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

The thirteenth meeting of the Advisory Committee on Bankruptcy Rules convened in the Supreme Court Building on Wednesday, June 21, 1967, at 10:05 a.m., and adjourned on Saturday, June 24, 1967, at 1:00 p.m. The following members were present during the sessions:

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

Professor Stanley Joslin was unable to attend. Others attending were Mr. Royal E. Jackson, Chief of the Bankruptcy Division of the Administrative Office of the U. S. Courts, and Professor Charles A. Wright, member of the standing Committee.

Judge Forman welcomed the members and guests. He reported that the Subcommittee on Style had met in May, and he hoped that the results of that meeting would help speed things up.

At this point, discussion was held for determination of the next meeting, and it was scheduled to be held from Wednesday, November 15, 1967, to 1:00 p.m. on Saturday, November 18, 1967.

Agenda Item No. 1: Drafts for the Shelf

Professor Kennedy stated that he had received two suggestions, with which he concurred for minor changes in Bankruptcy Rule 2.21: The words, "in his presence", at the end of subdivision (b) were to be deleted, and in subdivision (d) the words, "all matters", in the third line, were to be changed to "any matter". There were no objections to either of those changes.

There were no comments on Bankruptcy Rules 1.3(d), 1.4, 1.5, 1.5.8, 1.7, 1.7.2, 1.8, 1.8.1, 1.10, 2.21.1, 2.30, 4.11, 7.4, 7.12, 7.65, 7.82, 9.11(b), 9.12, and 9.45, and Judge Forman announced that they, with Bankruptcy Rule 2.21 as revised, would go on the shelf.

Agenda Item No. 2: PROPOSED BANKRUPTCY RULE 4.5 - STAYS OF IN PERSONAM ACTIONS AGAINST BANKRUPT

(a) Stay of Actions.

Professor Kennedy read the subdivision as proposed in the draft dated 6-15-67. It was decided to defer action on the parenthetical language until discussion of the discharge of corporations was reached.

During the discussion, Professor Kennedy pointed out that if an automatic stay was provided against all in personam actions unless the creditor came in and had it lifted, it would be a rather drastic interference going well beyond what Congress had deemed fit to do in section 11a of the Bankruptcy Act. He thought that it would be a very questionable policy decision. In answer to Judge Snedecor's suggestion that there ought not to be an exception as to taxes, Professor Kennedy stated that the automatic stay did apply to dischargeable taxes which the Government was proceeding to recover. He said the rule was not intended to protect the estate against dismemberment by a levy; it was just intended to protect the bankrupt against actions and enforcement of judgments. Professor Shanker suggested that there be a note indicating the extent the state courts will have jurisdiction to interpret the rule in determining whether a stay is operative as to particular litigation. Judge Herzog moved for the adoption of the proposed subdivision with such a note. The motion was carried unanimously.

(b) Duration of Stay.

Professor Kennedy read the subdivision as proposed in the draft dated 6-15-67 and gave the highlights of his Note thereto. He said that one question which had come to him was: What would happen if a case were dismissed after the bankrupt's right to a discharge had been determined? However, it was thought that this would not happen. Judge Snedecor moved for the adoption of subdivision (b). Professor Riesenfeld felt that some guidance should be given to the courts as to when stays shall be terminated or annulled. However, Professor Kennedy felt that it should be left to the discretion of the court. Judge Gignoux suggested that the language of Bankruptcy Rule 6.5(b) be changed to conform to that used in Bankruptcy Rule 4.5(b), and Professor Kennedy said that that would be done. There was no objection to the adoption of Bankruptcy Rule 4.5(b), and it was thereby adopted.

(c) Termination of Stay Against Unscheduled Creditor.

Professor Kennedy read the subdivision as proposed in the draft dated 6-15-67. There was no objection to its adoption.

(d) Relief from Stay.

Professor Kennedy read the subdivision as proposed in the draft dated 6-15-67. Judge Gignoux suggested that the reporter take verbatim the first sentence of Bankruptcy Rule 6.5(c) and just pick up the language of 4.5(d) at the words, "the court", in the third line. Professor Kennedy said that what he then had was the following: "Upon the filing of a complaint by a creditor seeking relief from a stay provided by this rule, the bankruptcy judge shall cause the date for the trial to be set for the earliest possible time, and it shall take precedence of all matters except older matters of the same character. The court shall terminate or annul the stay as to such creditor on a showing that there are reasonable grounds for believing that his debt is not dischargeable, and the court, may, for other good cause shown, terminate, annul, or otherwise modify such stay." There was no objection to the substituted language. However, Judge Gignoux suggested that the second sentence be inverted and made into two sentences. Professor Kennedy accepted this suggestion. There was no objection, and subdivision (d) was adopted as amended.

(e) Availability of Other Relief.

Professor Kennedy read the subdivision as proposed in draft dated 6-15-67. He said he felt that the word, "stay" with a comma, should be added before the word, "injunction". He did not think that the words, "by law", needed to be included at the end of the sentence. Since there was no objection to these amendments, subdivision (e) was adopted. During the discussion, Professor Riesenfeld stated that he felt that it must be made quite clear, in a comment, that the stay does not deprive the state court of jurisdiction when there is a valid initiation of proceedings. Professor Kennedy said that he would draft a Note in light of Professor Riesenfeld's comments.

PROPOSED BANKRUPTCY RULE 6.5 - STAYS AGAINST LIEN ENFORCEMENT [OR STAYS PROTECTING ESTATE]

(a) Stay Against Lien Enforcement.

Professor Kennedy read the subdivision as proposed in the draft dated 6-15-67.

There was a discussion on the meaning of "custody", and it was decided that the reporter would expand his Note to make sure that the broad meaning of "custody" as used in the Bankruptcy Rules is understood. There was no objection to subdivision (a) with the inclusion of such a Note, and it was adopted thereby.

(b) Duration of Stay.

Professor Kennedy read the subdivision as proposed in the draft dated 6-15-67 with amendments, so that it read: "Except as it may be terminated, annulled, or otherwise modified by the bankruptcy court under subdivision (c) of this rule, the stay shall continue until the bankruptcy case is dismissed or closed, or until the property subject to the lien is set apart as exempt, abandoned, or transferred with the approval of the court." Judge Gignoux thought that the word, "bankruptcy", should appear before the last word, "court", and Professor Kennedy agreed. There was no objection to the subdivision as amended, and it was thereby adopted.

Professor Riesenfeld mentioned that the approval of the bankruptcy court seemed to refer to the transfer only. Professor Seligson suggested that the phrase, "with the approval of the bankruptcy court", could be inserted after the words, "lien is", rather than at the end of the sentence. There was no objection to this modification.

(c) Relief from Stay.

Professor Kennedy read the subdivision as proposed in the draft dated 6-15-67, and added the word, "the" before "court" in the third line from the bottom. Professor Seligson suggested that "petitioner or petitioners" be used in lieu of "petitioning creditors", and Professor Kennedy accepted that amendment. There was a rather lengthy discussion concerning the use of the word, "satisfy", in the 7th line of subdivision (c), and the consensus was that it should be changed to "show". Judge Gignoux suggested that the second sentence be modified to read: "Unless the party seeking continuation of the stay shows that he is entitled thereto, the court shall terminate, annul, or otherwise modify the stay on such terms as may be appropriate under the circumstances." Professor Kennedy agreed.

Judge Gignoux suggested that the language from the word, "to", at the end of line 11, down through the word, "party" in line 13, be deleted. Professor Kennedy agreed that that would take care of a very awkward draft problem. He suggested that the words, "to the adverse party or his attorney", could be

used in lieu of the deleted material. Mr. Treister felt that it might be helpful to place the provisions regarding relief from stay without notice in a separate subdivision.

Professor Riesenfeld asked how a relief from stay was obtained. Professor Kennedy replied that it would be done by a complaint. During the discussion which ensued, Mr. Nachman said it seemed to him that where the facts justify a stay without notice, there ought to be something in the nature of an affidavit. He suggested that the words, "if any", in clause (2) of subdivision (c) be deleted. He also suggested that before a stay is vacated without notice, the party seeking relief should be required to make a showing. Mr. Treister suggested that there be a special subdivision to provide for a nonadversary proceeding under which relief from a stay could be obtained without notice. Mr. Nachman felt that the party to whom relief is granted should be required to notify the adverse party of such relief. Professor Seligson suggested that the third sentence read: "Notwithstanding the foregoing, relief from a stay provided by this rule may be granted without written or oral notice to the adverse party or his attorney if (1) . . . ." He felt that the adverse party should receive notice of the relief granted. Judge Gignoux suggested that what should be said in the rule is that if a creditor wants a relief from stay, he has to file a complaint in the usual form; if he needs immediate relief, then he should file, in the adversary proceeding, a motion for an ex parte order, which would expire within 10 days. After further discussion, Professor Kennedy felt that what the Committee had to decide was whether this rule should follow the mold of Bankruptcy Rule 7.1 or Bankruptcy Rule 9.7. Professor Seligson moved that the rule be kept within the mold of an adversary proceeding for the ex parte situation. This motion was lost by vote of 6 to 4.

Judge Gignoux stated that the procedure which he envisaged in this rule would be as follows: A creditor would seek relief from a stay by filing a complaint setting forth that the stay should be vacated because the bankrupt had no equity in the property; if there was urgency in the situation and the creditor wanted ex parte relief, then in the ancillary proceeding he would file a motion requesting an ex parte order setting forth that irreparable injury would result if he did not get immediate relief and that he could not get in touch with the adverse party. In that proceeding the judge would hear it ex parte and, if satisfied, would issue the order. When the adverse party heard about it and if he felt that there was no reason for such ex parte relief, he could come in and tell the judge that he felt that no damage would result, that there was no urgency, that the proceedings should go on, and that the judge should tell him whether there was an equity in the property. Judge Gignoux said that he would not regard that aspect of the proceeding as adversary.

After lunch, Professor Kennedy announced that subdivision (c) of Bankruptcy Rule 6.5 through the second sentence would remain as amended earlier. Then there would be a subdivision (d) entitled "Ex Parte Relief from Stay" which would read: "Notwithstanding subdivision (c), relief from a stay provided by this rule may be granted without written or oral notice to the adverse party, if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the plaintiff before the adverse party or his attorney can be heard in opposition, and (2) the plaintiff's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. A copy of an order granted under this subdivision shall be mailed immediately to the adverse party at his last known address. On 2 days' notice to the creditor who obtained relief from a stay provided by this rule without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its reinstatement, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require." Then Professor Kennedy said that Bankruptcy Rule 7.1 would be modified in clause (6) to read: "obtain relief from a stay as provided in Bankruptcy Rule 4.5(d) or 6.5(c)." He said that these provisions seemed to accord with the general tenor of the discussion. Professor Seligson suggested that instead of using the words, "A copy of an order . . . shall be mailed to the adverse party . . .", the reporter use the language as proposed in his draft of 6-15-67, i.e., "to the receiver or trustee or, if none has qualified, the petitioner or petitioners." Mr. Nachman suggested that the attorney be required to mail the copy. Professor Seligson felt that the party obtaining relief should have the obligation to mail the copy.

Judge Gignoux said that subdivision (c) provided that the creditor is entitled to relief from stay unless the adverse party showed that he was not, but that this provision was not picked up in proposed subdivision (d). He suggested that subdivision (d) read as follows: "Upon a filing of such a complaint the relief requested may be granted without notice if . . . ." Mr. Treister suggested that subdivision (d) be started out as follows: "Upon the filing of a complaint under subdivision (c) relief from a stay provided by . . . ."

Following additional language change suggestions, Professor Kennedy read the final interpolated sentence as follows: "A party obtaining relief under this subdivision shall give notice as soon as possible to the receiver or trustee or, if none has qualified, to the petitioner or petitioners and in any event shall mail a copy of the order immediately to the adverse party at his last known address." Professor Shanker questioned whether it was necessary that notice be given by mail. Professor Seligson moved that the language which had been discussed be adopted, in substance, as subdivision (d) of Bankruptcy Rule 6.5, and that the proposed change in Bankruptcy Rule 7.1 be approved. Judge Snedecor seconded. There was unanimous approval.

(e) Availability of Other Relief.

Professor Kennedy read the subdivision as proposed in the draft dated 6-15-67. However, it was changed from subdivision (d), as proposed, to subdivision (e), in light of the action taken above. He felt that the words, "a stay", should be included before the words, "a restraining", in line 2 of the subdivision, and that the parenthetical language was unnecessary. There was no objection to the adoption of the subdivision as amended.

Agenda Item No. 3: PROPOSED BANKRUPTCY RULE 4.10 - APPLICATION FOR DISCHARGE

Professor Kennedy read the rule as proposed in the draft dated 6-6-67. He then referred the members to his memorandum dated June 15, 1967, and read the material concerning Bankruptcy Rule 4.10. Judge Whitehurst moved that the rule be abolished as recommended by the Subcommittee on Style. There was no objection to the elimination of Bankruptcy Rule 4.10. After discussion as to the need for some kind of a Note to explain why this rule had been eliminated, it was decided that the explanation would be included in the Note to Bankruptcy Rule 4.11.

PROPOSED BANKRUPTCY RULE 4.12.2 - GRANT OF DISCHARGE IN EX PARTE PROCEEDINGS

Professor Kennedy referred the Committee to his memorandum dated June 15, 1967, and read the material pertinent to Rule 4.12.2 therein. Professor Riesenfeld said that he would like to see the words, "shall grant a discharge to the bankrupt", used in lieu of "shall discharge the bankrupt". He questioned why nonpayment of fees had not been considered, since the present law is that the discharge will not be granted, unless the fees are paid. It was agreed that an extra sentence was needed to

provide that no discharge shall be granted until the fees have been paid. Professor Riesenfeld pointed out that some courts have held that even though creditors do not object to the grant of a discharge, the court on its own motion may not grant a discharge. Mr. Treister proposed that the first sentence be modified to say that the court shall grant a discharge to the bankrupt and that there be a proviso regarding the filing fee situation. Since there were quite a few problems presented by this rule, it was decided to defer decisions until after discussion of related rules.

PROPOSED BANKRUPTCY RULE 4.12 - COMPLAINT OBJECTING TO DISCHARGE

(a) Time for Filing (Complaint Under § 14c of Act).

Professor Seligson felt that the second sentence should have some restriction on the maximum amount of time for filing of a complaint. Professor Kennedy suggested the following language: "The time fixed shall not be unreasonably delayed but shall be not less than 30 days after date set for first meeting of creditors." Professor Seligson moved for adoption of Professor Kennedy's language. The motion was carried by majority approval.

(b) Notice.

Professor Kennedy read the subdivision as proposed in the draft dated 6-6-67.

There was discussion of the necessity of retaining clause (3) of the subdivision, and it was decided that it should be eliminated. All were in favor of the elimination, and Professor Kennedy stated that he did not think it was necessary to have the remaining clauses numbered. There was no objection to the elimination of numbers and parentheses. The adoption of subdivision (b) as amended was favored unanimously.

(c) Extension of Time.

Professor Kennedy read the subdivision as proposed in the draft dated 6-6-67. He substituted the word, "the", for the words, "such a", in the last line.

Judge Whitehurst moved for adoption of the subdivision. Mr. Treister questioned the usage of "a motion" and suggested "application" be used instead. Everyone agreed to the substitution. There being no objection to adoption of subdivision (c), it was adopted.

(d) Complaint Under §14e of Act.

Professor Kennedy read the subdivision as proposed in the draft dated 6-6-67. He said that the question was whether the Committee wanted to assimilate objections under 14c and 14e of the Act, or whether the 14c cases should be distinguished from the 14e cases. Still another way of handling the 14e case was set out in Bankruptcy Rule 4.12.1. Professor Kennedy then read a draft of that rule.

PROPOSED BANKRUPTCY RULE 4.12.1 - IMPLIED WAIVER OF DISCHARGE [OR DENIAL OF DISCHARGE UNDER §14e OF ACT]

Mr. Treister would eliminate Bankruptcy Rule 4.12.1 and accept alternative material in Bankruptcy Rule 4.12(d). Professor Seligson felt that 4.12(d) would accomplish the ends of the Detroit practice. However, Professor Kennedy said that if the bankrupt does not appear at the hearing on objections, no new complaint is filed. The Detroit practice is simply to adjourn the hearing and tell the bankrupt of the adjournment. Judge Gignoux suggested that §14e be handled by paragraphs (1) and (2) of Bankruptcy Rule 4.12.1 and that the reference to §14e in Bankruptcy Rule 4.12(d) be eliminated. Professor Riesenfeld asked if there were not two things to be distinguished: (1) where the creditor wants to object, and (2) to examine a contempt. He said that the latter was in Bankruptcy Rule 4.12.2, clause (3), which had been tabled for the time being. Mr. Treister stated that if the bankrupt appeared and refused to answer a question, it would be both potentially a §14e situation and a ground to object to a discharge. He felt that both should be treated as subject to adversary procedure.

Following general discussion, Professor Kennedy stated that if the Committee wanted to follow Mr. Treister's proposed policy, treating every case under §14e as an adversary proceeding, initiated by a complaint, then the Committee should go to Rule 4.12(d); if the Committee wanted to recognize that the court could upon its own initiative make the determination, then he thought the Committee would want to take some form of 4.12.1. Professor Riesenfeld asked why the rules could not contain both. Professor Kennedy said that was a possibility, because the possibility of an adversary proceeding could be recognized under §14e and also Rule 4.12.1 could recognize the possibility that the court could on its own initiative determine the issue of waiver, at least in the third situation.

Following further discussion, Mr. Treister moved that the Committee take Bankruptcy Rule 4.12(d) as it appeared in the

draft of 6-6-67, adopting the bracketed alternatives and eliminating proposed Bankruptcy Rule 4.12.1. It was decided to vote first on whether procedure under §14e of the Bankruptcy Act should be adversary. Three were in favor and seven were opposed. Judge Gignoux suggested that it was the sense of the group that the rule to be adopted should provide that the referee would take § 14e action either on his own initiative or on motion of any party. Professor Kennedy said that he understood, by the last vote, that the Committee was not going to insist that the procedure all be adversary but that some of the matters might be adversary and others not. Judge Gignoux suggested that the § 14e sanctions be imposed by the referee either on his own initiative or upon motion of interested parties. Professor Seligson felt that the rule should provide that where there is a trustee, he should take the initiative. The majority were in favor.

There was considerable discussion as to whether the referee should be able to act without requiring the trustee to be present at the hearing. After much reconsideration, a vote was again taken on whether the rule should provide that if there is a trustee who does not act, the referee may not act. The motion was lost.

Judge Gignoux moved that Bankruptcy Rule 4.12.1(2) be amended to read: "If the bankrupt fails to attend the hearing on a complaint objecting to his discharge, or at the first meeting of creditors, the court on motion of trustee or any interested party, or if no motion is made, on its own motion may adjourn the hearing to another date, ..." After a short discussion, Professor Kennedy suggested the following wording might cover what the Committee wanted: "If the bankrupt fails to attend the first meeting of creditors or any meeting specifically called for his examination or the hearing on complaint objecting to his discharge, the court shall set a date for a hearing, of which notice shall be given the bankrupt and such parties as the court may designate, but if at the hearing set under this subdivision the bankrupt does not show sufficient excuse for his failure to attend, the court may enter an order that the bankrupt has waived his discharge." Judge Gignoux moved that the language be approved in substance. There was majority approval.

Professor Kennedy stated that if the Committee wanted him to treat the refusal to submit as a § 14e case, whether it was at the first meeting or at the hearing on objections, and he was unable to find cases either way, then he could draft the rule that way. There was a vote taken on whether the Committee

felt that the court should be able to act at the hearing on objections to discharge where the bankrupt refused to answer. No one felt that it should be done. Mr. Nachman suggested that the reporter submit a new draft of Rule 4.12.1 the next morning. Professor Kennedy agreed.

[The meeting was adjourned at 4:57 p.m. and was resumed at 9:22 a.m. on Thursday.]

Professor Kennedy read a draft dated 6-21-67. Professor Riesenfeld was troubled by the words "or if he attends but refused to testify at such trial". He said that § 14c of the Act says "or to answer any material question approved by, the court". He felt that "refusing to testify" should be qualified a little. Professor Kennedy suggested that perhaps the statutory language, "refuses to submit to examination", should be used. Judge Gignoux felt that it should be made quite explicit in the rule that the bankrupt would be deemed to have waived his discharge if he did not appear, and also if he appeared and refused to take the oath. He felt the Committee should consider whether it wished to impose that sanction if he took the oath but refused to answer a specific question or if he answered a question falsely. Professor Kennedy said he was troubled about the use of the rule-making power to interpret § 14e, since the subdivision is a substantive provision and the Committee can not extend it or limit it. He felt that the rule should follow the statutory language, and Professor Kennedy agreed with Mr. Treister that this could be done by using the first sentence of the draft of 6-21-67 and eliminating the bracketed material therein.

Further discussion ensued. Mr. Nachman felt that where the bankrupt failed to show up at the first meeting, or failed to attend an examination especially set, the referee should give notice. At a hearing on objections where testimony and evidence had been presented, however, he thought it could be discretionary with the referee as to whether he should decide the case. Mr. Treister said it would be acceptable to him if there were a Note saying that nothing in this rule would stop the court from trying the objection to a discharge. Mr. Nachman stated that he did not wish to take up any more time, and he waived his idea as to the referee's discretion.

Judge Forman stated that the consensus was that there be a Note to supplement the rule to the effect that if the creditor established a case under § 14c, even though the bankrupt was not there, there was no intent to deprive the court of the power to act on the proof and to deny the discharge.

It was decided that the first parenthetical sentence in the draft dated 6-21-67 would be omitted. Judge Gignoux suggested that in lieu of the phrase, "If the bankrupt does not show", in the last sentence, there be used the phrase, "Unless the bankrupt shows". Professor Seligon moved that the amended second parenthetical sentence be adopted. Mr. Treister suggested as an alternative opening clause, "If the bankrupt does not show sufficient excuse for such failure to attend or submit to examination, ..." Mr. Treister moved that the words, "is deemed to have waived" be substituted for "has waived". The motion was carried by vote of 6 to 2. After much discussion, Professor Kennedy suggested the wording, "Unless the court excuses such failure to attend or submit to examination, it shall enter an order that the bankrupt is deemed to have waived his right to a discharge." It was agreed that the matter should be left as one of drafting, since all were in agreement on the substance of the sentence.

There was no objection to the deletion of the parenthetical material at the end of the first paragraph in the draft of 6-21-67. It was felt that perhaps there should be a reference to Bankruptcy Rule 2.10 concerning the notice to be given, and Professor Kennedy said he would make a note of it.

Professor Seligson suggested that the words, "on motion or on its own initiative", be added after the words, "the court", in line 5 of Bankruptcy Rule 4.12.1. There was no objection to that addition. Professor Shanker suggested that word, "date", in the 6th line of Bankruptcy Rule 4.12.1 be changed to "time". There was no objection.

PROPOSED BANKRUPTCY RULE 4.12.2 - GRANT OF DISCHARGE IN EX PARTE PROCEEDINGS

Professor Kennedy read the rule as proposed in the draft dated 6-21-67. Professor Riesenfeld suggested that for clarification the sentence structure should be: "Upon expiration of the time fixed under subdivision (a) of Bankruptcy Rule 4.12, the court shall grant a discharge to the bankrupt unless . . . ." Professor Kennedy said that was perfectly acceptable to him, and the members had no objection to the change. There was no objection to the retention of the parenthetical words, "it appears that",. There was a general discussion on the payment of filing fees. Professor Riesenfeld felt that the language, "In no case, however", in the last sentence was a little strong. Professor Kennedy suggested the following wording: "A discharge shall not be granted, however, until the filing fees required by the Act have been paid in full." That language was acceptable.

Upon further consideration by the Committee of the subject of discharges, Judge Gignoux said he felt that the substance of Bankruptcy Rule 4.12.2 should be moved into Bankruptcy Rule 4.10 which should be entitled "Grant of Discharges", and which should state procedurally when a discharge is automatically granted. He suggested alternatively that Rule 4.12 include the provisions that the court shall make an order fixing a time for the filing of a complaint objecting to the bankrupt's discharge; that notice shall be given thereof; that the time may be extended; and that upon the expiration of the time fixed the court shall grant a discharge automatically unless there has been an express waiver, objection to the complaint has been filed, or there is an implied waiver situation; then have a rule on express waiver and one on implied waiver. Professor Kennedy said that he would take Judge Gignoux's suggestions under advisement, but he would rather put Rule 4.12.2 at the beginning rather than immerse it in Rule 4.12. Professor Seligson suggested that the following course of action be taken: Since Bankruptcy Rule 4.12(a) starts out with the time for filing, subdivision (b) deals with notice given, and (c) with extension of time, perhaps material in Bankruptcy Rule 4.12.2 could be put in as subdivision (d) of Bankruptcy Rule 4.12, because it follows naturally that after notice has been sent and the time has expired, if, at that time, there is no waiver, no complaint, and nothing under 14e, then the bankrupt automatically gets a discharge. Then the material in subdivision (d) of Bankruptcy Rule 4.12 as proposed in the draft dated 6-6-67 could cover the situation where there was a complaint. Professor Kennedy said that he would consider Professor Seligson's proposal. There was no objection to that course.

Mr. Treister suggested that subdivision (d) of Bankruptcy Rule 4.12 as proposed in the draft dated 6-6-67 be eliminated. Judge Shelbourne seconded. There was no objection.

PROPOSED BANKRUPTCY RULE 7.1 - SCOPE OF RULES OF PART VII

Professor Kennedy stated that in clause (4) of Rule 7.1 as proposed in the draft dated 5-23-67, the parenthetical language should be eliminated, because the hearing on waiver of discharge was no longer being treated as an adversary proceeding. Judge Whitehurst moved that the parenthetical material be deleted. The motion was carried by unanimous approval.

Professor Kennedy then referred the Committee to page 3 of his memorandum on the discharge rules dated June 15, 1967. After a short discussion, it was agreed that the Committee would not pursue the suggestion that a provision be included as a part of the Bankruptcy Rule 5.18 that the court shall appoint a trustee in a case where one has not been appointed and an adversary proceeding or contested matter is initiated requiring

the interests of the estate to be represented or it becomes necessary to determine whether the bankrupt waived his right to a discharge under § 14e of the Act.

PROPOSED BANKRUPTCY RULE 4.13 - BURDEN OF PROOF IN PROCEEDING TO DETERMINE DISCHARGE

Professor Kennedy asked the Committee to turn to his memorandum dated June 12, 1967. After noting some typographical errors therein, Professor Kennedy read Alternative 1 of Bankruptcy Rule 4.13. He changed the word "of" in the first line to "on" and eliminated the word "good" in line 14. While reading Alternative 2, Professor Kennedy stated that the word "of" in the first line should be "on". Judge Snedecor moved that Alternative 2 be adopted for Bankruptcy Rule 4.13 and Judge Gignoux seconded the motion. During the discussion which followed, Mr. Treister stated that he would like a codification of the pre-1938 law, which read in substance ". . . when the objectors showed facts which laid a reasonable foundation for believing the allegation, the bankrupt then had the burden of going forward with the evidence in order to overcome the reasonable inference." He said he saw no reason why the defendant who was charged with something should carry the burden of proof. Professor Kennedy pointed out that in the second full paragraph on page 4 of his memorandum dated June 12, 1967, cases are cited which indicate that if the objector shows the bankrupt made or is responsible for a false financial statement which came to the attention of a creditor, he has gone far enough to shift the burden of proof as to the element of reliance. It was the sense of the Committee that there be drafted a rule which would, in effect, codify the pre-1938 law. Mr. Treister read § 500 of the California Evidence Code as follows: ". . . a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." His motion was to adopt a rule which would be substantially the same as the California Rule of Evidence. It was agreed that § 14c(7) of the Bankruptcy Act is troublesome, but that the Committee really can not do anything about it by rules. Mr. Treister's motion was carried unanimously.

PROPOSED BANKRUPTCY RULE 4.14 - NOTICE OF FAILURE TO OBTAIN DISCHARGE

Professor Kennedy read the rule as proposed in the draft dated 4-30-67 and made the following editorial changes: deleted the words, "there is", from the first sentence and added "is filed" after the word "discharged" in line 1; added the phrase, "or deeming the right thereto to have been waived" after the word "discharge" in the second line; and added the words, "the filing of", following the word "after" in the third line. Professor Seligson moved for adoption of the rule as read by the reporter. Judge Snedecor seconded. Professor Riesenfeld

suggested that the caption be changed to read, "Notice of Non-discharge". There was no objection to the change. Professor Seligson's motion was carried unanimously, and the rule as amended was adopted thereby.

PROPOSED BANKRUPTCY RULE ON JOINT PETITIONS FOR HUSBAND AND WIFE

At this point, Mr. Royal Jackson submitted reports on installment petitions and the filing of joint husband-wife petitions. Copies of a memorandum dated July 3, 1967, which was on the agenda for the forthcoming meeting of the Committee on Bankruptcy Administration of the Judicial Conference of the United States, and copies of the statistics on Installment Petitions Filed in Voluntary Straight Bankruptcy and Chapter XIII Cases for Fiscal Years 1965 and 1966 were distributed to the Committee members. Professor Kennedy stated that what the Committee particularly sought was the attitude of the Administrative Office toward a proposal which would require notices of dismissal for failure to pay fees or costs to go out afterwards to all the creditors. Mr. Jackson stated that he would put this item on the agenda for the August lst meeting, because the Administrative Office had taken no official view of the situation.

Professor Kennedy stated that he now wished to consider Mr. Jackson's recommendation that a rule be adopted dealing with the husband-wife joint petition. Mr. Treister felt that in cases where the distribution of property would be changed the Committee should adhere to the state sentiments. After much discussion on the various requirements by states with regard to filing fees, Judge Gignoux suggested that the reporter be instructed to consider Mr. Treister's proposal for the authorization of joint petitions, provided that in the administration substantive rights are not affected, and to submit new material along those lines. There was unanimous approval to have the reporter consider problems incident to the consolidation of husband and wife bankruptcies.

Agenda Item No. 5 - PROPOSED BANKRUPTCY RULE 1.50 - DISMISSAL

Professor Kennedy read the rule as proposed in the draft dated 6-15-67. He wondered whether "motion" or "application" was the proper word to use in the first line of the draft. He said that sometimes "motion" would be appropriate if it was made in the course of a contested matter, but that perhaps when a petitioning creditor sought dismissal of his own case, that would be considered an "application". He read the definitions of "motion" and "application" in Bankruptcy Rule 9.1. It was agreed that the wording used in first line should be "application or motion". Professor Riesenfeld felt that perhaps the rule should be broken into two paragraphs - the first one for

voluntary dismissal and the second for involuntary dismissal. He said he would be happy to have the last sentence in a separate paragraph. There was discussion as to whether to add "as provided in Bankruptcy Rule 2.10" at the end of the last sentence. Since there were various suggestions as to exact language to be used, Professor Kennedy said that he would work it out so that the substance would be what the Committee desired.

Professor Riesenfeld had questioned whether there should be a sentence to cover dismissal without prejudice. Mr. Treister asked why there could not be a paragraph in this rule to say that dismissal is with or without prejudice unless the court otherwise specifies. He felt that the paragraph could be taken out of Bankruptcy Rule 1.5.8 and put into Bankruptcy Rule 1.50. Professor Shanker pointed out that dismissals for want of prosecution in the civil rules are with prejudice.

After discussion, Professor Kennedy stated that what he had was the following: "A dismissal upon application or motion of the petitioner or petitioners or for want of prosecution or by consent of the parties shall be without prejudice unless otherwise specified in the order of dismissal. The case shall not be dismissed for such a reason until after hearing upon notice to the creditors as provided in Bankruptcy Rule 2.10. The court shall require the bankrupt to file a list of all his creditors with their addresses, if not previously filed. If the bankrupt fails to file such list within the time fixed by the court, the court may order the list to be prepared and filed by the receiver, trustee, a petitioning creditor, or other party in interest." Then there would be a second subdivision which would read: "A notice of a dismissal for failure to pay the filing fees or the costs of the bankruptcy case shall be given within 30 days after the dismissal to all creditors listed in the schedule or who have filed claims." It was the consensus of the Committee that the reporter draft the provisions of the rule in the order in which he feels it should appear.

PROPOSED BANKRUPTCY RULE 5.75 - CLOSING CASES

Professor Kennedy read Rule 5.75 as proposed in the draft dated 6-18-67 and said that the last word should be "case" rather than "estate". Mr. Treister pointed out that there were many cases in California which the courts had closed but where assets had not been fully administered and, because of their potential value, the courts did not want the property to be abandoned. After a lengthy discussion as to practices of different referees, Mr. Treister moved that the principle of Bankruptcy Rule 5.75

be declared to permit leaving assets unadministered while closing the case. The motion was lost. After receiving several language suggestions, Professor Kennedy read the following: "Whenever it appears that an estate has been administered, and the court has passed upon the final account and discharged the trustee, it shall close the case." Professor Seligson moved for the adoption of the language, and it was approved unanimously.

PROPOSED BANKRUPTCY RULE 5.80 - REOPENING CASES

Professor Kennedy read the rule as proposed in his draft dated 6-18-67 and stated that the words "A motion" should be changed to "An application". He then turned to Bankruptcy Rule 1.5.1. He said that a possible way of handling the reopening of cases was to insert after the word, "petition", in line 1 of Bankruptcy Rule 1.5.1, the words, "or of an application to reopen a case". Judge Whitehurst felt that the language in the first sentence of Rule 1.5.1 should cover Judicial Conference authorization - rather than by local rule - for referees to act concurrently. Mr. Jackson read the last sentence of § 37b(1) of the Bankruptcy Act as a ground for such authorization by the Judicial Conference. After further discussion, it was decided that the technicalities of the language of Bankruptcy Rule 1.5.1 should be left to the reporter.

It was agreed that Bankruptcy Rule 5.80 would be left in with the first sentence reading: "An application to reopen a case shall be filed with the clerk of the district court having custody of the papers in the case." The second sentence would read: "The case shall be referred forthwith in accordance with [or as provided in] Bankruptcy Rule 1.5.1." dependent upon whether the words, "or upon an application to reopen a case" were left in the first line of Bankruptcy Rule 1.5.1. The reporter was to work on the final language.

Agenda Item No. 5 - PROPOSED BANKRUPTCY RULE 7.41 - DISMISSAL OF ADVERSARY PROCEEDINGS

Professor Wright pointed out that there is an inappropriate reference in Rule 41(a)(1) of the Federal Rules of Civil Procedure to Rule 23(c), which should be to Rule 23(e), but that the discrepancy would have to be cleared up by the Civil Rules Committee. Professor Seligson moved for approval of Bankruptcy Rule 7.41. However, after short discussion, Professor Kennedy said he would be glad to look further into the application of Bankruptcy Rule 7.41 to the withdrawal of objections to discharge.

Judge Herzog said he would like to see the inclusion of any reference to FRCP 23 eliminated too, because he did not think there should be a class action in bankruptcy. Professor Wright stated that the answer to Judge Herzog's problem was that under Rule 23c(1) no class action could be maintained except with the approval of the court. Professor Riesenfeld questioned the appropriateness of the exception of the reference to Rule 66 in Bankruptcy Rule 7.41. Professor Kennedy agreed to take another look at the exception. Therefore, decisive action on Bankruptcy Rule 7.41 was deferred.

Agenda Item No. 4 - PROPOSED BANKRUPTCY RULE 4.1 - EXEMPTIONS

Professor Kennedy read subdivision (a) of Bankruptcy Rule 4.1 as proposed in the draft dated 6-16-67. Mr. Nachman asked how a claim was filed in a schedule. Professor Kennedy replied that the Committee had approved a form which followed present Official Form No. 1 Schedule B-5. Mr. Nachman was troubled by the language and, after suggestions had been presented, Professor Kennedy stated that the sentence would read: "A bankrupt shall claim his exemptions in the schedule of his property required to be filed by Bankruptcy Rule 1.7." There was no objection to subdivision (a) and it was approved as changed.

(b) Trustee's (Examination and) Report.

Professor Kennedy read the subdivision as proposed in his draft dated 6-16-67.

Since certified mail has not been required by statute or general orders, it was felt that it was not necessary for the trustee's report to be sent by this means under the last sentence of the subdivision. There was discussion as to the time within which the trustee was to mail the copy of the report, and it was agreed that the five-day clause should be eliminated and the word "forthwith" added after "shall". Mr. Treister felt that a copy of the report also should be mailed to the bankrupt's attorney. Professor Kennedy stated the last sentence, with the proposed changes, now read: "The trustee shall forthwith mail or deliver copies to the bankrupt and his attorney." There was no objection to that language. Professor Kennedy felt that "(Examination and)" could be left out of the title, and there was no objection. Subdivision (b) as amended was approved unanimously.

(c) Objections to Report.

Professor Kennedy read the subdivision as proposed in the draft dated 6-16-67. Mr. Treister moved that the burden of proof be on the objector. There was unanimous approval of the motion. Judge Whitehurst questioned the usage of the word "dependent". Discussion ensued as to the restriction of filing to members of the family. It was felt that, in view of some states' laws,

that category was too narrow and that filing by any beneficiary who had the right to claim the exemption should be permitted. After short discussion, Professor Kennedy said that the language he had now was: "Any creditor or the bankrupt or any beneficiary entitled to claim the exemption may file objections. . . ."

Professor Shanker asked why there was no reference to Bankruptcy Rule 9.6(b) in this proposed rule. Mr. Treister said that he supposed the reason the reference was not made was that the reporter wanted to be sure that the application for extension was made within the ten-day period and 9.6(b) would allow it to be made after that time. Professor Kennedy said that was right, and that he had not wanted to leave the door open for creditors to come in after the 10 days. After further discussion, vote was taken on having the first sentence read as follows: "Any creditor or the bankrupt or any beneficiary entitled to claim the exemption may file objections to the report within 10 days after its filing, unless further time is granted by the court within such 10-day period." There was no objection to its adoption.

Professor Seligson moved that the parenthetical material in the second sentence be deleted. There was unanimous approval. Mr. Nachman suggested that copies of objections should be delivered or mailed to the bankrupt and his attorney. The reporter was to draft an appropriate sentence which would be put into the rule as a second sentence. During the discussion concerning the second sentence, Professor Kennedy stated that the rule proposed by him would require the objections to go to the trustee and to the bankrupt and his attorney if the objections were by creditors. It was agreed that the second sentence would read, "After hearing upon notice the court shall determine the issues presented by the objections," and that there would be a Note stating to whom notices would be sent. All were in agreement that the last sentence should read: "The burden of proof shall be on the objector." Subdivision (c) as amended was approved thereby.

(d) Procedure if No Trustee Appointed.

Professor Kennedy read the subdivision as proposed in his draft dated 6-16-67 and, because of earlier actions taken, stated that the second sentence should be changed by substitution of the phrase "any beneficiary entitled to claim the exemption" for "a dependent member of his family". All agreed that "bankruptcy judge" rather than "referee" should be used in the first sentence. As so amended, the first sentence was approved.

Professor Kennedy pointed out that "bankruptcy judge" rather than "referee" should be used to conform with the first sentence, and suggested that perhaps the language of the second sentence should end, "a trustee shall be appointed to represent the interests of the estate".

Judge Whitehurst asked if a trustee appointed under this subdivision was appointed for the limited purpose or for all purposes to administer the estate. It was generally agreed that he would probably assume all the duties of a trustee.

After Judges Snedecor and Herzog suggested revisions of the subdivisions to authorize the bankruptcy judge only to allow exemptions claimed or appoint a trustee, Professor Kennedy stated that the premise of their proposals was that the court should never on its own disallow an exemption claimed. However, it was felt that the proposed procedure was all right. Judge Herzog then moved for language that would read as follows: "If no trustee has been appointed at the first meeting of creditors, the bankruptcy judge shall either set apart the exemptions allowed by law and claimed by the bankrupt or appoint a trustee." Judge Snedecor seconded that motion. Mr. Nachman asked when the bankruptcy judge should set the exemptions aside. It was felt that the setting apart should be in the form of a report, and Judge Herzog agreed to that. Mr. Nachman stated that under subdivision (b) a trustee had to file the report within 15 days after notice of his appointment, and he wondered when the referee would have to file the report. Professor Seligson suggested: "no later than 15 days after the first meeting of creditors" should be inserted into the rule. Judge Herzog accepted that. Professor Riesenfeld did not like the usage of the words, "allowed by law", and Judge Herzog was willing that they be deleted. After discussion as to the duties placed upon the bankruptcy judge and trustee, Professor Kennedy suggested the following language: "If no trustee has been appointed, the duties of the trustee prescribed by subdivision (b) shall be performed by the bankruptcy judge within 15 days after the first meeting of creditors. If the bankrupt or any beneficiary entitled to claim the exemption files objections to the report, the court shall appoint a trustee." There was no vote taken, pending submission by the reporter of a new draft at the next day's meeting.

[The meeting was adjourned at 5:10 p.m. and resumed on Friday at 9:32 a.m.]

Professor Kennedy presented a new draft of Bankruptcy Rule 4.1 which incorporated changes made during previous day's discussion. He stated that Alternative A was substantially what he had proposed for subdivision (d) at the close of the previous day's session; Alternative B purported to be substantially that presented by Judge Herzog; and Alternative C was a compromise between Alternatives A and C. Judge Whitehurst asked if it was necessary to cover the situation where the bankruptcy judge would allow an exemption which some creditors thought ought not to be allowed. Professor Kennedy replied that he contemplated that in that situation the creditor would make an objection; there would be a hearing with the creditor objecting and the bankrupt and his attorney opposing the creditor's objection; and it would not then be necessary for a trustee to be appointed nor for the referee to be a litigant in the case. Judge Whitehurst thought it might be a good idea to have a note of explanation.

Judge Snedecor moved for the adoption of Alternative C with the elimination of the words, "and mail or deliver copies of the report to the bankrupt and his attorney." Judge Herzog offered alternative language as follows: "If no trustee has been appointed at the first meeting of creditors, the bankruptcy judge shall, as soon as practicable, determine the bankrupt's claim to his exemptions and either allow them or appoint a trustee who shall proceed in accordance with subdivision (b) of this rule." Professor Seligson asked what happened to the creditor who wanted to object. Professor Kennedy said that to take care of that question, he supposed he could add to Alternative C a sentence which would read: "A creditor may file objections to a report so filed in accordance with subdivision (c)." He said it might be accomplished by a Note, but Professor Seligson did not think that a Note would suffice. After a short discussion, a vote was taken on Alternative C. The motion was lost by a vote of 9 to 2. Professor Seligson then moved for the adoption of Alternative A. The motion was seconded, and it was carried by a vote of 9 to 2. Alternative A was thereby adopted.

(e) Approval of Report if no Objections.

Professor Kennedy read the subdivision as proposed in his draft dated 6-22-67. Judge Snedecor moved for its adoption. The motion was carried unanimously. Mr. Treister said he was not sure that the reference should be "provided by subdivision (c)". He felt that it should be "provided by this rule" to cover the case when the court files the report. Professor Kennedy stated that he had made a note of Mr. Treister's suggestion.

There was a short discussion as to what might happen if the report is not filed as required by subdivision (b) of Bankruptcy

Rule 4.1, and Professor Kennedy said that he would consider having a Note to cover the questions raised.

Agenda Item No. 6: PROPOSED BANKRUPTCY RULE 5.11 - RECEIVERS AND MARSHALS

(a) Application for Appointment.

Professor Kennedy read the subdivision as proposed in the draft dated 2-3-66 and gave its background. Professor Shanker inquired as to why the appointment of a receiver had been qualified by the use of the words, "to serve either as a mere custodian or with full powers". He felt that in some cases there might be a receiver who would be neither a mere custodian nor one with full powers, but one who had some other limited purpose. After a short discussion, Mr. Nachman moved approval of subdivision (a) with the deletion of the words, "to serve either as a mere custodian or with full powers" be approved. The motion was carried by majority vote.

Professor Riesenfeld said that the recently passed motion caused him difficulty with subdivision (f). He said that he would rather have the word "determined" used instead of "enlarged", because the receiver's duties could be contracted. Professor Kennedy agreed that "enlarged" perhaps should not be used. He asked if the reference to duties and compensation could come out. Professor Riesenfeld stated that that part did not bother him; he just felt that "unless specified" rather than "specifically enlarged" should be used. Following a very short discussion, Professor Kennedy said he felt that the words, "unless otherwise specified", should be included in the rule and a Note would indicate that the language was substantially what the General Order had always provided.

Judge Snedecor suggested that the words, "or delivered", be added after "mailed" in subdivision (g) of Bankruptcy Rule 5.11. Professor Kennedy stated that he had made that change already, and, as a matter of fact, he was making subdivision (g) a part of subdivision (f).

At this time, Judge Gignoux suggested that rather than have the Committee review all the General Orders which had been put on the shelf, the reporter could just highlight any material changes in the proposed revision. There was no objection to that line of procedure.

Judge Forman stated that he took it that Bankruptcy Rule 5.11 had no material change from the way it read when put on the shelf as General Order 40, and in any event the members would have notice, before the next meeting, of any changes made.

Mr. Nachman suggested that if any members wrote to the reporter on matters of substance in the revised general orders, copies of those letters should be sent to all of the Committee members. Judge Forman felt that in every instance the members should write to Professor Kennedy and let him decide whether the letters should be circulated.

PROPOSED BANKRUPTCY RULE 5.12 - ANCILLARY PROCEEDINGS

Professor Kennedy stated that this rule had been gone over before, but he wondered about the use of the words, "ancillary jurisdiction" in subdivision (b). He thought that it might be more appropriate to have the rule say "may enter orders and judgments binding on persons and property". He said that the reference to "ancillary jurisdiction" seemed to confer jurisdiction, and semantically it might cause trouble. Mr. Treister questioned the usage of "court of bankruptcy". Professor Kennedy replied that that was done deliberately, because "bankruptcy court" as used by the Committee meant the court where the petition was pending. Mr. Treister felt that "bankruptcy judge" should be used since, as defined, it includes the court exercising ancillary jurisdiction. Professor Kennedy agreed that "bankruptcy judge" could be used instead of "court of bankruptcy". On a motion by Mr. Nachman, subdivision (b) of Bankruptcy Rule 5.12 was approved to read as follows: "An ancillary receiver may not be appointed after a trustee has qualified. Any bankruptcy judge may enter orders and judgments binding on persons and property within its territorial limits in aid of a trustee appointed in another court of bankruptcy, upon the application of the trustee made with leave of the court of primary jurisdiction." However, the reporter was to make stylistic changes to cause conformity between the usage of "bankruptcy judge" and "limits".

Professor Riesenfeld was troubled by the idea of recognizing that a bankruptcy judge is bound by territorial limitations, because, in some cases, the bankruptcy judge is not bound by such limitations. Professor Kennedy said he was not sure whether the material as proposed in subdivision (b) was covered under the previously submitted General Order on which a vote had been taken. After a short discussion, it was decided that Professor Kennedy would review Bankruptcy Rule 5.12(b) and inform the members of his findings.

PROPOSED BANKRUPTCY RULE 5.18 - TRUSTEE NOT APPOINTED IN CERTAIN CASES

Mr. Treister noted that the phrase, "if the creditors do not elect a trustee", was shown in two places. Professor Kennedy stated that the repetition would be taken care of as suggested.

PROPOSED BANKRUPTCY RULE 5.19 - ACCOUNTS AND PAPERS OF RECEIVERS AND TRUSTEES

After a short discussion, Judge Herzog moved that Bankruptcy Rule 5.19 be eliminated. Judge Snedecor seconded. The motion was carried unanimously.

Agenda Item No. 7 - PROPOSED BANKRUPTCY RULE 3.1 - PROOFS OF CLAIM

(a) Form and Content of Proof of Claim.

Professor Kennedy read subdivision (a) as proposed in the draft dated 10-21-66.

Professor Kennedy said that since the official form for proof of claim itself indicates how agency shall be shown, he wondered if there was any need for the parenthetical language requiring the proof of claim to state the authority of an agent. Judge Snedecor moved that the parenthetical language be eliminated. There was unanimous approval.

(b) Claim Founded upon Written Instrument.

Following general discussion as to the value of written instruments as attachments to proofs of claim, Mr. Treister moved that the principle of the proposed subdivision (b) be that written evidence need not be attached to a proof of claim. After Mr. Nachman and Judge Snedecor expressed their view that it would be helpful to have information attached to the claim, a vote was taken on Mr. Treister's motion. The motion was lost by count of 8 to 2. There was a short general discussion concerning the words, "a written instrument", and it was agreed that "a writing" should be used. Professor Riesenfeld asked if it was intended to have the word "instrument" near the end of the second line changed to "original". Judge Forman stated that was correct. Judge Herzog moved that the words, "a true copy", be used in lieu of "a reproduction certified to be a true copy". The motion was carried by vote of 4 to 2.

Professor Wright asked what was proposed to be done with the parenthesized word "verified" in the fifth line. All were in agreement that it should be eliminated.

Following a short discussion concerning the third sentence, Judge Snedecor moved that the Committee vote on the principle of whether a negotiable instrument should be stamped before it is taken away from the bankruptcy court. Judge Snedecor pointed out that the present law did not require the stamping of the instruments. He then withdrew his former motion and moved that all language following the second sentence of the subdivision be stricken. The motion was carried by vote of 6 to 3.

(c) Claim Transferred After Bankruptcy; Unconditional Transfer Before Proof Filed.

Professor Kennedy read subdivision (c) as proposed in the draft dated 10-21-66 and gave its background. Professor Seligson moved for the adoption of subdivision (c) with the elimination of the parenthetical language, "unless excused by the court", and retention of the parenthetical language comprising clause (2). Mr. Nachman suggested the language concerning proof should be, "the proof of such claim may be filed only by the transferee and shall be supported by a statement of the transferee setting forth the consideration therefor." Professor Seligson said that he would like to add something to the effect that if the statement which was filed by the transferee was inadequate, then any party in interest might apply to the court for additional disclosures. Mr. Treister pointed out, however, that the function of this rule is to stop the filing of claims to control the election of the trustee. He said the rule merely required some evidence on the records from which the court would decide whether a claim could be voted if challenged. Mr. Nachman said if it was felt that the power was implicit in the rule, he would be satisfied with a Note giving that explanation. Professor Seligson agreed to such a Note.

Professor Seligson's motion to adopt subdivision (c) with the elimination of the parenthesized words, "unless excused by the court," and the retention of the parenthetical language, "or (2) a statement of the transferee why it is impossible to obtain a statement from the transferor", was carried unanimously.

(d) Same: Unconditional Transfer After Proof Filed.

Professor Kennedy stated that in Bankruptcy Rule 3.1(d) the language which appeared in the draft of 10-21-66 was the same as that which had been placed on the shelf. However, he said, that more recently, there had been manifested some dissatisfaction with the word, "satisfied". He stated that Judge Gignoux had pointed out that the word "satisfied" has a subjective connotation, and Professor Kennedy felt that if the word should be taken out in other rules, perhaps it should be taken out of

subdivision (e) of this rule also. He asked the Committee if they would prefer that the word, "finds", be used instead. Judge Gignoux moved that the suggestion of the reporter be adopted. There were no objections.

(h) Evidentiary Effect of Proof of Claim.

Professor Kennedy explained that this subdivision was new. He read it as proposed in his draft dated 10-21-66 and gave the background. Judge Whitehurst moved for its approval. There was no objection, and the subdivision was adopted thereby.

PROPOSED BANKRUPTCY RULE 3.2 - FILING PROOF OF CLAIM

(a) Persons Authorized to File.

There was general discussion of subdivision (a) as to the language which seemed to require that every creditor must file a proof of claim. To clarify what was intended, Mr. Treister suggested that the words, "in order for his claim to be allowed", be inserted after the word, "must". All agreed that that would take care of the problem.

(c) Time for Filing.

Professor Kennedy said the first question on this subdivision was whether the Committee wanted to put § 57n of the Bankruptcy Act into the rule or leave it in the statute. It was agreed by all that the provisions of § 57n included in the proposed subdivision should be in the Bankruptcy Rules. Therefore, Professor Kennedy read the draft dated 10-21-66 and gave its background.

Mr. Treister suggested the use of the word "minor" rather than "infant" in clause (2) of this subdivision. Professor Seligson suggested that the sentence read: "a minor or insane person without a guardian may have an additional six months for filing a claim if he has received no notice of the bankruptcy proceeding." Mr. Nachman asked how notice would be given to a minor or insane person. Mr. Treister felt that the principle of the provision should be that the court has discretion to extend the time for minors and insane persons as the interests of justice require, without any reference to a notice. There was no objection to Mr. Treister's suggestion, and Professor Kennedy was to work on the drafting.

Judge Whitehurst stated that in a situation where the property was in the hands of the trustee in bankruptcy, and a reclamation petition had been filed and would not be acted upon within the six-month period, the reclamation petitioner said he wanted to file an unsecured claim if his petition was ultimately denied by the courts. After noting that the denial of the petition was not a recovery from the petitioner under clause (3) of the proposed subdivision, Judge Whitehurst moved that the reporter include a provision which would specifically cover the situation in which a reclamation petition was denied. There was no objection to Judge Whitehurst's proposal. After a general discussion of clause (3) of the subdivision, Professor Kennedy stated as his understanding that he was to consider whether to leave the clause as it was in the draft of 10-21-66 or to use such words as, "if the judgment is not complied with by such person", and that the choice was left to his discretion.

Professor Kennedy then proceeded to clause (4) of the subdivision, and said that there should either be inserted "if duly proved" after the word "and" in the fourth sentence, or that the wording should be "and shall be allowed as provided in Bankruptcy Rule 3.5." He said that without one or the other, there was no alternative to the court other than to allow the claim. Mr. Treister moved that the words, "if duly proved" be used. There was no objection.

Professor Seligson asked what was meant by "paid in full". There was a short discussion, and Mr. Treister moved that the principle of clause (4) be that "paid in full" means without post-bankruptcy interest, and that the principle be incorporated into the rule. There was no objection.

Professor Kennedy presented a question raised by Referee Chummers of Chicago as to the duty of the referee respecting proofs of claim filed after the time for filing has expired. He asked if the Committee felt a need for a modification of the rule so that belatedly filed claims could come in without the necessity of a court order. Mr. Nachman said that he thought what Referee Chummers had in mind was to get some uniformity. Professor Kennedy stated that there was an implication in Bankruptcy Rule 3.2(c)(4) that there could not be any filing unless and until a time was fixed by the court. He said the question before the Committee was whether the rule should be revised so that it would be clear that any claim could be filed, even after the fixed period, but that it should not be allowed unless the claims have been paid in full.

Professor Seligson asked if there should be a statement in the rule that claims which are filed prior to expiration of time

fixed need not be refiled. Mr. Nachman said that he thought that Referee Chummers' question was whether it was proper for a clerk to accept the claims for filing since the court had not yet fixed the time within which the late claims might be filed. Mr. Treister said that it would be very difficult to read the statute or the rule as saying that claims can not be filed after the six months' period. He moved that the following principle be adopted: that claims can be filed at least as long as the case is open, and that the rule be couched in terms of non-allowance if the claims are filed too late. Judge Herzog suggested the following wording: "All claims duly filed having been paid in full, late claims filed before a bar date fixed by the court shall be allowed against the surplus remaining in the case." It was decided that the reporter would take another look at the language in order to achieve the desired result.

PROPOSED BANKRUPTCY RULE 3.3 - CLAIM OF BANKRUPT ESTATE

Professor Kennedy read the rule as proposed in his draft dated 10-21-66. Mr. Treister suggested that the first line read: "The claim of a bankrupt estate against another bankrupt". Judge Whitehurst asked if "bankrupt estate" included an estate in Chapter X, XI, or XII. Professor Kennedy replied that an estate being administered in bankruptcy was not necessarily the same as a bankrupt estate. After a very short discussion, Judge Gignoux moved that Bankruptcy Rule 3.3 be deleted and that in an appropriate Note the reporter explain why the provisions of § 57n of the Bankruptcy Act were not being picked up. Following a few short comments, Professor Riesenfeld moved that Bankruptcy Rule 3.3 be deleted and that it be left to the reporter whether to have a Note explaining the deletion or to incorporate the rule into Bankruptcy Rule 3.2(a). There was unanimous approval.

PROPOSED BANKRUPTCY RULE 3.3.1 - CLAIMS BY AND AGAINST PARTNERS IN PARTNERSHIP BANKRUPTCY

Professor Kennedy read the rule as proposed in the draft dated 10-21-66. After discussion, it was agreed that Bankruptcy Rule 3.3.1 should be deleted, as the material was covered by statute, and it was felt that that was where it should be. Professor Kennedy was to consider whether a Note was necessary.

PROPOSED BANKRUPTCY RULE 3.4 - FILING OF CLAIMS BY BANKRUPT

Professor Kennedy stated that proposed Bankruptcy Rule 3.4 had been discussed and approved down to the last sentence. He said that the word "summary" in the last sentence of the draft dated 10-21-66 should not have been there. It was felt that the parenthetical language should not be in the rule but that a Note could take care of its contents. Bankruptcy Rule 3.4 was approved except for the last sentence, which would be incorporated

into a Note.

PROPOSED BANKRUPTCY RULE 3.4.1 - WITHDRAWAL OF CLAIM

Professor Kennedy read the rule as proposed in his draft dated 2-21-66. Mr. Treister said his only objection to the proposed rule was that there should be an affirmative sentence, i.e., that a claim may be withdrawn as of right anytime before an objection is filed. Professor Kennedy felt that a Note saying in effect, "If these conditions do not apply, the claim may be withdrawn without the court's permission," would suffice rather than to have an affirmative sentence within the rule.

Professor Riesenfeld asked whether withdrawal of a claim without the court's permission would cancel a waiver of security otherwise resulting from the filing of a claim. Professor Kennedy said that he would consider putting that into the Note also. Mr. Treister said that he thought that a creditor should be allowed to withdraw a claim as a matter of right, and that what the creditor might do thereafter in trying to assert a different standing should not be dealt with in this proposed rule. Professor Kennedy, in light of the discussion, was to take another look at the implications of the proposed rule. However, he wanted further discussion of the rule in order to seek possible resolution of many different views. Professor Seligson asked how many did not want to give a secured creditor the right to withdraw, if he deliberately filed an unsecured claim. There was no real answer to this question.

Mr. Treister suggested putting into the text of the rule the following: "If a complaint has been filed or if an objection is made under 57g or if the claim has been voted for a trustee in bankruptcy, then the creditor may only withdraw with permission of the court. Otherwise, the creditor may withdraw as of right." There was no objection to Mr. Treister's proposal. There was to be a Note stating that there might be an election of remedies. The reporter was also to undertake further research and do a redraft of the rule.

PROPOSED BANKRUPTCY RULE 3.5 - ALLOWANCE OF CLAIMS

Professor Kennedy read subdivision (a) of Rule 3.5 as proposed in his draft dated 10-21-66. Judge Herzog suggested the addition of the word "deemed" before "allowed" in line 3, because he said that certain circuits had held that allowance is a judicial act which requires some affirmative action. Judge Herzog pointed out that if the claim was "deemed allowed," it would not be binding at all. Mr. Treister said he felt that the subdivision should end with the word "interest", as he could

not see that the second clause really added anything. Professor Kennedy said that "forthwith" was not really needed, and there was general agreement.

Professor Kennedy then asked what about the allowance of unliquidated and disputed claims. He said that the statute now says that these shall not be allowed unless the court shall determine that they are capable of liquidation. He said the Committee was changing that. Mr. Treister felt that those claims should be deemed to be allowed. Professor Kennedy asked what if a creditor filed a claim which did not have any amount, and then suggested as an answer that the claim would not be deemed allowed because not duly proved. Mr. Treister said that he would delete the word "duly" in the first line because if the claim was proved and filed in accordance with the rule, he assumed it would be "duly" proved.

Judge Herzog moved that subdivision (a) be adopted as amended, i.e., with in the first line, the word "duly" being stricken; in the third line, the word "deemed" being inserted before "allowed"; the parenthetical word "forthwith" being stricken; and all language after the word "interest" in the fourth line being stricken. Judge Snedecor seconded. There was unanimous approval.

(b) Temporary Allowance.

Professor Kennedy stated that the action just taken might undermine subdivision (b) as proposed in the draft dated 10-21-66. He said that if the claim was deemed allowed, then the language covering temporary allowance was unnecessary. Judge Whitehurst asked if the language could be saved by the addition of the following: "Notwithstanding objection by the party in interest" at the beginning of the subdivision. Judge Herzog suggested that the language be "provisionally allowed", but since he had no strong feeling about it, it was decided that "temporarily allowed" would be retained. Professor Kennedy said he supposed that the "Notwithstanding" phrase would refer to both the first and second sentences of the subdivision. Mr. Nachman did not understand the reason for the introductory phrase. Professor Kennedy replied that the idea was that even though an objection was made and not resolved, there could be a temporary allowance without a final determination on the issue of allowance. Mr. Treister felt that since the idea of subdivision (b) was to facilitate the holding of creditors' meetings and not to determine participation in dividends, it would be better to include the material of the subdivision in a rule dealing with creditors' meetings. He said that would eliminate the difficulty of the claim being deemed allowed for the purpose of getting dividends but not deemed allowed for the purpose of voting. All were in agreement

that subdivision (b) of Bankruptcy Rule 3.5 should be transferred to Bankruptcy Rule 2.22.

(c) Objections to Allowance.

Professor Kennedy read subdivision (c) as proposed in the draft dated 10-21-66. Judge Gignoux suggested that the first sentence be deleted. Professor Kennedy said he felt the need to say something about objections to claims in the rules. Mr. Treister suggested saying that objections to the allowance of a claim for the purpose of its entitlement to dividends shall be in writing. Following suggestions received during the discussion, Professor Kennedy said that what he planned to incorporate into the rule was the following: "An objection to a claim shall be in writing and a copy thereof shall be mailed or delivered to the claimant." However, it was pointed out that it was really a notice of hearing on the objection to the claim which would be mailed to the claimant. After hearing the comments, Professor Kennedy proposed the following: "An objection to a claim shall be in writing. A copy thereof and notice of a hearing thereon shall be mailed or delivered to the claimant." He stated that the language proposed would be in lieu of the first sentence of the draft dated 10-21-66. Vote was taken on Judge Gignoux's motion for deletion of the first sentence of the draft dated 10-21-66. The motion was carried unanimously. Mr. Treister moved that the reporter's proposed language be adopted in lieu of the first sentence, which was just deleted. There was unanimous approval.

Judge Gignoux said that the second sentence seemed to be circuitous. He suggested the deletion of the sentence and to have put into Note to Bankruptcy Rule 7.1 a statement that it would include a complaint that might be filed by the trustee at the time he objected to a claim. Professor Kennedy did not feel that a Note would suffice. Professor Seligson suggested that second sentence read as follows: "If the trustee joins with his objection a claim for relief of the kind specified in Bankruptcy Rule 7.1, the proceeding thereby becomes an adversary proceeding." His suggestion was approved by the Committee, and it was understood that a Note explaining adversary proceedings would accompany Bankruptcy Rule 3.5.

(d) Secured Claims.

Professor Kennedy read subdivision (d) as proposed in the draft dated 10-21-66. Professor Riesenfeld was concerned over the language because he said that it should be made clear that the claim of security must relate to the claim that was filed. Professor Seligson was troubled that the language might be interpreted to mean that the secured creditor had to file a proof of claim. Professor Kennedy wondered how the value of security would be determined where no proof of claim was filed but the property was sold free of liens. However, he guessed

that no difficulty would arise under the rule.

Following a short discussion, Professor Kennedy asked Professor Riesenfeld if the following language would take care of the problem which he had raised: "The value of security held by a secured creditor who has filed a proof of claim which is secured thereby ...." Professor Kennedy said the option about converting according to the terms of the agreement could be left out because the court directs how collateral shall be liquidated, and if the creditor and the trustee agree that it should be converted according to the terms of the agreement, there is no problem. However, Professor Riesenfeld pointed out that the agreement might be later or it might be the agreement which was the basis of the security. Professor Kennedy agreed that Professor Riesenfeld had a point, and he inserted after "determined by" in the third line, the following: "conversion into money according to the terms of the security agreement." Professor Riesenfeld felt that only the words, "according to the security agreement" needed to be added after "determined". Professor Kennedy said that one of the reasons he got into the reference to conversion according to the security agreement was that the determination had to be under the control and supervision of the court. He felt that it would be a little awkward to make the last sentence applicable to that situation. During the ensuing discussion, Professor Riesenfeld said he really did not think that the last sentence was needed. Judge Whitehurst suggested that the language be: "The value of security held by a secured creditor who has filed a proof of claim shall be determined as the court may direct." Mr. Treister suggested "as the court may approve". Following general comments, Professor Kennedy read the proposed language as follows: "The value of security held by a creditor who has filed a proof of claim which is secured by such security shall be determined as the court may approve." Mr. Treister said that he did not like the language, "secured by such security". Professor Seligson suggested the following language to take care of the problem raised by Professor Riesenfeld: "shall be determined according to the terms of the security agreement or by agreement of the creditor and the trustee, by arbitration, or by litigation, as the court may direct or approve." There was general agreement that only "approve" need be used. Mr. Nachman suggested: "The value of security held by a secured creditor as collateral for a claim filed by him" for the first part of the sentence. After a short discussion, Professor Kennedy stated that the language which he then had was: "The value of security held by a secured creditor as collateral for a claim filed by him shall be determined according to the terms of the security agreement or by agreement of the creditor and the trustee, by arbitration, or by litigation, as the court may approve." Professor Riesenfeld moved the adoption of that language. Mr. Covey seconded. The motion was carried by a majority vote.

Judge Snedecor asked what was being done with the rest of the statute. Professor Kennedy replied that he supposed that when the statute is cleaned up and if the Bankruptcy Rules Committee has something to say about it, the words, "the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance," would have to be included in the cleaned-up statute. He said he did not think the Committee could draft the statute that would remain after the rules are promulgated.

Judge Gignoux suggested that when the Committee uses the heart of a statute, the rules should indicate from where the material comes. Professor Kennedy did not agree. He felt that references should be in the Notes. Upon vote being taken on the issue the majority approved of the references going into the Notes.

(e) Contingent and Unliquidated Claims.

Professor Kennedy read subdivision (e) as proposed in the draft dated 10-21-66. After discussion, Judge Snedecor moved that the proposed subdivision material be left in the statute. Professor Riesenfeld seconded the motion. Mr. Treister asked whether there was a case in which a creditor contended that he had a non-dischargeable claim because it was very speculative at the time of bankruptcy. Professor Seligson said that it had been held that a creditor could not take it upon himself to determine whether an unliquidated claim was dischargeable. He felt, however, that the case so holding was irrelevant. After further discussion, Mr. Treister suggested that the Committee not try to deal with unliquidated or contingent claims, and that subdivision (a) of Bankruptcy Rule 3.5 be left as approved. Vote was taken on Judge Snedecor's motion that subdivision (e) be deleted from the Bankruptcy Rules and that the material be left in the statute. The motion was carried by count of 5 to 4.

Professor Seligson moved that Judge Gignoux's suggestion that Bankruptcy Rule 3.5(a) be modified to exclude any contingent or unliquidated claims be adopted. After a short discussion, Judge Shelbourne seconded the motion. The motion was lost by vote of 6 to 2.

PROPOSED BANKRUPTCY RULE 3.10 - RECONSIDERATION OF CLAIMS

Professor Kennedy read the rule as proposed in the draft dated October 23, 1966, and gave its background. Judge Whitehurst asked why the word, "estate", rather than "case" was used in the first line. Professor Kennedy said that was a good point, and the word "case" should have been used. Judge Whitehurst said that after the word, "closed", he would insert the words, "or after it has been reopened". Mr. Treister felt that Judge Whitehurst's point could be met by simply eliminating the first clause of the sentence. Professor Kennedy said that the present law is quite explicit in saying that reconsideration can not be obtained after the case is closed. He said that if the rule provided that a party in interest may move for reconsideration of the allowance or disallowance of a claim against the estate and then a Note stated that that meant anytime the case was open, he felt that would be relying on the Note quite a bit. After discussion, Mr. Treister suggested that the principle of Rule 3.10 be adopted with necessary drafting changes to make it clear that it applies also to a reopened proceeding of a closed case. Judge Snedecor seconded the motion. It was favored by the majority.

PROPOSED BANKRUPTCY RULE 3.20 - DECLARATION AND DISTRIBUTION OF DIVIDENDS

(a) Declaration.

Professor Kennedy read the subdivision as proposed in his draft dated 12-31-65. The general consensus was that the reporter should redraft this subdivision to state in effect that the dividends to general creditors shall be paid as promptly as practicable and in such amounts as the court may determine.

(b) Dividend Sheets.

Professor Kennedy read subdivision (b) as set forth in the draft dated 12-31-65. Professor Riesenfeld pointed out that "require" should be "cause", and Professor Kennedy agreed. Judge Whitehurst moved for the adoption of the subdivision as amended. There was unanimous approval.

(c) Payment.

Professor Kennedy read subdivision (c) as proposed in the draft dated 12-31-65. Mr. Treister felt that the word, "ordered", should be used in lieu of "declared". Professor Kennedy agreed with Professor Riesenfeld that the rule with respect to the ordering of dividends to be paid should be included in subdivision (a).

Judge Whitehurst moved that the words, "within ten days", be changed to "as soon as practicable". He pointed out that the trustee prepared the checks but he could not pay them until they were countersigned by the referee, and that might not be within ten days. Professor Kennedy felt the following language was what the Committee was proposing: "The trustee shall pay dividends as soon as practicable after entry of the order declaring them." Judge Whitehurst noted that Official Form No. 34 orders the payment of dividends.

Having reference to the parenthetical language regulating the mailing of dividend checks, Judge Forman asked what the present practice is. Judge Herzog replied that the practice is to have the check drawn to the creditor or the person named in a power of attorney and to have it mailed to the attorney. Professor Kennedy pointed out that the parenthetical language would make it possible for a power of attorney to be in favor of a layman. Professor Seligson moved that the principle which Professor Kennedy had set out be adopted with the proviso that local rules may otherwise provide. Judge Whitehurst seconded. There was unanimous approval.

Following further discussion, Mr. Treister moved that Bankruptcy Rule 3.20(c) provide that unless local rules otherwise provide dividend checks shall be made payable to the person holding a power of attorney and mailed to that person. There was a tie vote - 5 to 5. Judge Herzog moved that the rule provide that unless local rules otherwise provide, dividend checks shall be made payable to both the creditor and the holder of a power of attorney, but that they be mailed to the latter. Judge Snedecor seconded. The motion was carried by vote of 8 to 2. There was general agreement with a suggestion that subdivisions (a), (b), and (c) be consolidated into one subdivision.

(d) Unclaimed Dividends.

Professor Kennedy read subdivision (d) as proposed in the draft dated 12-31-65. Mr. Jackson suggested that in the last sentence the language be changed to read: "The aggregate amount of the unpaid dividends shall be deposited in the registry of the United States district court." There was unanimous approval for the adoption of subdivision (d) with the amended last sentence.

[The meeting was adjourned at 5:32 p.m. and was resumed on Saturday at 9:00 a.m.]

Professor Kennedy asked those members who had experience in proceedings for debtor rehabilitation to be thinking about problems which the Committee should be undertaking to deal with in the rules which deal with the applicability of the bankruptcy rules to such proceedings.

At this point, Professor Wright suggested to the reporter that he consider numbering the lines of the rules to facilitate discussions in the future.

Judge Forman announced that the next meeting had been scheduled to be held from Wednesday, November 15,to 1:00 p.m. on Saturday, November 18, 1967. He also announced that the next meeting of the Subcommittee on Style was scheduled to be held from 2:00 p.m. on October 6 through Sunday, October 8, 1967.

Agenda Item No. 8: PROPOSED BANKRUPTCY RULE 2.1 - MEETINGS OF CREDITORS

(a) First Meeting. (1) Date and Place.

Professor Kennedy read subdivision (a) of Bankruptcy Rule 2.1 as proposed in the draft dated 6-18-67. Mr. Treister suggested deletion of the last sentence. There was no objection. Judge Snedecor suggested that the first sentence could be shortened, because "unreasonably inconvenient for the parties in interest" was used twice. Following discussion, Professor Kennedy said the language in lines 6 and 9 could be changed to read: "the district in which the case is pending or at a place within the district more convenient for the parties in interest." All were in agreement.

Professor Seligson asked what happened when the court did not call the meeting within the time prescribed in this rule. Professor Kennedy replied that it just slowed things up. It was decided that a Note should state that something could be done in the case where the court failed to call the meeting within the time prescribed. Following a few brief comments, Bankruptcy Rule 2.1(a) as amended was adopted to read as follows: "The court shall cause the first meeting of creditors to be held not less than 10 nor more than 30 days after the adjudication, at a place designated by the Judicial Conference as a place at which court shall be held within the district in which the case is pending or at a place within the district more convenient for the parties in interest."

(a)(2) Agenda.

Professor Kennedy read paragraph (2) of subdivision (a) of Rule 2.1 as proposed in the draft dated 6-18-67 and said that he thought that parenthetical references to rules should go into a Note. Judge Herzog pointed out that, at the first meeting of creditors, the bankruptcy judge did not allow or disallow the claims of creditors for any purpose other than that of voting. Professor Riesenfeld stated that he thought that the Committee had agreed by Rule 3.5(c) that an objection to a claim had to be in writing. Professor Kennedy said that was correct but that perhaps language could be included to the following effect: "An objection to a claim shall be in writing unless made in open meeting." Mr. Treister said he thought the principle should be that objections made to a claim for the purpose of determining eligibility to vote if made at the time of the first meeting need not be in writing; objections made to claims for the purpose of determining the right to share in dividends should be in writing. Professor Seligson asked about the case where the objection is made orally and it is resolved then and there. Professor Kennedy replied that he guessed that the allowance would be made unless an objection in writing was filed. After brief discussion, Mr. Treister moved that the principle of the rule be that if the claim is disallowed for voting purposes at the first meeting, it should nevertheless be deemed allowed for dividend purposes unless a written objection is filed. There was no objection to the principle. Having considered a few comments, Professor Kennedy stated that the second sentence would now read: "Before proceeding with other business, he may pass on the claims of creditors for the purposes of voting."

During the discussion which followed, Judge Herzog said he liked section 336 of Chapter XI of the Bankruptcy Act as a model for the rule. Professor Seligson felt that if Professor Kennedy would follow this section, perhaps the rule could be written in one sentence. Professor Kennedy proposed the following possibility: "The bankruptcy judge shall preside and may pass on the claims of creditors for purposes of voting; shall conduct the election of a trustee, the examination of the bankrupt, and the election of a creditors' committee." There was general agreement to that approach.

Professor Kennedy read subdivision (b) as proposed in the draft dated 6-18-67. There was a lengthy discussion of the necessity or frequency of creditors' special meetings. Mr. Treister moved that the Committee not have rules or reference in the rules about special meetings, but that there be a Note saying that there were no special bankruptcy rules to cover special meetings of creditors because of the infrequency of such meetings, but that nothing in the Act or the Bankruptcy Rules prohibits special meetings. Mr. Treister restated his motion as being that Rule 2.1(b) simply say that the court may call a special meeting and that reference regarding provisions in special meetings be eliminated from the other Bankruptcy Rules. At Professor Riesenfeld's suggestion, Mr. Treister's motion was voted on in two parts. On the principle that the court alone shall have the right to call a special meeting, the motion was carried by vote of 5 to 4; on the elimination of references regarding provisions in special meetings from the Bankruptcy Rules, the motion was carried by majority approval. However, it was agreed that since some members were not present at this time and the vote was so close on the first portion of Mr. Treister's motion, the question would be reconsidered in the presence of full Committee. The matter was red-flagged for this purpose.

(c) Final Meeting.

Professor Kennedy read subdivision (c) as proposed in the draft dated 6-18-67. He suggested that the words, "proved and", could come out of the third sentence, and there seemed to be general approval. He then mentioned a proposal, which came from a referees' regional seminar, that there be no final meeting in any nominal asset case or any case where the assets have a value of no more than $250.00. Professor Kennedy stated that the second paragraph of subdivision (c) was probably not necessary, because it was an implication of what was said in the first sentence.

Mr. Jackson stated that there had been a proposal that notices to creditors not be sent to those creditors who have not filed claims. Following discussion concerning procedures of practice in different localities, Judge Herzog moved that the first sentence of subdivision (c)(1) be amended to read:

"Whenever the affairs of an estate containing assets in excess of $250.00 are ready to be closed, the court shall order a final meeting of creditors." There was majority approval of this motion with the understanding that the reporter would work out value of the excess.

Mr. Treister stated that several different subject matters were brought into the subdivision by the second sentence. He felt that there should be a separate subdivision covering the trustee's final report and a separate subdivision covering the calling of the final meeting. Professor Kennedy stated that this was the rule on the final meeting, and in order to get the machinery working, something had to be said about the trustee's final report. However, he acknowledged that perhaps there should be separate rules covering final reports, final accounts, and final notice. Professor Seligson, however, felt that the second sentence should be in this subdivision, and Professor Riesenfeld preferred it be left in the rule but that if this could not be done, he would agree to having it in a note. Mr. Treister asked what the setting of the final meeting date added, when the trustee was ordered to file his report. Judge Forman stated that the sentiment was that the subdivision must be geared to the filing of the final report. There was unanimous approval to have the reporter redraft along that line. All were in agreement that there should be given 15 days' notice of the final meeting.

The third sentence of subdivision (c) as presented in the draft dated 6-21-67 was approved unanimously. In light of a short discussion, Professor Kennedy stated that he would redraft the fourth sentence to read: "The trustee shall attend the final meeting and shall, if requested, report on the administration of the estate." There was no objection to that wording.

All agreed that the last paragraph was not necessary.

At this time, Professor Seligson stated that he felt that there should be a special provision for the court's calling of a meeting of creditors to fill a vacancy which had occurred in the office of trustee or after an estate has been reopened. Judge Snedecor thought that perhaps there could be a modification in the provision desired by Professor Seligson whereby in the event that a trustee had been appointed rather than elected at the first meeting of

creditors, the referee could appoint a trustee. Professor Seligson agreed that that was a good suggestion. Following general discussion, Judge Snedecor moved that in the case of a vacancy in trustee where he has been appointed by the court because the creditors failed to exercise their right to elect, he may be appointed without the court's calling another meeting of creditors. There was unanimous approval of this motion. Professor Seligson moved that where a case has been reopened, the trustee who has theretofore served be given the opportunity to be the trustee if he is willing to qualify; if he does not qualify then the court should be allowed to call a meeting of creditors. Mr. Nachman seconded and there was unanimous approval of the motion.

PROPOSED BANKRUPTCY RULE 5.80 - REOPENING CASES

Professor Kennedy felt that the matter previously under discussion would be an elaboration of Bankruptcy Rule 5.80.

Mr. Treister felt that the rules should say that a case could be reopened either for the purpose of administering assets or for any other good cause. Following a few comments, Professor Kennedy read the proposed language as follows: "A case may be reopened to administer additional assets, in the interest of the bankrupt, or for other good cause." Further discussion was held, and Professor Kennedy read the following as the final proposal: "A case may be reopened on application of bankrupt or other party in interest to administer assets or for other good cause." This was favored by the majority. Professor Kennedy read the remainder of Bankruptcy Rule 5.80 as follows: "An application to reopen a case shall be fil . with the clerk of the district court having custody of the papers in the case. The case shall be referred forthwith in accordance with Bankruptcy Rule 1.5.1." Bankruptcy Rule 5.80 was approved as read by the reporter. Professor Kennedy said that there also would be a provision that, in a reopened case, if the trustee who had theretofore served qualified, he should be the trustee in the reopened case; if he did not qualify, then the court could call a meeting of creditors.

Judge Snedecor inquired whether the referee should be able to reopen a case on his own. Professor Kennedy replied that he thought that it had been decided that the matter of a referee's reopening a case to correct administrative errors ought to be a matter of the referee's revoking his own order of closing and reconsidering rather than to reopen a case on it. He stated that there was no bankruptcy rule on reconsidering that particular kind of order, but that there would be a rule in Part VII concerning the applicability of the federal rules. Mr. Treister said he felt that there would have to be different federal rules on reconsideration as it would be an entirely different rule in an adversary matter. Professor Wright said he did not understand how the referee corrects his own administrative mistake. Professor Kennedy replied that it might be done by a bankruptcy rule which would permit generally the referee's reconsideration on his own motion. This rule would be outside Part VII. Since this latest discussion posed serious policy decisions, the reporter was to work on drafting for future submission.

Agenda Item No. 12: PROPOSED BANKRUPTCY RULE 8.1 - REVIEW OF REFEREE'S JUDGMENTS BY DISTRICT COURT

Professor Kennedy raised the issue whether the Committee wanted a rule regulating reviews by district courts of referees' judgments which followed very closely § 39c of the Bankruptcy Act or one which followed the pattern of Rule 73 of Federal Rules of Civil Procedure. The language which he proposed was as follows: "A review permitted by law from a referee to a district judge shall be taken by filing a notice of review with the referee or his clerk within 10 days from the entry of the referee's judgment of which review is sought except that upon a showing of excusable neglect the referee in any action may extend the time for filing the notice of review not exceeding 20 days from the expiration of the original time herein prescribed."

Following general discussion, Professor Seligson moved that the Committee adopt the procedure for appeals from the district court to the court of appeals and that material in Rule 39c be preserved except that a limitation of not more than 30 days' extension of time by the referee would be incorporated into the rule. After a short discussion, Professor Seligson moved that the Committee require the filing of notice of appeal within the 10-day period but permit the filing of a notice of appeal after the expiration of the

10-day period but not more than 30 days after the entry of the original order if the court, either before the expiration of the 10-day period or after, extends the time for the filing of notice of appeal, except that where the order affects title to real estate, the application to extend the time up to 30 days must be made within the 10-day period. The motion was lost by vote of 5 to 3.

Professor Seligson then moved that the aforementioned requirement, without the real estate exception, be adopted by the Committee. This motion was carried by vote of 6 to 2.

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

Judge Snedecor pointed out that a docket book was no longer kept, but that loose-leaf binders are used. There was a general discussion concerning whether the word "docket" should be used rather than "records". There was only one dissenter to the usage of "docket". Following a short discussion, Judge Snedecor moved that the language as originally written, including that enclosed in parentheses, be approved. Professor Riesenfeld seconded the motion, and it was carried by unanimous approval.

(b) Transmission and Return of Papers.

Professor Kennedy read subdivision (b) as proposed in the draft dated 12-31-65. Judge Whitehurst moved for its adoption, and Judge Snedecor seconded. There was unanimous approval. However, Professor Wright, in furthering the correct usage of grammar, asked the reporter to change "which" in the second line to "that", and the reporter stated that he would take it into consideration.

(c) Index of Cases and Discharges.

Professor Kennedy read subdivision (c) as proposed in the draft dated 12-31-65. Mr. Treister felt that the referee should not be required to keep an index of all discharges granted by the court. There was general agreement that this was unnecessary. Judge Herzog moved for the elimination of all language after the word "Act" in the last sentence. The motion was carried. Professor Riesenfeld felt that the word "complete" was unnecessary, and Professor Kennedy stated that "a complete index" would be changed to "an index". Professor Riesenfeld suggested that "under the Act" be inserted after the word "cases" rather than at the end. Following a short discussion, Mr. Treister moved that subdivision (c) read: "The clerk of the district court shall keep an index of all cases under the Act filed in the court." Judge Snedecor seconded the motion, and there was unanimous approval.

[Meeting was adjourned at 1:00 p.m.]