MINUTES OF THE JUNE 1966 MEETING OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

The tenth meeting of the Advisory Committee on Bankruptcy Rules convened in the Supreme Court Building on June 15, 1966, at 10:00 a.m. and adjourned at 1:00 p.m. on Saturday, June 18. The following members were present during the sessions:

Phillip Forman, Chairman
Edward L. Covey
Edward T. Gignoux
Asa S. Herzog
G. Stanley Joslin
Norman H. Nachman
Stefan 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; and Royal E. Jackson of the Administrative Office.

Several members were unable to attend all sessions, but the attendance record is preserved in the Secretary's Deskbook.

Judge Forman called the meeting to order and welcomed the guests and members. The minutes of the February meeting were accepted and approved.

Judge Forman stated the 30 agenda items in the Deskbook would not be considered in consecutive order but in the order which Professor Kennedy thought the most advantageous to a speedy disposition of the business before the Committee.

Agenda Item 1 - Disclosure of Bankrupt's Taxpayer Identification Number.

Professor Kennedy briefly summed up the developments through correspondence between Mr. Harold E. Snyder, Director of the Collection Division of the Internal Revenue Service, and himself since the February meeting. He stated that Mr. Snyder had written that he hoped his request for the taxpayer's identification number on petitions and schedules of bankrupts could be furnished in advance of the promulgation of the rules. Mr. Snyder further

stated that some referees have furnished the I.R.S. with a copy of the Statement of Affairs of the bankrupt at the same time the notice to creditors is given, and he would appreciate it if the Advisory Committee would modify the Rules accordingly. In addition, he would like to be furnished with the following reports:

Form 20, Order Approving Appointment of Trustee or Appointment of Trustee by Referee;
Form 25, Order that no Trustee be Appointed;
Form 40, Report of Trustee in No Asset Case; and
Trustee's First, Interim, and Final Account Reports.

Judge Snedecor stated that years ago a provision in the Chandler Act had required the referees to furnish the I.R.S. with copies of many of the forms in bankruptcy and that the Service had been so swamped with papers that it finally requested the provision be removed. It was pointed out that the material now requested is many times more than what was required to be sent at that time. Mr. Covey stated that if the Committee did comply with the request the Service would probably save only one out of twenty-five papers. The Committee decided that the Reporter should reply to Mr. Snyder's letter of June 3, 1966, advising him that it concurs with Professor Kennedy's letter of May 13 that it is unwise to proceed with recommendations for promulgation of partial rules changes, but that he might contact Mr. Royal Jackson, Chief of the Division of Bankruptcy of the Administrative Office, as Mr. Jackson has agreed to cooperate with the I.R.S. in encouraging the referees to furnish available information to the Service.

Agenda Item 2 - Revised Drafts of Rules Considered at February 1966 Meeting.

The memorandum in the Deskbook listed 10 Rules and 1 Form which had been redrafted as a result of suggestions made at the February meeting and which had been distributed to the members for comment prior to this meeting.

Proposed Bankruptcy Rule 1.1 - Commencement of Bankruptcy Case.

Professor Kennedy stated he had not received any comments to the redraft of March 10, 1966, and presumed it had Committee approval. This was confirmed.

Proposed Bankruptcy Rule 1.2 - Voluntary Petition.

No suggestions were made for the redraft of March 10, 1966. The Committee approved the rule as drafted.

Proposed Bankruptcy Rule 1.3 - Involuntary Petition.

(a) Form and Number

The Committee approved this subdivision as drafted.

(b) Who May File

This subdivision was discussed at the February meeting (Feb. 1966 Min., pp. 8-9), and the Reporter was directed to make a study of whether section 59b of the Bankruptcy Act was within the rule-making power of the Court. A background memorandum, prepared by Professor Kennedy, of a general nature on the line between substance and procedure was submitted to Judge Forman, but a general distribution was not made to the members because it was primarily of an historical nature. Professor Kennedy stated that doubts as to the validity and propriety of undertaking to prescribe by rule the number and qualifications of petitioners were expressed at the February meeting, and he had prepared a memorandum entitled Qualifications of Petitioners, dated June 10, 1966 (Item 5, Deskbook) covering subdivisions (b) and (c). Professor Kennedy read the memorandum and stated that the language and substance of these subdivisions were incorporated from section 59b and e of the Bankruptcy Act. He concluded that the Committee had three alternatives: approval of subdivisions (b) and (c) as originally drafted; approval of an approach proposed in a draft of subdivision (b) attached to the memorandum of June 10, 1966, which was an attempt to separate out the procedural elements of section 59b for the purposes of the rule; and relegation of the subject matter of the number and qualifications of petitioners to Congress. He asked for the views of the members.

Mr. Treister's view was that the Committee does have the rule-making power and that it may be better to stick with the original draft of subdivisions (b) and (c), recognizing them to be on the verge of the rule-making power, or to leave the entire matter to Congress. He felt that as to the alternative newly presented the same arguments could prevail that it goes too far; for instance, when you say what kinds of claims petitioning creditors must have, you are saying which creditors may be excluded from the count or how many creditors you need. Judge Herzog said he agreed with Professor Kennedy, since historically the requirements regarding petitioners have been a matter for Congress. He preferred subdivision (b) of the June 10 memorandum.

Professor Kennedy stated that it is difficult to say categorically whether the Committee does or does not have the power. He had come to the conclusion that the number of petitioners and aggregate amount of their claims should be left to Congress as a matter of policy which it is better able to handle. Professor Seligson, however, thought the Committee should meet the issue squarely and decide whether it has the power to recommend a rule and, if so,

adopt the rule as drafted. Mr. Treister thought the number of creditors should not be changed but that if in the future the Committee should want to change the number, it should state that it feels it is within the rule-making power of the Committee to do so. He did not think this change should be undertaken until it is clear that the statute has been repealed, and that the Advisory Committee's rule is the only rule on the subject.

Judge Snedecor moved that subdivisions (b) and (c) of Rule 1.3 on Involuntary Petition be deleted and a new paragraph (b) be inserted therefor, which would refer generally to the provisions of the Act, subject to the discretion of the Reporter in drafting. The motion was duly acted upon and carried by a vote of 7 to 3.

Professor Riesenfeld felt there should be an explanatory note telling why it was left this way; and that the Committee had made no judgment that it is beyond the rule-making power to deal with number and amounts of claims of petitioners. Mr. Treister stated that if there is a note it should state that number and qualifications of creditors is a matter of practice and procedure but because of the historically sensitive nature of the matter, the Committee did not change it. He felt that rather than say the Committee doubts it has the power, it should not say anything. Further discussion ensued, and Referee Herzog suggested the discussion on the note be postponed. Judge Maris felt that if the Committee decides to have a note declaring that the rule-making power extends to number and claims of petitioners, it should be backed with legal reasoning why this subject matter is procedural. Judge Whitehurst moved that there not be a note unless some member of the Committee presses for it at a future session. The sense of the Committee was that a note should not be prepared at this time, although the motion did not receive a second. The Chairman stated the matter would be passed unless raised for further discussion before adjournment. [The matter was not reconsidered during the meeting.]

(c) Counting of Creditors

[Deleted. See above.]

(d) Transferor or Transferee of Claim

Professor Kennedy stated that this paragraph was originally a part of General Order 5 and that it had been considered at length at a prior meeting. Discussion was held on the organization of the sentences and the paragraph was changed to read as follows:

> A person who has transferred or acquired a claim for the purpose of instituting bankruptcy proceedings shall not be a qualified petitioner. A petitioning creditor 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 documents evidencing the transfer, and 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.

The Committee adopted the revised paragraph by a majority vote of 8.

(e) Joinder of Petitioners After Filing

Professor Kennedy pointed out that in accordance with Committee action (p. 3, supra) the phrase in the last sentence of subdivision (e), "under subdivision c of this rule," would now have to read "under section 59e of the Bankruptcy Act." Mr. Treister stated that since it was not entirely clear to him that the draft had abolished the requirement of present section 59, that notices should be sent, he suggested the last sentence read as follows: If it appears that there are twelve or more creditors as counted under 59e of the Act, the hearing upon a petition shall be delayed for a reasonable time to afford an opportunity for other creditors to join. Mr. Nachman did not like ever to authorize delay. The possibility of handling the elimination of the notice requirement in a Note was suggested, and Mr. Treister pointed out he had already indicated a willingness to accept that mode of clarifying the purpose of the draft.

The consensus of the Committee was that it favors the treatment which Professor Kennedy outlined for subdivision (e) and that in addition there should be a Note as indicated. Professor Seligson inquired whether the first sentence is any more procedural than a provision prescribing the number of petitioners for an involuntary petition. After discussion, it was generally agreed that the first sentence is procedural.

(f) Particularity of Allegations

[See discussion, p. 32.]

Proposed Bankruptcy Rule 1.5.1 - Reference.

Professor Kennedy felt this rule had general approval as drafted, but noted that Mr. Nachman had inquired about the possibility of allowing judges by local rule to deal with reference. He stated the Committee had discussed this at the February meeting (Feb. 1966 Min., pp. 15-16), and it was the

judgment of the Committee at that time to take out of the law, by this superseding rule, any possibility that judges can adopt a local rule to prevent automatic reference. Professor Kennedy stated he did not know whether Mr. Nachman wanted to reconsider. Mr. Nachman was absent the first day of the meeting and therefore unable to comment.

Judge Whitehurst inquired about the referees who have joint jurisdiction and whether the phrase "a referee" in the second sentence would be restricting. Professor Kennedy stated this had been discussed at the February meeting and a decision was made to take care of it by Note. The word "a" was in the present statute and therefore carried over to the proposed rule. Judge Whitehurst was satisfied.

Judge Snedecor inquired about Chapter X cases, but Professor Kennedy stated the present discussion and rules were directed only to straight bankruptcy; that when the Committee reaches Chapter X it will then decide what modification is necessary.

Professor Joslin inquired about "except such as are required by the Act," as he did not think the phrase was pertinent. Professor Kennedy stated this was inserted to make clear that the Committee was not undertaking to interfere with the Congressional allocation of certain responsibilities to judges. Mr. Treister pointed out that the Committee was going to change the statute on who could transfer cases and he assumed that someday that part of the statute will be repealed. Mr. Treister inferred that the sections of the Act may have to be specified although the phrase is not technically incorrect. Professor Kennedy agreed that it would be better to specify the statutes. Professor Riesenfeld stated that the Committee should not assume that everything will be taken out of the Act that conceivably could be removed. He suggested that in drafting this Committee should follow the Uniform Commercial Code or at least a consistent policy on making cross references. Professor Shanker stated he thought it to be true that the Uniform Commercial Code often uses cross references in the text but not invariably. He did not feel the governing policy should be rigidly set, as sometimes it would be desirable to put references in the text while at other times it would be more desirable to put them in the Note.

Professor Kennedy again stated he thought it would be best to specify the sections in this particular rule but that if the list gets to be very long he would be inclined to put it in the Note. Judge Gignoux suggested this be left to the Reporter and the Committee so agreed.

Proposed Bankruptcy Rule 1.8 - Responsive Pleading; Burden of Proof.

(a) Time for Answer

Mr. Nachman had written Professor Kennedy suggesting a change in punctuation which Professor Kennedy thought would change the meaning of the rule. Mr. Nachman wanted to delete the commas around the phrase "or alleged general partner" and insert a comma after the word "petition" in the following line. Professor Kennedy stated that since the intention was to refer to a general partner not joining the petition as well as an alleged general partner not joining the petition, deletion of the commas would be confusing. Discussion ensued and the members were not in accord as to the proper punctuation. Judge Forman suggested this be left to Professors Kennedy and Shanker.

(b) Defense of Solvency to First Act

Professor Kennedy stated his memorandum of June 9, 1966 on the subject, Burden of Proof, was not circulated to the members prior to the meeting. He stated that he had told Judge Gignoux at the last meeting that the burden of proof was clearly procedural except in the Erie v. Tompkins setting and that he acknowledges burden of proof, being outcome determinative, to be a matter of substance within the Erie v. Tompkins context, as outlined in the first sentence of his memorandum. He stated that the proposed rule concerns the burden of proof on the issue of solvency when a petition is filed alleging the first act of bankruptcy. In answer to a question of whether this is a codification, he stated that it is very close to what the Act states in section 3c. The purpose of the proposed subdivision (b) is to determine the order and the quantum of proof, and generally these matters are regarded as procedural. Professor Kennedy stated his conclusion is that while Congress determines what is a defense, the allocation of the burden of proving is a matter appropriate for the Court to deal with in the rules. Judge Gignoux said he could not get away from the feeling that the section that shifts burden of proof is not within the scope of the statute which authorizes the Committee to enact rules governing the practice and procedure of the Bankruptcy Act.

Judge Whitehurst asked whether a Note could say that the first two sentences of section 3c of the Act will stand and subdivision (b) is a substitute for the third sentence. Professor Kennedy did not feel it was necessary as he thinks the Act is going to have to be amended at a later date but the rules should not tell Congress what to do to the Bankruptcy Act. He thought it would be more appropriate to state this in a separate document to be submitted to a committee of Congress at some later date. Judge Maris stated that except by making

reference to the fact that this provision was drawn from the Act, Judge Whitehurst's suggestion could not be accomplished in a Note. Such a reference would not be saying any of the Act was repealed.

Judge Snedecor inquired whether Bankruptcy Act § 3d, providing for a shift of the burden of proof, will be left as it is. Professor Kennedy stated that § 3d will be superseded by sanctions for not submitting to examination or discovery, and that this matter had been discussed at length at the February meeting.

Professor Kennedy stated he had one other reservation as to the rule because in any event it may be necessary to retain much of present § 3c, thus causing duplication in the Act and the Rule. There would be two provisions, one in the statute and one in the Bankruptcy Rules dealing with this. It might be better to leave § 3c intact rather than take out the burden-of-proof provision and to have a whole subdivision on that in the Rules. Even though the Committee might be persuaded that burden of proof is procedural, is there really sufficient justification for extracting the procedural aspect of § 3c and putting it in a rule? Mr. Treister thought the burden of proof is within the rule-making power, and he preferred to have it in the rules rather than leave it in the statute as he feels the statute is poorly drafted. Professor Joslin moved adoption of subdivision (b) as drafted. The motion was seconded and carried by a vote of 6 to 1.

Professor Riesenfeld inquired whether Professor Kennedy, in preparing the rules, had come across any other provision on burden of proof and, if so, whether they could all be dealt with in one rule. Professor Kennedy stated that he would keep this possibility in mind.

Judge Gignoux inquired whether the caption of the subdivision would be changed, as suggested by Mr. Nachman, and Professor Kennedy stated it would read, "Defense of Solvency to First Act of Bankruptcy," inasmuch as the word "Act" has two possible references. Professor Riesenfeld asked whether the words "Burden of Proof" should not be eliminated in the caption of the rule since they might be negating that the burden of proof is on the bankrupt as to other affirmative defenses. Judge Forman stated the words "Burden of Proof" in the title would be either eliminated or restricted.

Agenda Item 5 - Disqualification of Petitioners: The Estoppel Rule.

At the February 1966 meeting the draft of a rule on disqualification of petitioners was considered but the Committee was skeptical of the policy of the proposals as well as the power of the Court to promulgate them and suggested the Reporter give further study to this rule (Feb. 1966 Min., pp. 12-13). Professor Kennedy prepared a memorandum, dated June 8, 1966, on the subject and presented an alternative draft of a subdivision entitled "Petitioner's

Conduct as a Defense" (p. 4 of the memorandum), which covered the same subject matter as the provisions originally considered as subdivisions (b) and (c) of Rule 1.3.1. Professor Kennedy read the memorandum and then invited comments.

Judge Whitehurst favored a general recognition that if a petitioner consented without knowledge of facts sufficient to bar a discharge, he should be able to initiate proceedings under the Bankruptcy Act. He also discussed the case of creditors who had participated in an assignment for the benefit of creditors and who might be barred notwithstanding subsequent discovery by them of a preference made by the assignor. He thought the creditors should be permitted to file an involuntary petition so that a trustee could recover a voidable preference for the benefit of all. Mr. Treister said he understood the point made by Judge Whitehurst and thought it had merit, but clause (3) of the proposed new draft on Petitioner's Conduct as a Defense did not recognize it.

Professor Riesenfeld was troubled by the use of "unless" in clause (3) as he thought it was much too positive in its implication. He did not want to codify the holdings in the rule that a transferee cannot allege a voidable transfer as an act of bankruptcy. Professor Kennedy said he did not think the implication was so overriding and he did want to leave open the question of whether a transferee is or may be barred from invoking the transfer as an act of bankruptcy. Professor Riesenfeld said he would like to see it redrafted so as not to get the positive implication of the "unless" sentence. He further pointed out that the revised draft as well as the original one would get the Committee into all kinds of trouble.

Mr. Treister returned to Judge Whitehurst's point re relieving a petitioning creditor from an estoppel and stated that the reason he was willing to go along with the first version was that the rule follows the existing law closely, but if it is proposed to change the existing law then the merits should be fully considered. He did not see why ignorance of every act of bankruptcy should relieve the petitioner from estoppel, and if the Committee intends to change the existing law it should have a much better rule.

Professor Kennedy stated that his first draft of this rule, as shown on page 1 of the memorandum, was an effort to adhere closely to the present law, recognizing that this is an area of the twilight zone. He followed the existing law in the redraft on page 4 of the memorandum insofar as clauses (1) and (2) were concerned but he did not follow it in clause (3) as the cases are split. The sense of the Committee had been clear that it did not like the majority view in those cases, and so in drafting clause (3) he overrode that view and thought he could justify it as a procedurally oriented rule. He stated that the hearing on a petition gets into a collateral issue if a voidable transfer by debtor to the petitioner not alleged as an act of bankruptcy

are allowed to be interposed as a defense. Professor Kennedy pointed out that the draft of subdivision (c) on page 1 relates to the first five acts of bankruptcy whereas the draft of (c) on page 4 relates primarily only to the fourth and fifth acts of bankruptcy. He also stated subdivision (b) on page 1 relates to a transfer not alleged as an act of bankruptcy. Professor Riesenfeld thought that a decision made for (b) would materially affect the decision on (c) and therefore did not think (c) could be considered without consideration of (b). Professor Kennedy, however, said that if the decision not to have (b) was adhered to, it would not affect what is done in (c). Mr. Treister moved to adopt subdivision (c) on page 1 as drafted and to reject subdivision (b). The motion was seconded. Discussion continued.

Judge Gignoux again cautioned the Committee that it is acting under a statute by which Congress gave to the Court authority to prescribe general rules of practice and procedure under the Bankruptcy Act. Practice and procedure means the prescribing of how something is done -- how to go about it. He could not see how a rule that specifies the rights of litigants could be a rule of practice and procedure.

Judge Gignoux stated that before the Committee discussed the language any further he thought it should face up to the fundamental question of whether the right of a person to put another into bankruptcy is a substantive right. If it is, then it is beyond the scope of the Court's rule-making power.

Professor Kennedy stated he did not think the Committee would be enlarging upon substantive rights, or eliminating substantive rights, by the adoption of clause (3) of subdivision (c) on page 4 because anyone who has received a voidable transfer can be a petitioning creditor if he will disgorge the preference or property transferred under all the cases. He thought like reasoning applied to clauses (1) and (2), also on page 4. Professor Riesenfeld again stated his concern about clause (3). He was satisfied with the terminology up to the point of "unless the transfer was alleged as an act of bankruptcy or a part thereof," because he felt this was doing much more than the rule says it is doing. He said he would accept this clause if it were changed to read "if the transfer was not alleged as an act of bankruptcy." Mr. Treister said he agreed with Professor Riesenfeld on clause (3) but for another reason, as he felt leaving this implication open would be opening up the § 59h problem again. Professor Riesenfeld suggested that in place of Mr. Treister's motion he would prefer to have subdivision (c) on page 4 adopted, as he concurred with the terminology of clauses (1) and (2), since they take care of problems in § 59h of the Act; but he would remand clause (3) so that the "unless" clause could be reworked to incorporate subdivision (b) of page 1 as it relates to clause (3).

Professor Seligson suggested that Mr. Treister withdraw his motion until Judge Gignoux's problem could be resolved. Mr.

Treister concurred and his motion was withdrawn. Judge Gignoux then moved that it be the sense of the Committee that the subject matter of estoppel is beyond the scope of the rule-making power conferred upon the Supreme Court by the statute (28 U.S.C. § 2075). The motion was seconded, but lost by a vote of 6 to 4.

Mr. Treister then resubmitted his motion that the Committee adopt the approach of subdivision (c) on page 1 of the June 8 memorandum and eliminate subdivision (b) on page 1. Professor Seligson called for clarification of the term "approach" and Mr. Treister stated he would accept (c) as presently drafted but that some of the members may not want to hold to the precise terminology. Professor Riesenfeld thought the Committee should not positively state what constitutes an estoppel. The difference between Mr. Treister's and his own position was that Mr. Treister wanted to codify the law of estoppel and he wanted only to codify what should not be an estoppel and to leave the court free, beyond that, to develop the law of estoppel. Mr. Treister's motion was restated, seconded, and carried by a vote of 7 to 2. One member was recorded as abstaining.

Consideration was given to Judge Whitehurst's point that in the second sentence of subdivision (c), as approved, he would say: "Notwithstanding the foregoing, . . . or adjustment or settlement without knowledge of facts which would constitute the commission of the first or second act of bankruptcy or would be a bar to the discharge of a debtor in bankruptcy, he may nevertheless act . . . including such assignment or receivership." Judge Whitehurst moved that his terminology be used in lieu of that adopted. The motion was seconded and carried by a vote of 5 to 2.

Proposed Bankruptcy Rule 7.1 - Scope of Rules of Part VII.

Mr. Nachman suggested "any part thereof" in the second line be deleted and Professor Kennedy agreed. Mr. Nachman also suggested the substitution of "obtain" for "recover" in the third line, but this suggestion was not approved. Another modification suggested by Professor Kennedy was a revision of the first sentence to read "The rules . . . govern the procedure in any proceeding in a bankruptcy case before a bankruptcy court instituted by a party to. . . ." Discussion started on the meaning of "bankruptcy court" and reference was made to the Reporter's memorandum entitled "Bankruptcy Court, Its Composition, and Its Business," dated May 30, 1966. Professor Kennedy stated he had a definition of "bankruptcy court" included in the definitions of Rule 9.20. By this definition the term would mean a referee of a court of bankruptcy in which a bankruptcy case is pending, the judge of that court when acting pursuant to section 2a(15) of the Act and certain other sections or in lieu of a referee pursuant to Bankruptcy Rule 5.21 (the rule authorizing withdrawal of a case from the referee), or the referee or judge of a court of ancillary jurisdiction when acting pursuant to Bankruptcy Rule 5.12. Such a definition would simplify references to the court exercising summary jurisdiction.

Judge Gignoux stated the matter is so confusing to most people that he would suggest defining the word "referee." After discussion it was decided to define "bankruptcy judge" as a referee of the court of bankruptcy or a district judge of that court acting in bankruptcy.

Discussion ensued concerning the authority to change the title of "referee" to "bankruptcy judge" for use in the rules of Part VII, Adversary Proceedings. Judge Gignoux felt that if it is decided to call a "referee" a "bankruptcy judge," it should be done for all purposes, not only in the rules but in the statutes. However, Professor Kennedy thought there would be limitations on using "bankruptcy judge" in lieu of "referee." Thus, he thought it could not be done in the rule concerned with review of referees' orders and findings by district judges. Mr. Treister thought "bankruptcy judge" would not work because it would be necessary to equate statutory references to judges and referees, but that if it is used it should be made workable not only for Part VII but for all the rules. Judge Snedecor said the Referees' Association felt it should not push this proposal although, because of the confusion among the laity, the referees prefer to be called "bankruptcy judges." He said the Association feels that some other body should stimulate the change in designation of referees. Professor Riesenfeld said in that context he would like the rule to apply to section 23b cases. At the present time these cases are not heard before a referee and the reason they are not is the prevailing view that referees cannot handle jury trials. If the Committee were to change the designation of referees throughout, he would think the section 23b cases could be given to the new "bankruptcy judge." The question arose whether it is fitting for this Committee to do that even though it is procedural. Professor Kennedy was of the opinion that this matter had previously been discussed and that it had been decided that the Committee would not undertake to confer jurisdiction on referees over plenary proceedings. He was now proposing that "bankruptcy judge" should apply only to Rule 7.1, but that as the Committee moved along it could determine how much further the definition should be applied. Professor Seligson moved adoption of Professor Kennedy's suggestion. The motion was seconded and carried by a vote of 9 to 0.

Professor Kennedy referred to the matter of classifying the hearing on whether the bankrupt had waived his discharge as a contested matter or an adversary proceeding. Mr. Treister had convinced Professor Kennedy that a hearing on waiver should be treated in the same way as a hearing on an objection to discharge, and he did not think any change of language would be necessary as this would be raised on point of creditor. After discussion about a referee serving as a judge and litigant, Mr. Treister said there should be a rule that in every case where an adversary

proceeding arises, where a discharge is objected to, or a waiver of discharge is asserted, a trustee in bankruptcy must be appointed. He thought the phrase "object to or revoke a discharge" was broad enough to cover a waiver, but if not the language should be changed. Professor Shanker agreed with Mr. Treister in philosophy but thought section 14e of the Act imposes the duty on the court to find and declare a waiver, whether or not there is an adversary proceeding. It was agreed there are certain built-in provisions in the Act for nonjudicial duties to be performed by a referee which can not be changed, but in every case where it can relieve him of such functions, the Committee should do so. Professor Seligson moved adoption of Rule 7.1 as modified by the Reporter with the insertion of the words, "or declare a waiver under section 14e," after "revoke a discharge." Professor Riesenfeld said he was worried about the words "obtain, extend, or vacate a restraining order or injunction," as the party may wish only to limit it. Professor Seligson said he would include in his motion that "modify" be substituted for "extend." Professor Riesenfeld also inquired about the difference between "restraining order or injunction." Professor Kennedy stated Federal Rule 45 uses both terms. Professor Seligson pointed out that there is a "stay" which is different from injunction, but it was decided that since it is unknown at the present time what the text of the rule on injunctions will be, the language should remain unchanged for now. It was pointed out that Mr. Treister's problem regarding compulsory appointment of a trustee would have to be dealt with separately.

Professor Joslin suggested that the phrase "in a bankruptcy case" be deleted in the first sentence so as to read:

> The rules of this Part VII govern the procedure in any proceeding before a bankruptcy judge, instituted by a party to recover money ....

Professor Kennedy stated he put the phrase in to emphasize that the proceeding is in a bankruptcy case, not an independent plenary proceeding which is regarded as outside the bankruptcy case. Professor Riesenfeld contended that a referee in bankruptcy might be a proper forum for a plenary action under section 23b, and Mr. Treister stated that if this is so, then the proposed rule covers such plenary suits tried before a referee. Professor Seligson disagreed.

Professor Kennedy stated the revised paragraph would read:

> The rules of this Part VII govern the procedure in any proceeding in a bankruptcy case before a bankruptcy judge, 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 declare a waiver under section 14e of the Act, or obtain, modify, or vacate a restraining order or injunction. Such a proceeding shall be known as an adversary proceeding.

Judge Gignoux suggested the first sentence read: The rules of this Part VII govern the procedure in a bankruptcy case before a bankruptcy judge in any proceeding, instituted by a party .... The rule was approved, and the Reporter was asked to consider further where the phrase "in a proceeding" should go.

Judge Whitehurst inquired about "objections to claims" and was told the matter would be handled in another rule.

Proposed Bankruptcy Rule 7.3 - Commencement of Adversary Proceeding.

The Reporter stated that no one had raised any question as to this rule, and the Committee approved the rule.

Proposed Bankruptcy Rule 7.4 - Process.

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

There was initially no question concerning this subdivision. Judge Whitehurst, during the discussion of the next subdivision, inquired whether in subdivision (a) the date of trial has to be set at the date the summons is issued or could be later set. Professor Kennedy stated that his point was covered in Rule 7.40 but that Rule 7.4(a) is predicated on the assumption that the date of trial is set before issuing the summons. Professor Riesenfeld asked if the word "referee" should not be replaced by "bankruptcy judge." The Committee approved the change.

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

Mr. Nachman suggested that in the caption for this subdivision and in the text of subdivisions (f) and (g) the number of the rule should be moved ahead to read thus: Rule 4 of Federal Rules of Civil Procedure. Professor Kennedy concurred in this suggestion as applied to the text of the subdivisions but thought ellipsis appropriate in the caption. The Committee accepted this recommendation. Professor Kennedy pointed out he had changed the word "and" in the second line of subdivision (b) to read "4(d), (e), or (i)." This was also agreeable.

(c) Same: Service by Mail

Professor Kennedy stated he had made a slight change in the first sentence of the text of subdivision (c) by deleting "and

shall be made." The Committee approved the change.

Mr. Nachman had suggested, by correspondence, a slight change to delete "if he has one" after the word "or." Professor Kennedy agreed to this. The same change is to be made in paragraph (2). The Committee also approved these changes.

The Reporter stated he did not recommend any changes for paragraphs (3), (4), (5), (6), (7), (8), and (9).

(d) Same: Time

Professor Kennedy stated this subdivision was discussed at the February meeting (Feb. 1966 Min., p. 29) and was deferred for disposition until additional work could be completed on Rule 7.40. He stated, however, that the third sentence of the draft had not been previously discussed.

Mr. Treister inquired about the period of 15 days from personal service or 15 days from date of mailing in which to answer. This was discussed in relationship to Form 6B, and Professor Kennedy read the form, which he had amended:

> You are hereby summoned and required to serve upon ....., plaintiff's attorney, whose address is ....., ..., an answer to the complaint which is herewith served upon you, within 15 days after the date of mailing of this summons and notice [or if service is personal: after service of this summons upon you, exclusive of date of service]. (A place was inserted on the left side for the date of mailing, which would be entered by the person sending it out and there would be a postmark.)

Mr. Treister said he could foresee a problem, as the referee is required to state the time of hearing in the notice (Rule 7.40) and the Note accompanying the rule says not to fix the date of hearing in a hurry but to fix it, if possible, so as to make due allowance for time to plead. He thought if the rule were to indicate to the referee what the hearing date is, then the date should appear on the summons. He preferred the rule to tell the referee how to compute that date. After discussion, the Form was adopted to read as revised:

> Form 6B - Summons and Notice (of Trial) of Adversary Proceeding
>
> You are hereby summoned and required to serve upon ....., plaintiff's attorney, whose address is ....., ..., an answer to the complaint which is herewith

served upon you on or before ..... If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

You are hereby notified that trial of the adversary proceeding commenced by this complaint has been set for ....., at .... o'clock .. m., in ....., ...

.....
Bankruptcy Judge

.....
By

.....
Address

Dated: .....

Mr. Treister was not satisfied with the revised form as it did not say the answer should be filed with the court. Professor Kennedy said that in this respect the form follows Form 1 of the Federal Rules of Civil Procedure. Mr. Treister thought there is merit in following the Federal Rules but also thought the man should be told that he has to file with the court and that it should say, "You are hereby summoned and required to file with the court and to serve upon ....." Professor Kennedy said this would require the filing to take place at the same time as service. Professor Seligson suggested, "on or before ....., and to file the answer with the court either before service thereof or within a reasonable time thereafter," following the Federal Rules of Civil Procedure. Mr. Treister said there is reason for the Committee to depart from the Civil Rules, because the bankruptcy problems are different.

Judge Snedecor suggested the words "file with this court" be inserted so that the first line would read: You are hereby summoned and required to file with this court, and to serve upon ....." Professor Riesenfeld suggested the word "adversary" in the second paragraph of the form be stricken and it was so agreed. Mr. Covey questioned whether "Adversary" could come out of the title, but it was decided this should be left in. Professor Kennedy stated he had inserted "(of Trial)" to see if the members thought it was needed. Judge Herzog thought this was known as a Notice of Trial Form, and the Committee decided to leave it in without the parentheses. Judge Herzog also suggested the title should read: Summons and Notice of Trial (Adversary Proceeding). Professor Riesenfeld disagreed with this suggestion, and it was decided that Professor Kennedy should work this out. [For amendment of this form subsequently approved, see p. 24 below.]

[Discussion was concluded on Form 6B and resumed on subdivision (d)].

Mr. Covey suggested the words "and served" in the last line be included and the parentheses removed. This was acceptable. Judge Herzog questioned the phrase, "otherwise completed in accordance with the applicable statute, rule or order," in the third sentence. Professor Kennedy said that generally publication statutes referred to in Rule 4(e) of the Federal Rules of Civil Procedure require several publications, and his draft says that service thereunder is timely if you start within 5 days with the first publication and follow through. Judge Herzog thought service under Federal Rule 4(e) would have to be by order and not by publication. Mr. Treister disagreed and said a court order is not needed to authorize service by publication. Judge Herzog thought Professor Kennedy's draft was indistinct and said he did not think 4(e) was clear either. Professor Kennedy said if his draft were made more specific, it would cut down on some of the options in bankruptcy which are now available in ordinary federal civil proceedings. Judge Herzog withdrew his objections.

[No formal action was taken on this subdivision.]

(e) Territorial Limits of Effective Service

(1) Professor Kennedy stated this is a draft which had not been distributed to the members, and its purpose is to codify a decision made at the February meeting that the rule include the hundred-mile zone in all adversary proceedings, even though Federal Rule 4(f) makes the hundred-mile zone available only in proceedings involving Rules 13(h), 14, and 19. After reading the draft, he stated he did not see the necessity for the words "assigned or" but said they were derived from Federal Rule 4(f). The paragraph was approved as drafted. [For an amendment subsequently approved, see p. 20 below.]

(2) No suggestions were made for change. [For amendment of this paragraph subsequently approved, see p. 20 below.]

(3) Professor Shanker suggested that "adversary proceeding to determine rights in property" should be enlarged to include any adversary proceeding "relating to property." Professor Kennedy thought the suggestion went too far and would involve overruling a good many cases. Professor Riesenfeld did not think there was any difficulty under the existing decisions, and thought the rule should say "in the custody of the court" but not define custody, i.e., should leave it to the court to protect the rights. Professor Riesenfeld moved that the words "or protect" be included after the word "determine" in line three of paragraph (3). This point was fully discussed, and Mr. Treister said he would like to decide what a good rule is and then to draft one regardless of present case law. Professor Kennedy said he intends to propose a rule that will contemplate transfer of particular adversary proceedings to a more convenient venue so as to protect persons against the hardship of being transported across the country. He thought to some extent this might ameliorate the inconvenience caused by

extraterritorial service. Professor Riesenfeld thought the rule should give power to protect property which is in the custody of the court by any means necessary beyond the determination. Professor Seligson said he thought in ordinary bankruptcy the court should have the same power to protect property in its custody as it does in Chapter X and XI. Professor Riesenfeld's motion was seconded and carried by majority vote.

Professor Kennedy asked for comments on the latter part of paragraph (3) re determining controversy arising under the stated sections of the Act. Mr. Treister thought the rule should authorize extraterritorial service on the bankrupt, his agent, or his attorney in every kind of controversy. This would take care of the § 60d cases and most of the 2a(11) and 2a(12) cases, and he thought the § 67c(1) cases are not serious enough to worry about.

Discussion was also invited on the problems of foreign international service, and a suggestion was made to authorize process to be served under this rule beyond the territorial limits of the United States. Professor Seligson suggested the scope of the paragraph be left for the time being to service in the United States and its territories, possessions, etc. One member pointed out that this would not work as the statute still refers specially to Alaska and there are other similar problems. It was decided that Professor Kennedy should give consideration to where and how the geographical limits should be included in the rule. Professor Kennedy stated he would say "within the United States, the Commonwealth of Puerto Rico, and the territories and possessions of the United States where the Act applies," or would perhaps define United States somewhere. The definition would apply in paragraphs (1), (2), and (3), or perhaps wherever United States is used.

Mr. Treister suggested that in addition to the statutes mentioned in paragraph (3) it should include an authorization for service of process on the bankrupt, his agent, or his attorney in the bankruptcy proceeding within the United States as so defined. It was pointed out, however, that using the word "agent" is not good. [For subsequently approved amendments of this paragraph, see pp.20 and 22-23 below.]

(4) Professor Kennedy received several written comments, one from Professor Shanker, who thought the rule should authorize mail service when service by publication would be proper under subdivision (e) or (i) of Rule 4. Professor Kennedy stated that a clause could be added in paragraph (2), which deals with service by mail, or else a clause might be added to this paragraph to deal with service by mail. The Committee decided that service by mail should be provided for, and Professor Kennedy is to include it in the appropriate places. Mr. Treister inquired whether in the

drafting Professor Kennedy meant for mail to a foreign country to require a receipt. He thought this rule could not be adopted if it does require a receipt of foreign mail since you may not get a receipt on foreign mail. Professor Kennedy agreed and said this would require resort to the alternative of service by publication or other procedure prescribed by FRCP. He said a phrase could be added to paragraph (4) at the end of the sentence to read:

> "or if made by mail when some other mode of service authorized by subdivision (e) of Rule 4 of the Federal Rules of Civil Procedure."

Professor Riesenfeld thought it should also include service in accordance with any agreement made by treaty.

Meeting recessed at 5:40 p.m.
Reconvened at 9:00 a.m., June 16

Professor Kennedy started the second day's session by stating that he had given further consideration to this rule and he had decided to present an alternative caption for Bankruptcy Rule 7.4, Service of Summons, Complaint, and Notice of Trial, and that paragraph (1) of subdivision (e) would read: "Summons, complaint, and notice of trial may be personally served under this rule anywhere ...." Like changes would be made in paragraphs (2) and (3). He stated that in drafting this subdivision he would prefer to avoid the use of the word "process." Judge Herzog thought that if the rule meant process in general it should say so, and if it meant to limit this to notice of trial then it should say that. Professor Riesenfeld thought the drafting of this rule should follow as closely as possible that of FRCP 4. Mr. Treister thought that in Rule 4 the process was limited to dealing with the papers subsequent to the first pleading and the Bankruptcy Rule could not be so limited. Consideration was given to whether this rule applies to subpoenas. Professor Kennedy stated the words "summons, complaint, and notice of trial" would not include subpoena, but the word "process" without more would cover subpoena. Professor Riesenfeld questioned whether an automatic stay is possible and thought the Committee should decide whether that is a statutory matter. He also did not think the Committee could decide at the meeting without further consideration whether it wants to add the words "or protect" after the word "determine" in paragraph (3) if it goes beyond nationwide service. Mr. Treister wanted to leave the words in because he thought summons, complaint, and notice of trial could relate to protection of property. Thus a proceeding to prevent a court from conducting a judicial foreclosure would be started by summons, complaint, and notice of trial, which deal with protection of property. Professor Riesenfeld asked if the Committee could presently decide whether the proceeding would be in the local court as an ancillary court or in the domiciliary court or whether this shouldn't be given further consideration. Professor Joslin suggested that if the rule were drafted in the broad sense, i.e., all

process other than subpoena, it would cover every possible service, but if it is limited it would be necessary to have a rule dealing with every other type of process. Professor Kennedy thought Rule 5 would take care of many of the other types of process. He thought it would be better to keep the rule as drafted and then to have a rule which would cover the special problems that may arise.

A motion was made that the Committee address itself only to Rule 7.4 as applied to service of summons, complaint, and notice of trial. The motion was seconded and carried by majority vote of 7. As approved subdivision (e) reads as follows:

(e) Territorial Limits of Effective Service

(1) Summons, complaint, and notice of trial may be personally served (under this rule) anywhere within the territorial limits of the state in which the court is held, or within the United States but not more than 100 miles from the place in which the adversary proceeding is commenced or to which it is assigned or transferred for trial. [Professor Kennedy stated that he would give consideration to deleting "under this rule."]

(2) Summons, complaint, and notice of trial may be served by mail under this rule when the address, or one of the addresses, prescribed by subdivision (c) is within the state in which the court is held, or is within the United States but not more than 100 miles from the place in which the adversary proceeding is commenced or to which it is assigned or transferred for trial.

(3) Summons, complaint, and notice of trial may be served under this rule anywhere within the United States on the bankrupt or person required to perform the duties of a bankrupt, or any party to an adversary proceeding to determine [or protect] rights in property in the custody of the court or to determine any controversy arising under section 2a(11), 2a(12), 60d, or 67c(1) of the Act. [For further amendments of this paragraph later approved, see p. 22 below.]

(4) Service of summons, complaint, and notice of trial shall also be effective upon a party not an inhabitant of or found within the state in which the court is held if made in accordance with subdivision (e) or (i) of Rule 4 of the Federal Rules of Civil Procedure. [For amendments of this paragraph, see p. 23 below.]

(f) Proof of Service

Professor Shanker inquired whether the last sentence meant to infer that refusal to take the mail is effective service, or merely that if it is not accepted the receipt is returned and the court will determine the service. Professor Kennedy confirmed the latter because he said that refusal to take the mail might be justified and that would not be proof of service. Judge Gignoux suggested the last sentence of Federal Civil Rule 4(g) be included in this subdivision:

> Failure to make proof of service does not affect the validity of the service.

The Committee agreed that this should be done. It also decided that "under this rule" should be inserted after "proved" in the first line. Professor Seligson moved adoption of this subdivision with the above stated amendments. The motion was seconded and carried.

(g) Effect of Errors; Amendment

Professor Kennedy stated he would like to retain the word "process" in the second line as it was comprehensive and would include summons, notice, and mode of issuance and service. He read the draft and invited comments. Mr. Treister stated that as the draft is written it seems to infer the burden of proof is on the defendant, and he would like to separate out the error in process from the error in proof of service. He suggested this could be clarified by changing the "unless" clause to read, "if no material prejudice resulted." Professor Riesenfeld stated that he was now more troubled than ever by the two uses of the word "process," as it had been used to refer to papers served and now was being used for the manner of service. He suggested it be changed to say papers served or manner served. Judge Gignoux thought the "address used" clause should be deleted. It was decided the subdivision should read as follows:

> Service under this rule shall be effective notwithstanding an error in the papers served or the manner or proof of service if no material prejudice resulted therefrom to the substantial rights of the party against whom the process issued. Amendment may be allowed as provided in Rule 4(h) of the Federal Rules of Civil Procedure.

The Committee approved the amended subdivision by a majority vote of 8.

Unfinished Matters for Subdivision (e)(3).

Judge Forman announced there were several matters pertaining to subdivision (e)(3), as revised, which needed clarification. They were discussed and voted as follows:

1. Summons, complaint, and notice of trial may be served anywhere in the United States on the bankrupt. Approved.

2. The phrase "persons required to perform the duties of a bankrupt" will be used. Approved.

3. Professor Kennedy stated there already is approval for extraterritorial process where property is in the custody of the court, and he wondered if the Committee should deal with the general partner of an adjudicated partnership. The phrase "general partner of an adjudicated partnership" was approved.

4. Extraterritorial service on "any attorney who is a party to a transaction subject to examination under section 60d" was approved. (This codifies the law.)

5. Use of the phrase "any party to an adversary proceeding to determine [or protect] rights and property of court." Approved.

The foregoing decisions were understood to authorize service anywhere in the United States. Service outside the United States was also to be included in the rule, and the Reporter should decide where it belongs. United States, as used in this rule, shall include the Commonwealth of Puerto Rico and territories and possessions to which the Bankruptcy Act is or may hereafter be applicable. Mr. Treister thought that if it was to be used only in the rule on service of summons, complaint, and notice of trial, it would be all right to say, "service of summons, complaint, and notice of trial may be made anywhere beyond the territorial limits of the state in which the court is sitting." The Committee approved the following:

Summons, complaint, and notice of trial may be served anywhere beyond the territorial limits of the state in which the court is sitting on the bankrupt or persons required to perform the duties of bankrupt, general partners of an adjudicated partnership, any attorney who is party to a transaction subject to examination of section e of the Act, or any party to an adversary proceeding to determine [or protect] rights in property in the custody of the court.

Professor Joslin felt a Note would be needed or a separation of the provisions for service across state lines and across the national boundary, as it may not be understood that authorization was being given to go outside the United States. A Note was decided upon.

Unfinished Business for Subdivision (e)(4).

The Committee decided paragraph (4) should read:

> Service of summons, complaint, and notice of trial shall also be effective upon a party not an inhabitant of or found within the state in which the court is held if made in accordance with subdivision (e) or (i) of Rule 4 of the Federal Rules of Civil Procedure or if made in accordance with treaty or if made by mail when some other mode of service is authorized by subdivision (e) of Rule 4 of the Federal Rules of Civil Procedure.

Proposed Bankruptcy Rule 7.5 - Service and Filing of Pleadings and Other Papers.

Professor Kennedy suggested that as a result of the discussion at the June 15 session the draft of this rule should be divided into two subdivisions as follows:

(a) Service. Subdivisions (a), (b), and (c) of Rule 5 of the Federal Rules of Civil Procedure apply in adversary proceedings.

(b) Filing. All papers after the complaint required to be served upon the party shall be filed in accordance with Bankruptcy Rule 5.1 either before or at the same time they are served.

The Reporter recalled the prior discussion of summons and notice of trial in adversary proceedings and said the proposed rule embodies the idea then approved. The Committee decided that the rule should allow more time for the filing of pleadings and other papers and, after discussion, approved the following language:

> All papers after the complaint required to be served upon a party shall be filed with the court not later than the second business day following service.

Professor Kennedy stated he would give additional thought to whether a reference to Bankruptcy Rule 5.1 should be made in a Note to Rule 7.3.

Form No. 6B - Summons and Notice (of Trial) of Adversary Proceedings.

It was suggested this form would have to be changed in accordance with the revision of Rule 7.5. After discussion, Professor Kennedy read the following proposed revision:

> You are hereby summoned and required to serve upon ....., plaintiff's attorney, whose address is ....., ..., an answer to the complaint which is herewith served upon you, on or before ....., and to file the answer with this court not later than the second business day thereafter.

The Committee approved this first sentence of Form No. 6B as stated by Professor Kennedy.

Proposed Bankruptcy Rule 7.40 - Setting of Date for Trial.

In accordance with previous Committee action [see pp. 11-12, supra] "bankruptcy judge" was inserted for "referee." Mr. Nachman suggested "thereof" be inserted in the second clause in lieu of "of the date." Professor Kennedy stated the phrase, "shall cause a date to be set," was debated at the February meeting (Feb. 1966 Min., p. 31), and the Committee decided that this terminology should be used so as to indicate that the bankruptcy judge himself need not set the date but that he can delegate the responsibility. Mr. Treister called attention to the fact that the Note is the important part of the rule. Professor Kennedy pointed out that the time was stricken from the rule but will appear in the Note. Professor Kennedy stated the Committee action at the February meeting suggested revision of the Note and it was not completed.

Upon motion of Judge Whitehurst, which was seconded and approved, the rule will read:

> Upon the filing of a complaint the bankruptcy judge shall cause a date to be set for trial, and notice thereof shall be served with the complaint.

Memorandum of June 8, 1966 - Verification and Oaths.

Professor Kennedy stated he prepared the memorandum dated June 8, 1966, because of a question raised at the February meeting (Feb. 1966 Min., p. 11) whether the words "verified" and "verification" clearly import an oath. He read the memorandum and after discussion the Committee concurred with the policy enunciated in the memorandum.

Proposed Bankruptcy Rule 1.7.1 - Verification of Petitions and Accompanying Papers.

Professor Kennedy stated this rule had not been before the Committee at the February meeting. Judge Herzog inquired whether "all petitions" would cover voluntary, involuntary, and other types

of petitions and also petitions for other kinds of relief. Professor Kennedy said in drafting he had tried to adhere to a uniform definition for the word "petition" but a Note could define it. The rule was approved.

Proposed Bankruptcy Rule 5.20 - Oaths and Affirmations.

(a) Persons Authorized to Administer Oaths

Professor Kennedy stated this is a suggested rule based on section 20 of the Bankruptcy Act. The question was raised whether it is beyond the rule-making power to authorize employees of the referees' offices to administer oaths, and Professor Kennedy replied that if the Committee has the power to draft a rule in this area, he thought it could cover the referees' clerks. Discussion was held as to whether the rule should be broad enough to cover all oaths. Professor Kennedy said it would not cover the oath of office for a referee. Mr. Treister thought a rule should be drafted that would cover all oaths in bankruptcy proceedings with the exception of the oath of office. Suggestions were offered for drafting and Professor Kennedy presented the following redraft:

> A referee, an employee or assistant of the referee designated by his order, which shall be filed in the office of the clerk, an officer authorized to administer oaths in proceedings before the courts of the United States or under the laws of the state where the oath is to be taken, or a diplomatic or consular officer of the United States in any foreign country may administer oaths and affirmations and take acknowledgments.

The word "assistant" was questioned as there are no referees' clerks, and Professor Kennedy said he would do some research on this.

(b) Affirmations (in Lieu of Oaths)

Professor Kennedy stated this was also taken from section 20 of the Bankruptcy Act but that he did not feel the sentence in parentheses should be included. This was included to get the members' views. Professor Kennedy read the draft and after discussion the Committee approved subdivision (a) as amended and subdivision (b) without the bracketed material.

Professor Kennedy inquired whether the members agreed on whether there should be a rule requiring the testimony before a referee to be sworn to. The Committee agreed this should be done.

Another question raised was whether the word "referee" in the third line should be replaced by "bankruptcy judge" but the Committee decided it was not necessary in this instance.

Mr. Treister suggested that instead of following section 20 of the Bankruptcy Act in Rule 5.20 that the draft should follow Rule 43(d) of the Federal Rules. It was moved and carried that this approach should be taken but that the phrase "under these rules" in 43(d) would have to be enlarged to take care of bankruptcy cases.

Proposed Bankruptcy Rule 7.11 - Signing of Pleadings.

Judge Gignoux asked why Rule 7.11 is needed, inasmuch as Rule 9.11 will apply generally to all adversary proceedings. He thought Rule 9.11 could say that all papers filed by a party represented by the attorney are to be filed by the attorney of record, and then continue with the text of Rule 7.11. After discussion of this point Judge Gignoux moved that Rule 7.11 be eliminated and Rule 9.11 would begin with the following sentence:

> Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. The rule that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. (It was also decided to leave this sentence in but to take out the reference to equity.) [The text of Rule 9.11 follows.]

Professor Kennedy stated that the matter bothering him about combining Rules 7.11 and 9.11 is that this would require every pleading, including motions and other papers referred to in Rule 7, to be subject to the clause requiring an attorney to sign. This would mean that the attorney for the trustee would have to sign not only pleadings in adversary proceedings but every paper that Federal Rule 7(d)(2) refers to.

Discussion ensued as to whether the attorney should be required to sign papers not heretofore required to be signed. It was decided that any papers prepared for an adversary proceeding should be signed by the lawyer, as well as any other motions or papers prepared by him. Judge Gignoux's suggested first sentence was redrafted as shown:

> Every petition and answer of a party represented by an attorney, every pleading or motion of a party represented by an attorney in an adversary proceeding, and every application prepared by an attorney filed in a bankruptcy case shall be signed by the attorney of record in his individual name, whose address shall be stated.

Professor Seligson moved adoption of the principle of Judge Gignoux's suggestion with the understanding that the Reporter is

to work out the proper terminology. The motion was seconded and carried.

Judge Gignoux further noted that Rule 7 of the Federal Rules sets forth definitions of pleadings and motions and inquired if the Bankruptcy Rules should have a similar provision. He thought it should define pleadings as the "petition and an answer to the petition, the complaint in an adversary proceeding and the answer to the complaint, a counterclaim, and all adversary pleadings thereto"; then provide that any application to the bankruptcy judge shall be by motion so that there won't be any mixing up of motions, application, and petitions. Professor Kennedy stated he once suggested that "motion" should be treated as an application in a contested proceeding. He stated there are many instances where an application is not contested. Professor Riesenfeld stated that Judge Gignoux's suggestion would require the replacing of several rules using "petition" and other phrases. He thought the Reporter should be careful of the language inasmuch as there are many requests for motions, applications, and petitions and that he should reserve the word "application" for some reference in the Federal Rules. Professor Kennedy stated that generally he thought Federal Rule 7 should apply to adversary proceedings and that the Committee does need to deal with petitions, applications, and motions in contested matters that are not adversary proceedings.

Proposed Bankruptcy Rule 9.11 - Signing and Verification of Papers.

(a) Attorney's Signature

The Committee approved the following terminology for this rule [see discussion of this proposal in connection with proposed Rule 7.11, p. 26, supra].

> Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. The rule that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney on any paper filed in a bankruptcy case constitutes a certificate by him that he has read the paper; that to the best of his knowledge, information and belief, there is good ground to support it; and that it is not interposed for delay or other improper purpose. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

(b) Verification

Professor Kennedy read the draft for this subdivision and Mr. Treister stated that since this section was taken from Rule 11, Federal Rules of Civil Procedure he wondered if this picked up all the requirements for verification even though there is no specificity. After discussion of this point, the Committee decided that subdivision (b) should read:

> Except as otherwise specifically provided by a particular rule, papers filed in a bankruptcy case need not be verified. (Professor Kennedy is to itemize the rules).

Agenda Item 3. Bankruptcy Court, Its Composition, and Its Business.

Proposed Bankruptcy Rule 5.21 - Transfer or Revocation of Referee.

(a) Transfer to Another Referee

Professor Kennedy pointed out that "district" would be used before "judge" to distinguish him from a bankruptcy judge. Mr. Nachman inquired which judge would transfer the case. It was pointed out that since in some districts the cases are taken by rotation whereas in other districts one particular judge assumes all responsibility for the bankruptcy cases, the appropriate judge cannot be specified. Professor Kennedy said there was a discussion of this matter at the February meeting and it was then suggested that something might be added in the Note about the existing practice but he did not think it would be feasible to include it in the rule. He did, however, think the Note should say that the appropriate judge would be determined by local rule, referring to 28 U.S.C. § 137. Judge Snedecor moved adoption of the rule with the addition of a Note as specified. The motion was seconded and carried.

(b) Revocation of Reference

Professor Kennedy stated this subdivision is taken from section 43c of the Bankruptcy Act. Professor Riesenfeld questioned whether "disabled" is necessary as he thought it obvious the referee, if absent, would be disabled. It was pointed out, however, that the referee could be absent for reasons other than disability and the word remained. The Committee approved this subdivision.

Proposed Bankruptcy Rule 5.22 - Vacancies in Referees' Offices.

Professor Kennedy stated that the source of this rule was section 43a of the Bankruptcy Act. He reviewed the draft with the members and invited comments. Mr. Nachman suggested substitution of "a referee" for "its occupant" in the second line. Questions

raised were (1) whether the clerk is in a position to determine when a referee is disabled, and (2) whether, if the referee is disabled, the referee himself is to notify the Director of such fact. The members discussed whether the rule should state when the referee is disabled or disqualified in such a way that the clerk is to act. Professor Kennedy said he hesitated to get into this area, but he stated that he was asked at the February meeting (Feb. 1966 Min., p. 16) to draft such a rule. Judge Snedecor expressed the opinion that this is part of the machinery by which the courts operate and should be left in the Bankruptcy Act. Professor Kennedy agreed that it is administrative. Professor Joslin suggested that subdivisions (a) and (c) be deleted and subdivision (b) be transferred to Rule 5.21. Professor Kennedy stated it was also mentioned at the February meeting that there should be a rule to make clear that retired referees may be eligible for designation. Professor Riesenfeld did not think the Bankruptcy Rules should state who could or could not be a referee. Judge Whitehurst moved deletion of the entire text of Rule 5.22. The motion was seconded and carried.

Professor Riesenfeld pointed out that in the new definition for bankruptcy judge the reference to Rule 5.22 would have to be changed. Professor Kennedy stated it could refer to Rule 5.21 or section 43c of the Bankruptcy Act.

Proposed Bankruptcy Rule 5.55 - Retired Referees.

In line with the discussion of Rule 5.22, supra, it was moved and adopted that this rule be deleted, even though the Committee felt it was within the rule-making power of the Court to designate retired as well as active referees. The reason for this action was that as a matter of propriety it is better not to include the subject matter of retired referees in the rules.

Proposed Bankruptcy Rule 5.56 - Local Bankruptcy Rules.

Professor Kennedy stated that this rule is a grant of authority to promulgate local bankruptcy rules, and it is comparable to General Order 56 and Federal Rule 83. A drafting change, deleting "its practice" and inserting "practice and procedure under the Bankruptcy Act," was proposed and approved. Discussion ensued regarding the distribution of the local rules. One suggestion for distribution of the rules was to adhere to Federal Rule 83 and distribute them only to the Supreme Court of the United States. Mr. Nachman felt distribution should remain as drafted by the Reporter to include the Library of the Department of Justice, the Comptroller General, and the Administrative Office in addition to the Supreme Court, as he could see no great hardship in accommodating four or five branches of the government. Judge Gignoux moved that this rule coincide with Rule 57(a) of the Federal Rules of Criminal Procedure by providing that copies be made available

to the Administrative Office in sufficient number to be distributed to those of the public who might request them. The first sentence of Professor Kennedy's draft is to be retained. The motion was seconded and approved.

Judge Gignoux further suggested that the second sentence of Rule 83 of the Civil Rules, "In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules," should also be included in this rule. Professor Kennedy said he would consider this.

Proposed Bankruptcy Rule 9.7 - Procedure in Contested Matters Not Otherwise Provided for.

Professor Kennedy stated the subject matter of this rule was considered at length at the February meeting (Feb. 1966 Min., pp. 24-25). He felt this matter to be troublesome and that perhaps it cannot be settled until the Committee has gone through all the Civil Rules to see how many of the Civil Rules the Committee wants to import into Part VII. He further stated that the language of the draft was taken from Rule 66, FRCP, and that he thought a sentence should be added immediately after the first sentence as follows:

> In all such contested proceedings the parties shall be entitled to all the rights and remedies provided in Rules 7.26-7.37.

He also felt there are other rules which will probably have to be made applicable and tentatively he mentioned Rules 7.41-7.46, 7.51, 7.54-7.62, and 7.71. The matter of most concern at the February meeting was the pleading problem. The Committee did not want to apply rules that require answers to complaints to all contested matters and did not want admissions to be predicated on failure to respond. Professor Kennedy thought that many sections of the Federal Rules might be made applicable after the pleading stage is closed. Mr. Treister questioned "application" in the third line. He further stated that he thought there should be a rule that says that all requests to the court for an order shall be by application except the kinds that are in litigated matters and called motions, but in this rule he would not want to require an application because he feels that motions and applications are limited to writing. Professor Kennedy read Federal Rule 7(b)(1), which indicates that applications to the court may be oral. Mr. Treister felt, however, that in bankruptcy the word "application" has been used to refer to a formal document and that in the Civil Rules it is used synomously with "request." Professor Seligson stated he was concerned about the clause "the proceeding shall be initiated by an application to the court," because the attorney does not always find out until after the event that it is going to be contested, and proceedings have already been initiated. He thought Mr. Treister's suggestion for the shortened sentence, "When these

rules do not otherwise prescribe the procedure for determining a contested matter in a bankruptcy court, notice and hearing shall be afforded," was good. Professor Kennedy stated the objection is that it doesn't tell how to start. Professor Seligson asked if in some places the rules could deal with initiation of proceedings other than adversary. Mr. Nachman wondered if it would help to say that in contested matters in a bankruptcy court, except as these rules otherwise describe, reasonable notice of hearing will be afforded the party against whom relief is sought and leave open the matter of how you get to the court. Mr. Treister said that his problem is limited to application. That basically all the rule says is that it did not forget about this area but it doesn't cover it and, secondly, that reasonable notice of hearing must be given. He did not think this sufficient. Professor Seligson inquired whether any part of Federal Rule 7 had been put into Part IX. What he would like to see is a rule that would take care of proceedings in so-called contested matters which are not adversary proceedings but which arise during the course of hearing and that would require a writing if they do not arise in that fashion. Professor Seligson wanted the rule to read:

> An application to the court for an order in a contested matter not otherwise governed by these rules shall be by motion which, unless made during the hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

He thought this would take care of the initiation which is bothersome. Professor Kennedy stated that he had the suggestions to incorporate into the rule, that FRCP 7(b)(1) should be adopted, and that notice of hearing in a contested case shall be afforded. He inquired whether the sentence about the applicability of discovery rules should be included, and this was affirmed.

Proposed Bankruptcy Rule 9.20 - Definitions of Words Used in the Federal Rules of Civil Procedure.

A list of definitions used in the Federal Rules of Civil Procedure, made applicable to proceedings in a bankruptcy case, was supplied.

The Committee decided there should also be a definition of "bankruptcy judge." [See discussion in connection with Rule 7.1, pp. 11-12, supra.]

Meeting recessed at 4:30 p.m.
Reconvened at 9:00 a.m., June 17

Agenda Item 4 - Burdens Resting on Parties to Bankruptcy Cases and Adversary Proceedings: Amendments, Examinations, Depositions, and Discovery.

[Additional Subdivision for Proposed Bankruptcy Rule 1.3.]

(f) Particularity of Allegations

This draft is a proposed additional subdivision of Rule 1.3, relating to involuntary petitions, and is an adaptation of Rule 9 of the Federal Rules of Civil Procedure. Professor Seligson had doubts about requiring specificity as to the date, as it may be difficult to identify. Another member questioned whether the name of the transferee would always be known. Professor Seligson thought it would be better to end the sentence after the word "occurrence," as this would be enough for the purpose of identification and then leave it to the court to decide whether each act had been sufficiently identified. Mr. Nachman moved to strike everything after "occurrence." The motion was seconded and carried.

Proposed Bankruptcy Rule 1.9.1 - Applicability of Rules in Part VII.

The draft of proposed Bankruptcy Rule 1.9.1 was read. Inquiry was made whether Professor Kennedy had been sufficiently solicitous to deal with the point that pleading as used in the Federal Rules includes petition. He answered that primarily he wanted to make clear that in respect to an answer to an involuntary petition, the rule about answers in adversary proceedings applies. He further stated that many kinds of proceedings after the adjudication are not intended to be subject to Rules in Part VII. Judge Snedecor moved adoption of the proposed rule 1.9.1 subject to an amendment of adding a period after "thereon" and inserting "all" before proceedings. Professor Seligson inquired whether it was clear that the proceedings after the filing of the involuntary petition are proceedings on the petition. Professor Kennedy said he would think about that and report at the next day's session. At the next session of the meeting, June 18, Professor Kennedy said he had given further consideration to a redraft for this rule as follows:

> Except as otherwise provided in the rules, the rules in Part VII apply to involuntary petitions, pleadings, and motions directed thereto, and the determination of the issues presented thereby.

Mr. Nachman inquired why this rule did not belong in Part VII and was told that this rule does not deal with an adversary proceeding but with a proceeding initiated by a petition. Mr. Nachman then inquired why Rule 9.7 does not govern a situation like this, and whether the Committee does not want to leave it up to the court to apply the rules in Part VII to this kind of proceeding. Professor

Kennedy said it is desirable to say that the Rules in Part VII shall apply except as otherwise provided. Mr. Nachman thought it would create confusion to make specific reference to involuntary petitions and other things that occur to the draftsman but to leave out things which do not occur to him, and that a Note might cover all these possibilities, including particularly contested involuntary petitions. Professor Kennedy acknowledged that Mr. Nachman had a point since the approach taken in the draft makes it necessary to add some other specific provisions and something of this nature should be in Rule 1.8. Judge Forman said he thought it would be well to keep Mr. Nachman's caveat in mind as the Committee progresses. Professor Kennedy stated that motions to vacate adjudications of voluntary bankruptcy should also be covered - perhaps by a separate rule.

A motion was made, seconded, and unanimously carried to have Rule 1.9.1 read as follows:

> Except as otherwise provided in the rules, the rules in Part VII apply to all proceedings relating to an involuntary petition and to all proceedings to vacate any adjudication.

Mr. Treister suggested that the Note say voluntary petitions which have the effect of adjudication should not be included.

Proposed Bankruptcy Rule 7.15 - Amended and Supplemental Pleadings.

Professor Kennedy explained the rule and called attention to the time provisions. He stated that in order to make this relation back provision applicable to the petition it must be made clear that the petition is a pleading within FRCP 15(c). He recommended that a provision be added to Rule 1.3, subdivision (f), to state that FRCP 15 applies to any involuntary petition as a pleading. This would permit the amending of a petition in the same way and with the same effect, as a complaint may be amended. Judge Gignoux asked if there could be a set of definitions for certain words used in the Federal Rules of Civil Procedure. He thought pleadings should include petitions, answers thereto, complaints in adversary proceedings, answers thereto, counterclaims, cross-claims, etc. Professor Kennedy said that when the Federal Rules refer to "pleadings," it would not always be appropriate to include "petition" as used in the Bankruptcy Rules. Mr. Treister did not agree because he stated that Part VII rules do not apply to the petition unless specifically so stated in Part I. Professor Kennedy stated he would not reject the proposal. The Committee decided that Professor Kennedy should pursue the idea of one set of definitions which would be applicable to the Federal Rules of Civil Procedure.

Judge Gignoux stated he thought Professor Kennedy had knocked out an alternative allowed by Federal Rule 15(a) by his wording of

subdivision (2) to provide only for 5 days after service of an amended pleading for the responsive pleading. Professor Kennedy said the only other way to handle it would be to spell out the alternatives.

The matter of relation back was discussed at length and Professor Kennedy inquired if the members agreed that they do not want relation back when there is a failure to comply with the standard of specificity set out in subdivision (f) of Rule 1.3 previously approved [see p. 32, supra]. Professor Moore stated there would be times when relation back would be wanted, although there was a discrepancy between the original date alleged and the date in the amendment. Professor Seligson moved the adoption of the proposed Rule 7.15 with the reservation that the Reporter try to do something about the time allowed for the responsive pleading, as discussed. The motion was seconded and unanimously carried. Professor Riesenfeld asked for a point of clarification. He said he had voted for the motion, assuming that the Federal Rules take care of the problem, not that he is for relaxing the pleading of the acts of bankruptcy. He wanted to be sure the Federal Rules do take care of it. Mr. Treister stated, however, that there is at least one case which says that if an act of bankruptcy is pleaded in the language of the statute, relation back will occur. Professor Seligson said the 2d Circuit does not recognize that you can plead an act of bankruptcy in the language of the statute. Professor Kennedy said he understood the sense of the conversation to be that Mr. Treister thought a conflict existed which had not been eliminated and Professor Riesenfeld was objecting to the Reporter's trying to straighten out the conflict in the Note.

Judge Gignoux stated he voted for the motion because he accepted Professor Seligson's analysis that there is no conflict, that there would not be a relation back unless the transfer or occurrence alleged as an act of bankruptcy was sufficiently pleaded in the original petition. Professor Kennedy stated that a requirement of specificity had been added and that it may help to straighten out Mr. Treister's problem. Judge Gignoux asked if this could not be stated in a Note, saying it is the sense of the Committee that certain allegations as to acts of bankruptcy would not comply with this rule and amendments thereof would not relate back. Professor Joslin thought a Note could say that no amendment would have the relation back effect if it corrects any substantial defects in the original allegations. The general consensus was that there was objection to a Note, and it was decided to leave the question of relation back to the courts in the light of the addition to the rule of the specificity requirement. Judge Gignoux thought there should be a Note to the effect that it is not the intention of the Committee that the relation back rule should subvert Rule 1.3(f). Mr. Nachman suggested that the Reporter prepare a Note relating to Rules 7.15 and 1.3(f) and let the Committee see it before making a decision. The Committee so approved.

Proposed Rule 2.21 - Examination.

(a) Examination on Application

Judge Whitehurst inquired whether "any officer" would include the persons listed in the definition of section 1(22) of the Act. Professor Kennedy stated he assumed that where the Bankruptcy Act defines a word which is not changed by the Committee, the definition would apply. Mr. Nachman suggested the language be enlarged to include "any party in interest" rather than just the three persons listed. Judge Snedecor moved to include "party in interest" in the second line in lieu of "officer, bankrupt, or creditor." The motion was seconded and carried.

Mr. Treister inquired whether "conduct" should be included in the last line. Professor Kennedy thought the word "acts" covered "conduct" but several members expressed interest in having the word restored. Professor Riesenfeld stated that nonaction may be considered "conduct." Mr. Covey also thought the rule should be left as strong as it was before. The word "conduct" was restored.

Mr. Treister explained that in California an oral request is used instead of application to order a person to appear before the court for examination. Professor Kennedy said if the Committee wanted to include this, it would have to be done specifically in the rule or else have a Note to say the application does not have to be in writing, since the court could require it. The matter was discussed at length. Mr. Nachman felt that there should be a record of the examination and he did not think it a good policy to authorize an oral request. One suggestion made was to use "motion" instead of "application," and then if oral request was not specified, the rule would mean a motion in writing in line with Federal Rule 7(b). Professor Kennedy thought validation of the California practice could be accomplished by saying, "Upon motion, which may be oral, unless local rules otherwise provide, ..." This suggestion was agreeable with all, and Mr. Nachman moved approval to read as Professor Kennedy had tentatively drafted it. The motion was carried by majority vote.

The question of whether the court should be changed to bankruptcy judge in the second line was raised. It was decided that it was not necessary in this instance. Another question arose as to the meaning of "court" in the second line. It was pointed out by Professor Kennedy that it includes bankruptcy court, ordinarily the referee, but it does not mean the referee must issue the order but may delegate authority to an assistant. It was suggested the word "court" be changed to read "court may order or cause to be ordered" in accordance with prior discussion. Judge Snedecor moved to leave subdivision (a) as tentatively stated by Professor Kennedy to read:

> Upon motion of any party in interest, the court may order any person to appear before the court for

examination concerning the acts or property of a bankrupt. The motion may be oral unless local rules otherwise provide.

The motion was seconded and carried.

Judge Gignoux inquired whether section 21a examinations are limited to the acts, conduct, or property of a bankrupt as distinguished from an act or property of a creditor. This was affirmed, and then Judge Gignoux asked if it should be. Mr. Treister thought section 21a is a very good discovery tool but he thought the rule should be broad enough to cover any situation. He hoped it would cover the mental aspect where a man could be asked to come in and the attorney doesn't want to know anything about a transfer to the man but wants to know if he knew about the bankrupt's insolvency at the time of the transfer. He said this is not covered in present section 21a. Mr. Nachman moved adoption and insertion of the language "any other matter affecting the administration of the estate." The motion was seconded and unanimously carried. [Later rescinded. See discussion at p. 38.]

(b) Examination of Bankrupt

Discussion was held on a proposal of Professor Joslin to delete the words "shall publicly" in the first line. A majority of the members felt that this proposal would never pass the Court, as one of the biggest complaints about the administration of bankruptcy today is that there is not sufficient examination of the bankrupt. Professor Joslin thought that the bankrupt should be available for examination and that the court ought to be authorized but not required to conduct a public examination. Mr. Treister thought it would be a shock to authorize the referee to dispense with the first meeting, which was in essence what he thought Professor Joslin was saying. After further discussion Professor Joslin withdrew his suggestion.

Mr. Nachman suggested a revision for the first sentence to say, "At the first meeting of the creditors the court shall publicly examine the bankrupt or cause him to be examined." Further discussion ensued and Professor Riesenfeld again returned to the words "publicly examined," stating that his regard for human rights impelled him to ask why the bankrupt should be publicly examined. Professor Riesenfeld moved the word "publicly" from the first line of (b)(1) be stricken. The motion was seconded but lost, two voting in favor of the motion.

Professor Moore asked if consideration had been given to a meeting of the Advisory Committee with a Congressional committee or a committee of the Judicial Conference to go over the rules and the Bankruptcy Act to decide what should remain in the Act. Professor

Kennedy stated that at a previous meeting of the Committee it was agreed that this would eventually be desirable.

Mr. Treister referred to the second sentence about the bankrupt's submitting to an examination at the hearing upon objections to his discharge. He thought that examination of the bankrupt should be before and not at the hearing on the objections, that the bankrupt should be required to attend the hearing but without a subpoena, and that he should then be examined under ordinary rules pertaining to examination of an adverse party. Professor Riesenfeld said he had a more basic worry regarding the duties imposed upon the referee, as this subdivision is requiring the referee to preside officially at the hearing upon objection to discharge. He did not think the referee should be involved in making the objection. Mr. Treister said he thought it was important for the referee to be taken out of the prosecuting business, particularly whenever there is an adversary proceeding. Professor Seligson agreed with Mr. Treister that the bankrupt should not be required to submit to an examination at the hearing upon objection to his discharge and hoped this would be eliminated. The first examination was fully discussed as to its meaningfulness and as to the degree it is enforced. Another vote was taken for the deletion of the words "shall publicly." The motion was again lost by a vote of 7 to 2.

Many proposals were suggested for the text of this rule. Mr. Nachman moved that the second and third sentences of subdivision (b) be transposed and revised to read as follows:

> The examination shall relate to matters which may affect the administration of his estate or the determination of his right to discharge. The bankrupt shall also submit to examination at such other times as the court shall order.

Professor Kennedy said it was good logic to take away the requirement of examination upon hearing on discharge but he thought it may be substantive (see section 14e of the Bankruptcy Act) and he did not think the Committee could remove grounds for denying a discharge. Mr. Treister said he would agree with that, but it is not necessary to perpetuate it in the rules. He would prefer that nothing be said in the rules about it. Professor Seligson suggested deletion of the word "determination" so that it would read "or his right to discharge." Mr. Nachman accepted the amendment for the second sentence to read as follows:

> The examination shall relate to matters which may affect the administration of his estate or his right to discharge.

The motion was seconded and carried. [Committee action later rescinded, see discussion, p. 38].

Professor Riesenfeld suggested the subdivisions be broken down into the following categories:

(a) Examination on Application

(b) Examination of Bankrupt on First Creditor's Meeting, and

(c) Examination of Bankrupt on Objection to Discharge.

The last subdivision should state the method of examination that the Committee desires at the hearing on objections.

Judge Forman stated the consensus was apparent that another draft would be necessary, and Professor Kennedy was asked to summarize what should be included. He summarized the proposals as follows:

> (a) Examination on Motion. Upon motion of any party in interest, the court may order any person including the bankrupt to appear before the court for examination. [He inquired whether "bankrupt" should be left in as he felt it was unnecessary, but Mr. Treister said he would like to have it retained because when the Committee reached the second part he was going to urge that the reference to the court's conducting an examination of the bankrupt at some other time be eliminated. Then subdivision (a) would have the bankrupt covered.] The motion may be oral unless local rules otherwise provide.
>
> (b) Examination of Bankrupt at the First Meeting. At the first meeting of creditors the court shall publicaly examine the bankrupt, or cause him to be examined, and may permit creditors to examine him.
>
> (c) Scope of Examination Under Subdivisions (a) and (b). The examination under subdivisions (a) and (b) may relate to the acts, conduct, or property of the bankrupt and other matters which may affect the administration of the estate or the right to discharge.
>
> (d) Examination of Bankrupt on Objection to Discharge. The bankrupt is required to attend the hearing upon objections to his discharge and to submit to an examination. [For additional Committee action regarding subdivision (d) see p. 39.]

The summary of the Reporter was approved by a majority vote, subject to redrafting by the Reporter.

Professor Kennedy said that he had held a short conference with Professor Shanker and Mr. Treister and they were in agreement that

in Rule 2.21 the word "bankrupt" should be included in any reference to "person." Since "bankrupt" had been deleted from the second line of subdivision (a), there might be an implication that the bankrupt himself can't obtain an examination. Professor Kennedy said he would take care of this matter in a Note.

Professor Kennedy stated he would like to return to new subdivision (d). He suggested the following draft:

> The bankrupt is required to appear at the hearing upon a complaint objecting to discharge. Examination of the bankrupt at the proceeding shall be conducted by the parties or their attorneys and shall relate only to issues presented by the pleadings filed.

Mr. Treister thought it should say: "The bankrupt shall attend the hearing and if called as a witness shall testify with respect to the issues raised by the pleading." It was agreed that Professor Kennedy would redraft this, as some members thought the first part regarding the complaint was not needed.

Extraterritorial service of process for this rule was discussed and Professor Kennedy stated he would give this further thought. Professor Shanker thought this was a process problem, but Professor Moore did not agree and said you do not need process. Mr. Treister said he had not understood the rule to be as clear as Professor Moore stated, but if that should be the law, the order could be made orally. He was of the view that a subpoena is needed. It was the consensus of the Committee that this matter should be dealt with in a separate subdivision, which should perhaps be subdivision (e).

Professor Kennedy stated it had been decided to have a sentence saying the bankrupt shall also submit to examination at such other time as the court shall order (as in section 14e of the Act). This reference will apply only when there is an examination on motion of a party in interest. Mr. Treister said that although it is unusual, there could still be a meeting calling for an examination, but he would like to see it taken out of the Act so that it could not cause any trouble. Professor Riesenfeld thought that if the Bankruptcy Act is cleaned up to conform with the rules, it will eliminate the possibility.

Mr. Treister further stated that he objected to "examination" in the caption of new subdivision (d) as he thought the word should be "testimony." Mr. Nachman said he had the same trouble with this as Mr. Treister. Professor Kennedy said the title of the rule is EXAMINATION. Mr. Treister moved that the caption be "Testimony of Bankrupt on Objection to Discharge." The motion carried by a vote of 8 to 1.

Professor Kennedy stated that it now seemed to him that proposed paragraph (b)(2) of Rule 2.21 was substantive, and he would rather not submit it for discussion. He stated that it is now a part of section 7a(10) of the Act, and it precludes the offering of testimony in a criminal proceeding. Judge Whitehurst moved that the paragraph be eliminated. The motion was unanimously carried.

The Committee discussed proposed subdivision (b)(3) concerning the reimbursement of travel expenses, and Professor Kennedy said that due to changes the last sentence doesn't have as much application as before. He also stated this subdivision was patterned after FRCP 45(c) and section 7a(10) of the Act. From discussion it was gathered that very few cases involve examinations outside the 100-mile radus prescribed by the Act. It was suggested that this paragraph would now have to be new subdivision (e) and the caption would be "(e) Reimbursement of Bankrupt: Place of Examination." [A later decision was made to change "Reimbursement" to "Mileage."]

Many phases of this draft were considered: one, whether the word "shall" in the third line should be changed to read "may." It was the view of some of the members that the bankrupt may not be in need of reimbursement because he could have obtained a good position since entering into bankruptcy, or that the spouse may have ample funds and he should not be reimbursed from the estate. Some members felt this could properly be left to the discretion of the court, but other members thought it should be mandatory. Professor Seligson moved adoption of the following terminology for the first sentence:

> When the bankrupt is required to appear for an examination under subdivision (a), he shall be tendered mileage allowed by law [Professor Kennedy will make reference to the applicable law] for any distance over 100 miles from his residence at the date of bankruptcy.

The motion was carried by a majority vote with 1 dissent. It was decided that the second sentence should be transferred to another subdivision.

(c) Examination of Spouse

Professor Kennedy stated that the provisos of section 21a of the Act, on which the proposed subdivision (c) was based, was drafted to deal with a problem encountered under the administration of the Bankruptcy Act of 1898. The question was raised as to why the word "only" was taken out before "concerning," and it was pointed out that if the attorney wanted to ask the spouse questions about assets of the bankrupt of which she had special knowledge and non-bankruptcy law posed no bar, the questions should be permitted but the inclusion of the word "only" would prohibit it. A question was raised as to why other portions of section 21a were left out, and

Professor Kennedy stated that in trying to improve on the draftsmanship he did not include all the language of 21a. Mr. Treister suggested that rather than being confined by the poor draftsmanship of the Act, a Note say that the substance of 21a was not changed. Mr. Nachman stated he thought the proposed rule is more limited than section 21a of the Bankruptcy Act, as it leaves out business transacted by such spouse of the bankrupt. He further asked the Reporter if he intended the rule to be different. Professor Kennedy stated he did not intend it to be more narrow and stated that he would research the question about transactions of the spouse other than the business of the bankrupt. The Committee decided that the subdivision on examination of the spouse should be moved to new subdivision (c) entitled "Scope of Examination" and should be a separate paragraph.

Professor Joslin stated he would like to expand the scope of examination of the spouse so that she could be examined to the same extent as any other person. Professor Kennedy inquired whether consideration had been given by the Committee on Evidence Rules to the scope of examination of a spouse. After discussion of the matter, Professor Moore stated he thought the Committee should leave the scope as it is but that he would like to give it additional thought. The Committee also decided that final disposition of this matter should be postponed until Professor Kennedy could research further into the law on examination of the spouse.

Professor Kennedy stated he wanted to bring up the matter of dragging the bankrupt into court for purposes of examination and he also stated he was concerned about extraterritorial orders for examination of people other than the bankrupt. He would presumably include in the rule a subdivision based on section 10a of the Act, which he had not realized was so closely related. Other matters discussed were the amenability of a third person to examination when he is in a different state from that where the case is filed and the bankrupt or trustee wants to examine him. The Committee decided not to include a provision for ancillary proceedings. Professor Kennedy checked section 10 of the Bankruptcy Act, and said the rule should include paragraph (a) as being procedural, paragraph (b) should not be included in the rules, and paragraph (c) is procedural. The matter of bail was also discussed, and Professor Kennedy said he would check the Criminal Rules before including anything on bail.

Meeting was recessed at 4:35 p.m.
Reconvened at 9:00 a.m., June 18

Agenda Item 6.

Proposed Bankruptcy Rule 1.9 - Hearing and Disposition of Petition.

(a) Contested Case

Professor Kennedy stated that subdivision (a) served the purpose

of section 18d of the Bankruptcy Act, but the terminology was more or less taken from FRCP 65(b). Mr. Nachman moved the first sentence read as follows:

> The court shall determine the issues of the contested petition at the earliest possible time.

The Committee decided to leave the word "court" on the first line and not replace it by "bankruptcy judge." Mr. Nachman's motion was carried by majority vote.

(b) Jury Trial

Professor Kennedy stated that this subdivision is adapted from FRCP 38(b), (c), and (d), and 39(a) and (c). He read the following draft incorporating several drafting changes:

> An alleged bankrupt in an involuntary petition filed by creditors may demand a trial by jury of any issue triable of right by a jury, by serving a demand therefor in writing at or before the time within which the answer may be filed. If the demand specifies that a district judge conduct the trial or if a local rule of court so provides, the trial shall be placed on the docket of the district court as a jury action, and the demand shall be transmitted to the clerk of the district court. The failure of a party to serve a demand in accordance with this rule and to file it in accordance with Bankruptcy Rule 5.1 constitutes a waiver by him of trial by jury or of a jury trial before a district judge, as the case may be. When trial by jury has been demanded in accordance with this rule, the second sentence of Rule 39(a) of the Federal Rules of Civil Procedure apply. A trial with an advisory jury or a jury trial conducted as of right on consent of the parties may be ordered in accordance with Rule 39(c) of the Federal Rules of Civil Procedure.

Mr. Nachman questioned the necessity for including the clause, "and the demand shall be transmitted to the clerk of the district court."

The right to jury trial was discussed at length, and Professor Kennedy said there is no constitutional problem involved, and that the right to a jury trial before a judge may therefore be qualified by making it available only on demand. Professor Moore stated that the rules could not take away jury trial, but he hoped the Act, when revised as a result of the rules, would be revised to eliminate provisions for jury trial. The Committee decided that if the bankrupt asks for a judge he will get it; otherwise he will get a referee.

The question arose whether other issues raised at the hearing on an involuntary petition but not triable of right by jury might be determined by the judge when he conducts a jury trial pursuant to a demand. It was agreed that on cause shown the judge should be able to make such a determination. It was further decided that

Professor Kennedy should use his own discretion as to whether to put this in the rule or in the Note.

Professor Joslin stated he thought the right should be given to the bankrupt to have a trial by the judge without a jury if he so desires. It was pointed out that some people do not like to have the referee hold the jury trial, but it was otherwise pointed out that there are two ways of avoiding such a trial, i.e., by local rule or by a demand for a judge to withdraw the case for trial. It was stated that to demean the referee would be a step backward.

Judge Whitehurst inquired, inasmuch as there is no constitutional question involved, why it would not be possible for the jury before a referee to consist of 6 persons or fewer than 12 and whether a majority verdict might not be authorized. Judge Whitehurst stated he had in mind that these suggestions would apply only before the referee but he supposed that they could also apply when judges preside.

The following terminology was considered for the second and third sentences of the draft:

> If the demand specifies that a district judge conduct the trial or if a local rule of court so provides, the trial shall be placed on the calendar of the district court as a jury action; otherwise the referee shall conduct the jury trial. The failure of a party to serve a demand in accordance with this rule and to file it in accordance with Bankruptcy Rule 5.1 constitutes a waiver by him of trial by jury or of a jury trial before a district judge, as the case may be.

Professor Seligson moved adoption of this language, and it was carried by majority vote of 7.

Professor Riesenfeld stated he questioned the language of the first sentence, but Professor Kennedy stated he would revise it to read similar to this:

> An alleged bankrupt may demand a trial by jury of any issue triable of right by jury by serving on the petitioners of the demand therefor in writing.

Professor Riesenfeld suggested the rule follow the language of section 19 of the Bankruptcy Act. Professor Joslin thought it would be difficult to include all of section 19 in the rule and he would prefer to go to the alternative version of (b) shown in the Note accompanying the draft of the rule. Mr. Treister moved that the approach of the first alternative as considered be adopted (the one referring to section 19). The motion was seconded and unanimously carried.

Professor Kennedy asked if the Committee thought paragraph (b) of section 19 should be included and it was the general consensus that it need not be. Professor Kennedy then asked the Committee about the last two sentences of his draft:

> When trial by jury has been demanded in accordance with this rule, the second sentence of Rule 39(a) of the Federal Rules of Civil Procedure applies. A trial with an advisory jury or a jury trial conducted as of right on consent of the parties may be ordered in accordance with Rule 39(c) of the Federal Rules of Civil Procedure.

Professor Kennedy said that in effect what he had done was to incorporate Federal Rule 39(a)'s second sentence and Federal Rule 39(c) into this rule. Mr. Treister said that he thought 39(c) is useful if you have some issues before the court other than insolvency or an act of bankruptcy. However, the second sentence of 39(a) has to be in the Civil Rules because of the wide variety of stituations you may get in jury trials in civil litigation, and he didn't think it would be useful in the Bankruptcy Rules. Mr. Treister moved that the Committee adopt the last sentence as drafted by Professor Kennedy but that the sentence next to the last one which refers to Rule 39(a) be deleted. Professor Seligson opposed the motion as he could see no objection to using the sentence referring to 39(a). Professor Seligson offered an amendment, that this sentence be used but not to include subparagraph (2) of Rule 39(a), i.e., to stop before the word "or." Mr. Treister accepted the amendment and restated his motion that the Committee adopt the sentence next to the last one up to the word "or" in Rule 39(a) and that the last sentence also be adopted. The motion was seconded and carried by a vote of 6 to 2.

(c) Default

This subdivision was derived from section 18e of the Act, and FRCP 55. Professor Kennedy stated there was lengthy discussion at the February meeting and he had drafted a second sentence in compliance to read:

> For good cause shown the court may set aside an adjudication so entered, in accordance with Rule 60(b) of FRCP.

Mr. Treister questioned "good cause" as he thought it should be "cause." Professor Kennedy said he had taken this terminology from Federal Rule 55(c). Professor Moore said he didn't think the Committee wanted to put in the reference to Rule 60(b) because you may need to have a general rule about setting aside orders -- the turnover order, for instance, where the time for appeal has

gone by and the court should have power to set the order aside. If you put a reference to 60(b) in this rule, it will also have to be put in other places dealing with orders. Professor Kennedy said there would be counterpart rules of Rules 55 and 60 in Part VII, and so it might be that the reference would not be to 60(b) but to one of the rules of Part VII. Mr. Treister thought there should be full consideration of setting aside orders because the bankruptcy problems are often different from those of civil litigation, inasmuch as litigated matters in adversary proceedings under Part VII and on an involuntary petition under Part I are different from routine administrative orders which are normally noncontested. Professor Shanker inquired how this subdivision is coordinated with Rule 1.9.1, which had been discussed during the meeting. Mr. Treister inquired how a different rule could be drafted which would apply to both adversary proceedings and an order of adjudication entered by default. Professor Kennedy said it would be a matter of draftsmanship, that there appeared to be no advantage in trying to relate it to Rule 7.60(b). Mr. Treister thought brackets should be placed here to be sure that either by sentence in the rule or by a note there is a way of relief from this default. Professor Kennedy stated that Rule 1.9.1 might pick this up, and he would flag it.

Judge Forman inquired whether there was any opposition to including a sentence in this subdivision on default. There was no opposition. The first sentence was approved.

It was decided the second sentence of the draft would stay in but be flagged as it may be picked up by Rule 1.9.1. Mr. Treister suggested a Note to say what other orders may be appropriate. This was agreed to.

(d) Award of Costs

Judge Whitehurst questioned the last clause of the sentence, but Professor Kennedy stated he thought it was clarified by the Note. Judge Whitehurst moved adoption with the Note. The motion was unanimously approved.

Agenda Item 7.

Proposed Bankruptcy Rule 7.12 - Defenses and Objections.

Professor Joslin suggested the exact wording of Rule 12 be used except that the number of days be substituted in accordance with Professor Kennedy's proposal. Professor Kennedy said he would compromise by copying things that have time limits and just refer to the rest of the rule. Judge Snedecor moved adoption of the rule as drafted by Professor Kennedy. The motion was unanimously carried.

Professor Riesenfeld questioned whether this rule takes care of extraterritorial proceedings involving the man in Taiwan, as five days is too short a period for him to respond. Professor Kennedy suggested this be taken care of in a separate section, and he would develop a draft to take care of it. Discussion was held on trying

to relate Rule 7.12 to recent discussion on "Form of Summons and Notice of Trial." Mr. Treister suggested adoption of another approach in terms of days before the hearing by spelling this out in Rule 12. Professor Kennedy stated he would redraft subdivision (a) and relate it to mail service as well as personal service. The Committee recognized the problem in the time allowed in the rule and in the Form, as the clerk would have to know the kind of service, whether by mail or personal service, and that the time allowed should also agree with FRCP 12. It was decided that this be recommitted to Professors Kennedy and Shanker for additional study and redrafting.

(b) Waiver of Jurisdictional Objection

Professor Kennedy stated this subdivision deals with the procedure in an adversary proceeding and that he wanted to make it possible for these objections to be waived. He felt that if the Committee doesn't deal with the problem, someone will say, "I am not making a procedural objection. I am objecting to jurisdiction of the subject matter and I can make this point any time in the trial." Professor Riesenfeld stated he thought it should be dealt with but not by a reference to FRCP 12. Mr. Treister thought Professor Riesenfeld's suggestion might be a solution -- to write a Rule 12(h) for bankruptcy but to deal with the problem in terms of jurisdiction of the bankruptcy court rather than of subject matter. The section 2a(7) provisions should also be stated in the rule. The Committee decided that both sections (a) and (b) of this rule should be remanded to the Reporter for further drafting.

Professor Shanker called attention to the fact that the automatic transfer provision in the rule had not been discussed. A suggestion was then made to change the approach, so that generally a proceeding will not be dismissed, but where it appears the action could have been commenced and prosecuted in the district court, it may be transferred. Professor Kennedy thought this could be done by Note and not spelled out in the text. The Committee decided to keep the general approach and deal with this problem outside of the context of Rule 12.

Agenda Item 8.

Proposed Bankruptcy Rule 9.6 - Time.

Professor Kennedy stated he had used the terminology of FRCP 6(a) for drafting this proposed rule but now thought it would be better to revise it as follows:

> In computing any period of time in a bankruptcy case, subdivision (a) of Rule 6 of the Federal Rules of Civil Procedure applies.

Judge Whitehurst moved adoption as revised. The motion carried.

Agenda Item 9.

Proposed Bankruptcy Rule 1.10 - Venue and Transfer.

(a) Proper Venue

Professor Kennedy said that this rule will incorporate venue and transfer provisions and include consolidation of cases filed in the different courts. He said the Committee should decide first whether it wants to attempt to deal with venue and transfer by rule. He thought a bankruptcy rule, by good draftsmanship, may be able to improve over the Act and General Orders. He recommended that there be a rule on venue and transfer. He noted that the Advisory Committee on Admiralty Rules had gone into this area. Professor Kennedy pointed out that this rule would deal with venue and transfer of the whole case, and venue and transfer of particular adversary proceedings initiated by complaint would be governed by another rule. He stated that this draft embodies the principles of the present Act and the changes are mostly drafting changes.

Professor Seligson thought subdivision (c) was too broad, as he would prefer a rule drafted to provide that a case filed in the wrong district by intention be transferred. He felt the rule provides this may be done but that in some cases the court is reluctant to transfer the case. Mr. Treister stated he thought the first and second sentences were covering the same problem; that the first sentence could deal with proper venue as well as improper venue; that only the first sentence was needed, that the second might be deleted, but that the first should include a provision that if venue is improper, the case can be dismissed. After discussion it was decided that this could not easily be handled, and Professor Kennedy said he would be pleased to have any drafting suggestions for this.

Professor Kennedy called attention to the fact that the proposed rule contemplates that the referee may transfer without going through the judge. He stated that it is questionable under present law whether the referee can transfer on his own initiative. He also stated he would like to get a resolution as to whether authority to "retain" wrong venue cases should be left in. It was suggested that it might be well to have a provision in subdivision (a) dealing especially with corporations. Someone suggested it might be taken from Chapter X, section 128. Mr. Treister inquired whether this provision would include references to domicile and residence, and Professor Kennedy advised that there is no domicile in Chapter X, just place of business and place of assets. Mr. Treister said that as long as it is going to be changed, it may be well to define where the domicile of a corporation is. It was recognized that there can be a difference of opinion about the principal place of a business, as some courts may determine it by reference to assets and others by reference to

location of executive offices. Professor Kennedy said he had detected no opposition to getting rid of domicile and residence with respect to corporations, and that the rule should include the principal place of business or location of principal assets. If the rule is to have a special provision about corporations, he thought the Committee may also want a provision about partnerships, since they likewise have neither a domicile nor residence. If so, should the principal place of business or the principal assets be the determinant as to partnerships? It was decided to include these alternatives in brackets for future consideration.

Professor Seligson stated that in Chapter X the language dealing with the parent of a subsidiary is better than the language in Chapter XI. He thought Professor Kennedy might want to deal with this matter in straight bankruptcy.

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It was decided that the next meeting of the Committee would be held on October 31 through November 2, 1966, and tentative dates of February 15-18 and June 21-24, 1967, were also set.

There being no further business, the meeting was adjourned at 1:00 p.m., Saturday, June 18, 1966.