MEETING OF THE FEBRUARY 1966 MEETING OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

The ninth meeting of the Advisory Committee on Bankruptcy Rules convened in the Supreme Court Building on February 23, 1966, at 10:00 a.m. The following members were present during the session:

Phillip Forman, Chairman
Edwin L. Covey
Edward T. Gignoux
Asa S. Herzog
G. Stanley Joslin
Norman H. Nachman
Stephen A. Riesenfeld
Charles Seligson
Roy M. Shelbourne
Estes Snedecor
George M. Treister
Elmore Whitehurst
Frank R. Kennedy, Reporter
Morris G. Shanker, Assistant to the Reporter

Others attending were Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure; Professor James W. Moore, a member of the standing Committee on Rules of Practice and Procedure; Royal E. Jackson and Berkeley Wright, of the Administrative Office.

Judge Forman opened the meeting by welcoming the members and guests and introduced Judge Asa S. Herzog who was attending for the first time. He stated that this would be a very crucial meeting as it would test the first full format of the Committee's objectives as designed by Professor Kennedy in his Syllabus Outline, a copy of which had been mailed to each of the members. He pointed out that in drafting the proposals which would come before them now, Professor Kennedy had had the assistance of Professor Morris Shanker and members of the Subcommittee, consisting of Judge Gignoux, Professor Seligson, and Messrs. Nachman and Treister. He further stated that two meetings of the Subcommittee had been held - one in Chicago and one in New York, each lasting three long days, and that these meetings invited the same kind of concentration as has been demonstrated at each full Committee meeting. Judge Forman stated this information was not meant to influence the Committee but to inform and stimulate questions and to promote ideas which would produce a set of rules which would make for efficient conduct of the bankruptcy courts.

Professor Kennedy presented fifteen agenda items for consideration and a Syllabus Outline containing a list of proposed rules.

Agenda Item No. 1 - Revision of Statements of Affairs

Professor Kennedy stated that his memorandum of July 9, 1965, was on the further revision of the Statements of Affairs and enclosed the proposals of the Eastern Regional Conference of Referees for consolidating Forms Nos. 2 and 3, these being the official forms of the Statements of Affairs, and for some specific changes. He further stated that a ballot had been sent out with that memorandum and his memorandum of November 23, 1965, summarized the responses made on the ballot.

The first question was whether there should be a consolidation of Official Forms Nos. 2 and 3. Members of the Committee were unanimous against consolidation, as indicated in his memorandum of November 23. Professor Kennedy stated that in going over the forms he noted that there were 15 paragraphs in Form No. 2 and 20 paragraphs in Form No. 3, that there were thus no counterparts in Form No. 2 of five paragraphs of Form No. 3, and that there were seven identical paragraphs in the two forms.

Professor Kennedy stated that one member, Judge Herzog, wrote to him later stating that he felt the proposal of the Eastern Regional Conference for consolidation should not be passed over too quickly. He advised Judge Herzog that one of the reasons that the Committee felt the forms should be maintained separately was that Form No. 2 would be simpler for the debtor or bankrupt not engaged in business.

Judge Herzog informed the Committee that a minimum of 20 referees attend the meetings of the Eastern Regional Conference twice a year, and that the Conference was unanimous in favoring consolidation. The common experience is that the referees receive Form No. 2 when they should receive Form No. 3 and vice versa.

Judges Snedecor and Whitehurst felt that more confusion would be created than eliminated by consolidation of Forms No. 2 and No. 3. Judge Snedecor pointed out that ninety percent of the bankrupts throughout the country are not engaged in business and should not be required to fill out a form which asks many questions that do not apply to them.

After discussion Mr. Nachman moved that Official Forms Nos. 2 and 3 not be consolidated. The motion was seconded and carried.

Questions Regarding Business Income

Professor Kennedy stated that in its consolidated form, the Eastern Regional Conference of Referees inquired about business and nonbusiness income of both kinds of debtors. He noted that on Official Form No. 3 no question was asked concerning business income, only income other than from the operation of a business. Responses to the Reporter's memorandum of July 9, 1965, indicated a general sentiment in favor of asking on Form No. 3 for information concerning both kinds of income. Professor Kennedy presented a draft of such a question to the Committee.

Judge Snedecor inquired whether the "income" to be disclosed is net or gross. Professor Seligson inquired whether it meant what you drew from a business or what the business was earning. Professor Moore and Mr. Nachman felt that Paragraphs 5 and 14 (renumbered 19 in the draft on the shelf) of Form No. 3, as drafted, were not adequate to cover partnerships, corporate bankrupts, and individual proprietorships and should be reconsidered. Professor Riesenfeld was of the opinion that income tax returns covering a two-year period should be attached to the statement. Mr. Nachman suggested that the third sentence of 5a. should include the words "earned or" and that "money" should be used instead of "income."

After further discussion, Judge Snedecor moved that Question 5 of Form No. 3 be left as it is. The motion was seconded and carried.

Judge Herzog felt that there should be a rule requiring a man in business to state how much money he had withdrawn from the business. Judge Gignoux suggested that perhaps Paragraph 14 (renumbered 19) could be expanded to contain this information. After considerable discussion, Judge Herzog moved that a separate subsection be added to Question 14 for "personal withdrawals under an individual proprietorship." The motion was seconded and carried.

Questions Regarding Losses and Insurance

The next suggestion of the Eastern Regional Conference of Referees presented by Professor Kennedy involved the questions of losses and insurance. He advised the Committee that the numbering of the paragraphs being considered corresponds to the numbering of the drafts on the shelf, 11 of Form No. 2 now being 14 and 13 of Form No. 3 now being 17. Subsection b. is new.

After discussion, Mr. Nachman moved that subsection b. for Paragraph 14 of Form No. 2 and for Paragraph 17 of Form No. 3 be approved as presented. The motion was seconded and carried.

Professor Kennedy informed the Committee that 14A of Form No. 2 and 17A of Form No. 3 were new. It was the sense of the Committee that this question was adequately covered in the schedules. Judge Snedecor moved that Question 14A of Form No. 2 be eliminated. The motion was seconded and carried. This action would also apply to 17A on Official Form No. 3.

Questions Regarding Identification of Bankrupt

Professor Kennedy called the Committee's attention to the name-and-residence paragraph of each of the forms. He stated that there were two points here; the first one being whether the taxpayer's identification number should be entered on the Statement of Affairs, and the second whether aliases should be required to be disclosed. The number appears on the Eastern Regional Conference's proposal, and District Directors of Internal Revenue have contacted several referees, suggesting that the number be placed on the Statement of Affairs. The Committee earlier had agreed that this information should be put on Schedule A-1 and on the voluntary petition. Heretofore the Committee did not think the Statement of Affairs was the appropriate place for the social security number in that the Statement of Affairs does not come in until after the first meeting notices have gone out. Since he was proposing, in a new rule on the subject, that schedules and statements of affairs come in at the same time, the earlier Committee action regarding the social security number could well be reconsidered. Judges Snedecor and Whitehurst stated that the proposed rule was already followed in their districts. Professor Kennedy acknowledged that the proposed rule would codify a widely spread practice.

If the rule is adopted, the recommended revision of the first question of Form No. 2 would read, "What is your full name and social security number?" A new subparagraph "e" had been added to Paragraph 1. of Official Form No. 3:

"e. What is your employer identification

number?.....

Your social security number?....."

It was moved that the Committee approve the requirement that taxpayer's identification number be entered on the Statement of Affairs and the requirement that the

Statement of Affairs and the schedules come in at the same time. The motion was seconded and carried.

Professor Kennedy called the Committee's attention to Paragraph 1b. of Form No. 2: "Have you been known by any other name or names?" in the name-and-residence section. Judge Herzog suggested that this information be included in the caption. It was suggested that this information could be included in the notice to creditors.

After discussion, the Committee approved the recommendation that captions should include all names used by the bankrupt within a six-year period. A six-year limit would also apply to the question regarding use of other names in the Statement of Affairs for nonbusiness bankrupts.

Questions Regarding Income Tax Returns and Refunds

Professor Kennedy suggested that the Committee consider the matter of income tax returns and refunds. He thought the heading of the paragraphs involved should be amended to read "Income tax returns and tax refunds" in view of the language used in subparagraphs b. and c. Inasmuch as the Eastern Regional Conference had made it a point to get information regarding tax refunds that may be payable to another person jointly, he had tried to incorporate this feature in the parenthetical expression in the last sentence of subparagraph c: "(Give particulars, including information as to any refund payable jointly to you and another person.)" Professor Kennedy informed the Committee that he intended to determine whether a joint refund may be payable to anyone other than a husband and wife.

The Committee approved subparagraph c., as amended, subject to any further information which the Reporter may supply. There was also general approval of the title, as amended.

Professor Seligson suggested that subparagraph c. be revised by including the words in the parentheses under the blanks, "your spouse or any other," and deleting "another." Mr. Treister was of the opinion that this change should be made only on Form No. 2. Professor Joslin indicated that the heading should call attention to the fact that there are other tax refunds. He suggested the title "Income tax returns and income tax and other tax refunds." He furthere suggested that subparagraph b. also reflect this

information. Professor Kennedy stated that perhaps "income tax and other tax refunds" inserted parenthetically in b. and c. would be appropriate.

After considerable discussion, Professor Seligson moved that Paragraph 3. of Official Form No. 2 be approved as follows:

"3. Income tax returns and tax refunds.

a. Where did you file your federal and state income tax returns for the last two years?

.....

.....

b. What tax refunds (income or otherwise) have you received during the last year?

.....

.....

or language to this effect

c. To what tax refunds (income or otherwise), if any, are you, or may you be, entitled?

.....
(Give particulars, including information

.....
as to any refund payable jointly to you

.....
and your spouse or any other person.)"

or similar language. The motion was seconded and carried, subject to any other information Professor Kennedy may supply.

Questions Regarding Leases

Professor Kennedy presented proposed drafts of questions regarding leases for Official Forms No. 2 and No. 3. He stated these drafts were based on a proposal of the Eastern Regional Conference. Judge Herzog informed the

Committee that the purpose of this proposal was to discover a security deposit in the hands of the landlord. After discussion, it was the sense of the Committee that a question regarding leases in nonbusiness cases serves no purpose, and a motion of Judge Whitehurst not to add such a question to Official Form No. 2 was seconded and carried.

In considering the appropriateness of such a question for Official Form No. 3, Mr. Covey inquired of Judge Herzog whether security deposits are a substantial item - do they cover advance rent and guarantee money? Judge Herzog replied in the affirmative. Mr. Nachman suggested the word "periodic" in lieu of "monthly." Professor Seligson was of the opinion that the schedules needed amplification. He suggested that "landlord" be inserted in the schedules to take care of the security deposit problem. Professor Riesenfeld stated that the first sentence of the draft of the paragraph under consideration should be clarified to apply only to leases of business property. After further discussion, a motion was made that the draft of Paragraph 17B, as amended, be approved. The motion was carried. The modified draft now reads as follows:

"17B. Leases.

a. If you have leased or rented your business premises, what are the name and address of your landlord, the amount of your rental, the date to which rent had been paid at the time of the filing of the original petition herein, and the amount of security held by the landlord?

.....

....."

Agenda Item 2 - Proposed Bankruptcy Rule 1.3 - Involuntary Petition

(a) Form and Number.

Professor Kennedy called the Committee's attention to proposed Rule 1.3(a). He pointed out that the preceding

rule regarding voluntary proceedings contemplated the petition be filed in duplicate; but involuntary petitions should be filed in triplicate because one copy has to be served on the bankrupt. It is contemplated that there may be variant local rules on this procedure and this would permit the local rules to vary this requirement of triplicate petitions. He indicated that two petitions may be sufficient in a consolidated clerk's and referee's office.

Mr. Covey was of the opinion that three copies should be required for voluntary and involuntary petitions, stating there were many situations where three copies were necessary. Judge Whitehurst concurred, adding that in his office one copy is a working copy. Professor Shanker stated that there was merit in the adoption of a uniform rule. Professor Riesenfeld was of the opinion that a general rule might deal with the question when local rules may depart from the Bankruptcy Rules.

The Chairman inquired of Mr. Jackson whether he was sending instructions to the clerks regarding the disposition of petitions. Mr. Jackson informed the Committee that this was being done and that since the establishment of the new docketing and case reporting system, the clerk sends everything to the referee unless instructed to do otherwise by local rule. Ordinarily, where the clerk of the court is situated some distance from the referee's office, the clerk's office does retain a copy, but when located in the same city as the referee, the clerk does not. He further stated that the new docketing and case reporting system is the result of a two-year study undertaken by the National Archives and Records Service.

Professor Seligson felt there might be some question regarding the language "filed in triplicate, unless otherwise provided by local rule." He was of the opinion that if three copies are needed, "unless otherwise provided by local rule" should be amended to read, "unless additional copies are required by local rule " After discussion, Professor Seligson moved that Rule 1.3(a) be approved as amended. The motion was seconded and carried.

(b) Who May File

Professor Kennedy stated that Paragraph (b), entitled "Who May File", is a very interesting proposal. After reading the rule as drafted, he pointed out that the Committee might recognize this as a rephrasing of section 59b. He referred to his note regarding whether this paragraph is

within the scope of the Committee's rule-making power. He stated that the important question before the Committee is whether a rule should deal with the subject matter of who may file an involuntary bankruptcy petition.

Professor Joslin inquired whether the Committee has the power to draft a rule that would permit one creditor to file when there are nore than twelve creditors. He was of the opinion that this was the first thing which must be decided by the Committee. Judge Gignoux felt that the Committee did not have the power. Mr. Nachman strongly felt that reducing three creditors to one is a decision for the Congress and stated he could not approve this rule on the ground of policy. Judge Maris inquired whether this was a substantive matter and whether the Committee would recommend to the Supreme Court that it get involved. He indicated that there should be more research on this subject. Professor Moore stated a revision of the applicable provision of the Bankruptcy Act is needed. Professor Seligson stated that the Committee should first resolve this question of rule-making power and then decide, as a matter of policy, whether it wanted to adopt this provision.

After discussion Professor Joslin moved that it was the consensus of the Committee, as presently advised, that Rule 59b is within the rule-making power of the court, with the understanding the Professor Kennedy would make further study. The motion was seconded and carried 7 to 4.

After further discussion, Professor Seligson stated that the Committee should go no further until it received a report on this question from the Reporter. This motion was seconded and carried 6 to 4.

(c) Counting of Creditors

Professor Kennedy stated that this paragraph dealt with the counting of creditors in order to determine whether there should be one or three petitioning creditors. He further stated that this is a paraphrase of § 59e of the Bankruptcy Act, plus three additional paragraphs (4), (8), and (9), which the Committee might not want to approve as these items are not in the Act.

After discussion Mr. Nachman moved that Rule 1.3(c) be approved. The motion was seconded, but Professor Riesenfeld requested that the proposal be amended by deleting (9), stating that he did not approve the inference in the statement.

Mr. Treister stated that the function of (c), as he understood it, was to make it easier to get a one-creditor petition by exluding from the count the creditor whose incentive would be to keep the man out of bankruptcy. Professor Riesenfeld did not agree. He was of the opinion that the vote of one creditor who cannot share in the distribution of the estate and who may therefore oppose bankruptcy should count as much as that of any other creditor. He moved that the Committee approve his proposal to delete (9). The motion did not carry. Professor Seligson requested that the record show that he did not vote on whether (9) should be deleted.

Professor Joslin suggested that (c) be amended by adding "(10) and creditors whose claims are contingent." A motion was made that (c) be approved as amended. The motion was seconded and carried.

On Thursday, February 24, paragraph (c) was reconsidered. After discussion Judge Snedecor moved that the Committee reconsider Rule 1.3(c) and approve the deletion of (9) and (10). The motion was seconded and carried. Judge Whitehurst made a further motion that new proposals (4) and (8) be approved. This motion was seconded and carried. The Committee approved the following draft of Rule 1.3(c):

> "(c) Counting of Creditors. In determining whether there are as many as twelve creditors for the purpose of paragraph (b) of this rule, the following creditors shall not be counted: (1) creditors employed by the bankrupt at the time of bankruptcy; (2) relatives of the bankrupt; (3) if the bankrupt is a corporation, creditors who are stockholders or members and officers, directors, trustees, or members of similar bodies controlling the bankrupt; (4) if the bankrupt is a partnership, creditors who are general or limited partners; (5) creditors who participated, directly or indirectly, in the act of bankruptcy alleged in the petition; (6) creditors whose claims are fully secured; (7) creditors who have received transfers voidable under the Act; and (8) creditors whose claims are for less than $50."

Professor Riesenfeld asked the Reporter to consider whether limited partners should be included in (c) (4).

(d) Joinder of Petitioners after Filing

Professor Kennedy stated that this section is a revision of the present § 59d of the Act. Judge Herzog stated that "with the answer" should be inserted after "file" in the sixth sentence.

Professor Shanker inquired why this provision should not be equally applicable when three or more actually join and the answer avers that two or more are disqualified for some reason under (b). He stated this language could be misconstrued to prevent the remaining two from seeking out two more who are qualified. Professor Kennedy stated that the first sentence of the paragraph follows § 59f of the Bankruptcy Act in providing that creditors other than original petitioners may at any time join in the petition.

It was suggested that "thereon" be stricken from the last sentence. Judge Herzog questioned "verified" and indicated that in his opinion it should be changed to "verified under oath." Professor Kennedy called the Committee's attention to Rule 1.7.1 on "Verification of Papers." He stated that a rule would probably be drafted which would supersede the provision of the Bankruptcy Act describing persons before whom an oath may be taken. He further stated that this rule would clarify "verification." It was suggested that "verified" could be omitted completely. Professor Kennedy stated there were two questions here, (1) whether we want to retain the requirement of verification which is now in the statute, and (2) whether we want to add "under oath." The sense of the Committee was that "verified" should be retained. Professor Kennedy stated he would keep in mind whether a clarification of "verified" should be included in a note or rule.

After discussion Judge Herzog moved that the Committee approve Rule 1.3(d) with the amendment "with the answer." The motion was seconded and carried.

Agenda Item 3 - Proposed Bankruptcy Rule 1.3.1 - Rules Affecting Petitioners

(a) Transferor or Transferee of Claim

Professor Kennedy stated that this rule comes from General Order 5, paragraph 2, as revised by the draft on the shelf. He further stated that he was inserting "stating"

after "the transfer and" in the second sentence. He pointed out to the Committee that the last sentence goes beyond anything now on the shelf.

After discussion, it was suggested that the last five words of the last sentence be eliminated, these being "with respect to that claim." Professor Riesenfeld stated that "writing" would be more appropriate than "instruments." Judge Gignoux argued for the word "documents." Judge Herzog stated that "petitioning creditor" would be more correct than "petitioner."

After further discussion, Judge Whitehurst moved that Rule 1.3.1(a) be approved as amended. The motion was seconded and carried. The Committee approved the draft as follows, subject to the Reporter's further consideration of the word "instruments":

> "(a) Transferor or Transferee of Claim. A petitioning creditor for involuntary bankruptcy who is a transferor or transferee of a claim, whether transferred unconditionally or for security, shall annex to each of the triplicate petitions a copy of all instruments of transfer. He shall also annex to each petition an affidavit stating the consideration for and terms of the transfer and stating that the claim was not transferred for the purpose of instituting bankruptcy proceedings. A person who has transferred or acquired a claim for the purpose of instituting bankruptcy proceedings shall not be a qualified petitioner."

(b) Transferee of Property

Professor Kennedy state that the proposed 1.3.1(b) was new. After reading the draft, the Chairman invited comments.

Professor Joslin stated he could not see how a determination could be made whether a petitioner was qualified to petition and yet not to decide it until adjudication. Professor Kennedy inquired whether he believed "adjudication" should be changed to "petition." Professor Joslin answered in the affirmative. Mr. Treister believed that this proposal was an aspect of estoppel and that subdivision (b) should be eliminated.

After discussion Mr. Treister moved (1) that the Committee strike Rule 1.3.1(b) and (2) that the Committee indicate its disapproval of the law of estoppel. Professor Seligson inquired why a man should be disqualified because his lien is nullified. Judge Herzog stated that if a man's claim is not allowable, he should not be a petitioning creditor.

After extensive discussion, Mr. Treister's motion to delete Rule 1.3.1(b) was seconded and carried.

(c) Participation in Act of Bankruptcy

Professor Kennedy pointed out that in part, subdivision (c) is based on section 59h of the Act, but that it also codifies a good deal of the case law as discussed in 3 Collier, Bankruptcy paragraphs 59.06[1.2] and 59.39 (14 ed. rev. 1964).

Professor Joslin proposed that the Committee not approve (c), but take some action that would negate 59h and prevent it from being in the Act. Judge Gignoux said he had serious doubt whether estoppel was a proper subject for consideration. He moved that subdivision (c) be deleted entirely.

At the Thursday session, Professor Kennedy stated that he had some general observations to make relating to proposed Rule 1.3.1(c) and that he shared Judge Gignoux's doubt with respect to the Committee's power to deal with the subject matter of 59b of the Act and the question of estoppel. He further stated he did not believe the Committee could avoid these issues. On the other hand, if the Committee would stake out as much area as it could defend in a respectable way, he felt it could later retreat from an earlier determination. He pointed out that if the Committee now determines that no rule should be drafted to deal with eligible petitioners in involuntary cases or with estoppel, a rule might not be adopted at all or, at least, in the foreseeable future. He stated that in these areas of doubtful power, it seems wise to go no further than to propose a rule that codifies or copies a rule that Congress and the courts have already declared.

After discussion Professor Kennedy read a draft of Rule 1.3.1(c) for the Committee's consideration:

> "(c) Participation in Act of Bankruptcy. A creditor may not file or join in a petition alleging the commission of an act of bankruptcy other than the sixth act, if the creditor consented to, participated in, or secured the commission of the act alleged. Notwithstanding the foregoing, if a creditor merely participated in any general assignment, receivership, or other mode of adjustment or settlement of the affairs of the debtor without having consented in writing thereto, or if he consented in writing to such an assignment, receivership, adjustment, or settlement without knowledge of facts which would be a bar to the discharge of the debtor in bankruptcy, he may nevertheless act as a petitioning creditor and may allege any act of bankruptcy including such assignment or receivership."

Judge Gignoux stated that the Committee was moving into an area about which there is question regarding its power. He further stated that he understood that, as a matter of policy it had been decided to make no material changes in the statute and that, as far as he knew, the Committee had made only two or three changes which he believed were noncontroversial. Professor Kennedy stated that Professor Riesenfeld regarded exclusion of creditors whose claims are not provable as originally proposed in Rule 1.3(c) quite controversial. /Committee approval of this particular proposal was rescinded on Thursday, February 24th. See discussion at p. 10 supra./

Judge Gignoux moved to strike Rule 1.3.1(c) in its entirety as read by Professor Kennedy, or any other version. Professor Riesenfeld moved that Rule 1.3.1(b) and (c) be recommitted to the Subcommittee and reported to the full Committee by mail as expeditously as possible. After considerable discussion, the motion was seconded and carried 5 to 4.

Professor Seligson suggested that those who voted for recommittal should write to the Reporter expressing their views regarding changes to be made. The Chairman felt that this should be done.

Agenda Item 4 - Proposed Bankruptcy Rule 1.5.1 - Reference

(a) Original Reference

Professor Kennedy called the Committee's attention to the fact that Rule 1.5.1 consists of two parts: (a) Original Reference and (b) Transfer or Revocation of Reference. He stated the significant thing he wanted to call to the Committee's attention is that the draft does not recognize that the judges can otherwise provide by local rule, but that provision is made in subdivision (b) for a transfer or revocation of a reference, and this is considerably more restrictive of the role of judges than § 22 of the Act now contemplates.

After discussion it was the sense of the Committee that subdivision (a) be amended by deleting the terminology "and shall transmit two copies of the petition to the referee." This matter would be covered in another rule. Judge Gignoux stated this subdivision should go in the Administrative Section.

Judge Snedecor moved that Rule 1.5.1(a) be approved as amended. The motion was seconded and carried.

The Committee approved Mr. Treister's suggestion that a Note be added to this subdivision stating: "There is a practice in some districts of referring cases concurrently and nothing in this rule would change this practice."

(b) Transfer or Revocation of Reference

Professor Kennedy stated that the first sentence of Rule 1.5.1(b) was the same as § 22b of the Act.

Judge Herzog objected to the second sentence. Judge Gignoux suggested that "district" be stricken from the sentence. The Committee approved this change. Mr. Nachman suggested the deletion of the last six words of the sentence, "to whom it has been referred." Judge Gignoux suggested "and may act himself or refer the matter to another referee in the district" should be added after "referee" in the last sentence. Professor Riesenfeld asked that "refer" be changed to "designate" in the language suggested by Judge Gignoux. After considerable discussion Professor Seligson moved that Rule 1.5.1(b) as revised by Judge Gignoux with modifications

suggested by Judge Herzog, be approved with the final drafting to be accomplished by the Reporter. The motion was seconded and carried. The draft, subject to further revision, reads as follows:

"(b) Transfer or Revocation of Reference.

The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another. Whenever the office of a referee is vacant or its occupant is temporarily absent or disqualified to act, or whenever the expeditious transaction of the business of the court may require, the judge may withdraw a case in whole or in part from a referee. Thereupon he may act himself or may designate a referee to act."

It was the sense of the Committee that the Reporter draft a rule embodying the substance of § 43c of the Bankruptcy Act following the first part of the first sentence. This rule should also include § 43a and 40d(2) of the Bankruptcy Act and should be drafted in language as close to the statute as possible. It should also incorporate a privision making retired referees eligible for assignment wherever they are needed.

Bankruptcy Rule 1.2 - Voluntary Petition

At this point, attention was turned to Rules 1.2 and 1.1. After considerable discussion, it was the sense of the Committee that Rule 1.2 should be amended to read substantially like Rule 1.3. Mr. Covey moved that three copies of the petition be required in all cases. The motion was seconded and carried. The revised rule reads as follows:

"A voluntary petition shall conform substantially to Official Form No. 1. It shall be filed in triplicate, unless additional copies are required by local rule."

Bankruptcy Rule 1.1 - Commencement of Bankruptcy Case

After discussion a motion was made to approve this rule as presented, with the provision that a Note stating "See Bankruptcy Rule 5.1" be added. The motion was seconded and carried. The rule so approved reads:

"A bankruptcy case is commenced by filing a petition with the court."

Agenda Item 5 - Proposed Bankruptcy Rule 1.8 - Responsive Pleading; Burden of Proof

(a) Time for Answer

Professor Kennedy stated that Rule 1.8 is concerned with responsive pleading and the burden of proof. He also stated that he was suggesting that "Rules 6 through 12 of the Federal Rules of Civil Procedure" be inserted as the subject of the second sentence.

After discussion Judge Whitehurst stated that "alleged" should be inserted before "partner" in the second sentence. Judge Herzog stated that "alleged bankrupt" is outdated by the definition of bankrupt in the Act. Professor Kennedy stated that the Bankruptcy Act sometimes uses "alleged."

In response to an inquiry why "alleged" should be inserted before "partner," Judge Whitehurst supplied the following answer: "Suppose a petition is filed on the part of the partnership and one of the partners says, 'I am no partner. I am an employee.' If a man says he is not a general partner, the issue has to be determined."

Professor Seligson stated that he was disturbed about the man who is not a general partner and pleads to the petition. He inquired what provision in the statute gives him this right. Mr. Treister stated that if he does not answer, he admits that he is a partner. Professor Seligson inquired whether a rule would clarify this situation. Professor Shanker stated that Federal Rules 6 to 12 give this right to anyone who wishes to state a difference of his position. Professor Kennedy suggested that perhaps it could be stated like this: "The alleged bankrupt in an involuntary petition or, in the case of a petition against a partnership under Rule 1.3 or 1.4(b)...."

After considerable discussion relating to rules, Judge Gignoux stated that a set of rules for adversary proceedings in bankruptcy will have to be drafted incorporating all of the Federal Rules of Civil Procedure which should be applied. After Part I of these rules is completed, to avoid a great deal of duplication, there should be a provision that, except as otherwise provided in Part I, upon the filing of an involuntary petition the rules relating to adversary proceedings in Part VII shall apply. Professor Kennedy answered in the affirmative, but said a provision covering the partner will have to be provided.

Judge Herzog and Mr. Nachman stated there should be a requirement that an application for an extension be made within 10 days of service. Professor Seligson stated that a determination should first be made regarding whether a bankrupt should be required to answer within a definite period of time, or whether discretion to extend should be vested in the court. Judge Whitehurst stated the answer should be filed within such time as the court shall allow prior to adjudication. Professor Seligson inquired whether the referee should be given the power to extend the time.

Professor Shanker informed the Committee that the new proposed draft of Rules of Civil Procedure now being considered by the Supreme Court deals with appeal. He stated that comparable problems have been encountered with respect to appeal times -- whether, after judgment has been entered, it shall be within the discretion of the court to grant an extension of the appeal time. The conclusion was that even though there would be a requirement to file within 30 days, the court could extend the appeal time to an outer limit of 60 to 90 days for good cause shown. He further stated it has to be assumed that judicial officers will act properly.

Mr. Treister stated there was not a great deal of confidence shown in the bankruptcy courts when present § 39c of the Act was enacted. Mr. Nachman stated the reason for this legislation was to eliminate inconsistencies. The language in § 39c is concerned with any order in a bankruptcy proceeding, not just with an order of adjudication. He further stated there should be something in the rules making it clear that although word has not been received that an order has been entered, the time starts running. Judge Gignoux stated that he has always felt that § 39c is harsh, and that it is outrageous for an attorney to be barred from seeking review because he did not receive notice of an order being entered.

Professor Seligson inquired why there could not be a provision to separate this matter in two parts, (1) the extension of time for the filing and service of an answer, and (2) the reopening on a default. He further inquired why the following terminology or something similar could not be used, "Filing an answer shall be within 10 days or such further time as the court may allow upon application made before the expiration of whatever the period is."

Professor Seligson moved that, coupled with Mr. Nachman's motion, a rule provide, as does Rule 55c, that for good cause shown the court may set aside an entry of a court order and, if a judgment by default has been entered, it may be likewise set aside in accordance with Rule 60b. Mr. Nachman seconded the motion and it was carried. Judge Whitehurst stated that he had voted for this provision; however, he wanted to point out that the court should be able to extend the time for filing an answer anytime before the order of adjudication is entered.

After further discussion, Judge Whitehurst suggested that after "general partner" "or alleged general partner" should be inserted. This was approved by the Committee.

Judge Gignoux felt that perhaps a sentence should be added stating that "The service of the motion permitted under Rule 12 shall extend this period of time as provided in that rule." Professor Shanker stated that general use of the word motion would be more appropriate than tying it to Rule 12. Judge Herzog suggested as an alternative sentence in connection with the period of time in which to answer: "A motion addressed to the petition made within the 10-day period shall extend the time to answer for an additional 10 days after an entry of an order disposing of the motion."

Mr. Treister stated a Note was needed explaining the general applicability of Rule 7.12 when special reference is made to Federal Rule 12.

This final draft was approved by the Committee:

> "(a) Time for Answer. The alleged bankrupt in an involuntary petition or, in the case of a petition against a partnership under subdivision (b) or (c) of Rule 1.4, any general partner or alleged general partner not joining in the petition shall serve and file his answer or a motion permitted by Rule 12 of the Federal Rules of Civil Procedure within 10 days of the service of the summons and petition or within such further time as the court may allow on motion filed within such 10-day period."

(b) Defense of Solvency to First Act

Professor Kennedy stated that this subdivision undertakes to deal with the burden of proof.

Judge Gignoux stated he thought that the burden of proof is substantive. Professor Kennedy stated that it was his understanding the burden of proof is procedural.

After discussion, the Committee approved Rule 1.8(b).

(c) Burden of Proving Insolvency

Professor Kennedy stated that this subdivision (c) goes beyond the present § 3d of the Act, which is the source of this provision, by adopting a sanction recognized in Federal Rule of Civil Procedure 37(b)(2)(i). He informed the Committee, in answer to Professor Riesenfeld's inquiry, that the intention here is to adopt the rule of the cases that creditors who file involuntary petitions simply paraphrasing the language of § 3a(1), (2), or all of them, without specifying such facts as dates, names, and other circumstances, are insufficient. He further informed the Committee that a sentence has been added as a safeguard against the abusive use of this subdivision for the purpose of enabling a petitioner to discover whether the alleged bankrupt has committed an act of bankruptcy.

Mr. Treister suggested that there is arguably no sufficient difference between an involuntary bankruptcy and other kinds of civil actions to justify a difference in the availability of discovery proceedings in the two proceedings. If, for example, discovery is available to the plaintiff who alleges a violation of the anti-trust laws in general terms, he wondered why petitioning creditors who allege a preference in statutory terms should be denied the full use of the wide discovery procedure generally available under the Federal Rules, with a right to amend and a relation back of the amendment to the date of the original petition. Professor Kennedy inquired whether he felt that only a general reference to the discovery rules would be needed rather than a specific provision dealing with discovery under an involuntary petition. Mr. Treister replied that the bankruptcy system has a couple of discovery rules which are better than the Federal Rules of Civil Procedure and he would not want to give them up. He inquired whether a counterpart to § 3d of the Act was needed. He was of the opinion that a § 21a examination, in addition to the Federal Rules of Civil Procedure's discovery provisions, cover the whole ground and that a special rule is not needed. Judge Herzog stated that § 21a could not be used inasmuch as this provision is for the purpose of discovering an act of bankruptcy.

Professor Shanker inquired whether the penalty for filing petitions in bad faith should not be left to suits of malicous prosecution and the power of the court to take action against an attorney for filing a claim without any basis therefor. He stated his original feeling, when he first read the proposal, was, "What would this do that the Federal Rules could not do better?" Mr. Treister felt that one respect where the bankruptcy procedure is better is that the examination is not before a notary or a court reporter, but in the court.

Professor Kennedy stated that he supposed the crux of the whole matter was whether there is something special about filing a petition in bankruptcy as distinguished from other kinds of civil proceedings. If an involuntary petition is filed and the effort to discover an act of bankruptcy fails, a great deal of damage has been done to the man.

Judge Whitehurst stated that he understood that § 21a can be used prior to adjudication after an involuntary petition had been filed.

Professor Seligson inquired of Mr. Treister whether he felt subdivision (c) should be eliminated? Mr. Treister stated that in the adversary rules there should be a discovery rule that is as broad as all of the discovery rules of the Federal Rules of Civil Procedure, which should be made applicable to involuntary petitions, plus a rule like § 21a of the Bankruptcy Act. If these were combined, he thought subdivision (c) would not be needed

Professor Seligson stated that he would vote for the elimination of (c) if it was understood that all of the discovery procedures as well as § 21a of the Act would apply and would be available to the petitioning creditors.

Judge Herzog stated he would like to take a vote to see whether, in the future, an act may be alleged in the language of the statute as in an ordinary complaint or whether an involuntary petition is a little different and that allegations of an act of bankruptcy have to be in detail and specific. He stated that he was opposed to Mr. Treister's suggestion.

Mr. Nachman stated that he was disturbed by the suggestion that there is no need for any part of (c) because this meant the deletion of the last sentence of the proposal; that this sentence goes to the heart of what the Committee had been discussing; that he was opposed to general, loose pleading in involuntary petitions in bankruptcy; that since the last sentence, as drafted, was permissive, the court may

protect the alleged bankrupt in the exercise of its discretion; that without this safeguard there is danger of encouraging the filing of indefinite and vague involuntary petitions. Somewhere the rules of court should protect an alleged bankrupt from the use of discovery to discover that an act has been committed. This protection, he believed, would not interfere with anybody's rights.

At the Friday morning session, Professor Kennedy stated that he had in mind drafting a general rule along the lines discussed in the previous session, which would say:

> "Except as otherwise provided in the rules in Part I, the rules in Part VII (or the Rules of Civil Procedure) apply to an involuntary petition and proceedings thereon through adjudication or dismissal."

He informed the Committee that in the rule that deals with the involuntary petition, it might be well to have a subdivision entitled "Particularity of Allegations," which might read:

> "The specific facts constituting an act of bankruptcy shall be alleged with particularity, including the date when it was committed, the name of each transferee when a transfer is alleged, and other pertinent circumstances identifying the transaction or occurrence."

He noted that Judge Snedecor was of the opinion that an official form creating or imposing this kind of requirement should not be relied on. He further advised the Committee that he had in mind putting a rule in Part VII stating that Rules 26 through 37 of the Federal Rules of Civil Procedure apply in adversary proceedings and a rule which would be an adaptation of § 21a of the Act making it clear that an examination before the court may be had and that after a petition is filed, the court may, upon application of any officer, bankrupt, or creditor, require any designated person to appear before the court. He stated that with a rule like this, the question might arise whether a sentence would be needed imposing the kind of safeguard that Mr. Nachman had discussed at the previous session, namely, that set out in the last sentence of proposed Rule 1.8(c): "The court may nevertheless protect the alleged bankrupt from a use of this subdivision for the purpose of enabling a petitioner to discover whether an act of bankruptcy has been committed."

Bankruptcy Rule 1.8.1 - Amendment of Papers

Professor Kennedy stated that with respect to the amendment problem which Professor Riesenfeld had referred to at the last session, VIZ., the relation-back of amendments, proposed Rule 1.8.1(b) provides:

> "(b) Involuntary Petitions. Amendments of involuntary petitions shall be governed by Bankruptcy Rule 7.15."

Professor Kennedy pointed out that proposed Rule 7.15 would be an adaptation of Federal Rule of Civil Procedure 15 on amended and supplemental pleadings. Subdivision (c) of that rule provides for relation-back of an amendment "whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."

Rule 7.15 would read as follows: "Rule 15 of the Federal Rules of Civil Procedure apply in adversary proceedings, except as follows:

> "(a) If a pleading is one to which no responsive pleading is permitted, a party may amend, as a matter of course, only within so many days after service."

Professor Kennedy stated there is a 20-day provision in Federal Rule 15 but it would probably be changed to 15 days for this rule.

> "(b) A party shall plead in response to the amended pleading within the time remaining for response to the original pleading or within 15 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders."

Judge Forman asked whether this set of proposals seemed to the Committee to present a feasible approach to the problems that the Committee had been discussing in connection with the proposed Rule 1.8(c). There was a consensus that the Reporter should prepare drafts carrying out his ideas, which should be distributed to the Committee with a request for early Committee attention and comment.

Agenda Item No. 10 - Proposed Bankruptcy Rule 7.1 - Scope of Rules in Part VII

Professor Kennedy called the Committee's attention to the numbering of the rules in Part VII which is correlated to the numbering of the Federal Rules. He further called their attention to the fact that there is no Rule 7.2, only a Note.

Mr. Treister questioned whether Rule 1.9(b), referred to in subdivision (a), was applicable. It was determined that it was not and was deleted. Judge Gignoux stated that Rule 1.5.1(b) should be in the Administrative Section. Professor Kennedy stated that he would keep this suggestion in mind.

Professor Riesenfeld objected to the words "obtain a money judgment." He stated the terminology should be "recover money or property." After discussion, this suggestion was adopted by the Committee. Mr. Treister stated that since there was some question as to the rule regarding restraining orders, a question mark should be placed there until some further study could be made.

After extensive discussion regarding adversary proceedings instituted to obtain authority to sell property free of liens, Mr. Treister suggested that perhaps most of the questions involved in this problem could be eliminated if "extent" was inserted before "of a lien," in the seventh line of subdivision (a).

Judge Gignoux stated that "in a bankruptcy case" should be added at the end of subdivision (b).

After further discussion, these amendments were approved. The proposed rule as amended reads:

> "(a) Applicability in Adversary Proceedings. The rules of this Part VII govern the procedure in a bankruptcy case or any part thereof before a referee, or before a judge acting therein pursuant to Rule 1.5.1(b), when a proceeding is instituted by a party to recover money or property, determine the validity, priority, or extent of a lien or other interest in property, object to a bankrupt's claim to exemptions or to a trustee's report setting them apart, object to or revoke a discharge, or obtain a restraining order or injunction. Such a proceeding shall be known as an adversary proceeding.

"(b) Applicability in Other Contested Matters. The court may direct that one or more of the rules in Part VII shall govern procedure in other contested matters in a bankruptcy case."

Professor Kennedy informed the Committee that a new paragraph would be drafted which would cover matters not governed by (a) or (b).

The Chairman asked whether the Committee felt the Note should be amended any further than to change a reference at the end of the first paragraph from "501" to "50n." Mr. Nachman stated that "in Part VII" should be inserted in the second sentence after "rules." Professor Riesenfeld stated there should be a sentence in the second paragraph indicating that "sale free and clear of liens" would be covered by another rule. Professor Kennedy indicated that a reference would be made in the Note indicating places where other contested proceedings are dealt with.

After discussion, Rule 7.1(a) and (b), the drafting of a new paragraph, and the changes in the Note were approved by the Committee.

At the Saturday session, Professor Kennedy read the following draft, which may be made a part of subdivision (b) or may be placed in Part IX containing General Rules:

"When the bankruptcy rules do not otherwise proscribe the procedure for determining an application for relief against a party in a bankruptcy case or any part thereof before a referee (or a judge acting pursuant to Rule 1.5.1(b)), notice of hearing shall be afforded such party in accordance with the practice heretofore followed in courts of bankruptcy or as provided by local rules, but the referee may direct that one or more of the rules in Part VII shall govern the procedure in any such proceeding."

An additional sentence may be added: "Notice of such direction shall be served at such time and in such manner as to avoid material or substantial prejudice to any party."

Agenda Item II - Proposed Bankruptcy Rule 7.3 - Commencement of Adversary Proceedings

Professor Kennedy advised the Committee that a Note here would refer to Rule 5.1 indicating where papers are filed after reference.

After discussion, Judge Snedecor moved that an adversary proceeding be commenced by an appropriate pleading setting forth the relief sought. Judge Gignoux seconded. The motion did not carry.

After further discussion, Judge Herzog moved that Rule 7.3 be approved as presented. The motion was seconded and carried.

Agenda Item 12 - Proposed Bankruptcy Rule 7.4 - Process

This being a new proposal, Professor Kennedy read the rule in its entirety. The Committee then discussed each subdivision.

(a) Summons and Notice of Trial: Issuance and Form

Judge Gignoux suggested that the words "clerk" and "or an employee" be stricken from the first sentence and that the main clause of the sentence should be amended to read "the referee shall cause to be issued" or words to that effect. Mr. Treister suggested that "already" be inserted in line three before "a person not" to conform with the Note. He also stated that it might be advisable to have one rule covering commencement of an adversary proceeding against persons who are and persons who are not parties to the bankruptcy case in that the differences between the two are so slight. Professor Kennedy stated that this idea had been incorporated in an earlier draft, but the Subcommittee did not feel the need for a summons when a person is already a party in a case.

After considerable discussion relating to notice of appearance and service, Mr. Treister suggested that a Note be added to Rule 9.10 stating that an attorney who files a pleading or any paper on his letterhead shall be deemed to have filed a notice of appearance.

After further discussion Professor Kennedy read the draft of Rule 7.4(a) as amended:

> "(a) Summons and Notice of Trial: Issuance and Form. Upon the commencement of an adversary proceeding and the setting of a date for trial pursuant to Bankruptcy Rule 7.40, the referee shall cause to be issued a summons and notice of trial. The summons and notice shall conform substantially to Official Form No. 6B."

Mr. Treister suggested an additional subdivision be added to Rule 7.4 regarding service on an attorney. After considerable discussion, Mr. Treister withdrew his suggestion.

Judge Snedecor moved that Rule 7.4(a) as amended be approved. The motion was seconded and carried.

Bankruptcy Form No. 6B.

Form No. 6B was brought to the attention of the Committee and Judge Gignoux recommended that the signature line of the notice be amended to read,

".....

Referee

_____

By"

Judge Herzog stated that "Seal of the Court" should be stricken as the bankruptcy court has no seal. It was also suggested that a Note be added to take care of the contingency when the judge acts as referee. Judge Whitehurst stated there should be a rule which would give the referee's clerk the same authority that is given to the clerk's deputy. He further stated that if this was done, many of the referee's problems would be solved. The Committee was in accord with regard to these changes.

Bankruptcy Rule 9.20 - Definitions

In discussion this section, several Committee members stated that clarification was needed in the definitions. It was the consensus of the Committee that Rule 9.20 should be deferred for the present.

(b) Same: Service Pursuant to Federal Rule of Civil Procedure 4.

There was considerable discussion relating to the manner of service and the age of the server. It was suggested that Federal Rule of Civil Procedure 4(d), (e) and (i) should be applied and that these words should be added to subdivision (b): "Personal service may be made by anyone not under the age of 18 years." Professor Riesenfeld stated that "process" was more appropriate than "a summons and complaint."

Proposed Rule 7.4(b) was amended to read as follows:

> "(b) Same: Service Pursuant to Federal Rule of Civil Procedure 4. Service of the summons, complaint, and notice may be made as provided in Rule 4(d), (e), and (i) of the Federal Rules of Civil Procedure for the service of process. Personal service may be made by any person not less that 18 years of age who is not a party."

A motion was made to adopt Rule 7.4(b) as amended. The motion was seconded and carried.

(c) Same: Service by Mail

Judge Gignoux requested that "clerk" and "an employee of the referee" be deleted from the second sentence of the proposed subdivision (c), since a rule will be drafted to give the referee's clerk the authority now enjoyed by the deputy clerk of the clerk of court. Judge Whitehurst suggested the deletion of all the second sentence except the last six words, "and shall be made as follows."

Professor Seligson raised the question when service by mail occurs and pointed out that a signed receipt does not establish when the summons was mailed. Professor Kennedy suggested the addition of the following sentence to (c): "Service by mail is complete upon mailing." This sentence is now found in Federal Rule of Civil Procedure 5(b). Professor Seligson was troubled by the word "complete" in that it contradicts the need for a signed receipt. Judge Herzog pointed out that the word "complete" was used only for the purpose of computing time, and Mr. Treister suggested as a second sentence of the subdivision the following: "For the computation of time to respond, service by mail is complete by mailing." Professor Kennedy suggested the following as a sentence appropriate for insertion either in Rule 7.6 or 7.12(a):

> "The time to respond to any paper, including a complaint, served by mail shall be computed from the date of mailing."

After extended discussion, Rule 4(c) was amended to read as follows:

> "(c) Same: Service by Mail. Service may also be made by any form of mail requiring a signed receipt and shall be made as follows:"

As so amended, Rule 4(c) was approved on motion duly seconded and carried.

NOTE: Rule 7.4(c) was 7.4(d) in the draft as distributed by Professor Kennedy. The original 7.4(c) having been deleted, the subsequent subdivisions were relettered.

(d) Same: Time

After considering this proposal, Mr. Treister suggested the following amendment to the first sentence: "A summons shall be personally served or deposited in the mail within 5 days of its issuance."

After discussion the Committee deferred action on Rule 7.4(d).

(e) Same: Territorial Limits

Professor Seligson inquired whether, as a question of policy, the Committee should take up the matter of the initiation of an adversary proceeding beyond the 100-mile limit of the State.

Mr. Treister inquired whether third-party practice is applicable to bankruptcy. He agreed that this rule cannot decide the jurisdictional question, but if there is no jurisdiction, why have a rule which contemplates this practice?

Professor Kennedy stated that this kind of question came up quite frequently and that it was very difficult to conceive application sometimes, but that the Committee should not assume that it is impossible or inconceivable. He further stated that his assumption is that under the language proposed, a third party can be reached across the state line if there is a third-party complaint.

Professor Joslin stated, as a matter of policy, the Committee should adhere to the limitations under the Federal Rules but he believed the Committee would have the power to extend the limitation farther.

Professor Seligson moved that this question be resolved to give the bankruptcy courts the power to exercise jurisdiction over persons served within 100 miles of the place of pendency of any adversary proceeding. The motion was seconded and carried.

In discussing the second sentence of proposed Rule 7.4(e), Mr. Treister suggested "by mail" be deleted.

Judge Snedecor moved that the Committee approve the adoption of a rule that would cover nationwide service. This motion was seconded and carried. This motion was understood to apply to the second sentence only.

(f) Same: Proof

Professor Kennedy stated that when proof of service was discussed during the first reading of this subdivision, there seemed to be a feeling that the proposal should say that when service is made by mail, the proof should include the signed receipt but that the case of a man's refusal of all mail or of certified and registered mail might also be covered. Mr. Treister stated this question could be resolved by eliminating "signed." He suggested the incorporation of the following terminology into the second sentence: "include the signed receipt or evidence that receipt was refused."

After discussion a motion was made to approve the revised proposal. The motion was seconded and carried.

Rule 7.4(f) as amended reads:

> "(f) Same: Proof. Service shall be proved as provided in Federal Rule of Civil Procedure 4(g). When service is made by mail, the proof shall include the signed receipt or evidence that receipt was refused."

(g) Amendment

Professor Kennedy stated that this subdivision was concerned with the problem of errors.

After discussion, Judge Herzog moved that the Committee approve Rule 7.4(g) as presented. The motion was seconded and carried.

Agenda Item 13 - Proposed Bankruptcy Rule 7.5 - Service and Filing of Pleadings and Other Papers

After considerable discussion regarding changes in this proposal, Professor Kennedy presented a tentative draft which reads as follows:

> "Subdivision (a), (b), (c), and (d) of Rule 5 of the Federal Rules of Civil Procedure apply in adversary procedures."

He noted that Federal Rule 5(a) deals with service when required, including service of every order required by its terms to be served, every pleading subsequent to the original complaint, every written motion other than one which may be heard ex parte, et cetera. Federal Rule 5(b) provides for service upon an attorney by mail. Federal Rule 5(c) deals with numerous defendants and Federal Rule 5(d) concerns filing.

The second sentence will read:

> "The filing of pleadings and other papers with the courts as required by this Rule shall comply with Bankruptcy Rule 5.1."

A motion was made that the Committee approve this draft. The motion was seconded and carried.

Bankruptcy Rule 7.40 - Setting of Date for Trial

Professor Kennedy presented proposed Rule 7.40 to the Committee.

After discussion, Mr. Treister suggested the deletion of "thereof" in the third line. Judge Herzog suggested the deletion of the last sentence, and Judge Snedecor moved the approval of the deletion of the second sentence from the draft. The motion was seconded and carried.

A further motion was made by Mr. Treister that a new sentence be added to the effect that the matters to be set for trial should be set at the earliest date practicable on the court's calendar but not too soon to permit the pleading process to be finished before the trial date.

Professor Kennedy called the Committee's attention to the explanation for the 25-day limitation in the Note. After discussion it was decided that a reference to "the average case" would be included in the Note. It was the sense of the Committee that the Note covered the problem. A motion was made to approve the Note. It was seconded and carried.

The Committee decided upon the dates of Wednesday, June 15, 1966, through Saturday noon, June 18, 1966, for the next meeting.

There being no further business, the meeting was adjourned at 12:30 p.m.