MINUTES OF THE JUNE 1968 MEETING OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

The sixteenth meeting of the Advisory Committee on Bankruptcy Rules convened in the Supreme Court Building on Wednesday, June 5, 1968, at 10:00 a.m., and adjourned on Friday, June 7, at 3:00 p.m. The following members were present during the sessions:

Honorable Phillip Forman, Chairman
Edwin L. Covey
Asa S. Herzog
G. Stanley Joslin (absent on Wednesday)
Norman H. Nachman
Charles Seligson
Estes Snedecor (absent on Thursday and Friday)
George M. Treister
Elmore Whitehurst
Frank R. Kennedy, Reporter
Morris Shanker, Assistant to the Reporter

Judge Forman welcomed the members and guests and expressed regret that three committee members could not be present: Judge Shelbourne was unable to attend the meeting because of a slight injury suffered in a fall; Judge Gignoux was unable to attend because of illness; and Professor Riesenfeld was in New Zealand on a visiting professorship. Others attending all or part of the sessions were Judge Albert B. Maris, Chairman of the Standing Committee on Rules of Practice and Procedure; Professor James Wm. Moore, member of the Standing Committee; and, Mr. Royal E. Jackson, Chief of the Bankruptcy Division of the Administrative Office of the United States Courts.

The first order of business was a discussion of the Reporter's Memorandum of May 22, 1968. All rules mentioned therein were offered for final review before placement on the shelf. Of this group, the following rules were discussed and amended:

Rule 9.30 - SECRET, CONFIDENTIAL, SCANDALOUS, OR DEFAMATORY MATTER.

Deletion of the first "the" in line 9 was ordered.

Rule 5.13 - SELECTION AND QUALIFICATION OF TRUSTEE.

Professor Kennedy stated that it had occurred to him in connection with Rule 5.13 that subdivision (d) on eligibility of trustees might include the disqualification of referees, both full-time and part-time, to act as trustees and receivers, which disqualification was added to the Bankruptcy Act in 1966. He noted that there is a rule dealing with disqualification of referees for nepotism and influence (Rule 5.23), and inquired whether the Committee wanted a rule dealing with disqualification of referees. This could be done by a new rule or by incorporating all of some of section 39b of the Bankruptcy Act into Rule 5.23.

Mr. Treister proposed that Rule 5.23 be amended to embrace the last sentence of section 39b of the Bankruptcy Act. Mr. Nachman questioned whether it was best to do this by rule or leave it up to Congress to take care of, but he suggested that if it was decided the Committee should take care of it, all of section 39b should be covered. Professor Seligson felt that this is an area that is obscure, that the Committee should not wait for Congress but should take care of it, and that all of section 39b should be incorporated. Mr. Treister then agreed to Professor Seligson's suggestion with one reservation, via, whether the prohibition of purchasing assets of the estate is of the same quality as the other limitations. There was a consensus in the Committee that the Reporter should take care of incorporating section 39b in its entirety, subject to investigation by the Reporter as to the propriety of Mr. Treister's suggestion.

DRAFTS FOR THE SHELF

At this point, Professor Kennedy stated that minor changes in the Rules which he had mentioned in his Memorandum of May 22, 1968, would be considered acceptable unless questioned by a member of the Committee. This was approved.

Rule 2.22 - VOTING AT CREDITORS' MEETINGS.

Professor Riesenfeld's suggestion at a prior meeting concerning an amendment to cover the strange cases in which an assignee for the benefit of creditors was regarded as a creditor for the purposes of the Bankruptcy Act was discussed. It was the opinion of the Committee that this matter should be left to the courts.

Rule 5.11 - APPOINTMENT AND DUTIES OF RECEIVERS.

Professor Kennedy explained that this rule was taken from the shelf for the purpose of adding clause (3) of subdivision (a), authorizing appointment of a receiver to represent the estate in an action, adversary proceeding, or contested matter when no trustee has qualified or the interest of the trustee is adverse to that of the estate. He was asked to make an investigation of the law with respect to other alternatives than the appointment of a receiver for that purpose and also to see what he could find out about the payment of the receiver who acts in that situation. This inquiry related to what should go into the Note regarding Rule 5.11(a)(3). He had not been able to find any relevant precedent regarding these matters. The consensus was that at the appropriate time the Committee should suggest an amendment of the Act to provide for this special kind of receiver.

(i) Duties. The Reporter explained that this was a new subdivision of the rule, imposing certain duties on the receiver. The first sentence of Rule 5.11(i) was discussed and edited to read: "A receiver shall perform the duties prescribed in Rule 5.13.1 to the extent it is appropriate, except as the court may otherwise direct." General discussion was held on the terms "forthwith" and "within 10 days". Another term of "as soon as practicable and not less than 5 days" was suggested. A motion by Mr. Nachman that "forthwith" be used to begin the second sentence was seconded and carried by a vote of 6 to 1. The phrase "books, papers, and property" was discussed and changed to "records and property". Mr. Nachman moved that the second sentence of the subdivision read as follows: "Forthwith after qualification of the trustee, the receiver shall, unless otherwise ordered, turn over to the trustee all the records and property of the estate in his possession or subject to his control as receiver." The motion

was seconded. Mr. Treister then questioned the phrase "subject to his control as receiver", but by informal vote the members preferred to leave the phrase in. The sentence was approved as stated. The last sentence was discussed and the consensus was that it should read: "The receiver shall file his final report and account within 30 days after qualification of the trustee unless the court otherwise directs." The sentence was approved by vote. Judge Snedecor suggested that the Note should indicate that the report should be filed at the first meeting. It was agreed that the Reporter should incorporate this suggestion.

Rule 5.33 - DELEGATION OF FUNCTIONS TO REFEREES' ASSISTANTS.

Professor Kennedy explained that Rule 5.33 was taken off the shelf because of a question raised as to the phrase, "employed by him". After consideration, the rule was amended to read: "The referee may delegate to an assistant employed in his office or with the approval of the chief judge, any person employed in the office of the clerk of the district court any ministerial function which these rules require or authorize to be performed by the court, the bankruptcy judge, or the referee." While both the "court" and the "bankruptcy judge" include the "referee," the rules authorize or require each of these three to act in certain situations, and this rule is intended to permit delegation of ministerial functions, whether initially assigned by the rules to the "court," the "bankruptcy judge," or the "referee".

The title decided upon was "Delegation of Ministerial Functions". The text of the rule and title were approved as stated above.

Rules 2.9, 2.10, 5.3, 5.3.1, 5.11.1, 5.12, 5.13, 5.13.1, 5.18.5, 5.30, 5.49, 5.69, 6.1, 6.18, 7.25, 9.2.1, 9.28, and 9.30 were ordered to the shelf. Rules 2.1, 2.22, 3.20, 4.12, 4.14, 5.11, 5.33, and 7.1 were adopted with changes as stated in the Reporter's Memorandum of May 22, 1968, and as amended during this meeting.

Rule 2.10 - NOTICES TO CREDITORS.

Judge Snedecor stated that in Rule 2.1(c), the Committee had provided that the referee may not order a final meeting. Although the realizable proceeds may not exceed $250 in small cases, the trustee may be allowed up to $150, and there may be an allowance to an attorney. To harmonize Rules 2.1(c) and 2.10(a)(8) so that the court would not have to send a notice of hearing on allowances in small cases, Judge Snedecor suggested that the latter provision be amended. Mr. Treister said he agreed with the purpose of Judge Snedecor's suggestion but not with his manner of accomplishment. He stated that if there was going to be a final meeting, the Committee should not propose to abolish the notice of the hearing on small fees; it is only where there is not to be a final meeting that the notice should be abolished. He proposed that subsection (8) have an exception to it. Judge Herzog also pointed out that there is no compensation to a creditors' committee in straight bankruptcy, and therefore the reference to such compensation in subsection (8) should be deleted. It was agreed that this should come out until Chapter X is covered by the rule.

The last sentence of subdivision (a) was amended to read: "The notice of a hearing on an application for compensation shall specify the applicant and the amount he seeks, except when no final meeting of creditors is ordered under Rule 2.1(c)." The Reporter was asked to review and edit this sentence. Rule 2.10 was then ordered to the shelf.

Rule 5.38 - RECORDING AND REPORTING OF PROCEEDINGS.

Professor Kennedy stated that his Memorandum of May 23, 1968, on Rule 5.38 explained its background.

(a) Recording of Proceedings. Mr. Nachman's suggestion to strike in line 5 "the bankrupt or other" and "if he" and insert therefor "any" and

"who", respectively, was adopted. Line 5 thus read, "imposed on any person who asserts a". Discussion was also held as to whether all proceedings should be recorded, as provided in the first sentence, particularly when it might be felt that no recording was necessary. It was unanimously decided that "all" should remain. After discussion of the last sentence and upon motion of Professor Seligson, the last sentence was revised to read as follows: "Such a recording of a proceeding, when properly certified, shall be admissible evidence to establish the record of the proceeding."

(b) Transcripts of Proceedings. Professor Kennedy read a revised text of this subdivision and explained that the reference to stenographer in line 22 would be clarified in the Note to indicate that the stenographer could be just a typist. The Committee agreed that the first sentence of subdivision (b) should read as follows: "Upon the request of any person, including the United States, who has agreed to pay the fee therefor, or of the bankruptcy judge, the stenographer shall promptly transcribe the original records of the requested parts of a proceeding, and deliver the transcript certified by him to the person making the request." Several suggestions were made and discussed for the remaining portion of subdivision (b) beginning at line 19, but the Committee decided not to make any further changes.

Rule 9.60 - RELIEF FROM JUDGMENT OR ORDER.

Professor Kennedy reviewed his Memorandum of May 23, 1968, written pursuant to a request from the Committee at the February 1968 meeting for an analysis of the case law dealing with administrative orders and for a draft of a rule which would integrate that case law with that developed in the cases that have considered the applicability of Rule 60 of the Federal Rules of Civil Procedure.

Professor Kennedy said that the words "without a contest" in line 4 are subject to interpretation. He had in mind not only ex parte orders but defaults in proceedings against parties. Discussion then ensued on defaults in adversary proceedings. Suggested language for this rule was to the effect

that Rule 60 of the Federal Rules of Civil Procedure should apply in bankruptcy cases except that relief from an order in other than adversary proceedings as defined in these rules should not be subject to the one-year limitation of Rule 60(b).

Professor Kennedy made further reference to cases cited in his Memorandum of May 23, 1968. He felt that the most serious difficulty would arise when the court makes a ruling early in a bankruptcy case, and two years or so later in the same case a different ruling is made on the same kind of issue. This suggested to him a need for reconsideration of the first ruling, but Mr. Treister thought that Civil Rule 60(b) would cover this as long as there was notice of an opportunity for a contest. There were views differing from those expressed by Mr. Treister, and later Mr. Treister reconsidered and suggested that Civil Rule 60 be made applicable in bankruptcy cases with two qualifications: (1) reopening of estates and (2) reconsideration of allowed claims. Professor Seligson inquired whether, if such a rule was adopted, one would still be able to obtain any relief from a referee's order after a year had passed. Professor Kennedy stated that after a year has gone by, laches would not have to be asserted to defeat relief for most of the reasons recognized in Civil Rule 60(b). The Chairman asked for a vote as to how many members were in agreement with the policy stated by Mr. Treister, and the vote was 4 in agreement to 3 opposing. Mr. Nachman suggested that the Reporter redraft the rule showing both versions for consideration at the next meeting. It was so ordered.

Rule 6.2 - DUTY OF TRUSTEE OR RECEIVER TO GIVE NOTICE OF BANKRUPTCY TO THIRD PERSONS.

Professor Kennedy referred to his Memorandum of May 26, 1968, concerning Rule 6.2.

(a) Real Property. He pointed out the difficulty under §21g of the Act in identifying the county in which the record of the original proceedings is kept. He stated that the draft rule did not require the trustee or the receiver to file in the county where the case was pending and relieved him of the necessity of filing in such county whether there was exempt real estate or not.

The Committee discussed the use of the word "file" in the second line and throughout the subdivision. It was the consensus that "file" should be used and a notation placed in the Note to state what it covers. Further discussion was had on the word "file", however, and in view of Judge Maris' suggestion that the rule should coincide with the statute, the Committee approved Mr. Nachman's motion to change the word in line 2 from "file" to "record". After a discussion of the phrase, "or an interest therein", in line 6, it was decided that the clause on lines 5 and 6 wherein the phrase appeared should read, " . . . where the bankrupt has an interest in real property . . . ."

Subdivision (a) was approved to read as follows:

"A receiver shall as soon as possible after his qualification record a certified copy of the petition without schedules or of the order of adjudication in the office where transfers of real estate are recorded in every county where the bankrupt has an interest in real property not exempt from execution, except the county in which is kept the record of the original proceedings in the case. If a copy of the petition or order of adjudication has not previously been recorded in an office where recordation is required by the preceding sentence, the trustee shall as soon as possible after his qualification, record in every such office a certified copy of the petition without schedules of the order of the adjudication, or of the order approving his bond."

(b) Personal Property. Subdivision (b) was approved as amended in two respects: (1) The word "forthwith" in line 17 should be changed to "as soon as possible after"; and (2) the notice requirement should be excused with respect to exempt personal property.

Rule 5.50 - COMPENSATION OF OFFICERS, ATTORNEYS, ACCOUNTANTS, AND EMPLOYEES.

Professor Kennedy read from his Memorandum of May 28, 1968, dealing with Rule 5.50.

(a) Application for Compensation. After a reading of subdivision (a), Judge Forman asked if there was any suggestion or discussion on this subsection. There was none.

[The meeting adjourned at 4:45 p.m. on Wednesday and resumed on Thursday, June 6, at 9:30 a.m.]

(b) Disclosure of Division [or Sharing] of Compensation by Attorney for Petitioner. Professor Kennedy said that the first question the Committee had to decide was whether a rule should undertake to deal in any way with the compensation of a creditor's attorney if he does not seek compensation from the estate as he is entitled to do under the statute.

Professor Kennedy then reverted to General Order 43, which was discussed at a previous meeting and decided to be unnecessary and which authorizes disallowance to the attorney for petitioning creditors "if it shall appear that the proceedings were instituted in collusion with the bankrupt or were not instituted in good faith." Professor Kennedy asked whether the Committee would like to consider this general order again, and the sentiment appeared to be negative.

Mr. Nachman said he understood the draft of subdivision (b) to present the question whether an attorney who does not expect to get any compensation from the assets of the estate should nevertheless be required to disclose a division of compensation or an agreement therefor. He said he felt subdivision (b) would be easier to understand and work with if worded differently.

Professor Kennedy answered that he had a redraft, which he then read.

Professor Seligson moved that the Committee not attempt to regulate the fee of an attorney who files an involuntary bankruptcy petition if he does not apply for compensation from the estate directly or indirectly. Mr. Treister then restated Professor Seligson's motion as follows: If the attorney for the petitioning creditors has an arrangement for compensation from some source other than the estate, the court should not require him to state the facts as to the arrangement because he is not applying for fees from the bankrupt estate. Professor Seligson's suggestion was carried unanimously.

Professor Seligson made a second motion as follows: "Any attorney who applies for compensation *from the estate must make a full disclosure of* any compensation paid or agreed to be paid to him for services rendered or to be rendered in the case in any capacity whatsoever and the details thereof except where the sharing is with his partners." This motion was seconded and carried.

Professor Seligson continued with a third motion: Every attorney for a bankrupt, whether or not he applies for compensation, shall file a statement with the court on or before the first day set for the first meeting of creditors as to the compensation paid or promised him for services rendered in contemplation of or to be rendered in connection with the bankruptcy case, the source of such compensation, whether he had divided or agreed to divide such compensation with any other person, and the particulars of such division if any was made or agreed to by the attorney. There was no objection to this motion, and it therefore, was adopted. Professor Kennedy made the suggestion that division with a partner should not be required to be disclosed. This the Committee agreed with.

The consensus was that some revisions were needed in (a) and (b). It was decided no more time would be spent on these two subdivisions.

(c) Factors in Allowing Compensation. (1) General. After Professor Kennedy read this subsection, it was adopted without objection or discussion. (2) Trustee, Receiver, or Marshal. This subsection was also adopted without objection or discussion. It was clarified that the term "marshal" meant a "United States marshal". (3) Attorney for Trustee or Receiver. Professor Kennedy read this subsection. Mr. Nachman wanted to know why this subsection was restricted to attorneys for trustees and receivers. He and Mr. Treister agreed that the attorney may have to do some accounting work. Professor Kennedy drew the attention of the members to the first full paragraph of the second page of the Note. Mr. Nachman stated he felt an accountant should do the bookwork. He said "Let lawyers practice law . . . ." Mr. Treister again agreed. It was then proposed by Mr. Nachman that "or Accountant" be inserted in the title of subsection (3) in place of "for Trustee or Receiver" and that in line 40 "or an accountant" replace "for a trustee or receiver". It was adopted as amended.

(d) Restriction on Sharing of Compensation. Professor Kennedy read subdivision (d). He stated "attorney-at-law" was sometimes used, as in line 51, when there was some question as to whether an attorney-at-law or an attorney in fact was meant. He suggested the reference to "at-law" be left out. After some discussion other changes were proposed. Professor Seligson said he and Professor Shanker felt that the first sentence of (d) was too broad in its prohibition. In line 47 it was proposed to delete "not contributing to such services". In line 53, "or associate in his firm" was suggested to follow "with a partner". The clause, "If a person knowingly violates this subdivision," was suggested as an introduction to the first full sentence in line 53 preceding "The court shall", and "him" was suggested to follow "deny". The words, "to an applicant who violates

this subdivision," were then deleted as unnecessary. In line 55 after some hypothetical cases were discussed, it was suggested that "In the event of any other violation, the court may enter any other appropriate order" be added to follow "Section 60d of the Act" for clarification. Lines 56, 57, 58, and 59 were suggested to be deleted. Professor Seligson suggested tabling this portion of the Rule for full Committee comment and decision.

Rule 5.48 - TRUSTEES' AND RECEIVERS' BONDS.

Professor Kennedy turned first to the Memorandum of May 30, 1968, on Rule 5.48, the draft of which he stated carried out the ideas discussed at the last Committee meeting. He stated that the draft was derived largely from Section 50 of the Act. Section 50 also deals with referees' bonds, but this type of bond was abolished at the last meeting.

(a) Qualifying Bonds of Trustees and Receivers. It was moved that the words "or by giving such other security as may be approved by the court," be added in line 8 following "his official duties". The motion was carried. Mr. Nachman suggested that "every trustee and receiver shall" be inserted in line 2 after "as provided hereinafter" and that these same words be deleted from lines 5 and 6.

(b) (Blanket) Bonds for Several Trustees (and Receivers). Professor Kennedy stated that his draft of subdivision (b) was meant to authorize bonds to cover more than one trustee and more than one receiver. It was then suggested that the draft refer to a bond for a trustee or receiver in more than one case. Professor Kennedy drew the attention of the members to Rule 5.17, entitled Limitation on Appointment of Receivers and Trustees, which had already been adopted by the Committee. There was no disagreement with a suggested amendment *adding "by a trustee or receiver in more than one case or" in line 13 after "official duties".*

(c) Bond Excused in No-Asset and Nominal Asset Cases. After reading this subdivision, Professor Kennedy suggested "Certain" in place of "No-Asset and Nominal Asset" in the title. Judge Whitehurst stated his feeling that whenever there is property, there should be a bond. After several suggestions were made and discussed, Professor Kennedy read the subdivision as amended for a vote: "Bond Excused in Certain Cases. The court may excuse a trustee (or receiver) from filing a bond when there appears to be no property in the estate other than that which can be claimed as exempt or there appears to be no need for such bond" (underlined portion inserted by Professor Kennedy). Mr. Treister questioned why the bond could not be dispensed with in respect to a receiver who is not the receiver of property. Professor Seligson stated the questions being raised could be handled in the Note. Judge Whitehurst put a motion to accept the subdivision as read and to leave it up to the referee to handle cases involving contrary issues. This was seconded. Mr. Nachman stated he approved the subdivision as written with the inclusion of "or when the receiver will not be a custodian of property" at the end of line 19. Judge Herzog then moved to adopt the subdivision as phrased by Mr. Nachman. This motion was carried.

(d) Qualification by Filing Acceptance. Professor Kennedy stated he had drafted subdivision (d) to incorporate the essence of what the National Bankruptcy Conference had approved. Mr. Treister moved the subdivision be approved, deleting the bracketed language in lines 25 and 26. The motion was seconded and adopted.

(e) Failure to Qualify. Professor Kennedy stated that he felt subdivision (e) was unnecessary because it is obvious that if a trustee or receiver fails to file a bond he has declined his appointment or election. No discussion was heard. As a result, the subdivision was deleted.

(f) (Court's Determination of) Amount of Bond and (Number and Qualifications of) Sureties to be Required. Professor Kennedy stated before the reading of subdivision (f) that it was meant to incorporate section 50d, e, f, and g of the Bankruptcy Act. After reading (f), Professor Kennedy stated it another way: "The court shall determine the amount of the bond and sufficiency of the surety for each bond filed under this rule." Judge Forman then stated it could be shown in the Note that the court may increase or decrease the amount. Professor Kennedy stated that was what he had had in mind. It was moved and adopted that the subdivision read as last proposed, with the title, "Amount of Bond and Sufficiency of Surety."

(g) Proceedings on Bonds. After Professor Kennedy read this subdivision, the question was asked of Professor Moore if it had ever come up under the Federal Rules what statute of limitations applies to a proceeding on a surety's bond. Professor Moore answered, "No, there isn't any period of time. The court fixes its own." This subdivision was adopted as written.

(h) Evidentiary Effect of Copy of Order Approving Trustee's or Receiver's Bond. Professor Kennedy read this subdivision. Mr. Treister questioned the use of "conclusive". Professor Kennedy stated that unless "conclusive" is used with "evidence", the rule would not say anything. He stated the certified copy was certainly evidence without this rule. The question on the draft of the subdivision, with a period after "qualification" in line 48 and deletion of the parenthetical phrase, was put to a vote. The motion to approve was carried.

Rule 9.41 - CONTEMPT PROCEEDINGS.

Professor Kennedy directed the attention of the members to his memorandum of November 12, 1967, on the subject of contempt proceedings. He noted that the Committee had precedents for making a different allocation of functions between the referee and the judge from that prescribed by the Bankruptcy Act. After he had read the draft of the rule, Judge Whitehurst stated that the referee should be able to punish contempt by a fine.

Professor Joslin suggested a re-affirmation by the Committee of the policy position that the referee may hold a person to be in criminal contempt. It was then suggested that the bankruptcy judge should be granted as much contempt power as possible, keeping in mind the procedural safeguards applicable to criminal contempt. It was moved that the referee should have some power over contempt. This was carried. It was then asked whether the referee's power of contempt should be limited to acts committed in the courtroom. Professor Seligson stated that the power should be limited to preserving order in the court. Mr. Nachman stated that if the referee is only able to keep order (quiet) in the courtroom, he hasn't any authority at all. He felt the referee should have authority to require a witness to answer a question. It was then moved that the referee should have the power to punish, as provided in subsection (a)(2), "misbehave[ior] during a hearing (or trial) or so near (the place) thereof as to obstruct its conduct." Professor Joslin spoke against this motion, and on a vote the motion was lost. It wa~ then moved that subdivision (a) be adopted in its entirety. The vote of 4 to 3 was not convincing enough to resolve the differences among members. It was then suggested by Mr. Covey the four parts of (a) should be voted on separately. Professor Seligson wanted to give the referee power in civil and criminal cases. It was moved that the extent of punishment should be a fine (not a commitment fine). This motion was seconded and carried. It was then moved by Judge Herzog that the fine should not exceed $250. This, too, was carried. Professor Kennedy stated there would be additional drafting on this rule.

Rule 8.1 - APPEALS FROM JUDGMENTS (AND ORDERS) OF REFEREES TO DISTRICT JUDGES.

(a) Filing the Notice of Appeal. Professor Kennedy stated that subdivision (a) was very close to Rule 3(a) of the Federal Rules of Appellate Procedure. Professor Seligson asked if the rule meant that the decision as to whether the appeal lies is the district court's, that of the referee. Professor Kennedy said he was under that assumption. There were no other questions with this subdivision.

(b) When Appeal May Be Taken. Professor Kennedy stated that this subdivision was an adaption of Rule 4(a) of the Federal Rules of Appellate Procedure. Mr. Treister stated that if the Committee did not keep the time limits of Rules 7.52 and 7.59 within a ten-day period, there would be some anomalies. Judge Herzog asked about docketing. Professor Kennedy answered that Rule 5.3 already dealt with docketing. No other points were brought up regarding this subdivision. No motions were made.

(c) Applicability of Federal Rules of Appellate Procedure. Professor Kennedy read (c). Mr. Treister asked about 28 U.S.C. §1914, referred to on lines 53-54, which allows the Judicial Conference to fix fees. It was found that Section 40c(3) of the Bankruptcy Act confers the same authority; therefore, it was substituted. Professor Shanker said this set of rules makes a uniform approach whereas before numerous sets of appellate rules were in effect. He felt oral argument could be excused. Mr. Treister felt oral argument should be only by invitation after the appropriate briefs had been filed and if the Court wished oral argument. Professor Kennedy asked if an additional provision regarding oral argument was needed.

[At this point it was decided that the next meeting would be held on Wednesday, Thursday, Friday, and Saturday, December 4, 5, 6, and 7, 1968.]

It was then moved by Professor Seligson that the Committee adhere to the suggested methods in respect to oral argument and briefs. This motion was seconded and carried.

Judge Herzog agreed with Mr. Nachman that lines 48 and 49 of Rule 8.1(c) were confusing. For better understanding Professor Kennedy then proposed placing the portion of line 49 beginning "the Federal Rules of Appellate" in lines 50 and 51 before "Rules 2, 3(b)" etc., in line 48. Judge Herzog asked if subsection (1) through (5) from lines 52 through 69 were the "provisions of this subdivision" mentioned in line 47. Professor Kennedy answered "yes".

Mr. Nachman stated this wording would be easy for an appellate attorney. However, there would be some attorneys who would find this wording difficult. He then said it should be made simpler. He suggested leaving it up to the reporter to reword this subsection.

Professor Kennedy said he wanted to add another clause to the subdivision. He said there was a problem as to the timeliness of a petition for rehearing. Rule 40(a) of the Appellate Rules allows 14 days for a rehearing unless the time is shortened or enlarged by a court order. A motion was made to add the following as clause (b): "A petition for rehearing must be filed within 10 days after entry of a judgment by the district judge unless the time is shortened or enlarged by order". This motion was unanimously adopted.

Professor Kennedy stated this rule is only for applying the Federal Rules of Appellate Procedure to an appeal to the district judge. Thus this motion did not change Rule 40 with respect to rehearings in the court of appeals. It was then suggested that "Notwithstanding Appellate Rule 40(a)" should precede the provision set out in (6).

Professor Kennedy brought up the Federal Rules of Appellate Procedure which are not mentioned in subdivision (c). Rule 41 deals with Mandate. It was decided this was not necessary. Rule 45 deals with the Duties of Clerks of the courts of appeals. Subdivision (a) of Rule 45 sets out General Provisions. This, too, was decided not to be of necessity in subdivision (c) Professor Kennedy then went on to subdivisions (b), (c), and (d) of Rule 45 of the Federal Rules of Appellate Procedure. It was decided

these three subdivisions should be adopted without change or in a modified form. It was also decided that when a notice of appeal is filed in the district court, the referee should get a copy of the notice. He then turned to Rule 35, entitled Determination of Causes by the Court in Banc, which was included in the list of rules mentioned in 8.1(c). Mr. Treister felt Rule 35 was of little value and should be excluded from this rule. Mr. Nachman disagreed. He felt this rule should be included. When this issue was put to a vote, the Committee split 4-to-3, and as with other matters generating close votes during this meeting, the question will be reconsidered.

(d) Meanings of Words Used in Federal Rules of Appellate Procedure. Professor Kennedy stated that in order to carry out the idea here, the Committee had to make substitutions, as indicated in subdivision (d). When he read clause (1), he stated there should be just one set of quotation marks around "adversary proceeding or contested matter". As an example of use of the words "Civil case" in an applicable rule, within the contemplation of this subdivision (d), he mentioned Rule 4, Appeal as of Right--When Taken, of the Federal Rules of Appellate Procedure. Mr. Nachman felt the opening paragraph of (d) could be better written for easier understanding of the purpose of the subdivision. Nothing definite was decided and no motions were made.

(e) Scope of Judge's Authority on Review. Judge Herzog asked if Professor Kennedy wanted "Review" in the title, and it was agreed that "Appeal" should be substituted. Mr. Treister suggested "District" be placed before "Judge's" in the title. Professor Kennedy stated the Federal Rules of Civil Procedure in 54(a) state that an appealable order is a judgment, whereas the Federal Rules of Appellate Procedure refer to judgments and orders. The Civil Rules thus eliminates the necessity for saying both judgments and orders by making an appealable order a judgment. Professor Joslin asked if the Committee hadn't already shelved lines 91 and 92. Professor Kennedy stated none of this is on the shelf. This section was once put on the shelf when the Committee was revising the general orders.

Attention was once again directed to subdivision (b) by Professor Kennedy. He wanted to make certain the members were aware of every portion which was passed on. He then read Rule 3(d) of the Federal Rules of Appellate Procedure, entitled Service of the Notice of Appeal. He then asked if the Committee would like for him to redraft Appellate Rule 3(d) to incorporate "referee" for "clerk". Professor Seligson felt that some of the rules in Appellate Rules 25-40 of the Appellate Rules must not be applicable to appeals under this rule. Professor Kennedy read just the titles of these Appellate Rules. Mr. Treister said all the Rules were necessary because one followed the other for comprehensibility.

Professor Kennedy brought up the question of whether the Committee should tamper with the Appellate Rules as applied to appeals in bankruptcy cases. He stated that the Committee really could not do so without consulting the Appellate Rules Committee. Professor Seligson said he felt the Bankruptcy Committee should not bother the Appellate Rules. Professor Kennedy stated there was another rule of the Appellate Rules which dealt with bankruptcy, that being Rule 6, Appeals by Allowance in Bankruptcy Proceedings. Professor Kennedy then stated he felt there should be no recommendations made as of then.

Professor Kennedy read the second full paragraph of Rule 4(a) which concerned Professor Shanker. This paragraph deals with the running of the time for filing a notice of appeal to the court of appeals. Professor Shanker said that the draft of the Bankruptcy Rules did not incorporate Rule 4 of the Appellate Rules. Professor Kennedy stated that the draft of Rule 8.1 has its own provision in reference to this problem. Professor Kennedy then stated that if there was a motion for a rehearing of a district court judge's ruling on a referee's order, there is not any rule for determination of the running of the time for filing a notice of appeal. Professor Shanker asked whether, if the motion for a rehearing was granted, the time does not stop running. It was then said that if a rule is needed for the filing of a motion for a rehearing, then there should also be a time limitation rule applicable to the filing of an appeal after such a motion. Professor Kennedy said that if this was the case, he would get in touch with Professor Ward (Reporter for the Appellate Rules Committee). No definite decision was made to this Rule.

RULE 8.20 - APPEAL BOND TO BE GIVEN BY TRUSTEE OR RECEIVER.

Professor Kennedy read his Memorandum dated June 2, 1968, on appeal bonds. The motion was made by Judge Herzog to require bonds of all parties appealing to the referee. Professor Kennedy stated that the effect of the motion would be to make Rule 7 of the Federal Rules of Appellate Procedure applicable to appeals from the referee to the district judge. By such incorporation of Rule 7, an appeal bond would be in the amount of $250 unless the court would otherwise fix an amount. The motion was carried. Professor Seligson objected to the motion. The motion was then made that the court should excuse the trustee from posting the cost bond where it appeared that the assets of the estate were sufficient to pay the bond. It was specified that this motion only dealt with the asset case. It was carried with Professor Seligson objecting. In the case where there were no assets, Professor Joslin moved that the trustee be required to furnish cost bonds on appeal. This motion was carried with Professor Seligson objecting.

The subject of supersedeas bonds was brought up. Professor Kennedy stated he thought there was a conflict between Rule 8(b) of the Federal Rules of Appellate Procedure and Rule 62(d) of the Federal Rules of Civil Procedure. Rule 8(b) makes a supersedeas bond a matter of discretion because it is put in permissive terms, whereas Rule 62(d) states that a stay of proceedings is not available unless there is a supersedeas bond.

Mr. Treister moved to make the general rules applicable to supersedeas bonds apply to the trustee or receiver at all appeal stations. It was carried. Professor Seligson was against this motion.

Professor Kennedy drew the attention of the members to Rule 24 of the Federal Rules of Appellate Procedure, entitled Proceedings in Forma Pauperis. In view of the determination already made, there were to be no additional provisions in Rule 8.20.

RULE 7.62 - STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT.

Professor Kennedy read from his Memorandum dated June 3, 1968, on Bankruptcy Rule 7.62, and the draft of the rule. Upon reading he changed "pending" to "pendency" in line 7. It was then decided that Rule 9.7, entitled Procedure in Contested Matters not Otherwise Provided For, makes a lot of 7.62 inapplicable. Professor Kennedy then stated the issue to be whether the Committee thought the 10-day automatic stay that Civil Rule 62(a) provides for should not operate either as to an order for the turnover of property or the turnover of books and papers, unless otherwise ordered by the court. If this qualification is not set out, there will be an automatic stay. Mr. Nachman wanted to know what was wrong with an automatic 10-day stay. There ensued a discussion of where the 10-day stay did have an effect on the value of the property. Therefore, Professor Joslin suggested the assets be recovered as soon as possible on the posting of a bond. Professor Kennedy then stated that the Note might clarify that a turnover order is a kind of injunction. Mr. Nachman stated he would not want to rely on the discretion of the court and that he felt the 10-day stay would have no adverse effect at all on the full administration of the case.

Professor Kennedy stated that the question was: is the 10-day stay to apply to turnover orders and ordinary money judgments in a referee's court? The turnover is for specific property. Professor Joslin moved there not be a 10-day automatic stay. The motion was lost. Then Professor Seligson made the motion that there be a 10-day stay. If the turnover is for money, interest will accrue during the 10-day stay. The motion was carried. It was asked, for the record, if there was any objection to the proposition that on money judgments no execution should issue in accordance with Civil Rule 62 until the expiration of 10 days. There was none.

[The meeting adjourned at 3:00.]