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

The eleventh meeting of the Advisory Committee on Bankruptcy Rules convened in the Supreme Court Building on Monday, October 31, 1966, at 10:00 a.m. and adjourned at 2:50 p.m. on Wednesday, November 2, 1966. The following members were present during the sessions:

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

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

Judge Forman called the meeting to order, welcomed the members, and remarked on the consistency of attendance at this and all prior meetings. He announced and welcomed the guests.

Agenda Item 1: Drafts for the Shelf

Judge Forman stated that a report had been sent to the standing Committee since the last meeting of the Bankruptcy Rules Committee and that there was enclosed with that report a revised organizational outline of the Bankruptcy Rules. This outline was to be found in the Deskbook. Judge Forman said that the Style Subcommittee had been working arduously on the drafts for the shelf. All the items, except the last five, had been reviewed by the Subcommittee, and since the last five had been gone over more than once by the Advisory Committee, it was hoped that they could go on the shelf without further discussion, except for the comments to be made by Professor Kennedy.

Professor Kennedy called attention to the following changes to be made in the Agenda:

1. The list of Drafts for Shelf in Item 1 does not include 7.4 or 7.15.

2. The reference to Rule 4.15 in Item 6 should be to 4.5.

3. Item 12 should refer to Rule 9.1.2 instead of 9.12.

He also noted that in the Revised Organization Outline, the rule on Auctioneers and Appraisers should be listed only in Part V as 5.45 - not in Part VI as 6.45.

He then proceeded to consider Rule 9.11.

PROPOSED BANKRUPTCY RULE 9.11 - SIGNING AND VERIFICATION OF PLEADINGS AND OTHER PAPERS.

(a) Attorney's Signature.

Professor Kennedy said a suggestion had been received that Rule 9.11 could be considerably compressed if there were just a general reference to Rule 11 of the Federal Rules of Civil Procedure -- somewhat after the fashion of other rules of Part VII, which say something like, "Rule 11 of the Federal Rules of Civil Procedure applies in bankruptcy cases except as follows:". He stated that there were quite a few exceptions in Bankruptcy Rule 9.11, particularly in the 4th sentence, where it says: "The signature of an attorney on any paper filed in a bankruptcy case . . . ."; not just any pleading but any paper. He also stated that there were two sentences in Rule 11 which were not included in Bankruptcy Rule 9.11, because the Committee has its own rule on verification (paragraph (b)). In connection with the suggestion received, he had some additional observations as follow:

1. Subdivision (a) ought to be entitled "Signature" - not just "Attorney's Signature." He thought the present title too limited, since the second sentence says: "A party who is not represented by an attorney . . . ."

2. He thought the third sentence, "The rule that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished.", really belonged under subdivision (b) on verification, since it has relevance only in connection with an oath and not in connection with the signature.

Mr. Treister questioned whether that sentence really had to be in at all. Professor Kennedy said that the question of whether to leave it in had been previously discussed, and it was decided that it should be left in, although no one felt strongly that it had to be in. Judge Forman said that everyone agreed that the sentence belonged under (b), if retained. He then asked if there was any objection to its going out. There was discussion about a Note being put in with reference to the Committee's deletion.

Judge Forman stated, at this time, that the Style Subcommittee had agreed that all Notes should be left to the discretion of the reporter, subject to objections expressed by any member, and he hoped that the Committee could adopt that policy, because it would save an awful lot of time. This in no way meant that suggestions regarding the Notes were not to be made, but that they could be made privately in most instances to Professor Kennedy. Professor Kennedy extended a warm welcome to all comments regarding the Notes. Professor Riesenfeld felt that the Notes should indicate that they are the work of the reporter. The consensus was that although the reporter did the drafting, the work was certainly that of the Committee as a whole, because all members are allowed to present their views with regard to the Notes, and what Professor Kennedy drafted, therefore, were not just his own ideas.

Judge Forman then asked if all members were agreed that the third sentence in Rule 9.11(a) should be deleted and a brief Note, historical in nature, put in by Professor Kennedy. There were no objections, but Professor Riesenfeld asked whether there should be put in the Note a comment to the effect that the sentence was abolished and that it was a matter subject to the rules of evidence. Professor Kennedy said that he intended to flag the possible relationship between the comment and what happened in the Rules of Evidence.

Judge Whitehurst referred to the last sentences of Rule 9.11(a) and said he wondered just what he should do, if, as a referee, he were confronted with a violation of the rule. Professor Kennedy stated that the sentences came right out of Rule 11 of the Federal Rules of Civil Procedure. He said that perhaps any sanction other than citation for contempt might be imposed by the referee. He suggested that unless Judge Whitehurst wished the Committee and reporter to pursue this matter further, the draft of Rule 9.11 should follow the corresponding Federal Civil Rule.

Professor Seligson asked why the sentence with regard to signed pleadings had been deleted. Professor Kennedy said that Rule 9.11 actually resulted in a merger of what he had proposed as Rule 7.11, which made Federal Rule 11 applicable directly in adversary proceedings, and another rule, which dealt with all kinds of papers. He referred to page 27 of the Minutes of the June 1966 meeting and noted that the proposed wording was very close to that agreed upon at the June meeting. Professor Seligson asked if an answer were filed with the intent to defeat the purpose of the rule, should not

there be express power to strike that answer as sham and false so that the proceeding could go ahead as though it had not been served. Professor Kennedy said he thought it had been agreed that this sanction should not be applicable to any paper other than a pleading. Professor Seligson asked why it should not apply to any paper. After discussion, Professor Seligson moved that the sentence be reinstated and the appropriate language left to the reporter. Judge Forman asked if there was any objection. There was none.

(b) Verification.

Professor Kennedy said that in going over the exceptions listed in subdivision (b) of the rule, he had picked up a few more which should be in the list: namely, 1.3(d), 5.50, and 5.69. Rule 1.3(d) imposes an affidavit requirement in connection with certain petitioners; 5.50 deals with applications for compensation by officers and attorneys; and 5.69 deals with an accounting by a prior custodian of a bankrupt's property.

He interpolated that the Style Subcommittee had recommended deletion of a verification requirement in Rule 1.3(e), which is the subdivision that requires the alleged bankrupt to file a list of all of his creditors when his answer alleges that there are more than twelve creditors. The Act now requires any list of creditors filed by the bankrupt to be a verified list. Professor Kennedy said that the verification requirement had been eliminated from Rule 1.3(e), as set out in the deskbook and reference to it had been eliminated from the list in 9.11(b). There was no objection to its being eliminated.

Professor Joslin asked why the Rule could not say simply, "Except as otherwise provided in this Act or these rules, ..." Professor Kennedy said that it was because there were some verification requirements in the Act that were being superseded and some that were not. He said the wording used made it clear what provisions in the Act were not superseded and what were.

Professor Moore felt that unless (b) were constantly revised to keep up with the changes in provisions, it would be misleading, if not downright dangerous. Professor Kennedy said that he realized it raised a problem, but he didn't think there was any other way of doing it than by giving specifics. Professor Moore pointed out the eventual need for a revised Act to correlate with the changed rules.

Professor Kennedy made reference to the Minutes of the June meeting (at p. 28) wherein it was noted that he was to itemize the excepted rules in subdivision (b). Professor Riesenfeld said that he would like to leave (b) as it was. He felt that later on if

the rules were amended, then 9.11(b) also could be amended. Professor Seligson said he was a little troubled by the specific mention of section 77(p). He felt that reference to section 77 would be enough, because a bill pending in Congress would change parts of section 77 and he didn't feel that a particular subdivision should be referred to, since the changes might affect particular subdivisions. Professor Kennedy said he intended to save only subdivision (p) of section 77 - not all of the section - and therefore felt that it was quite necessary that only (p) be designated. He thought the verification requirement of that paragraph ought to be left alone because Congress had clearly intended to vest rule-making authority in the relevant area - solicitation (of proxies) or use in railroad reorganization cases - in the Interstate Commerce Commission. Since there was much more to be discussed with regard to Professor Seligson's question, Professor Kennedy suggested that the Committee come back to it at a later date.

Judge Forman called for a vote on whether the Bankruptcy Rules excepted in subdivision (b) should be listed specifically therein, or whether they should be deleted from the text and put in a Note. By majority vote, it was agreed that the specific rules would be left out of the text of Rule 9.11(b) and that Professor Kennedy would devise a Note.

(c) Reproduction of Signature.

Professor Kennedy said that this subdivision was proposed in response to a suggestion he had received from Referee Cowan. Judge Whitehurst said that he felt this was entirely acceptable and moved for the adoption of the rule. Some members were concerned that many of the duplicating machines do not pick up the signature. Professor Moore suggested that the original be verified but that it was not necessary to verify all copies. Mr. Treister thought that there would be some value in requiring that the copies at least conform to the verified original. Judge Herzog was concerned that the one verified copy could be removed somehow from the files and the case would be gone, unless there were sworn copies in the hands of other people. Mr. Treister said there would not be any problem, because it could be proved that the verified copy had been filed. There was a general discussion on the meanings of "facsimile" and "conformed."

Judge Forman asked the members to listen to Professor Kennedy's draft, which he had revised as follows: "When these rules require more than one copy of a signed or verified paper, it shall suffice if the original is signed or verified and the copies conform to the original." Judge Gignoux moved that the suggestion be adopted. It was seconded. There were no objections, and the draft was adopted.

Professor Kennedy said that that completed the matters he had with reference to drafts for the shelf. Judge Forman said that

unless there was objection, it would be considered that Agenda Item 1 described the rules that are now complete.

Agenda Items 2 and 4: Process, Responsive Pleadings, and Motions.

Professor Kennedy said he would like to enlarge the scope of the second item on the Agenda, because he decided to take 7.4 out of the list of items for the shelf and would like to take it up now.

PROPOSED BANKRUPTCY RULE 7.4 - SERVICE OF SUMMONS, COMPLAINT, AND NOTICE OF TRIAL.

Professor Kennedy stated that a large part of this rule had been approved at prior meetings, and he wanted to discuss only particular provisions. He first referred to subdivision (c), paragraphs (7) and (9). He explained that the language of paragraph (7) came from Federal Civil Rule 4(d)(7). He stated that Professor Shanker wondered whether paragraph (9) also should be added to the references to paragraph (1) and (3) in paragraph (7). The assumption of the suggestion was that there might be a statute of the United States or a law of the state that covered service on a defendant referred to in paragraph (9). Professor Riesenfeld did not think that any such state statute would be valid after the Sabbatino case, and he would not like to make a mistake in the rules. He was opposed to the insertion of "or (9)" in (7). Professor Kennedy then discussed a related question raised by Professor Shanker, viz., how is a subdivision of a foreign government served by mail? Professor Kennedy thought that perhaps paragraph (9) should, instead of saying "Upon a foreign government," read as follows: "Upon a foreign state or municipal corporation or other governmental organization thereof". This would make paragraph (9) parallel to paragraph (6) of the same subdivision. Professor Riesenfeld thought that the rule should stick to the service upon a foreign government. It was agreed to leave Rule 7.4(c) as it was.

Professor Riesenfeld noted that no provision had been made for the United Nations. Professor Kennedy said that he would be receptive to the expert advice of Professor Riesenfeld.

(d) Same: Time of Service.

Professor Kennedy said that this subdivision of the rule had never been approved, although it had raised no particular controversy.

Professor Moore wanted to know why there was a mandate for personal service to be made within 5 days. Professor Kennedy referred to Rule 7.40 and then to Form No. 6B, both of which he read. Professor Kennedy said that this rule and form rested on certain assumptions as to how long it would take to serve the summons. He said that the assumption was supported by the requirement that

personal service shall be made within 5 days of the issuance of the summons. He then read the last sentence of Rule 7.4(d). He said that unless the time allowed for service was limited, the assumption made by the referee's clerk in setting the date for the trial would often impose a hardship. Mr. Treister felt that there should not be any difficulty in making the service by mail within 5 days, and he thought the scheme of the rule did correlate with the time periods set elsewhere in the rules. After discussion, Judge Gignoux moved that Rule 7.4(d) be approved. It was seconded. The subdivision was approved unanimously.

(e) Territorial Limits of Effective Service.

Professor Kennedy said the Style Subcommittee suggested that in view of the extent to which the Committee already had been willing to go in authorizing extraterritorial service within the United States, the Committee should consider covering also proceedings under sections 67a and 2a(21). He then presented a rule which would, in effect, allow national service for all summary proceedings and worldwide service for certain proceedings listed in paragraph (4) of subdivision (e). He proposed striking out all language in parentheses in Rule 7.4(e)(1). It thus would read: "Summons, complaint, and notice of trial may be personally served anywhere within the United States." He proposed the same deletions from 7.4(e)(2), which then would read: "Summons, complaint, and notice of trial may be served by mail when the address, or one of the addresses, prescribed by subdivision (c) is within the United States."

Professor Moore wanted to know if, in a summary proceeding brought by the trustee, this meant that there would be nationwide jurisdiction over the defendant. Professor Kennedy said it came pretty close to that. He also noted that he later would present a proposal for a venue shift - a transfer - of just the adversary proceeding, but that there could be initiation in a primary court with nationwide service of process whenever there was summary jurisdiction.

Professor Kennedy then read Rule 7.4(e)(3) and proposed deletion of the parenthesized phrase, "or if made in accordance with a treaty." Then he read paragraphs (4), (5), and (6) of 7.4(e). He said that he would insert "transmission or" just before "service of any document."

Mr. Treister said he thought it was too much to go so far beyond the Civil Rules in one jump. He said he had little faith in referees letting litigation be transferred when the courts of jurisdiction were far apart. Professor Joslin said that he accepted the proposal for extending extraterritorial service in light of the possibility of transfer to the most convenient forum.

Professor Seligson noted that the Committee had voted for service outside the state within the 100-mile limitation. Professor Kennedy said if the parentheses were deleted from subdivision (e) down to (6), all of the subdivision had been approved in almost the language set out in the draft. Reference was made to pages 17-22 of the Minutes of the June 1966 meeting. Professor Seligson thought the Committee ought to stick with what had been adopted before - the 100-mile limitation. Judge Herzog felt that the 100-mile limit was not realistic in the light of today's transportation. Professor Kennedy noted that the Civil Rules Committee had put the 100-mile limit in its Rule 4 very recently. Mr. Nachman felt that since there was no question of power and extraterritorial process had worked so well under Chapter X and XI, the Committee ought to extend the same procedure to straight bankruptcy. He thought adoption of the proposal would be a forward step in bankruptcy administration. Mr. Treister said that if a rule of civil procedure would provide for nationwide service of process, he could go for that much more quickly than he could go for such a provision in a bankruptcy rule. There was general discussion on transferring bankruptcy proceedings and the desirability of vesting bankruptcy courts in ordinary bankrupt cases with the same jurisdiction that the courts have under Chapters X and XI. Mr. Treister said that the proposal did not go all the way because in the chapter proceedings the effect of the exclusive jurisdiction provision was to give the bankruptcy court jurisdiction not only where it had custody of the property but also where the adverse claimant was in possession if the debtor had title to the property.

Judge Gignoux asked why the Civil Rules Committee did not recommend nationwide service. Judge Maris said that the Civil Rules Committee felt that it would be too radical a change at this time, and so compromised on the 100-mile limit. A few members felt that bankruptcy was quite different from civil litigation, with regard to nationwide service, and that it would help bankruptcy administration to get the assets brought in and the job done. One member added that was the reason for the provisions in Chapters X and XI. Professor Moore said there was a distinction in that X and XI normally embrace rather sizeable debtors. He noted that nationwide service process might force someone in possession of property in California to litigate with a trustee in Connecticut, if the trustee made an allegation that the defendant's claim was either sham or fictitious. Judge Gignoux said he was concerned about extension of the limits on service in straight bankruptcy cases because of the unfairness which is likely to result in a substantial number of cases in which the claims were not sufficiently substantial to justify retaining counsel in a foreign jurisdiction. There was further discussion among the members as to the transferring of proceedings.

Judge Forman asked for a vote on the principle of nationwide service as suggested in the proposed draft of Rule 7.4(e) with elimination of parentheses. The motion was carried on a vote of 6 to 5.

Professor Seligson said he was worried about jeopardization of the 100-mile limitation by proposing something that was going to look so radical that the Committee may be slapped down completely and not even be allowed to go 100 miles outside the states. Mr. Nachman wanted to know the justification for that surmise. Professor Seligson said that if nationwide service was ultimately rejected, he thought there would be a revulsion toward what the Committee was trying to do, and that the Committee would end up without extending the limits to the 100-mile radius outside the state.

There was further discussion among the members regarding the closeness of the vote and whether a Note should show the tally when the rule is presented to the Supreme Court. Judge Maris said that this had never been done. Mr. Nachman suggested that the vote be considered like any other vote of the Committee: that at any time a member could bring the matter up for further discussion.

It was noted that the vote was only for Rule 7.4(e), paragraphs (1) through (5). With regard to paragraph (6), Judge Maris said he did not know what would be in conflict with a treaty. Professor Kennedy pointed out the parenthesized words in paragraph (3), "(or if made in accordance with a treaty)." He said that he did not think the words were needed there, because there had already been provided, by cross-reference to (i) of Rule 4 of the Federal Rules of Civil Procedure, ways by which transnational service could be made. He did not read anything in (i) as inconsistent with the Hague Convention or any other treaty. Judge Maris and Professor Riesenfeld had a discussion on the effects of rules in foreign territory. Judge Maris concluded by saying he did not see any need for 7.4(e)(6). He thought it was restrictive. Judge Snedecor moved that Rule 7.4(e)(6) be deleted. The motion was carried by majority approval.

Professor Kennedy felt that if included anywhere, the expression, "or if made in accordance with a treaty," now in 7.4(e)(3) should probably be inserted in an earlier subdivision and not in the paragraph on effective limits. Professor Riesenfeld felt that since the Committee was taking out (6), it didn't need paragraph (3) either. There was no objection to deletion of "(or if made in accordance with a treaty)" from 7.4(e)(3). It was deleted.

Judge Gignoux asked if paragraphs (1) and (2) under 7.4(e) could be simplified by saying: "Summons, complaint, and notice of trial may be served personally or by mail anywhere within the United States." Professor Kennedy voiced a supposition where the addressee was a resident and national of a European country, and you deposited the letter in the same courthouse where the court sat. That is service within the United States, but he said the Committee was not intending to authorize service on a national of a foreign country except in situations contemplated in (4). Service is effective under the Federal Rules of Civil Procedure upon mailing, but Professor Kennedy did not suppose the Committee

would want to say service by mail anywhere in the United States was all right. Judge Maris said that mailing was not service at the courthouse, even if it were effective. Professor Kennedy said that he tried to take care of the problem by saying "when the address is within the United States."

Judge Gignoux asked if (3) and (4) were designed only to apply to service upon a party in a foreign country. Professor Kennedy said that (3) dealt with persons out of state and out of country, and that under (3) if you could serve under Federal Rules of Civil Procedure 4(e) or 4(i), you can use that mode of service under these rules. Judge Gignoux asked if there were any situation in which paragraph (4) would authorize service upon any person within the country, which was not authorized by (1) and (2). He thought that the paragraph ought to state affirmatively that summons, complaint, and notice of trial may be served upon a person in a foreign country in the situations specified therein. Professor Kennedy said that the wording had been discussed last time, and that the language which he used was the choice made at the last meeting.

Judge Maris wondered if there should be service by publication where one had nationwide opportunity for personal service. He felt that service by publication should be made available only where personal service was not. Mr. Treister felt that if national service was allowed, you should not be able to serve the resident agent of a corporation; you should have to serve the person directly. He felt that the only time the rules should allow publication or some substituted mail or personal service was when you did not know where the party was. Judge Gignoux said that if the rules authorized nationwide service, the Committee had to go back to the previous set of rules and eliminate substitute service. Professor Kennedy said that he would go over the prior material before submitting a redraft. Professor Moore suggested deletion of "which is subject to suit under a common name" in Rule 7.4(c)(3). Judge Forman said that Professor Kennedy would think about the suggestions, and that he would look at the whole body of Rule 7.4.

(f) Proof of Service.

Professor Kennedy pointed out that the second sentence of the draft of subdivision (f) was adapted from Rule 4(i)(2) of the Federal Rules of Civil Procedure. He said that the wording used in the second sentence in 7.4(f) was a little too restrictive, however, and suggested amending it to read: "When service is made by mail, the proof shall include the signed receipt or evidence satisfactory to the court that delivery was made to the addressee or to his residence or that receipt was refused."

Judge Gignoux felt that the Committee should adopt the language of FRCP Rule 4(i), which limits delivery to the addressee. Judge Maris agreed that proof should not be extended beyond delivery to the addressee, and he was also concerned over acceptability of

evidence that the receipt was refused, because it would be too casual a matter. Judge Snedecor suggested as an alternative, "evidence that the receipt was refused by the addressee." There was a general discussion of signed receipts.

Judge Gignoux moved that the second sentence in 7.4(f) read as follows: "When service is made by mail, the proof shall include the signed receipt or other evidence of delivery to the addressee satisfactory to the court." The motion was carried by unanimous approval.

There was extensive discussion on the matter of the addressee's refusing to sign a receipt for delivered mail. Professor Seligson moved that there be added to the already approved wording the following: "or that acceptance was refused by the addressee." Professor Kennedy suggested a change in the wording so that it would read: "When service is made by mail, the proof shall include the signed receipt or other evidence satisfactory to the court that delivery was made to the addressee or that acceptance was refused by the addressee." The motion on the amendment was carried, 6 to 4.

There was recess for lunch at 1:06 p.m.
Meeting was resumed at 2:05 p.m.

PROPOSED BANKRUPTCY RULE 7.12 - DEFENSES AND OBJECTIONS: Subdivision (a)

Professor Kennedy read the proposed Bankruptcy Rule 7.12. Mr. Nachman wanted to know if it was clear in the first sentence that not only must a summons be issued but that it had to be served as provided in the rules. After discussion, Professor Kennedy agreed to put in a Note with regard to the first sentence.

Judge Maris was a little concerned about parallel rules which allow different time limits. He felt that the whole concept of service being complete on mailing was a fictitious thing, and that the time limitation should be based on receipt of mail. Mr. Treister said that the concept of completed service by mail was no longer needed; that the difficulty came about in an effort to preserve the setting of the trial date before the pleadings were completed; and that once you embarked on that course, you could not be parallel to the Federal Rules any more. Professor Kennedy felt that if the date of trial were set by reference to any other than the date of issuance, it would cause the referee's assistant to do too much speculating. Judge Gignoux asked if it wouldn't work out more satisfactorily if the time that an answer were to be filed in was fixed by reference to the time when the defendant was served. Professor Kennedy wanted to know the advantage of that over what he had provided. Judge Gignoux felt that in granting 20 days after issuance of summons, it would be giving, in the majority of cases, 18 days after service, which wasn't what you

wanted to give. Mr. Treister didn't feel that it was too urgent a matter to be concerned over the extra days which might be given to some defendants. He said you wanted to make sure that no one got less than 10. Judge Maris felt that the proposed rule would permit you to give less than 10.

Professor Kennedy referred to Rule 7.4(d) in regard to timely service, which was the premise for the proposed new rule. Judge Gignoux said that he would have the defendant answer within "10 days after the service of the summons and complaint and notice of trial upon him" and then continue with the exceptions. He said that would conform with the Civil Rule. Professor Kennedy brought up the provision of Rule 5(b) of the Federal Rules of Civil Procedure that service by mail was complete on deposit of the mail. He said that if the Committee should adopt what Judge Gignoux was suggesting, it would have to modify Bankruptcy Rule 7.5.

Judge Whitehurst wanted to know what constituted service upon plaintiff's attorney and whether, if service was not made on plaintiff's attorney but was made with the court within 2 days after it was supposed to have been made on the attorney, a default would be taken. Professor Kennedy explained that the service was to be made on the attorney, but the filing was to be with the court.

Judge Gignoux wondered whether the provision that service was complete upon mailing in Federal Rule 5(b) was not an effort to establish a definite date that could be known, whereas the date of receipt would not be known, since the service by mail under that Civil Rule was not return-receipt service. He felt that since, under the Bankruptcy Rules, service by mail would be required to have return receipt, they should provide that service would not be complete until the receipt was returned. Professor Kennedy said it would be sensible but he had not seen the superiority of that over what he had set out. Mr. Treister and Professor Kennedy pointed out that they had been through this matter before. He felt that it was much easier for the referee to set the date, in Form 6B, from the date of issuance, and then it would not make any difference when the service occurred.

Mr. Nachman wondered whether there would be more room for error on the part of some referees in computing the time and filling in the blank than there would be if the procedure suggested by Judge Gignoux were followed. Professor Kennedy said the procedure suggested by Judge Gignoux would generate the possibility of errors by litigants and litigation over the computations, whereas the fixed date by the referee was clear and would not cause litigation over the matter.

Judge Herzog wondered if, in accordance with the practice he now had, the date for trial should not be fixed when the parties appear. Mr. Treister felt that if Judge Herzog's practice were followed in a large-volume district, the referee would have to set two dates on the calendar, one for the hearing and one for the trial. Judge Herzog said that what was worrying him was that the suggested procedure was going to kill his calendar, because he would set a date for trial according to the summons [Form No. 6B], and then both parties would come before him and ask for time for pretrial practice and he would have to lose that time. However, Judge Herzog agreed, as did Judge Whitehurst, that he would be able to arrange his calendar in accordance with the proposed rule, if it were adopted. Judge Snedecor said that the trial date could be set 30 or 40 days ahead and then get the parties together for pretrial before that date.

Professor Riesenfeld would like to see something put in the first sentence of Rule 7.12(a) rather than to rely on the Note regarding the necessity of service of the summons. Professor Kennedy suggested: "The defendant shall serve his answer to a complaint duly served upon him." Professor Riesenfeld suggested leaving the first sentence of the rule as it was proposed but adding in front of it "Upon being served . . . ." Mr. Treister thought that the addition of the three words would be ungrammatical. Professor Riesenfeld said a motion was not necessary on his suggestion, but he just wanted the Reporter to think about it.

Professor Seligson moved that the Committee adopt Rule 7.12 as written, with the understanding that "summary" in subdivision (b) would come up for further discussion. The motion was carried by majority vote.

OFFICIAL FORM NO. 6B - SUMMONS AND NOTICE OF TRIAL

Judge Forman then asked for a vote on Form No. 6B. Mr. Nachman was troubled by the reference to "the answer" in lines 4 and 5 of the Form. Judge Gignoux suggested leaving Form No. 6B as it was. There was a general discussion on just using "an answer" in line 3, because the defendant could file a motion. It was moved and seconded that Form No. 6B be adopted with the understanding that a footnote would be added after the word "answer" to indicate that a motion would be permissible and also to give other related information. The motion was carried unanimously.

PROPOSED BANKRUPTCY RULE 9.12 - OBJECTION TO SUMMARY JURISDICTION

Professor Kennedy said that "summary" would come out of the title and the text. Professor Moore felt that "summary" was proper in this rule, because you could have the question of where an alleged bankrupt was an insurance company or a building and loan association; if the alleged bankrupt failed to object, then some person interested in the proceedings could object. Professor Kennedy said that went to jurisdiction of subject matter. No consent should be effective as to that. Professor Moore said that was why he felt "summary" should be kept in the rule. Professor Kennedy felt too it should be left in, but he said that Mr. Treister felt that it was not helpful to the non-specialist, who does not know what summary jurisdiction is anyway. Mr. Treister felt that the word "summary" had caused reversals in trials, because the courts of appeals said that summary jurisdiction was not as good as plenary jurisdiction. He felt that the Committee could accomplish a great deal by abolishing the term "summary jurisdiction" from its rules, and he would like to see it abolished in the Act. Judge Whitehurst agreed that the word "summary" should be eliminated.

Professor Seligson said that he would also eliminate "jurisdiction", because he did not think jurisdiction was involved. He would say: "A party to a contested proceeding consents to the determination . . . ." Professor Moore wanted to know if, when a petition was filed against a corporation which was a charitable organization and could not become a voluntary bankrupt, there should be an adjudication on consent. Professor Seligson said that he did not think that was purely jurisdictional, and the objection could be waived.

There was no objection to the deletion of the word "summary" from the first sentence, and it was deleted by unanimous approval.

Judge Snedecor moved that the word "summary" be removed from the title and body of Rule 9.12 and that the word "jurisdiction" be left in. Professor Kennedy suggested that the words "of the bankruptcy court" be added after the word "jurisdiction" in the third line of the second sentence. Professor Riesenfeld felt that if Judge Snedecor's suggestion was carried out, somebody could say that the defendant had consented to jurisdiction but the defendant would say he consented only to jurisdiction of the federal court and, of course, plenary jurisdiction. Judge Gignoux wanted to know if consent to jurisdiction meant consent to subject matter jurisdiction as well as to what was formerly summary jurisdiction. Mr. Treister felt that if this rule did not apply to proceedings under Part I, it would solve most of the difficulty. He would leave it open as to whether a rule in Part I should deal with objections to jurisdiction. Mr. Nachman favored retention of the word "jurisdiction" in proposed Bankruptcy Rule 9.12.

Professor Riesenfeld suggested the words "bankruptcy judge" instead of "bankruptcy court." After discussion, a vote was taken on Professor Riesenfeld's suggestion. It lost by a vote of 2 to 9.

Next a vote was taken on Judge Snedecor's motion, which deleted the word "summary" throughout and changed the title to "Objection to Jurisdiction of Bankruptcy Court." The motion was carried by a majority vote.

Professor Kennedy said that with regard to Mr. Treister's suggestion of a rule in Part I dealing with jurisdictional objections, he did not have a draft and wished to leave that until later. He then said that he thought the words "of the bankruptcy court" should be inserted after "jurisdiction" in the third line of the second sentence, because the sentence was not talking about federal jurisdiction of subject matter in the usual sense. There was no objection to his suggestion, and words were added by unanimous approval.

Professor Kennedy read a few sentences, which he proposed as a subdivision (b) to Rule 9.12, as follows: "If a timely and sufficient objection is interposed to the jurisdiction of the bankruptcy court, an adversary or contested proceeding shall be dismissed or transferred from the referee's docket to the civil docket of the district court as may be appropriate. On transfer pursuant to this rule, the proceeding shall continue as a civil action in the district court." Professor Seligson was worried about the word "sufficient." Mr. Treister wanted to know whether "dismissed or transferred as may be appropriate" meant that the proceeding could be transferred if it could have been brought originally in the district court. Professor Kennedy felt that "as may be appropriate" left room for flexibility. After a discussion of transfers from one docket to another, a vote was taken on the approval of the proposed paragraph (b) of Rule 9.12 in principle, and leaving the caveats to be taken care of by the Reporter. The proposal was approved by a majority.

PROPOSED BANKRUPTCY RULE 7.12 - DEFENSES AND OBJECTIONS: Subdivision (b)

(b) Applicability of Federal Rule of Civil Procedure 12(b)-(h)

Judge Whitehurst moved the word "summary" be removed from Rule 7.12(b)(3). Vote was taken and the motion was carried unanimously.

PROPOSED BANKRUPTCY RULE 7.15 - AMENDED AND SUPPLEMENTAL PLEADINGS

Professor Kennedy wanted to make a general incorporation of Rule 15 of the Federal Rules of Civil Procedure in Bankruptcy Rule 7.15, with the two exceptions noted in the draft in the deskbook. He wished, however, to substitute for the proposed clause (2) the following adaptation of the last sentence of Federal Rule 15(a): "that a party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 5 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders." A vote was taken on his suggestion, and it was carried by majority approval.

PROPOSED BANKRUPTCY RULE 1.8 - RESPONSIVE PLEADING OR MOTION

Professor Kennedy corrected the draft of the proposed Rule 1.8 by deleting "or" from line 10. Mr. Treister asked why the time ran from issuance of summons in this rule. Professor Kennedy said that since this mode of measuring the allowable time was adopted in Part VII, it would be better to have the rules consistent. He acknowledged the same necessity did not exist here, but the matter had been talked about at the Subcommittee meeting. Mr. Treister wanted to know if the voluntary petition was required to be served within 5 days. Professor Kennedy referred to Bankruptcy Rule 1.7.2. Mr. Treister pointed out that if the Committee simply authorized personal service under Rule 4(d) of the Federal Rules of Civil Procedure, there was no time limit within which one must serve. He also pointed out that it would be necessary to include what was meant by "service" when you served by mail. He suggested putting a sentence in Rule 1.7.2 requiring personal service to be made. Judge Gignoux asked if the Rules in Part I were providing for nationwide service. Professor Kennedy said Rule 1.7.2 dealt with that. Judge Gignoux asked if it would not be much simpler to provide that service by mail was complete when it was received or delivered rather than to depend on artificial formulas. Professor Kennedy said he would take the suggestion under consideration. After a general discussion, Judge Gignoux moved that Rule 1.8 as presently drafted be amended to provide that ". . . the answer shall be served and filed within 10 days after the service of the summons . . . ." The motion was seconded. Professor Kennedy pointed out that service would be complete upon receipt of mail, and that a provision to that effect would be included in Rule 1.7.2 rather than 1.8. Mr. Nachman was concerned over counting the time for filing responses from "service" and from "issuance" within the same body of rules, and he would vote against the motion for that reason. Mr. Treister asked whether the last sentence of Rule 1.7.2 could be simplified by going Judge Gignoux's way. After discussion, Professor Kennedy concluded that he did not think

he would be able to simplify it much. A vote was taken on Judge Gignoux's motion. The motion was lost by a vote of 5 to 6, and Rule 1.8 remained as was. Professor Riesenfeld asked for a Note concerning the reason, other than consistency, for the provisions in the rule, and Professor Kennedy said he would keep it in mind.

PROPOSED BANKRUPTCY RULE 1.7.2 - SERVICE OF PETITION AND PROCESS

Professor Kennedy read the draft of proposed Rule 1.7.2. Mr. Treister thought that the Rule should require that just one general partner be served. He moved that the second sentence of the rule be changed to read: "Upon the filing of a petition against a partnership under Bankruptcy Rule 1.4(b), the clerk shall forthwith issue a summons for service upon the partnership and all general partners not joining therein." Professor Seligson said that then something would have to be done with Rule 1.4(c). Professor Kennedy pointed out that the Committee had never approved Rule 1.4, but he felt that the "partner's petition against a partnership" was the wording he wanted, because it was not an involuntary petition. Professor Seligson suggested: "Upon the filing of a partnership petition under . . . ."

Professor Covey asked if "alleged" should be put in in front of "bankrupt" in the third line. Professor Kennedy said he did not see any problem with just saying "bankrupt." After discussion, a motion was made and seconded to change "bankrupt" to "person." The motion was voted down by a majority.

Judge Forman asked for a vote on the first two sentences as amended. Professor Moore said that under the present law, in a quasi-voluntary partnership petition, you do not have to serve the partnership, and he wondered if, in the sixth line, the words "the partnership and" should not be stricken. Professor Kennedy agreed they should, and so did all of the members. A vote was then taken on the first two sentences of Rule 1.7.2. There was unanimous approval.

Meeting was adjourned at 5:04 p.m. on Monday
Meeting was resumed at 9:30 a.m. on Tuesday.

Judge Whitehurst asked if the rule gave the petitioning creditor the option, in serving an involuntary petition on a local respondent, to serve him by mail rather than by personal service. Professor Kennedy answered affirmatively. Judge Whitehurst said it bothered him that service by mail could be made if service by a United States marshal could be had. Professor Kennedy said that was matter for the Committee to consider. He said that he was building into Rule 7.4 a set of priorities whereby service there would be by personal service or by mail and by publication under 7.4(e) only if neither mail

service nor personal service was possible. He said that idea would be carried into this rule by a cross-reference he was making. He stated that there was no discrimination between service by mail and personal service in Rule 1.7.2 as it was drafted. Mr. Treister said that he thought the Committee agreed that service by return-receipt mail was just as good as personal service by marshal, because service by marshal just meant that he left the summons at the house; it did not mean that the person served received it. He also felt that many times it took longer for service when it was done by the marshal. Judge Whitehurst said that he had his answer, and if no one else was concerned, he wouldn't pursue the matter.

At this time, Judge Forman welcomed Mr. Wright of the Bankruptcy Division of the Administrative Office of the United States Courts and Professor Shanker.

FORM NO. 6 - SUMMONS TO ALLEGED BANKRUPT

Professor Kennedy then asked the members to look at Form No. 6. Professor Kennedy said in light of the discussion the day before, he would append a footnote to the word "answer" and indicate that an appropriate motion might be made.

Judge Snedecor wanted to know where the referee got the rule to tell him how to fill in the blank after "on or before." Professor Kennedy said that the rule discussed the day before had said to file within 15 days after the issuance of the summons, and a Note would state that Bankruptcy Rule 1.8 requires service and filing within 15 days after date of issuance. Judge Whitehurst said he noticed the heading was "Summons to Alleged Bankrupt", but the summons was addressed to the "Bankrupt," and the closing said, "You may be adjudged a bankrupt by default." Professor Kennedy said that the definition of a "bankrupt" included one who was only alleged to be one and if the inconsistency bothered anyone, perhaps the word "alleged" could be left out. Judge Whitehurst said he would rather put it in all the time than leave it out. However, he did not pursue the issue.

It was decided, by unanimous agreement, to change "Dated" at the lower left hand corners of Forms No. 6 and 6B to "Date of issuance." After discussion of the first paragraph, it was generally agreed to leave it in. It was also agreed that the date after "on or before" was to be filled in by the referee.

PROPOSED BANKRUPTCY RULE 1.7.2 - SERVICE OF PETITION AND PROCESS

Judge Gignoux stated that he understood this rule to say that it did not incorporate the provisions which were incorporated in Bankruptcy Rule 7.4 permitting personal service to be made by

any person not less than 18 years of age who is not a party. He also stated that it did not incorporate the provisions of both Civil Rule 4 and Bankruptcy 7.4 regarding time of service and to proof of service. Professor Kennedy stated that these provisions were included in Bankruptcy Rule 7.4(d) and Civil Rule 4(f), (g), and (h). He questioned whether the proposed rule would provide for service of mail outside the state. Judge Gignoux asked whether, inasmuch as the Committee had decided to provide for such service by mail in adversary proceedings, it should not be in this rule too. Professor Kennedy thought the Committee should also decide whether it wanted to include the provision regarding refusal of mail to apply just as much to service of the original bankruptcy petition as it would to other kinds of service by mail. Judge Gignoux thought that this rule could provide for proof of service. He would say that: "The summons and petition shall be served as in Rule 7.4 except that extraterritorial service is not permitted except as provided in (e) and (i)."

Professor Moore felt that the Rule would have to provide that service could be made in the manner provided in § 1655 of the Judicial Code. He thought that Civil Rule 4(i) would be workable but not 4(e). Professor Kennedy felt that it would be necessary to do more than Judge Gignoux suggested and that language something like that in § 18(a) of the Bankruptcy Act would be necessary. Judge Gignoux suggested that the rule provide: "Service shall be made as provided in Rule 7.4 except that service upon a party not an inhabitant or resident of a state shall be made only as provided in Rule 4(i)." Professor Kennedy stated it would have to include § 18(a) of the Bankruptcy Act also. After discussion, Professor Seligson moved adoption of the principle of service outside of the state and incorporation of all of Rule 7.4 as it stood. Professor Joslin seconded the motion. Professor Moore felt that there was danger in picking up Civil Rule 4(e) in this rule, and that the Committee should have its own publication rule. Professor Seligson amended his motion to include the points discussed after his motion. Judge Forman stated that the record would indicate that there would be a revision of Rule 1.7.2 with necessary revision of Rule 7.4 to encompass policy proposals just discussed. There was no objection. Professor Joslin asked for a hand show on Professor Seligson's motion. The motion was carried, 9 to 1, one member not voting.

Professor Kennedy said he was having trouble trying to analogize service by mail to personal service for the purpose of defining territorial limits. He asked if service was made in the United States when the mail was forwarded for delivery in a foreign country. Mr. Treister felt it was desirable to avoid undertaking to locate the situs of service by mail, and concluded he would like to see the rule left the way it was, because the proof of service includes the signed receipt.

Agenda Item 3: Examinations and Related Matters.

PROPOSED BANKRUPTCY RULE 2.21 - EXAMINATION.

(a) Examination on Motion.

Professor Kennedy read (a) of proposed Rule 2.21 and referred to pages 38-39 of the Minutes of the June 1966 meeting. Judge Herzog moved that the last sentence of 2.21(a) be removed. Mr. Nachman said he was not worried about the courts' permitting examinations too freely, but he was concerned that one could make a motion to someone other than the referee or a judge. Judge Gignoux seconded Judge Herzog's motion. Mr. Nachman referred to the definition of motion in Rule 9.1 and asked if it was really a motion that was made under Rule 2.21(a). Mr. Nachman would change the language to read: "Upon application of any party in interest, orally or in writing, the court may order any person to appear before the court for examination," and he would eliminate the second sentence. Judge Whitehurst supported Mr. Treister's suggestion that the sentence just read: "The court may order any person to appear before the court for examination." Mr. Treister said he had suggested that, but that the Rule ought to recognize that a local rule may put restrictions on it. He thought the easiest thing to do would be to say: "Upon application of any party in interest, the court may order any person to appear before the court for examination." Professor Seligson suggested deletion of the last sentence and modification of the definition of "motion." Mr. Nachman moved to amend Judge Herzog's motion so that the subdivision would read: "Upon application of any party in interest, the court may order any person to appear before the court for examination. The application may be oral unless local rules otherwise provide." Judge Forman put Judge Herzog's motion - simply to eliminate the second sentence from Rule 2.21(a). The motion was carried, 7 to 3.

Judge Herzog moved that in place of the sentence deleted, the following be substituted: "The application shall be written unless local rules otherwise provide." The motion was seconded. It was carried by majority approval.

Judge Gignoux suggested that the second sentence read: "The application shall be in writing unless made in open court or unless local rules otherwise provide." Professor Seligson seconded the motion. After discussion of the meaning of "open court," Judge Gignoux amended his proposal to substitute "during a hearing" for "in open court." Professor Kennedy read a suggested second sentence as follows: "The application shall be in writing unless made during a hearing or examination or unless local rules otherwise provide." A vote was taken, and the suggestion was adopted unanimously. Professor Kennedy noted

that the heading of the subdivision should be revised to read, "Examination on Application."

(b) Examination of Bankrupt at First Meeting.

Professor Kennedy noted that § 47(a)(7)(a) of the Act provided that the trustee shall examine the bankrupt at the first meeting of creditors or at other meetings specially fixed for that purpose, unless he shall already have been fully examined by the referee, receiver, or creditors. He suggested as a draft of subdivision (b) the following: "At the first meeting of creditors the court shall publicly examine the bankrupt or cause him to be examined and may permit the receiver or trustee and/or creditors to examine him." He thought that perhaps, instead of saying "receiver or trustee and creditors," it would be better to say "any party in interest." After discussion, vote was taken on Rule 2.21(b) as proposed in the draft set out in the deskbook, with the only change being substitution of the phrase "any party in interest" for the word "creditors" in the last line. This was unanimously favored, and the rule was adopted as amended.

(c) Scope of Examination.

Rule 2.21(c)(1) was read by Professor Kennedy. It was moved and seconded that it be adopted as written. It was adopted by unanimous approval.

Professor Seligson felt that the last sentence of paragraph (2) should include not only a state or other federal law prohibiting examination of spouses, but also a state or other federal law allowing examination. After discussion, Professor Kennedy suggested putting in the word "such" before "examination" and changing "spouses" to read "the spouse." Judge Snedecor suggested putting in the second line after the word "bankrupt" the word "or." He moved the adoption of Rule 2.21(c)(2) with the proposed amendments. Vote was taken, and the rule was adopted by majority approval.

(d) Testimony of Bankrupt on Objection to Discharge.

Professor Kennedy read subdivision (d) but suggested changing "objections," in the first sentence of the draft, to "a complaint objecting." In order to incorporate § 47a(7)(b) of the Act into this subdivision, he would like to say, instead of "if called as a witness," the following: "unless otherwise ordered by the court, the trustee shall question the bankrupt." Mr. Treister brought out that the hearing on objections to discharge was to be an adversary proceeding like any other trial - not a fishing expedition - and that the issues were all that had to be testified to by the bankrupt, and then only as a witness. He said that he

had never seen a trustee have to perform the above-mentioned task. Professor Kennedy said that if the Committee wished the trustee's responsibility at the hearing on objections to be eliminated, it would be necessary somehow to assure that Congress will jerk the reference to the hearing of objections out of § 47a(7)(b) of the Act when it is amended, and that perhaps an appropriate reference should be made in a Note. Mr. Nachman moved that Rule 2.21(d) be adopted as amended by the Reporter, i.e., changing "objections" to "a complaint objecting." Professor Kennedy pointed out that "attend" might be a better word for the word "appear" in the first line. There were no objections. A vote was taken on the adoption of Rule 2.21(d) with substitutions suggested by the Reporter. There was unanimous approval and the rule was adopted.

(e) Mileage for Bankrupt.

There was no objection to subdivision (e), and it was approved with the prospective Note, which was agreed upon at the June meeting.

(f) Place of Examination.

Professor Kennedy read the proposed subdivision (f) and substituted "case is" for "proceedings are." Judge Whitehurst moved for the adoption of the proposed rule. There was a discussion of the meaning of "before the court" as used in subdivision (a). Judge Herzog said it meant that the referee must be sitting there. Mr. Treister said that he would like not to adopt a rule which forbade a local district from excusing the referee from sitting. He felt that this particular matter had too many problems of policy to be pursued at this meeting, but he would like for it to be put on the agenda for the next meeting. He said he had some material, on the particular point under discussion, with which he would like to support his position. Professor Kennedy asked if a cross-reference to subdivision (a) was needed after the word "examined." Judge Maris said he didn't think so.

Judge Herzog wanted to know the reason for limiting the examination to the bankrupt. Mr. Nachman felt that it should not be any other person, because he didn't feel that just any party to the proceeding should be directed to assist a court in a district in which he was not residing. Mr. Treister said the Federal Civil Rules govern the subpoena limitations as to any other person being called from outside the district of his residence. Judge Herzog said he just asked if the subdivision would restrict ancillary examinations. Mr. Treister suggested that the caption might be "Place of Examination of Bankrupt." Professor Kennedy felt that it was a good suggestion. Vote was taken on (f), which read as follows: "(f) Place of Examination of Bankrupt. The court may for cause shown and upon such terms

as it may impose authorize the bankrupt to be examined at any place it designates, whether within or without the district wherein the case is pending." The rule was adopted by unanimous approval.

At this time, Judge Maris wanted to go back to Rule 7.4. He said that service upon a foreign government, as provided in clause (c)(9), disturbed him. He said he was just raising a caveat and did not want to discuss it at that time, but since the Civil Rules do not provide for service upon a foreign government, he felt that it is like waving a red flag in international relationships. He would like to omit the paragraph entirely. Professor Riesenfeld moved to eliminate Rule 7.4(c)(9). It was seconded. Vote was taken, and (9) was eliminated by unanimous approval.

At this point, Professor Kennedy said that Professor Shanker had pointed out that § 21a of the Act enabled the court to order the bankrupt to appear before the court or before the judge of any state court, and he wanted to know why the words "or before the judge of any State court" had been deleted. Professor Kennedy said that the omission had not been made deliberately, so far as he could recall, but he did not know why the phrase was not in there now. After considerable discussion, it was moved and seconded to leave the rule as it now stood. When the Act is amended to conform to the Rules, it was acknowledged that the reference to a state judge should be omitted from the Act. The motion was carried by unanimous approval.

PROPOSED BANKRUPTCY RULE 2.21.1 - APPREHENSION, EXTRADITION, AND RELEASE OF BANKRUPT FOR EXAMINATION OR GIVING TESTIMONY

(a) Warrant and Bail to Compel Attendance for Examination.

Judge Gignoux suggested for consideration by the Reporter that the provision should not be that "the court shall fix bail." He would say: ". . . conditions including bail." Professor Kennedy said he would keep it in mind. Mr. Nachman wanted to know why there was a time limitation in subdivision (a). Professor Kennedy replied that it was to keep the court from holding a man indefinitely for examination. There was a discussion on what the "ten days" meant. Professor Seligson moved that the time limitation for the conducting of the examination be eliminated and a requirement substituted that the examination commence within 10 days after the conditions had been set. Professor Kennedy read the last sentence with these suggested changes: "If, after hearing the evidence of the parties, the court finds the allegations to be true and that it is necessary, the court shall fix such conditions including bail for assuring his attendance for examination commencing within 10 days and for his obedience to all lawful orders made in reference thereto." Mr. Treister made reference to the first sentence to include Professor

Kennedy's suggestion of saying "party in interest" instead of "receiver, trustee, or a creditor." Professor Seligson suggested that in clause (3) the sentence should end at the word "court," because the following sentence determined whether or not there was to be an examination. Professor Kennedy said that if "for examination" is taken out, it would suggest that there could be no examination forthwith. After further discussion, Professor Seligson moved that subdivision (a) be amended in principle as discussed. There was unanimous approval.

Judge Gignoux suggested that the first sentence should start out, "Upon sworn application of any party in interest alleging (1) . . . ." Professor Kennedy said that this would be changing the provision and making the sworn application conclusive whereas the prior law gave the court freedom to reject the sworn application on the ground that it was not satisfactory proof. Judge Gignoux then suggested "verified" application. There was no objection to the word "verified."

Judge Gignoux also suggested in clause (3) the addition of "or some other officer authorized by law" after the word "marshal." There were no objections to the addition. Judge Gignoux further suggested taking out the words "the evidence of the parties" in the second sentence of the subdivision. There were no objections. There was a discussion on whether "opportunity for hearing" should be used instead of just "hearing." It was agreed that in this specific rule, "hearing" was appropriate, although elsewhere in the rules "opportunity for hearing" was properly used and should stand.

There was recess for lunch at 1:10 p.m.
Meeting was resumed at 1:55 p.m.

(b) Extradition

There was a discussion of the usage of "Extradition" and "Transfer," and it was decided that the Reporter should look into the proper usage in this federal context.

There was unanimous approval of the proposed rule with the provision that the Reporter would look into the matter of terminology regarding "Extradition."

In the course of a discussion on arrests, warrants, and apprehensions, Judge Gignoux said he felt that there was not a provision for arrest in § 10a of the Bankruptcy Act, but that there was one in proposed Bankruptcy Rule 2.21.1(b). He felt that in subdivision (a) of this rule, the warrant described should be an arrest warrant. Judge Herzog suggested that in the 4th line the word "apprehended" be used rather than "extradited." After further discussion, Professor Kennedy

read subdivision (b) with proposed amendments as follows: "Whenever any warrant for the apprehension of a bankrupt is issued under this rule and he is found in a district other than that of the court issuing the warrant, he may be apprehended under such warrant and transferred in the same manner as persons under indictment are now transferred from one district to another." He said that reference to "persons under indictment" may be qualified in the light of research he would do on procedures dealing with extradition of indicted persons. Judge Forman asked for approval, under those circumstances, of subdivision (a) and (b). They were approved as amended. Professor Joslin suggested a comma after the word "apprehended" in (b). Professor Kennedy agreed to put it in after "apprehended under such warrant."

(c) Release from Imprisonment to Testify.

Judge Herzog suggested that "an imprisoned bankrupt" be used instead of the word "him" in the third line of subdivision (c). Professor Kennedy agreed to this suggestion and also to include a Note with reference to the time of imprisonment. There were no objections to these suggestions, and subdivision (c) was approved accordingly.

Mr. Treister asked the Reporter if he had made a note to determine whether it should be "district" or "state" in all places where "district" now appeared in (a) and (b). Professor Kennedy said that he had it in mind.

(d) Definition of Bankrupt.

Professor Seligson thought that before an obligation is placed on any person, there should be a designation by the referee on whom it is being placed. He said he would add language to subdivision (d) to make it correlate with § 7(b) of the Act, Judge Whitehurst said that he favored having a designation of the one on whom the duty had been cast and a determination that that person was in fault, before he could be transferred from one city to another. There was a discussion concerning persons who had information and those persons in actual control. Mr. Nachman said it was agreeable to him to leave out the words from § 7b of the Act, "or such of them as may be designated by the court." Professor Kennedy then read this revised version of subdivision (d): "For the purpose of this rule, if a bankrupt is a corporation, 'bankrupt' includes its officers, members of its board of directors or trustees or of similar controlling body, its stockholders or members, or a person in control." Professor Joslin moved adoption of the rule down to the semicolon, the formulation being left to the Reporter. This was seconded. The motion was carried unanimously.

Professor Kennedy said that beyond the semicolon of the approved part of the rule, he would say "if a partnership, 'bankrupt' includes its general partners or a person in control." There were no objections. The concluding part of the Rule was approved.

PROPOSED BANKRUPTCY RULE 4.30 - DISCHARGE FROM ARREST OR IMPRISONMENT

Professor Kennedy stated that the source of Rule 4.30 is General Order 30. He also stated that "on or after the date of bankruptcy" would be left out in the light of an earlier decision of the Committee made that day respecting another rule. For the same reason the second sentence would say: "Upon notice and hearing . . . ." A query might be raised as to the territorial limits on the court's reach.

There was considerable discussion as to the applicability of the rule to debtor on a provable but nondischargeable claim. Professor Joslin said that if the rule operated only where there was imprisonment at the time of the petition, then the bankrupt would be discharged from that imprisonment, and the state court would have to act again to commit him. Professor Kennedy felt that the suggestion was good and asked the Committee how it felt about restricting the rule to read, "If the bankrupt is under arrest or is imprisoned on the date of bankruptcy." Professor Joslin moved that the rule continue to refer to "provable claim" but to authorize discharge from arrest or imprisonment only at the time of petition. Judge Gignoux said the Committee might consider broadening the Rule to include any bankrupt who was in prison. Professor Seligson thought that the Rule should be tied in with § 11(a), under which the power to stay depends on whether the debt is dischargeable. Professor Kennedy said that he would have a great deal more doubt about the power except that the Supreme Court had promulgated General Order 30.

After discussion, Mr. Treister moved that Rule 4.30 relate to any debt owing at the date of bankruptcy. Professor Seligson proposed that the Rule stick to dischargeable debts. Mr. Treister withdrew his motion, because it didn't seem to be acceptable. Professor Joslin restated his motion, i.e., that "provable claim" be retained but that arrest be related to the time of the petition. Judge Gignoux cited a case, Weber v. Meyering, 66 F.2d 347 (7th Cir. 1933) holding that a provable claim was used in General Order 30 as synonymous with dischargeable debt. Professor Seligson moved that the Committee adopt Rule 4.30 but change the word "provable" to "dischargeable." The motion was seconded but was lost on a vote of 5 to 6.

Judge Gignoux stated that the Court of Appeals for the First Circuit, in 1960, held that although present General Order 30 speaks of a claim provable in bankruptcy, it is to be applied in terms of a dischargeable debt or claim. Damon v. Damon, 283 F.2d 571. Professor Kennedy said that he thought final action on Rule 4.30 should be deferred pending further study.

PROPOSED BANKRUPTCY RULE 7.43 - EVIDENCE

Judge Forman said that Rules 7.43 and 7.45 were to be added to the agenda.

Professor Kennedy read Rule 43 of the Federal Rules of Civil Procedure, and no problems were raised. Mr. Nachman thought that the parenthesized second sentence of the proposed rule was not necessary and therefore should come out, although G.O. 22 carried it. Judge Herzog moved adoption of Rule 7.43 with the deletion of the second sentence. The motion was seconded, and the Rule was adopted by unanimous approval.

PROPOSED BANKRUPTCY RULE 7.45 - SUBPOENA

Judge Herzog moved approval of the first sentence in Rule 7.45. Judge Maris suggested "blank subpoenas" rather than just "blanks" in the second line. A vote was taken on a motion to approve the first sentence of 7.45 with the addition of "subpoenas" in the second line and the deletion of the parenthetical phrases. There was unanimous approval.

With regard to the second sentence, Rule 45 of Federal Rules of Civil Procedure, incorporated generally into Bankruptcy Rule 7.45, was read. There were no objections, and Rule 7.45 as modified was adopted by unanimous approval.

Professor Kennedy said that Professor Shanker had asked how Rule 7.45 related to Rule 2.21. He replied that they had discussed, at the last meeting, extraterritorial examination orders. He read the second paragraph on p. 39 and the last paragraph on p. 41 of the June 1966 Minutes. He asked if the Committee wanted examination orders to disregard the limitations on issuance of subpoenas. Mr. Treister said that it seemed to him that Rule 7.45 was a general rule - not limited to adversary proceedings - and therefore really belonged in Part IX. Professor Kennedy said he didn't see any problem in putting this Rule in IX.

Professor Kennedy asked if Rule 2.21 should have a provision regarding the extraterritorial scope of orders not embodied in writs of subpoenas. Judge Whitehurst said he thought that under § 21a of the Act, without a subpoena being issued, an order could be entered and certified copies delivered to the marshal, one of which he would deliver to the person to whom it was directed and the other of which he would make his return on and file with the court. Mr. Treister said that whatever the kind of order, the policy reasons behind Rule 45 should apply. He said the only question was whether the bankrupt himself should be amenable to service further away than were ordinary witnesses. Professor Seligson felt that a rule was needed to specify that a notice could be served on the bankrupt's lawyer without any territorial limitations on its effectiveness. Professor Riesenfeld asked if that would go into Rule 2.21. Professor Kennedy

answered affirmatively. Professor Seligson thought that Federal Civil Rule 5 should apply. After a short discussion, Professor Kennedy said that he understood the Committee to be moving toward a provision that made Rule 45 of the Federal Rules of Civil Procedure applicable to orders affecting persons other than the bankrupt and that, as to the bankrupt, Rule 5 of the Federal Rules of Civil Procedure as incorporated into Bankruptcy Rule 7.5 should apply. Professor Seligson moved that it be adopted to go into Bankruptcy Rule 2.21. Professor Kennedy said that Rule 7.45 would go into Part IX. There were no objections, and the rule was to be drafted by the Reporter. Professor Kennedy said the last two words in Rule 7.45 would be changed to read "bankruptcy cases" rather than "adversary proceedings."

Agenda Item 5: Venue and Transfer

PROPOSED BANKRUPTCY RULE 1.6 - CONSOLIDATION OF CASES COMMENCED IN SAME COURT

Professor Kennedy read the proposed Rule 1.6 and General Order 7. There was a discussion of the word "person" as used in the second line. Mr. Treister moved the adoption of Rule 1.6 as proposed with substitution of "the same bankrupt" for "a person." After the motion was seconded, it was carried by unanimous approval.

The meeting was adjourned at 5:02 p.m. on Tuesday.
The meeting was reconvened at 9:30 a.m. on Wednesday.

PROPOSED BANKRUPTCY RULE 1.10 - VENUE AND TRANSFER

Professor Kennedy read Rule 1.10(a)(1) and said that he had come to the conclusion that the second sentence should be put in a separate paragraph to be entitled "Alien" and to read thus: "A petition by or against a bankrupt who has no principal place of business, residence, or domicile within the United States, shall be filed in any district wherein he has property." It was decided that "Alien" was not the correct word. Professor Kennedy then read paragraph (2) and inserted (A) after the word foregoing, in the 6th line. Then he added a semicolon at the end and inserted the following clause: "(B) petition by or against an affiliate of a bankrupt may be filed in a case pending by or against a bankrupt." He then read a proposed definition of "affiliate" to be included in Rule 9.1(a). Mr. Treister asked if there was any significance to the use of the word "jurisdiction" at the end of the first sentence in paragraph (2). Professor Kennedy said that was a slip; it should have been "district." Professor Shanker wanted to know if it wouldn't be desirable to have a test for determining what is "principal." After lengthy discussion concerning the meanings of "principal," "chief," and "substantial," the consensus

was that in most cases a court would be able to determine by the facts where the principal assets were. Professor Seligson said he thought the only real question for the Committee was whether it was ready to eliminate, in the case of every corporation and partnership, the domicile requirement. Mr. Treister moved the first sentence of Rule 1.10(a)(2) be approved as the Reporter had given it - with the substitution of "district" for "jurisdiction." It was seconded. There was no objection, and the sentence was approved.

There was a discussion as to whether "shall" or "may only" should be used in this Rule, and it was agreed that the Reporter should look more closely into this.

Professor Kennedy questioned the acceptance of the first sentence of paragraph (a)(1). Mr. Treister moved that it be adopted. Approval was unanimous and it was adopted.

Judge Gignoux wanted to know what the situation was where a district was divided into divisions. He asked if the general venue statute applied. He referred to 28 U.S.C. § 1393(a), and asked if that would apply in this rule. Professor Kennedy said that he was glad Judge Gignoux brought it up, because apparently the division problem did give rise to difficulties in bankruptcy cases. He read a letter, which he had received from Referee Cowans of San Jose, California. The referee said that a problem arose when a case got assigned to a referee in the wrong division of the same district or to the wrong referee in the same division. Judge Whitehurst said that he had that problem in his district, too, but the referees just went ahead and heard the cases, unless there was objection, in which event the case was transferred. Judge Maris urged that as much as possible divisions be completely ignored. He said that the Criminal Rules, effective July 1, 1966, eliminated division venue altogether. He hoped that it could be eliminated in Title 28 of the U.S. Code also, so as to make the matter completely flexible and subject to local rules and local practices. Professor Kennedy said that he would put in a Note something to the effect that the Rules applied to districts regardless of divisions. Judge Forman stated that the first sentence was otherwise approved.

Professor Kennedy then went to the second sentence, which he had proposed as a separate paragraph to be rephrased as follows: "A petition by or against a person who has no principal place of business, residence, or domicile within the United States shall be filed in any district wherein he has property." There was a lengthy discussion about whether property or assets mean American property or assets. Professor Riesenfeld summed up his feelings, which had started the discussion, by saying that the Rules should never use "domicile" when they were dealing with corporations. Professor Kennedy said all agreed that domicile shouldn't be a factor in choosing venue for corporations. The preparation of

a draft, which would incorporate the meaning of the material discussed, was left to the reporter.

Professor Kennedy then set forth the second sentence of paragraph (2) as follows: "Notwithstanding the foregoing, (A) a petition by or against a partnership, any general partner, or any combination of the partnership and the general partners may be filed in any district where the venue of a petition by or against the partnership or by or against any of the general partners could be properly laid." Mr. Treister said he thought the basis for getting the partnerships and partners altogether was economy of administration, but that if you were not going to file against partner A who was in New York, why should you be able to file there against partner B who happened to live in California; if A's petition was pending, there might be some excuse for letting the other partner's case be filed there. Professor Kennedy said he had an earlier draft, which the Style Subcommittee had considered and rejected, which would allow a petition to be filed in New Jersey against a Connecticut partner only if a petition was pending against the New Jersey partner. He said he had some doubts about the present proposed rule, but that that was what the Style Subcommittee thought should be done. He read his earlier draft, which was: "If the venue of a petition by or against a partnership is properly laid, a petition may also be filed by or against any general partner in the same district. If venue of a petition by or against a general partner is properly laid in a district, a petition may be filed in that district by or against the partnership or by or against any other general partner or by or against the partnership and any combination of the partnership and the general partners." He said that is what he would stand by. Professor Seligson moved that the Committee adopt in principle just what had been read. The motion was seconded. It was carried by unanimous approval.

Professor Kennedy then went to proposed clause (B) of paragraph (a)(2). He read § 129 of the Act. Professor Seligson said the Rule must make it clear that the wording used did not mean that the assets were not consolidated. Mr. Treister wanted to know the advantage of filing in the same case, as distinguished from having several cases pending in the same court. Professor Seligson replied that it meant procedural consolidation with but one set of notices required. After discussion, Mr. Treister brought out the fact that they were talking about the right court for a case to be in, not the administration of a case. Professor Riesenfeld also objected to the reference to "case" rather than "court" in a rule dealing with venue. Judge Herzog moved that the wording be changed to read: "filed in the same court," to which Professor Kennedy said, "filed in the same court in which the case is pending by or against the bankrupt." Judge Whitehurst seconded the amended motion. Mr. Treister said that even if the petitions should be filed in the same case, this

rule shouldn't deal with that. Mr. Treister questioned the usage of "by or against a bankrupt" following the word "pending." Judge Snedecor suggested: "in which the case is pending." Professor Kennedy suggested adding "bankruptcy" before the word "case" in Judge Snedecor's suggested wording, and Judge Snedecor agreed. Professor Seligson wanted to know if there could be joint petitions. Mr. Treister said he felt that the language "the bankruptcy case is pending" would mean that at the moment of filing simultaneous petitions by or against 5 affiliates you would not have proper venue, but immediately after you filed venue for all 5 would be good. Judge Herzog wanted to know the authority for putting all 5 corporations in one petition. It was agreed that there was no authority in this rule, because it did not deal with joint petitions. Professor Kennedy said the only rule on joint petitions was in Rule 1.4. Mr. Treister moved for the adoption of Clause (B). Professor Joslin suggested in order to make it a true venue provision, the clause could say: "A petition by or against an affiliate of a bankrupt may be filed in the district in which the bankruptcy case is pending." Mr. Treister then moved for the adoption of (B) subject to drafting improvements. There was unanimous approval.

Next, the Committee went to Rule 9.1(1a) defining "Affiliate." Professor Kennedy explained why he had taken 25 per cent rather than 10. Professor Covey wanted to know if there was any reason for leaving "or more" out of (a) and (c) and putting it in (b). Professor Kennedy said he meant to have "or more" everywhere he had 25 per cent. Mr. Treister moved that Rule 9.1(1a) be tentatively approved subject to any revision which may later be deemed desirable. It was seconded. There was unanimous approval, and the amendment was adopted.

(b) Transfer and Dismissal of Cases; Objections to Venue.

Professor Kennedy read subdivision (b) of the proposed rule and said that "or division" came out of the 4th line.

Mr. Nachman wanted to know why the last sentence was necessary. Professor Kennedy said it was a result of Professor Seligson's suggestion. Professor Seligson felt it was necessary to pin the burden down on the one who had filed the petition wrongly. Judge Maris felt they should follow the language of 28 U.S.C. § 1404(a) and use the term "convenience of the parties" rather than "interests". Professor Riesenfeld pointed out that "interests" should then be singularized. Professor Seligson moved the incorporation in lines 1 and 10 of the language suggested. It was seconded. Sentences 1 and 10 were modified thereby by unanimous approval.

Mr. Treister asked what the court did in a case where an involuntary petition was wrongly laid but there was no objection by the bankrupt. Professor Kennedy said that where there was no objection, the venue went on. Mr. Treister said that ordinarily an objection is raised upon motion of an interested party; in the proposed transfer provision no mention was made of a motion of the party. He thought the court could transfer sua sponte in an involuntary case. Professor Kennedy said that this rule was drafted on the assumption that a transfer of an involuntary case could occur only on a timely motion. Mr. Treister said that if any creditor, whether he was a party to the petition or not, could make a motion to transfer, then it was satisfactory, because the court wouldn't have much to say about it. Professor Kennedy asked Mr. Treister if he would say "on a timely motion of a party in interest." Mr. Treister asked whether a creditor was a party in interest before adjudication. Mr. Nachman asked if they were trying to get away from having the court do it on its own motion. Mr. Treister said he thought that the Committee had decided that the court should not be in the prosecuting business in involuntary cases. Mr. Nachman asked if it presented any real problem by letting the timely motion language, which the reporter had used, stand. Professor Kennedy said it could. He suggested: "a timely motion to be filed by the bankrupt or any party in interest including a creditor." Judge Gignoux said he didn't know how the approach used in the rule was arrived at but wondered if it would not be better draftmanship just to say, "The court may transfer or dismiss a case." He also questioned the "timely motion" language, but Professor Kennedy preferred to leave that in, because the timeliness of the motion depended on the circumstances. Mr. Treister said that if Judge Gignoux's suggestion were followed, the risk would be that the court could transfer or dismiss sua sponte in involuntary cases. Professor Kennedy asked if Judge Gignoux would also take out "on its own initiative" in alternative (2). Judge Gignoux replied that he wouldn't put (2) in at all; it wouldn't be necessary. Professor Kennedy said the important distinction - between an involuntary petition in (1) and a voluntary petition in (2) - had to be preserved.

There followed a lengthy discussion on 28 U.S.C. § 1404. Professor Kennedy said that he understood that under § 1404 and § 1406, the court did not have the power to transfer on its own motion. Judge Maris said he did not accept this as true. Judge Gignoux asked why, under the assumption that it was true, the Committee's rule would not be similarly construed. Professor Kennedy said he wanted to make it quite clear that the court ought, of its own motion, have the power to transfer a voluntary petition. He did not think, however, that an involuntary petition ought to be transferred on the court's own motion. Judge Gignoux suggested that it would be simpler and clearer to

break this rule into two parts - one handling the forum non-conveniens situation, which would be substantially 28 U.S.C. § 1404, the other to handle the venue situation in two sentences - the first of which would be substantially § 1406(a) and the second which would provide that the court, on its own motion, could transfer a voluntary petition. Professor Kennedy said that he wanted the principle approved first, and then he would worry about the draftmanship. Judge Gignoux said that as a principle, first, he would say, "For the convenience of the parties and witnesses and in the interest of justice, the court may transfer any case to any other district or division." Secondly, he would say: "The court in which is filed the case laying venue in the wrong division or district shall dismiss or, if it be in the interest of justice, transfer such case to any other district or division." Judge Maris said that, in effect, this was saying that there wasn't any such thing as improper venue.

Professor Joslin asked the Reporter why he would not want the court, on its own motion, to be able to transfer an involuntary petition but to be able to transfer a voluntary petition. Professor Kennedy said that certainly if the parties selected a proper venue it would be too much of an interference with their rights for a referee to be able to transfer. Professor Joslin said that perhaps in the interest of justice it might be better to transfer. Professor Seligson moved that in the case of a petition filed in the right district the court could transfer only on timely motion, but in the case of a petition filed by or against a bankrupt in the wrong district, the court could transfer on its own motion, dismiss, or retain. Judge Gignoux said that he was afraid that if a petition was filed in the wrong venue and no objection was made, normally the venue would probably be waived. He wanted to know if there was any intention to permit a court, even though the defense of venue had been waived, to dismiss that action. Mr. Treister said it seemed to him that the Committee would be well advised, even in the involuntary cases, to allow the referee, on his own motion, to dismiss or transfer in the case of a proper venue or retain it in the case of an improper venue. Professor Seligson said he did not want language to keep creditors out after the initial meeting of creditors. A lengthy discussion ensued. Judge Herzog said he would not use the word "retain" at all. Professor Kennedy said the proponents wanted to enable the referee to retain a case filed in the wrong district - in the interest of justice - on a motion. Judge Maris said that when the referee ordered the venue to be retained, it made it good; in other words, it cured the venue. Professor Kennedy then read what he thought to be the proposals up to that point: "In the interest of justice and for the convenience of the parties and on notice and hearing to parties in interest as it may direct, the court may on its own motion, at or prior to the first meeting of creditors, transfer or dismiss any case if the venue has been wrongly laid. Also, on its own motion, the court may transfer at or prior to the first meeting of creditors any case filed in the right

district." Any party in interest may file a motion to transfer or dismiss any case brought in the wrong district without regard to the first meeting of creditors; or to transfer a case though filed in the right district. Professor Seligson said authority to retain ought to be clear but he thought the Reporter would have to work out some language without the word "retain" in there, because the creditor would not make a motion to retain. Professor Kennedy said it should be: "On a motion, the court may transfer, dismiss, or retain." Judge Gignoux reiterated his earlier suggestion that the two concepts of the rule be put in separate sections - one to cover the non-conveniens situation and one to cover the wrong venue situation. He thought it would make it clearer, and Judge Maris agreed. Judge Forman then took a vote on the motion to approve the rule in principle subject to appropriate drafting. There was unanimous approval.

Professor Kennedy said he thought the Committee had approved the last sentence but wanted it looked at again. Judge Whitehurst moved that it be approved. The motion was seconded, and the last sentence was retained by majority approval. Judge Gignoux refrained from voting, because he wasn't sure the sentence should be in; he understood there were instances where the court may be doing this on its own motion and the petitioner may not have any interest. Professor Kennedy said that court could not, on its own motion, retain the case if the venue had been laid wrongly. There was a discussion on what section of the rule the last sentence would go in. Professor Kennedy said he understood that the Committee had approved only the principle of the last sentence; the drafting would be up to him. Judge Forman said he thought that the record would be clear that the vote was that the principle of the last sentence be retained.

(c) Consolidation of Cases Filed in Different Courts.

Professor Kennedy read subdivision (c) and proposed leaving out "two or more" and changing "a debtor" to "the same bankrupt" in the first line; inserting "and by or against a bankrupt and by or against an affiliate" after the word "partners" in the fourth line; deleting "opportunity for" in the 6th line; singularizing "interests" and adding "for the convenience" before "of the parties" in the 8th line; deleting parentheses around "other" and omitting the parenthetical phrase in line 9. Mr. Treister suggested deletion of last sentence as unnecessary. He said that after the word "determine" in the 7th line, the wording really should be "the court or courts." Professor Kennedy agreed. There was a lengthy discussion on primary courts and determinations, but it was generally conceded that the proposed language was adequate. Mr. Treister moved that the last sentence be deleted. There was unanimous approval.

Judge Forman asked for a vote on the principle embodied in subdivision (c) as revised. Professor Kennedy said he understood that the subdivision would have two sentences - drafted so that in any case the courts were going to proceed after the determination in accordance therewith. The principle was approved unanimously.

Professor Kennedy said there was a proposal at the last National Bankruptcy Conference to create a kind of presumption that the place where the case ought to proceed was the place where the parent or the controlling corporation was in bankruptcy, and the idea might be extended to make the place where the partnership was in bankruptcy the place to which transfer ought to be ordered. There was no approval of material going into the text.

(d) Reference of Transferred Cases.

Professor Kennedy read subdivision (d) of the proposed rule, and Judge Whitehurst moved for its adoption. Judge Gignoux suggested that it say: "A case transferred pursuant to this rule to a court in another district shall be referred in accordance with Bankruptcy Rule 1.5.1." It was moved and seconded that Rule 1.10(d) be adopted as amended. It was adopted by unanimous approval. However, as an afterthought, Mr. Treister suggested that the words "by the clerk of that court" be inserted after "referred."

There was recess for lunch at 1:00 p.m.
The meeting was resumed at 1:55 p.m.

PROPOSED BANKRUPTCY RULE 7.82 - TRANSFER OF ADVERSARY PROCEEDING

Professor Kennedy read Rule 7.82; singularized "interests" in the first line; added "for the convenience" before "of the parties" in the second line; and dropped "or division" in the third line. He then read the Note.

There was no objection to the principle of the proposed rule. Mr. Treister moved that approval of the wording "in the interest of justice and for the convenience of the parties" uniform wherever it was used. It was seconded. There was unanimous approval.

Professor Kennedy asked if the Committee wanted "on timely motion" in this rule. There was no motion to insert any reference to "on motion," and it was decided that none would be inserted. Professor Kennedy suggested inserting after "may," in the first line, "on such notice and hearing to parties in interest as the court may direct." Professor Riesenfeld suggested saying; "Upon notice and hearing afforded the parties

thereto, ..." Mr. Nachman moved the language suggested by Professor Riesenfeld be included. It was seconded. There was unanimous approval.

At 2:17 p.m., Chief Justice Warren came down to greet the Committee. After the Chief Justice left, the Committee proceeded with Rule 7.82.

Judge Gignoux asked if the last sentence was necessary. He moved that it be omitted and the subject matter thereof be referred to in a Note by the Reporter. It was seconded. The motion was approved unanimously.

Professor Riesenfeld did not like "transferee court" in the second sentence and suggested instead "court of that district." Judge Maris suggested: "court to which it has been transferred." Professor Seligson moved that the second sentence be adopted as "An adversary proceeding transferred under this rule shall be referred to a referee by the clerk of the court to which it has been transferred." It was seconded. There was unanimous approval.

Agenda Item 6: Stays and Injunctions

PROPOSED BANKRUPTCY RULE 4.5 - STAYS OF ACTIONS AGAINST BANKRUPT

Professor Kennedy read all of proposed Bankruptcy Rule 4.5 and the Note through paragraph (f). He said this Rule would be high on the agenda for the February meeting.

Judge Forman called attention to the tentative dates of the next meeting - February 15, 16, 17, and 18, 1967 - and asked if they could be confirmed. This was done with the understanding that the meeting would be adjourned at 3:00 p.m. on Saturday, February 18, 1967.

The meeting was adjourned at 2:50 p.m.