his memorandum dated November 1, 1967. Mr. Treister thought that the rule should read: "Notwithstanding an objection a claim may temporarily be allowed for voting purposes in such amount as the court deems fair and equitable under the circumstances." Professor Seligson said it should not make any difference whether there is an objection if the claim is an unliquidated one. Mr. Nachman suggested the following: "A creditor with a security or priority claim may have such claim temporarily allowed for the purpose of voting but only if it can be liquidated or the amount thereof reasonably estimated in the manner and within the time directed by the court without unduly delaying the administration of the estate. The claim shall be so allowed only for such sum as the court may determine exceeds the value of the security or realizable priority." Mr. Treister felt that not enough ground was being covered by Mr. Nachman's suggestion.

Professor Riesenfeld asked if the reporter's proposed language meant that the allowance depended on whether the claim could be liquidated. Professor Kennedy replied that his drafted language meant that the bankruptcy judge should decide whether the claim could be liquidated or reasonably estimated within a reasonable time, and on that basis could allow the claim for the purpose of voting as to what seemed to him at the time to be the value. In line with the discussion,Professor Kennedy proposed the following language: "Notwithstanding subdivision (a) the court may allow the claim of any creditor over objection for the purpose of voting and in such sum as to the court seems to be owing above the value of any security or realizable priority." The reporter felt that language was awkward. Professor Seligson moved that the principle therein be adopted and that language be left to the reporter. The motion was carried unanimously.

Professor Kennedy said that he had made a note to include, in Part IX, language which would be in substance: "Minor irregularities which do not affect substantial rights can be disregarded."

It was felt that lines 27 and 28 should not be in the rule.

(d) Creditors with Claims of $50 or Less.

Professor Kennedy read subdivision (d) of Rule 2.22 as proposed in the draft dated 11-1-67 and said that the words "or present" in line 31 were not needed. There was no objection to their deletion. The reporter said that Mr. Nachman felt that "included" should be used in lieu of "counted" in line 32. Professor Seligson moved the approval of subdivision (d) with the reporter's amendments. There was unanimous approval. As approved, Rule 2.22(d) reads as follows:

"(d) Creditors with Claims of $50 or Less.

A creditor holding a claim of $50 or less shall not be counted in computing the number of creditors voting at creditors' meeting, but his claim shall be included in computing the amount."

(e) Proxies.

Professor Kennedy read subdivision (e) of Rule 2.22 as drafted under date of 11-1-67 and explained the background. After a very brief discussion, the general consensus was that subdivision (e) should be put into a note rather than the rule.

(f) Exclusion from Voting for Trustee.

Professor Kennedy read subdivision (f) of Rule 2.22 as proposed in the draft dated 11-1-67. All agreed that the words "in the election of the trustee" in line 37 should be stricken and the colon placed after the word "vote". There was no objection to the deletion of the words "for Trustee" from the caption. Judge Gignoux asked if the language in lines 38 to 40 could be simplified by the usage of just the words "any stockholder, director, or officer of a corporate bankrupt". Mr. Treister suggested the use of the words "bankrupt corporation" in lieu of "corporate bankrupt". Professor Kennedy agreed. Professor Kennedy said that with the aforementioned suggestions, the language would read: "Creditors having the following connections with the bankrupt shall not be entitled to vote: relative of the bankrupt; stockholder, member, director, trustee, or officer of a bankrupt corporation; or a general partner, limited partner, or person in control of a bankrupt partnership."

Professor Seligson moved adoption of the language read by the reporter. The motion was carried unanimously.

Agenda Item No. 3: PROPOSED BANKRUPTCY RULE 5.11 - APPOINTMENT OF RECEIVERS AND MARSHALS

At this point, Professor Kennedy returned to Rule 5.11(d), upon which there had been a 5-5 vote at the previous day's meeting. He proposed the following:

> "(d) Appointment of Receiver Before Adjudication. Before adjudication, appointment of a receiver may be made only upon application and, except as provided hereinafter, after hearing upon notice to the bankrupt and any other party in interest designated by the court. A receiver may be appointed without notice if irreparable loss to the estate may otherwise result. An application for appointment of a receiver without notice and any order of appointment made without notice shall state what loss may result and why it would be irreparable."

> "(e) Appointment of Receiver After Adjudication. After adjudication, the court may appoint a receiver on application or upon its own initiative. Such appointment shall be made only after notice to parties in interest (or parties whose rights may be substantially affected thereby), unless the court finds that notice is impracticable or unnecessary."

Judge Gignoux moved approval of the substance of the reporter's suggested language. Professor Seligson seconded the motion. Subdivision (d) was favored unanimously. Subdivision (e) was approved by a vote of 6 to 1. Judge Snedecor dissented, because he would like for the court to have the power to appoint a receiver on its own initiative in any case.

Agenda Item No. 5 - PROPOSED BANKRUPTCY RULE 5.12 - ANCILLARY PROCEEDINGS

Professor Kennedy said that Mr. Treister had suggested that it would be a great simplification of procedure to eliminate ancillary receiverships and to provide in the rules for just one receiver. He said that he would like to have the Committee pass on this policy question. He proposed the following subdivisions:

"(a) Ancillary Receiverships Abolished. No ancillary receiver may be appointed in a bankruptcy case.

"(b) Ancillary Relief. A receiver or trustee may, with leave of the court which appointed him or which approved his election, seek relief in another court of bankruptcy by filing a complaint or motion against any person or an application with respect to any property within the territorial limits of such court of jurisdiction. Such complaint, motion, or application shall be referred by the clerk of the court in which it is filed to a referee of that court.

"(c) Duties of the Ancillary Court. The ancillary court may only enter such judgments as may be required to preserve the property of the bankrupt estate, conduct the business of the bankrupt if necessary, and reduce the property's money, pay therefrom liens against the property found to be valid, and the expense of the ancillary administration and transmit the property or its proceeds to the court of primary jurisdiction."

Mr. Treister said there really was not much need for ancillary proceedings at all because provision had been made for nationwide service of process. He felt that the language proposed concerning the duties of the ancillary court should not be used, as the powers given to the ancillary court were really those held by the primary court.

Following further discussion centered around the meaning of an ancillary receiver, Professor Kennedy said that he thought what was desired was the following: "No ancillary receiver may be appointed in a bankruptcy case. A receiver appointed by a bankruptcy court under Bankruptcy Rule 5.11 has standing to represent the bankrupt's estate in any court."

To solve problems presented by Professor Riesenfeld, Judge Gignoux suggested that there be a note which would say in substance that this rule is not intended to require a foreign court to accept any jurisdiction. A vote was taken on approval of the two sentences last proposed by the reporter. The language was favored by a majority of 8. It was agreed that the note suggested by Judge Gignoux should be used.

Professor Kennedy suggested the following to provide for automatic reference: "Any complaint, motion, or application for ancillary relief shall be referred by the clerk of the court in which it is filed to a referee of that court." It was understood that the language may be changed by the

reporter, but it was the consensus that there should be a provision for automatic reference.

Professor Seligson asked the reporter to look at 28 U.S.C. § 754 and consider whether the word "capacity" should be used rather than "standing" in the language proposed for Rule 5.12(d). The reporter said he would do so and correlate where it was necessary.

Agenda Item No. 6 - **PROPOSED BANKRUPTCY RULE 1.50 DISMISSAL (OF CASE) WITHOUT DETERMINATION OF MERITS**

Professor Kennedy referred the Committee to his memorandum dated October 23, 1967, and explained the relation of Bankruptcy Rule 1.50 to other rules. He said that the Sub-committee on Style had suggested that in subdivisions (c) and (d) the references to costs should be deleted. Following a general discussion, Mr. Treister moved that in proposed subdivisions (c) and (d) the parenthetical language concerning costs be deleted. The motion was carried by unanimous approval.

Professor Riesenfeld said he hoped that the words "is without prejudice" in lines 24 and 25 of subdivision (c) would not be construed to mean that dismissal of a case for nonpayment of filing fees could be done with prejudice. It was decided that the language used to clarify what was intended by the Committee would be left to the reporter.

Following a recess, Professor Kennedy proposed the following language for Rule 1.50(c): "(c) Effect of Dismissal. Unless the order specifies to the contrary, dismissal of a case otherwise than on the merits is without prejudice." There was no objection.

Judge Snedecor moved that the Administrative Office be requested to draft a new rule to replace General Order 10 which would meet its requirements. There being no objection from the Committee, Mr. Jackson was requested to submit the draft to Professor Kennedy at some future date.

PROPOSED BANKRUPTCY RULE 3.4.1 - WITHDRAWAL OF CLAIM

Professor Kennedy summarized the material on pages 3, 4, and 5, related to Rule 3.4.1, from his memorandum dated October 23, 1967. He then read proposed Rule 3.4.1 as drafted

under date of 10-22-67 and said that Mr. Nachman had suggested the insertion of "with" before "notice" on line 6 and of the word "upon" before the word "order" in line 7. Professor Kennedy suggested the deletion of the parenthetical language in line 2. Mr. Treister moved the elimination of the parenthetical phrase in line 2, and there was no objection.

Judge Snedecor questioned whether the word "shall" or "may" should be used in line 5. It was pointed out that the word "shall" was the proper one to be used, because it was intended that the court should have no discretion in this instance. Judge Snedecor suggested that the reporter consider Professor Riesenfeld's suggested addition of the words "if at all" after the word "shall" in line 5, and the reporter said that he would.

It was felt by some that lines 9 and 10 should be at the beginning of Rule 3.4.1, reading in substance as follows: "A creditor may withdraw the claim as of right by filing a notice of withdrawal except as hereinafter provided." Professor Seligson moved that the rule be approved in principle and that the language be left to the reporter.

Professor Kennedy said another unresolved question was whether the Committee wanted any reference to be made to participation in a creditors' meeting. However, after a short discussion it was voted by a count of 8 to 1 to approve Rule 3.4.1 in principle and leave the refinements of language to the reporter.

PROPOSED BANKRUPTCY RULE 7.41 - DISMISSAL OF ADVERSARY PROCEEDINGS

Professor Kennedy again referred the Committee to his memorandum of October 23, 1967, and summarized its discussion of Rule 7.41. He then read his draft of the rule dated 10-12-67, and said that the word "upon" should be added at the end of line 4, and the word "containing" should be substituted for the word "upon" in line 5. Judge Whitehurst moved approval of Rule 7.41 as submitted by the reporter. The motion was carried unanimously.

Agenda Item No. 6(a): PROPOSED BANKRUPTCY RULE 7.4(f) - TERRITORIAL LIMITS OF EFFECTIVE SERVICE

Professor Kennedy read Rule 7.4(f)(2) as proposed in the draft accompanying his memorandum of November 12, 1967, and gave the background thereof. Mr. Treister asked why provision (D) was needed, since the rules already provide for nationwide service of process, and said that all that was being picked up was language covering foreign creditors. Professor Kennedy said that

without provision (D) it could be argued that the foreign creditor could not be served a summons and complaint merely because he had filed a claim or had otherwise submitted himself to the court's jurisdiction. Upon being asked by Professor Seligson what he was proposing to do, Professor Kennedy replied that he was trying to add a provision for extraterritorial service in the Ketcham v. Landy situation. Judge Gignoux asked if some general language such as "Any creditor over whom the court has personal jurisdiction" could be used. Mr. Treister suggested: "Any creditor who has filed a proof of claim and has not withdrawn it by the time the adversary proceeding is filed". Following further discussion, Judge Gignoux moved that provision (D) of Rule 7.4(f)(2) be deleted. Judge Snedecor seconded. The motion was carried unanimously. Professor Kennedy stated that this meant that Rule 7.4(f) would be left as it was on the shelf originally and that the Committee was not authorizing extraterritorial service of process on any claimant who has filed a claim or on anybody who consented to the court's jurisdiction.

[The meeting was adjourned on Thursday at 4:58 p.m. and was resumed on Friday at 9:34 a.m.]

Judge Gignoux was acting chairman at this time.

Agenda Item No. 7 - PROPOSED BANKRUPTCY RULE 2.10 - NOTICES

(a) Notices to all Creditors.

Professor Kennedy read subdivision (a) of Rule 2.10 as proposed in the draft dated 11-5-67. The words "ancillary receiver" in lines 13 and 14 were deleted in light of earlier action.

Professor Kennedy said the first question was whether "first-class" in line 2 should be used in the rule. With reference to line 4, Professor Kennedy said he thought perhaps the word "any" should be substituted for "the first". It was the sense of the Committee that clause (1) should be deleted and that line 4 should include the words "the first". Following a short discussion, during which Mr. Jackson gave his views on the usage of first-class mail, Judge Whitehurst moved that the words "first-class" be used in the rule. Mr. Covey seconded. The motion was lost by a vote of 5 to 3.

With reference to clause (3), Professor Kennedy read a letter from Judge Herzog. Mr. Treister said he would delete the word "proposed" and add "time and place of sale" in clause (3). After a short discussion, Judge Snedecor moved that clause (3) read "time and place of any sale and property". Mr. Covey seconded the motion, and it was carried by a vote of 7 to 1.

Since he felt that notice of interim reports should not be required, Mr. Treister moved that clause (4) be deleted, and Judge Snedecor seconded the motion. Professor Seligson felt that if confirmation was asked of something done by receiver or trustee, the creditors should be given notice in order to have an opportunity to pass on what was done. After a short discussion, Mr. Treister withdrew his motion. Professor Seligson then moved that clause (4) be redrafted to provide for 10 days' notice of any hearing upon the confirmation of any receiver's report or any trustee's interim report, and after the six months' period has expired that notice be given only to those who apply. Mr. Treister seconded the motion, and there was unanimous approval.

There were a few suggestions for clause (5), and Professor Kennedy proposed: "the hearing on approval of a compromise of any controversy, unless the court, upon cause shown, directs that notice not be sent." There were no objections.

Following a brief general discussion, Judge Gignoux stated that the proposed language for clause (6) was: "the proposed dismissal of the case when notice is required by Bankruptcy Rule 1.50(a)". Mr. Treister asked why there was particularization of this notice. Professor Kennedy replied that notice of dismissal for nonpayment of fees came after the dismissal, and he felt that the reference to (a) would make it clear that reference was not intended to be made here to subdivision (d) of Bankruptcy Rule 1.50. Mr. Treister did not think that clause (6) was necessary at all, because there is another rule on notice. Professor Kennedy said that Bankruptcy Rule 1.50(a) would have to be modified, if clause (6) was not used, because it refers back to Rule 2.10. Professor Seligson moved that the proposed language of the reporter be adopted. Mr. Treister seconded the motion, and it was carried by unanimous approval. As approved, Rule 2.10(a)(6) reads: "the proposed dismissal of the case when notice is required by Bankruptcy Rule 1.50(a);".

Judge Snedecor said that the words "appraiser, or auctioneer" in line 15 would have to be stricken, because compensation for those persons had to be fixed at the time of the appointment. Following suggestions received, Professor Kennedy proposed the following language for clause (7): "the hearing on every application for compensation filed pursuant to Bankruptcy Rule 5.50." After a short discussion, Professor Kennedy said he understood that what the Committee wanted was

that clause (7) be adopted without the words "ancillary receiver", "appraiser, and auctioneer"; that, if Rule 5.50 is approved, the reference thereto in clause (7) should remain; and that clause (7) is to be correlated with the Committee's decision concerning the final meeting.

It was the sense of the Committee that the last sentence of proposed subdivision (a) should be retained.

(b) Notice of Final Meetings and Meetings in Reopened Cases.

Judge Forman resumed chairmanship at this time.

Professor Kennedy read subdivision (b) of Rule 2.10 as proposed in the draft dated 11-5-67. It was agreed that in order to be consistent with subdivision (a), "The court" rather than "The bankruptcy judge" should be used in line 19. In line with an earlier action, the words "first-class" were deleted from line 21. During an ensuing discussion, it was decided that there should be something in the rules to provide that in cases where there are surplus funds under Rule 3.2(e)(4), notices of additional time for filing claims should be sent to all creditors, regardless of whether they have previously filed. It was further decided that the provision would go into Rule 2.10(a). Mr. Treister said that Rule 3.2(e)(4) should either have a reference to Rule 2.10(a) or an explanatory note, and Professor Kennedy agreed. Upon further discussion, Professor Seligson moved the elimination of reference in subdivision (b) to reopened cases. Judge Snedecor seconded the motion, and it was carried unanimously. Judge Snedecor suggested to the reporter that words such as "Notice of the order extending the time for the filing of claims in the case of a surplus" might be used. As to the parenthesized language in lines 21 and 22, it was agreed that the reporter would include it, unless he heard otherwise.

There was a general discussion regarding the use of the pattern of the notice provision in Chapter X of the Bankruptcy Act. Professor Kennedy said that he would study it.

Following the coffee break, a vote was taken on the deletion of the words "order pursuant to Bankruptcy Rule 2.1(c)". This deletion was opposed by the majority. Judge Whitehurst moved approval of subdivision (b) as amended, i.e., cut down to providing for notice of the final meeting to those creditors who have filed proofs of claim. Judge Snedecor seconded the

motion, and it was carried by unanimous approval.

(c) Addresses of Notices to Creditors.

Professor Kennedy read subdivision (c) of Rule 2.10 as proposed in the draft dated 11-5-67. Mr. Treister moved approval of subdivision (c) but with the deletion of the parenthetical language in lines 25 and 26. Mr. Covey seconded the motion, and it was carried unanimously.

(d) Notice to Creditors' Committee.

Professor Kennedy read subdivision (d) of Rule 2.10 as proposed in the draft dated 11-5-67 and gave the background thereof. He said that the clauses in line 39 would have to be renumbered as a result of action taken earlier. Mr. Treister felt that the words "the court may order that" should be inserted before the words "the notices" in line 38. Professor Riesenfeld questioned the need of the cross reference to Bankruptcy Rule 5.19, and it was agreed that it was unnecessary. Judge Snedecor moved approval of subdivision (d) as amended. Having been duly seconded, the motion was carried unanimously.

(e) Notices to (Officers of) the United States.

Professor Kennedy read subdivision (e) of Rule 2.10 as proposed in the draft dated 11-5-67 and gave the background thereof. While so doing, he deleted the bracketed words, "The bankruptcy judge" in line 44 and "the bankruptcy judge sits" in line 47, and suggested that the optional words "from the petition" be used rather than the words "on the face of the petition" in line 49. There was a general discussion of the need for and the burden involved in sending copies of various papers to the district directors of internal revenue and to the Comptroller General. Mr. Treister moved the deletion of clauses (2) and (3). Judge Snedecor seconded the motion, and it was carried unanimously. Professor Kennedy stated that by the action just taken, no enumeration was necessary, and therefore "(1)" would not be used in line 44. Judge Gignoux moved that provision (B) be deleted, the Comptroller General notified of that action, and, if the Comptroller General desires to receive copies of the notices of first meetings of creditors, the rule be reconsidered. The motion was carried unanimously.

Following a general discussion concerning the sending of notices with regard to bankruptcy cases wherein the United States is or might be a party, Mr. Treister moved that the language for proposed subdivision (e) be deleted and the following substantial language in substance be used in lieu thereof: "All notices to which creditors are entitled shall be sent to the district director of internal revenue. If it appears

that the United States is a creditor, then notices also shall be sent to the United States district attorney and to any agency or instrumentality through which the debt was incurred." Judge Snedecor seconded the motion, and it was carried unanimously.

Judge Gignoux suggested that the reporter, when redrafting, consider limiting the obligation regarding notices to district directors of internal revenue to that of sending notices only of the first meeting of creditors.

(f) Notice by Publication.

Professor Kennedy read subdivision (f) of Rule 2.10 as proposed in the draft dated 11-5-67. Mr. Treister suggested the deletion of subdivision (f). Professor Seligson moved that subdivision (f) be eliminated and that instead there be a provision to permit the court, in cases where it would be impracticable to give notice by mail, to give it by publication and (2) to give notice by publication in addition to the mail notices. Judge Gignoux seconded the motion. There was unanimous approval, the reporter having discretion as to the language to be used. The word "impracticable" was red-flagged for particular consideration.

(g) Waiver (of Notice).

Professor Kennedy read subdivision (g) of Rule 2.10 as proposed in the draft dated 11-5-67 and said that he had omitted the sentence, found in § 58c of the Bankruptcy Act, which provides: "All notices shall be given by the referee unless otherwise ordered by the judge." He asked if the sentence should have been left in. The general feeling was that the matter was covered in subdivision (a) of Rule 2.10. Mr. Treister moved that subdivision (g) be deleted. Judge Gignoux seconded the motion, and it was carried unanimously. There was, however, to be a Note stating that the sentence was not carried into the rules, because the Committee did not deem it necessary.

PROPOSED BANKRUPTCY RULE 9.28 - DESIGNATION OF NEWSPAPER

Professor Kennedy read Rule 9.28 as proposed in the draft dated 10-3-67. Judge Whitehurst moved its elimination.

Mr. Treister suggested a separate rule on publication, which would provide that whenever publication is directed, the order shall recite the number of times and in which

newspapers it is to appear. Judge Gignoux suggested that there be a general rule in Part IX which would state in effect: "These following rules supersede the following sections of the Bankruptcy Act." Following a short discussion, Judge Gignoux moved that proposed Rule 9.28 be deleted. Judge Snedecor seconded the motion, and it was carried by unanimous approval.

Professor Kennedy felt that a rule on publication was not really needed, and that it would be better to leave it to the discretion of the judge. Mr. Treister changed his motion to one that there be a rule on notice by publication. There was unanimous approval of Mr. Treister's proposal. Professor Kennedy said he understood that in the notice-by-publication subdivision, it was to be made clear, as it has been made clear in the rule on service of process, how many publications the court may direct.

PROPOSED FORM NO. 17B - NOTICE OF FIRST MEETING OF CREDITORS AND TIME FOR FILING COMPLAINT OBJECTING TO DISCHARGE

Professor Kennedy gave the background of proposed Form No. 17B. Following a short discussion, Judge Gignoux moved that Form No. 17B be placed on the shelf. Professor Riesenfeld moved that the words "which may then be allowed or disallowed" be stricken. Judge Snedecor seconded the motion. Judge Gignoux withdrew his earlier motion.

After lunch, Judge Snedecor moved the deletion of the words "which may then be allowed or disallowed" from the second paragraph of Form No. 17B. Judge Whitehurst seconded the motion, and it was carried unanimously.

It was generally agreed that the words "proofs of claims" should be substituted for "their claims" in the first line of the second paragraph. However, when Professor Kennedy referred to his memorandum of November 7, 1967, with regard to the usage of the terms "filing a claim", "proving a claim", and "filing a proof of claim", Judge Whitehurst moved for reconsideration. Judge Snedecor seconded the motion, and by unanimous approval, the first clause of the second paragraph of Form No. 17B was left in its originally proposed language: "At the meeting the creditors may file their claims, ..."

Judge Gignoux moved that Form No. 17B as amended be placed on the shelf. Judge Whitehurst seconded the motion, and there was unanimous approval.

PROPOSED FORM NO. 17H - NOTICE OF FINAL MEETING OF CREDITORS

Judge Gignoux moved that Form No. 17H be placed on the shelf. Judge Whitehurst seconded the motion, and it was carried unanimously.

Professor Seligson questioned the necessity for the words "filed and" in the last line of page 2 of Form No. 17H. Professor Kennedy agreed that they were not necessary.

Agenda Item No. 8: PROPOSED BANKRUPTCY RULE 3.1 - PROOFS OF CLAIM

Professor Kennedy stated that Mr. Nachman felt that the words "the terms of" should not be used in lines 25 and 56 of proposed Bankruptcy Rule 3.1. Following a short discussion, it was decided that Rule 3.1 need not be considered by the full Committee as it had gone over the rule previously, but that the rule should be left to the Subcommittee on Style.

PROPOSED BANKRUPTCY RULE 3.2 - FILING PROOF OF CLAIM

(a) Manner of Filing.

Professor Kennedy read subdivision (a) of Rule 3.2 as proposed in the draft dated 10-15-67. Professor Joslin suggested that a reference also should be made to Rule 3.1(g) in line 5. This was agreeable to all.

(b) Place of Filing.

Professor Kennedy read subdivision (b) of Rule 3.2 as proposed in the draft dated 10-15-67. Judge Snedecor moved its adoption, and the motion was carried unanimously.

(c) Time for Filing.

Professor Kennedy read subdivision (c) of Rule 3.2 as proposed in the draft dated 10-15-67. He suggested that the words "not more than" be inserted before the words "an additional" in line 16, and said that the bracketed material in line 17 should be stricken thereby. Judge Snedecor moved that proposed Rule 3.2(c)(2) be approved, and there was no objection.

Professor Kennedy read the material relating to Rule 3.2(c)(3) from his memorandum of November 7, 1967. He then read clause (3) and while so doing made the following language changes: in line 18, the word "because" was substituted for "by reason"; in line 19, the word "action" was changed to "adversary proceeding"; in line 20, the words "by reason"

were changed to "because"; in line 22, the word "final" was changed to "such"; in line 23, the words "in such action" were deleted; and, in line 24, the phrase "the entry of such final judgment" was changed to "it becomes final". Upon Professor Joslin's inquiry, Professor Kennedy said that he did not think the Committee should deal with the provability or the dischargeability of a claim, as those are matters of substantive law.

As the result of an extensive general discussion, Professor Kennedy said that the policy question was whether the Committee wanted to cover all unsuccessful claimants in reclamation proceedings, regardless of whether the reclamation petitioner asserted a security interest or title. Following more discussion, Professor Kennedy said he thought that the policy favored by the Committee was a recognition of the right to file a claim 30 days after a final adverse judgment is entered in a reclamation proceeding filed by a title claimant or a lien claimant, in a plenary action, or in an adversary proceeding grounded on § 57(g) of the Bankruptcy Act. There was unanimous approval for adoption of this policy with the language being left to the reporter.

Professor Seligson asked if, in the case where there is no stay, the judgment was considered to be final if there is an appeal. He asked if a note was needed to make clear what the Committee meant by final judgment. Mr. Treister said that what normally is meant by a final judgment in such a situation is the judgment that becomes effective when there has been disposal of the appeal. When there is no stay of execution, payment still must be made, and if the trustee goes out with the execution and makes the collection anyhow, there is no problem, because payment has been made within the time allowed. If payment is not made, the bankrupt still has 30 days in which to file after the judgment becomes final on disposition of the appeal. Professor Joslin asked why not strike the word "final" because all that the Committee is worried about here is filing a claim, and the bankrupt certainly knows he is in a position where he should file it now if there is a judgment. Following a general discussion on the meaning of final judgment, Professor Joslin moved that if the word "final" is used, it mean that the time starts to run 30 days from the date of entry of judgment. Professor Riesenfeld seconded the motion. The motion was lost by a count of 8 to 1. The subject matter was re-referred to the reporter for further study and submission of new language at a later meeting.

Professor Kennedy read provision (4) of Rule 3.2(c) as proposed in the draft dated 10-15-67. While so doing, he changed the words "duly proved and filed" in line 30 to "a sufficient proof of claim is filed". Mr. Treister said he agreed with the policy of the provision but that he was not sure that the language said that the post-bankruptcy interest does not get to share in the surplus. He asked if the rule would be relevant at all in the referee's determination as to the amounts to be paid on claims not previously filed because of lack of sufficient interest. Professor Kennedy felt that the Committee should not try to deal with that by procedural rule. Mr. Treister said that if it could be established that under substantive law the post-petition interest could share in the surplus, then he felt that there should be no reference in the rule to post-petition interest. Professor Seligson asked if it was intended to exclude all post-bankruptcy interest on claims that were filed within the six months' period and were paid in full as to the principal. Mr. Treister said that he thought that the Committee meant to say, without undertaking to determine any substantive issues, that late-filed claims could participate in surplus which otherwise would be returned to the bankrupt. Following a short discussion, Professor Kennedy proposed the following language: "If all claims duly allowed have been paid in full, any claim not filed within the time prescribed by these rules may nevertheless be proved and filed before a date fixed by the court." Judge Gignoux said that if the Committee was agreed as to policy, he would suggest that the drafting follow the same approach which was used for clauses (1) and (2), e.g.: "If all claims duly allowed have been paid in full, the court may grant a reasonable, fixed extension of time for filing of any claim not previously filed." Mr. Treister asked if there should be a cross-reference to the rule on notices, and Professor Kennedy said it had been decided that there would be one. The subject matter of provision (4) of proposed Rule 3.2 was remanded to the reporter. Professor Seligson suggested that there be in the footnote a reference to § 57n of the Bankruptcy Act.

PROPOSED BANKRUPTCY RULE 3.5 - OBJECTIONS TO AND ALLOWANCE OF CLAIMS; (VALUATION OF) SECURED CLAIMS

(a) Trustee's Duty to Examine and Object to Claims

Professor Kennedy read subdivision (a) of Rule 3.5 as proposed in the draft dated 11-7-67 and gave the background thereof.

To resolve Mr. Treister's dislike of the words "when appropriate", Professor Kennedy suggested the words "when necessary" be inserted after the word "shall" in line 1. Professor Riesenfeld suggested the deletion of the word "all" in line 1. There were no objections to those two changes, and there was to be a note explaining what the Committee meant by the words "when necessary".

(b) Allowance When No Objection Made.

Professor Kennedy read subdivision (b) of Rule 3.5 as proposed in the draft dated 11-7-67 and gave the background thereof. Mr. Treister suggested that the word "dividends" be used in lieu of "distribution of the estate". Judge Gignoux did not think that the words "proved and" were necessary. Professor Seligson suggested that the word "declaring" rather than "ordering" should be used in line 2. Professor Riesenfeld pointed out that payments to priority creditors were not termed "dividends" in the Bankruptcy Act, and Mr. Treister withdrew his suggestion. Professor Riesenfeld suggested the deletion of the parenthesized words "of the estate". Professor Seligson suggested that the parenthetical language be changed to read: "for the purpose of distribution". Professor Riesenfeld moved that the parenthetical wording suggested by Professor Seligson be adopted.

Following a short discussion, Mr. Treister suggested that subdivision (b) read as follows: "A claim filed in accordance with Bankruptcy Rule 3.2 shall be deemed allowed for the purpose of distribution unless objection is made by a party in interest." Judge Gignoux moved that Mr. Treister's suggested language be approved. Mr. Treister seconded the motion, and it was carried unanimously.

(c) Objections to Allowance.

Professor Kennedy read subdivision (c) of Rule 3.5 as proposed in the draft dated 11-7-67 and gave the background thereof. In line with action just taken for subdivision (b), Professor Kennedy said that the parenthesized words "ordering" and "of the estate" were to be deleted from proposed subdivision (c). Professor Seligson moved approval of subdivision (c) as read and modified by the reporter. There was unanimous approval.

(d) Secured Claims.

Professor Kennedy read subdivision (d) of Rule 3.5 as proposed in the draft dated 11-7-67. Judge Whitehurst moved approval of the subdivision as read by the reporter. Professor Seligson seconded the motion. Following a brief discussion, the motion was carried unanimously.

Following general suggestions concerning the title for Rule 3.5, Professor Kennedy said that it would read: "OBJECTIONS TO AND ALLOWANCE OF CLAIMS FOR PURPOSES OF DISTRIBUTION; VALUATION OF SECURITY." There was no objection.

[Further action as to this rule was taken during the discussion of Rule 3.10 *infra*.]

PROPOSED BANKRUPTCY RULE 3.10 - RECONSIDERATION OF CLAIMS

Professor Kennedy read Rule 3.10 as proposed in the draft dated 10-13-67 and gave the background thereof. Professor Riesenfeld pointed out that the word "foreclosed" beginning at the end of line 2 of the 4th paragraph of the Note should be "closed". Professor Kennedy agreed.

Professor Seligson, with respect to the usage of the language for the first sentence of paragraph 2 of the Note, questioned if it meant that a trustee would not have an absolute right to object to a claim which had been automatically allowed. Following a general discussion, Professor Kennedy proposed the following language for Rule 3.10: "After a ruling on an objection to a claim, a party in interest may move for reconsideration of the allowance or disallowance of such claim." Professor Joslin suggested: "A party may move or object to an allowance of a claim." Professor Seligson suggested that the language be: "After a ruling on an objection to a claim, a party in interest may move for reconsideration of an order allowing or disallowing a claim." Judge Gignoux moved Professor Seligson's proposed language for the first sentence be adopted. Professor Seligson wanted the second sentence to read: "If the motion is granted, the court may after hearing upon notice, make such further order as may be appropriate." Judge Gignoux accepted that amendment to his motion. The motion was carried unanimously, and Rule 3.10 as approved reads: "A party in interest may move for reconsideration of an order allowing or disallowing a claim. If the motion is granted, the court may after hearing upon notice, make such further order as may be appropriate."

Judge Gignoux asked what happens in a situation where no objection is made to a claim, the dividend is paid, then objection is made, and the claim is disallowed. Professor Kennedy said that subdivision 1 of § 57 of the Bankruptcy Act allows the trustee to recover any excess dividends paid to any creditor after a reconsideration. Professor Riesenfeld said that in the situation hypothesized, it was not a reconsideration - just a consideration - and the Committee could not, by a rule authorizing an automatic allowance, deprive the estate of the right to recover dividends paid on a claim disallowed after such a consideration. Professor Kennedy said he thought that was right and that the Committee probably needed in Rule 3.5 a reference to the effect of sustaining an objection after a dividend has been declared. Professor Riesenfeld said he wondered whether the order of subdivisions (b) and (c) in Rule 3.5 could be inverted and a note drafted referring to the proceeding under Rule 7.1. There was no objection to Professor Riesenfeld's suggested procedure. In line with a suggestion of Professor Shanker, Professor Kennedy asked if the note just

discussed should not refer to subdivision 1 of § 57 of the Bankruptcy Act, i.e., that the note should say that that statute covers the case of an objection to a claim after a dividend. There seemed to be agreement on having such a reference in the note.

PROPOSED BANKRUPTCY RULE 3.20 - DECLARATION [OR ORDERING] AND DISTRIBUTION OF DIVIDENDS

Professor Kennedy said that, in light of action taken earlier in the meeting, the words "OR ORDERING" would be eliminated from the title and the word "DISTRIBUTION" should be changed to "PAYMENT".

((a) Declaration [or Ordering] and Payment.)

In line with action taken on the main title, Professor Kennedy said the words "or Ordering" also should be deleted from the subtitle for subdivision (a).

Professor Riesenfeld suggested the deletion of the words "to (general) creditors", because dividends are payments to general creditors. Following a rather lengthy discussion, Professor Joslin moved that the provisions in proposed Rule 3.20 apply to priority creditors. Judge Snedecor seconded. The motion was lost by a vote of 7 to 1.

Judge Snedecor moved that Rule 3.20 be adopted with the words "to general creditors" being left in. Judge Gignoux seconded the motion, and it was carried by a vote of 6 to 1.

Since Professor Seligson felt that something should be put into Rule 3.20 to clarify what is meant by "general creditors", Professor Riesenfeld moved that the subject matter be reconsidered. Judge Snedecor accepted a change of his motion. Professor Seligson then moved that in line 2 of Rule 3.20(a) the word "general" be deleted. The motion was favored unanimously.

Judge Whitehurst questioned the need for the second sentence in the rule. There was general agreement that that sentence should be deleted.

The third sentence was flagged by the reporter, as he felt that proposed Rule 5.29 would cover the matter. In the event that the reporter finds that it is covered in Rule 5.29, the third sentence is to be deleted.

Professor Seligson moved approval of the last sentence of proposed subdivision (a) of Rule 3.20. Judge Whitehurst seconded the motion, and it was carried unanimously.

((b) Unclaimed Dividends.)

Professor Kennedy read subdivision (b) of Rule 3.20 as proposed in the draft dated 11-5-67.

Following a visit of Chief Justice Warren, Professor Seligson moved the elimination of subdivision (b) and the usage of the approach of proposed Rule 3.66. Judge Gignoux seconded the motion, and it was carried unanimously.

[The meeting was adjourned on Friday at 5:24 p.m. and was resumed on Saturday at 9:00 a.m.]

Agenda Item No. 9 - PROPOSED BANKRUPTCY RULE 5.2 - BOOKS AND RECORDS KEPT BY CLERKS

Professor Kennedy read a letter from Referee Cowans regarding treatment of scandalous matter that gets into bankruptcy files. He then referred the Committee to his memorandum dated November 3, 1967.

Professor Seligson related a case in which he was involved, and he asked if it was felt that papers, which are not matters of public record, should have to be shown to interested parties.

Professor Kennedy said he wanted to know if the Committee thought it was appropriate to try to formulate a rule which will circumscribe, in effect, the operation of a criminal statute (18 U.S.C. § 154). During the discussion, Professor Joslin said that he felt that if there was going to be a rule, it should require that the public record show that any excluded material therefrom has been impounded and cannot be reached except upon some showing to the court. Following a very lengthy general discussion, Judge Gignoux said he understood it to be the sense of the Committee that there should be a rule providing in substance that any filed document in the referee's office should be open to inspection at any reasonable time subject to the power of the court (a) to impound a scandalous document or (b) to strike a scandalous allegation upon notice and upon notice to the person making the allegation. It was understood that no rule was necessary to cover correspondence or papers which are not matters of public record.

PROPOSED BANKRUPTCY RULE 5.13.1 - RECORDS AND REPORTS OF TRUSTEES

Professor Kennedy said that the discussion raised the question, with regard to lines 4 and 5 of Rule 5.13.1 as proposed in the draft dated 11-3-67, whether there should be a modification of that language. Professor Seligson felt that the language was too broad. After a short discussion, Judge Gignoux stated that it was the sense of the Committee that Rule 5.13.1 should contain a provision regarding documents in the possession of trustees similar to the provision in § 166 of the Bankruptcy Act, with such modification as necessary. Professor Kennedy felt that the provision of § 166 of the Bankruptcy Act ought to go into the rule on referees too, and the Committee agreed.

Following a discussion concerning the divulgence of trade secrets and the like by the trustee, Professor Riesenfeld suggested that a rule provide in substance that the trustee should furnish information as requested except that as to matters pertaining to pending litigation, the trustee should furnish information only as the court directs. It was the sense of the Committee that a rule be drafted along those lines.

PROPOSED BANKRUPTCY RULE 5.2 - BOOKS AND RECORDS KEPT BY CLERKS

At this time, Professor Kennedy returned to Rule 5.2 as proposed in the draft dated 6-26-67.

(a) Bankruptcy Docket.

This subdivision had been examined at an earlier meeting, and there had been a question concerning the usage of the phrase "a book known as the 'bankruptcy docket'". However, Professor Kennedy said he had decided to leave in the phrase as it had been taken directly from Federal Civil Rule 79(a), and the Committee agreed that it should be used.

(b) Transmission and Return of Papers.

Professor Kennedy read subdivision (b) of Rule 5.2 as proposed in the draft dated 6-26-67. He said the following suggestions had been made by Mr. Nachman: in line 9, the word "any" should be changed to "every"; the words "that has been" should be deleted; and the words "the referee" should be changed to "him". In line 10, Professor Kennedy changed the word "the" before "case" to read "a". Judge Gignoux did not think that the clause "unless the judge otherwise directs" was necessary at the end of the first sentence, and Judge Whitehurst moved for its deletion. However, it was decided that the language of the first sentence would be worked out by the reporter.

Professor Kennedy said that Mr. Nachman had suggested that in line 11 the word "connected" should be changed to "filed" and in line 12 the words "receive and" should be deleted. There was a discussion concerning the necessity for the last half of the second sentence proposed for subdivision (b), and it was concluded that it was unnecessary, because the preservation of papers for the records of the court is covered sufficiently by other rules. Professor Seligson moved that there be approval of subdivision (b) as modified but that it be ended at the word "clerk" where first shown in line 12. In order for the sentence to be ended as desired by Professor Seligson, it was necessary to delete the word "and" in line 10, and to change the word "are" to "shall be" in line 11. Judge Whitehurst seconded the motion, and it was carried by unanimous approval. As approved, Rule 5.2(b) reads as follows: "The clerk shall transmit to the referee all papers which pertain to every case referred to him, unless the judge otherwise directs. When a case is closed, the record, certificate, and file papers shall be transmitted by the referee to the clerk." [See later action regarding this subdivision in the discussion of Rule 5.3 *infra.*]

(c) Index of Cases.

Professor Kennedy read subdivision (c) of Rule 5.2 as proposed in the draft dated 6-26-67. He said that Mr. Nachman suggested the deletion of the words "of the district court" in line 14. There was no objection. Judge Whitehurst moved approval of subdivision (c) as modified, and there was unanimous approval.

(d) Certificates of Search.

Professor Kennedy read subdivision (d) of Rule 5.2 as proposed in the draft dated 6-26-67 and gave its background. Judge Gignoux felt that this rule was unnecessary. Professor Seligson moved that subdivision (d) be eliminated unless the reporter, upon the examination of applicable laws, determines that other general statutes do not cover the situation. Judge Whitehurst seconded the motion, and it was carried unanimously.

(e) Public Access.

Professor Kennedy read subdivision (e) of Rule 5.2 as proposed in the draft dated 6-26-67 and gave its background. He said that he preferred that lines 25 and 26 read: "for reference and shall be open to examination by any person without charge." Judge Whitehurst moved that subdivision (e) be adopted

with language suggested by the reporter. Professor Seligson seconded the motion, and it was carried unanimously. As approved, subdivision (e) reads as follows: "The docket and index kept by the clerk under this rule shall be arranged in a manner convenient for reference and shall be open to examination by any person without charge."

PROPOSED BANKRUPTCY RULE 5.3 - BOOKS AND RECORDS KEPT BY REFEREES

(a) Docket.

Professor Kennedy read subdivision (a) of Rule 5.3 as proposed in the draft dated 10-17-67 and for the purpose of conformity changed the words "public inspection" to "examination by any person". Professor Riesenfeld asked what a "docket sheet" is. After a short discussion, it was agreed that the word "sheet" was unnecessary. Professor Seligson moved for approval of subdivision (a) as modified. Judge Whitehurst seconded the motion, and it was carried unanimously.

(b) List of Claims.

Professor Kennedy read subdivision (b) of Rule 5.3 as proposed in the draft dated 10-17-67. It was agreed by the Committee that the first sentence should read: "The referee shall keep open for examination by an person without charge a list of the claims proved against the estate." However, Judge Gignoux pointed out that, in line with an earlier decision, the word "proved" should be changed to "filed". The reporter agreed. Judge Whitehurst moved approval of subdivision (b) with the suggested modifications. Professor Seligson seconded the motion, and there was unanimous approval.

The reporter was to flag the rule for a possible inclusion of a reference to another rule on impounding.

(c) Record of Receipts and Disbursements.

Professor Kennedy read subdivision (c) of Rule 5.3 as proposed in the draft dated 10-17-67. Judge Gignoux suggested that the provision of Rule 79(d) (FRCP) be used in lieu of proposed subdivision (c). Professor Seligson moved that the Committee adapt subdivision (d) of Federal Civil Rule 79 in place of subdivision (c) proposed in Rule 5.3. Mr. Covey seconded the motion, and it was carried unanimously.

(d) Disposition of Record of Closed Cases.

Professor Kennedy read subdivision (d) of Rule 5.3 as proposed in the draft dated 10-17-67.

Professor Kennedy suggested that the second sentence proposed for Rule 5.2(b) be used in Rule 5.3(d). He proposed the following new language for the second sentence of subdivision (d): "When a case is closed, the record, certificate, and filed papers shall be transmitted by the referee to the clerk." However, when Professor Riesenfeld pointed out that there was a duplication caused by the usage of the words "When a case is closed" in the first and second sentences, Professor Kennedy proposed the following sentence for subdivision (d) of Rule 5.3: "When a case is closed, the referee shall certify the docket and list of claims as the record of the case and shall transmit the record, certificate, and filed papers to the clerk of the district court." Judge Whitehurst moved that subdivision (d) of Rule 5.3 be approved as read, and that the second sentence of proposed Rule 5.2(b) be deleted. Judge Shelbourne seconded the motion, and it was carried unanimously.

It was decided that proposed subdivision (e) of Rule 5.3 would not be discussed at this time.

Following recess, Professor Kennedy raised the question of whether the referee's certificate as to the docket and list of the claims was necessary. Judge Whitehurst moved that the word "certify" in subdivision (d) of Rule 5.3(d) be changed to "transmit". However, Professor Riesenfeld moved that there be no requirement in Rule 5.3(d) that the referee certify the docket and list of claims, unless the reporter finds out that this would have an effect on the rules of evidence. Professor Seligson seconded the motion, and there was unanimous approval, with the understanding that if there is a problem with regard to the rules of evidence, the motion would be reconsidered.

PROPOSED BANKRUPTCY RULE 5.3.1 - REPORTS OF REFEREES

Professor Kennedy read Rule 5.3.1 as proposed in the draft dated 10-17-67. However, since the material could be covered by the new subdivision (a) proposed for Rule 5.3, Professor Kennedy suggested its deletion. There was no objection.

PROPOSED BANKRUPTCY RULE 5.13.1 - RECORDS AND REPORTS OF TRUSTEES

Professor Kennedy read Rule 5.13.1 as proposed in the draft dated 11-3-67.

Judge Gignoux asked if the rule could not simply read: "A trustee shall keep a record of all receipts and disbursements." Mr. Covey suggested that many things had been put into the rules originally in an effort to organize and systematize procedures to be followed, but that they are no longer needed. Judge Whitehurst suggested that the rule should simply require the

trustee to file such written reports as the court may require. Following a brief discussion, Judge Gignoux stated that it was the sense of the Committee that the rule should require the trustee to keep a record of all receipts and disbursements.

Professor Seligson moved that the rule require the trustee to make a written report within one month after qualification and every three months thereafter, unless otherwise ordered. Mr. Covey seconded the motion, and it was carried unanimously.

It was the sense of the Committee that the last sentence of Rule 5.13.1 as proposed in the draft dated 11-3-67 should be retained.

Judge Whitehurst moved that the rule require the trustee to file an inventory immediately upon taking office. Professor Seligson suggested an amendment to require the trustee to file inventory within a reasonable time as the court may direct. This amendment was accepted by Judge Whitehurst. Mr. Covey seconded the motion, and there was unanimous approval.

Professor Kennedy said that there is a provision in General Order 17(3) for the court, on its own motion, to take action to discharge a trustee if the trustee failed to perform his duties. Following a short discussion, Judge Gignoux stated that it seemed to be the Committee's suggestion that there be no specific provision in Rule 5.13.1 relating to the removal of the trustee for nonperformance, but that the reporter should draft a rule of general application empowering the referee to remove a trustee after hearing, etc., if the trustee is not performing his duties.

Professor Kennedy said that his impression was that the Committee had earlier indicated its disposition to get rid of G.O. 17(4), which reads "All accounts of trustees and receivers shall be referred as of course to the referee for audit, unless otherwise especially ordered by the judge." It was agreed that the provision should be abrogated.

PROPOSED BANKRUPTCY RULE 5.33 - REFEREES' ASSISTANTS

(a) Employment Authorized.

Professor Kennedy read subdivision (a) of Rule 5.33 as proposed in the draft dated 7-30-67. He felt that the sub-

division should not be in the rule but that it belonged in the statute. Mr. Covey moved that subdivision (a) be deleted. Professor Seligson asked whether, if the subdivision was deleted from the bankruptcy rules and the provision also was deleted from the statute, the referee would have the power to hire or discharge an assistant. Mr. Jackson said that he would never want to see the provision taken out of both the bankruptcy rules and the statute, as it was a most useful provision. Following further discussion, a vote was taken on the motion to delete proposed subdivision (a) of Rule 5.33. There was a tie count of 3 to 3. As a result, it was decided that the matter would be discussed at a later meeting when the full Committee would be present.

(b) Functions Assignable to Assistants.

Professor Kennedy read subdivision (b) of Rule 5.33 as proposed in the draft dated 7-30-67. Following a general discussion, Judge Gignoux stated that it was the sense of the Committee that the reporter redraft subdivision (b) along the lines of § 956 of Title 28, U.S.C., to make it clear that assistants may perform only the administrative duties otherwise performed by the bankruptcy judge and referee.

PROPOSED BANKRUPTCY RULE 5.38 - EMPLOYMENT OF STENOGRAPHERS

Professor Kennedy said that he was skipping over proposed Rule 5.38 at this time, because he and Mr. Jackson would be having a future discussion regarding General Order 10.

PROPOSED BANKRUPTCY RULE 5.53 - SPECIAL MASTERS

Professor Kennedy read Rule 5.53 as proposed in the draft dated 10-22-67 and gave its background. Judge Gignoux asked how a referee could ever be a special master in a bankruptcy case. Professor Kennedy replied that it had been done under Chapter X. However, since this was no longer the practice in a straight bankruptcy case, Professor Kennedy said that the words 'a referee or other person as" could be deleted. Judge Whitehurst said he thought that reference to a referee as a special master might be made in the case of an involuntary petition, where the jury demands the judge to do so. However, Professor Seligson pointed out that the reference was being made to the referee, not as a referee, but as a special master, and Judge Whitehurst agreed that the reporter's proposed language would take care of the matter. Judge Whitehurst moved for approval of Rule 5.53 with the suggested deletion and with the understanding that the reporter consider other language to be

used in lieu of "as nearly as may be". There was unanimous approval.

Agenda Item No. 14: PROPOSED BANKRUPTCY RULE 9.41 - CONTEMPT PROCEEDINGS

Professor Kennedy said that he would be glad to have any reactions to proposed Rule 9.41 before the next meeting. Judging from statements made by the members present, there was sufficient interest in such a rule to warrant its further consideration.

[The meeting was adjourned at 11:55 a.m.]