MINUTES OF THE NOVEMBER 1969 MEETING OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

The nineteenth meeting of the Advisory Committee on Bankruptcy Rules convened in the Conference Room of the Administrative Office of the United States Courts, 725 Madison Place, N. W., Washington, D. C. on Wednesday, November 19, 1969, and adjourned on Saturday, November 22, 1969. The following members were present during all or part of the sessions:

Phillip Forman, Chairman
Edward T. Gignoux
Charles A. Horsky
Norman H. Nachman
Stefan A. Riesenfeld
Charles Seligson
Morris Shanker (absent on Saturday)
Estes Snedecor
George M. Treister (absent on Saturday)
Elmore Whitehurst
Frank R. Kennedy, Reporter
Vern Countryman, Associate Reporter
(absent on Wednesday and Saturday)
Lawrence P. King, Associate Reporter

Judge Forman welcomed the members and called the meeting to order. He announced that Referee Herzog would be unable to attend due to the Regional Seminar in San Francisco. Referee Herzog had a three-hour presentation on the program at the Seminar and could not arrange for a substitute. Professor Joslin was unable to attend due to a conflict with his Law School schedule. Judge Shelbourne was ill and unable to attend. Others attending all or part of the sessions were Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure; Professor James Wm. Moore, member of the standing Committee on Rules of Practice and Procedure; William E. Foley, Deputy Director of the Administrative Office of the U. S. Courts, and Secretary to the Committees; and Mr. Thomas E. Beitleman, Jr., an attorney in the Division of Bankruptcy.

Professor Kennedy began the meeting by directing the attention of the members to a memorandum dated September 21, 1969 on "Rules Adapted from Federal Rules of Civil Procedure," explaining that these rules had not before been considered. Judge Maris stated that the amendments of Civil Rules 7.26 and 7.28 to 7.37 referred to in the memorandum had been approved by the Judicial Conference.

RULE 7.17. Parties Plaintiff and Defendant; Capacity.

This rule stated generally that Rule 17 of the Federal Rules of Civil Procedure applies in adversary proceedings. Mr. Treister had reservations regarding this rule. He stated that the Civil Rule did not apply to a bankruptcy receiver. Professor Kennedy suggested that a note be written to accompany the rule, stating that it would not militate in any way against what was provided in the bankruptcy rule on ancillary proceedings. This was agreeable to Mr. Treister. There were no objections to the note from the members. Professor Kennedy further stated that some language would have to be added to clarify the point that the Bankruptcy Act rather than Rule 17(b)(2) of the Federal Rules of Civil Procedure governs the capacity of receivers appointed in bankruptcy proceedings.

RULE 7.18. Joinder of Claims and Remedies.

This rule states that Rule 18 of the Federal Rules of Civil Procedure applies in adversary proceedings. An accompanying note points out that the rules in Part VII (including this rule) do not govern the making of a claim by an unsecured creditor against the estate of the bankrupt. This type of claim would be governed by Rules 3.1-3.10. There were no objections from the members.

RULE 7.19. Joinder of Persons Needed For Just Determination.

This rule stated that Rule 19 of the Federal Rules of Civil Procedure applies in adversary proceedings. In a note, Professor Kennedy stated that since "adjudication" is defined in a special way in § 1(2) of the Bankruptcy Act, the word "determination" was substituted in this rule to avoid confusion.

Professor Kennedy asked whether some modification was necessary in the first sentence of subdivision (a) of Rule 19 of the Federal Rules of Civil Procedure. In order to aid in the discussion, Professor Kennedy read Bankruptcy Rule 9.12, Objection to Jurisdiction of Bankruptcy Court, which was "on the shelf." Professor Seligson questioned how the proceeding would be affected if Rule 7.19 were deleted. Professor Kennedy answered that the court would have to decide without any guidance whether persons should be joined.

There was disagreement among the members. Professor Riesenfeld suggested the Style Subcommittee draft a rule regarding subdivision (a) of Rule 19 of the Federal Rules of Civil Procedure. Judge Gignoux moved a redraft be presented by the Style Subcommittee. His motion was accepted.

There was a short discussion then of Rule 5.12, Ancillary Proceedings, and Rule 7.82, Transfer of Adversary Proceedings. It was decided that the note to Rule 7.82 would state the present law as to the reviewability of orders granting or denying motions for transfer.

RULE 7.20. Permissive Joinder of Parties.

This rule states that Rule 20 of the Federal Rules of Civil Procedure applies in adversary proceedings. Professor Seligson moved its approval. The motion carried.

RULE 7.21. Misjoinder and Non-Joinder of Parties.

This rule states that Rule 21 of the Federal Rules of Civil Procedure applies in adversary proceedings. Professor Seligson moved its approval. The motion carried.

RULE 7.22. Interpleader.

This rule states that Rule 22 of the Federal Rules of Civil Procedure applies in adversary proceedings. Professor Moore stated that this rule should be limited to Rule 22(1) of the Federal Rules of Civil Procedure. His reason was that subdivision (2) of Rule 22 dealt only with "statutory interpleader." Professor Seligson agreed with Professor Moore and moved that this rule be so limited. His motion carried.

RULE 9.41. Contempt Proceedings.

The draft of this rule was two pages long with an accompanying memorandum of fifteen pages dated June 24, 1969. Professor Kennedy stated he stood by what he had said in the memorandum, viz., that he thought it lies within the rule-making power to adopt the rule (Rule 9.41) and therefore that the question before the Committee was one of policy: Did the Committee desire to give contempt power to the referees? Professor Riesenfeld had indicated that in light of his research contempt power could not be given to the referee, and he had submitted a supporting memorandum dated November 17, 1969.

Referee Whitehurst questioned whether any contempt powers were conferred on federal magistrates. Professor Kennedy stated that the procedure was very comparable to the procedure in the Bankruptcy Act: the magistrate certifies the matter "up." Referee Whitehurst then stated that the Tax Court does not have the same people to deal with as does the bankruptcy court.

Professor Seligson's motion to give the referee "limited" power on contempt was carried. Professor Moore suggested that the word "criminal" be inserted as a modifier before "fine" in line 40. Professor Kennedy said he understood Professor Moore as meaning the Committee should not limit a referee on fines in civil contempt cases. Referee Whitehurst stated he felt the limits should be applicable in both criminal and civil cases. This was the consensus of the Committee. The word "criminal" was then omitted.

Professor Kennedy suggested going through the rule line by line for any suggested changes. Subdivision (a), Contempt in Proceedings Before Referee dealt with cases that are not within the referee's jurisdiction to furnish. Professor Kennedy stated that he had not distinguished between civil and criminal contempt cases. Section 41a of the Bankruptcy Act likewise does not distinguish between criminal and civil contempt. It was then suggested by Professor Riesenfeld that subdivision (a) be limited to § 41a(2), "misbehave during a hearing or so near the place thereof as to obstruct the same." Professor Seligson suggested that "may" be substituted for "shall" in line 4.

Since paragraph (3) of subdivision (b) prescribed the limits on a fine or imprisonment by the referee, the words "may warrant punishment by imprisonment or by a fine of more than $250, he shall," were deleted from subdivision (a). Following "of the Act" in line 3 of subdivision (a), the following words were added: "has occurred, he may." The last sentence of the subdivision was omitted.

In paragraph (1) of subdivision (b), Contempt Punishable by Referee, the bracketed language, "Conduct that is prohibited by § 41a of the Act and that occurs" was preferred to the single word "Misbehavior." The parenthesized language in the first two sentences of the paragraph was also left in. On line 18, the parenthesized words "of contempt" were stricken. The word "fact" was pluralized. Paragraph (1) of subdivision (b) was approved as amended.

Paragraph (2), Disposition Upon Notice and Hearing, was then discussed. Professor Shanker suggested a period be placed after the word "charged" in line 27. The members, however, felt the notice should state whether the contempt was criminal or civil.

There was discussion of the sentence, "The notice may be given on the court's own initiative or on motion by a party, by the United States Attorney, or by an attorney appointed by the court for that purpose." Referee Snedecor moved the sentence be inserted in paragraph (2). The motion carried. The approved phrase will appear on lines 31 through 34.

It was then proposed that a subsection (d) be added to the rule to deal with the right to jury trial. It was left to Professor Kennedy for the wording of the subsection. He proposed a rule along the lines of "Nothing in this rule shall be construed to impair the right to a jury trial."

RULE 7.23, 7.23.1, & 7.23.2. Class Proceedings, Etc.

Rule 7.23 states that Rule 23 of the Federal Rules of Civil Procedure applies in adversary proceedings. Professor Kennedy stated that Rule 23 originally dealt with derivative actions by shareholders and actions relating to unincorporated associations. Because of the recent reorganization of Civil Rule 23 into three separate rules, he had followed suit with Rule 7.23.1, Derivative Proceedings by Shareholders, and Rule 7.23.2, Adversary Proceedings Relating to Unincorporated Associations. Professor Kennedy stated the titles of the Civil Rules were different from those of the comparable Bankruptcy Rules in that the latter referred to "Proceedings" rather than "Actions." There were motions to adopt Rules 7.23, 7.23.1, and 7.23.2 as drafted. The motions carried.

RULE 7.24. Intervention.

This rule incorporates Rule 24 of the Federal Rules of Civil Procedure. Judge Gignoux moved its approval. The motion carried.

RULE 7.25. Substitution of Parties.

This rule incorporates Rule 25 of the Civil Rules, subject to the provisions of Rule 5.18.5(b). Rule 5.18.5(b) provides for automatic substitution of the successor of a trustee or a receiver as a party in any pending proceeding without abatement. There was a motion to approve Rule 7.25. It carried.

(The meeting adjourned at 4:30 p.m.)

November 20, 1969

(The meeting reconvened at 9:30 a.m.)

RULE 7.26. General Provisions Governing Discovery.

This rule states Rule 26 of the Federal Rules of Civil Procedure applies in adversary proceedings. Rule 26 of the Civil Rules deals with depositions and discovery but will be re-entitled "General Provisions Governing Discovery." Rule 7.26 was approved as drafted.

RULE 7.27. Depositions Before Adversary Proceeding or Pending Appeal.

Professor Kennedy stated that the draft of this rule went along with the language in Rule 27 of the Federal Rules of Civil Procedure. He indicated that where the Civil Rules referred to "petition" and "petitioner" he had substituted in the Bankruptcy Rules "application" and "applicant," and "adversary proceeding" was substituted for "action."

Mr. Treister was against recognizing bankruptcy jurisdiction in a case where no petition had been filed. Professor Kennedy was in agreement but said the Committee had to resolve whether Rule 7.27 should be available even though a bankruptcy petition had not been filed. Professor Seligson moved that the Committee adopt the principle of Rule 7.27, but that it be limited to cases in which a petition has been filed and that the question as to what may be done where a creditor intends to file an involuntary bankruptcy petition and wants to perpetuate testimony be left at large under the Federal Rules of Civil Procedure. The motion carried.

Professor Kennedy then stated the words, "is expected to be or," should be taken out of line 6 of the draft in light of Professor Seligson's motion. Mr. Treister also suggested that "verified" in line 5 be stricken. Both these suggestions were adopted. Mr. Treister stated that the words, "shall be entitled in the name of the applicant and" were unnecessary in lines 8 and 9. He moved their deletion, and his motion was carried.

Judge Gignoux moved the adoption of subdivision (a) of Rule 7.27 as amended. Mr. Treister then suggested striking "commencing a case in which such testimony will be relevant" in lines 7 and 8. Professor Kennedy agreed that it was awkward with the phrase left in. Judge Gignoux' motion carried, along with Mr. Treister's suggestion.

When reading subsection (a) with amendments, Professor Kennedy stated the "adversary proceeding" should be related to "the petition" somehow. It was then suggested by Judge Gignoux that "in a pending bankruptcy case" should be inserted into line 5 following "adversary proceeding."

Under subparagraph (b), Pending Appeal, Mr. Nachman called attention to an apparent omission at the end of the subsection. Professor Kennedy agreed and stated that subparagraph (b) of Rule 27 of the Federal Rules of Civil Procedure would be incorporated in the Bankruptcy Rules in its entirety. Professor Kennedy added that the word "action" in lines 53 through 66 should be changed to "proceeding." Judge Gignoux questioned whether the sentence in lines 51-55 was necessary. Professor Kennedy stated that he would decide if it was necessary in light of the amendments made to the rule.

Judge Gignoux moved approval of the rule as amended. The motion carried.

RULE 7.28. Persons Before Whom Depositions May Be Taken.

There were two alternative drafts of this rule. One alternative simply stated that Rule 28 of the Federal Rules of Civil Procedure applies in adversary proceedings. The second alternative was a paraphrase of Civil Rule 28. Judge Gignoux was in favor of adopting the first alternative. His motion carried.

RULE 7.29. Stipulations Regarding Discovery Procedure.

This rule states that Rule 29 of the Federal Rules of Civil Procedure applies in adversary proceedings. Referee Whitehurst moved its approval. The motion carried.

RULE 7.30. Depositions Upon Oral Examination.

When reading the proposed rule, Professor Kennedy suggested that "upon any defendant" in line 5 be stricken; that in line 9 " or service made" should be inserted after "upon any defendant"; and that in line 12 "Rule 7.45" should be "Rule 9.45."

It was decided that the note accompanying this rule should explain that under the "old" version of Rule 30 of the Federal Rules of Civil Procedure, soon to be revised, a plaintiff could, by not serving the summons, always arrange to take the deposition first. Mr. Treister stated that apparently the Civil Rules Committee had decided that it was not a good policy to start the running of the 20-day period from the commencement

of the action, and that the defendant should have the opportunity to take depositions first. Therefore, the 20-day period was made to start running upon service. If the Bankruptcy Rules require a 30-day period to run from the issuance rather than the service of the summons, people will be under the impression that the Bankruptcy Rules are returning to the policy of former Rule 26(a) of the Rules of Civil Procedure. A note should explain that the Bankruptcy Rules require that summons be served within five days.

RULE 7.31. Depositions of Witnesses Upon Written Questions.

This rule states that Rule 31 of the Federal Rules of Civil Procedure applies in adversary proceedings. In line 4 of the rule, Professor Kennedy stated that "7.45" would again be changed to "9.45." There was a motion to adopt Rule 7.31 as drafted. The motion carried.

RULE 7.32. Use of Depositions in Adversary Proceedings.

This rule states that Rule 32 of the Federal Rules of Civil Procedure applies in adversary proceedings. The rule was approved as drafted.

RULE 7.33. Interrogatories to Parties.

This rule states that Rule 33 of the Federal Rules of Civil Procedure applies in adversary proceedings. The newly revised Civil Rule 33 allowed 30 days after the service of interrogatories within which the party upon whom the interrogatories have been served may serve his copy of the answers and objections. The proposed Bankruptcy Rule allowed only 20 days for such action. It was decided the parenthetical phrase in the proposed draft should be stricken so that the times allowed parties would be the same under both rules. The rule was approved after striking the parenthetical phrase and placing a period after "proceedings" in line 2.

RULE 7.34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes.

This rule states that Rule 34 of the Federal Rules of Civil Procedure applies in adversary proceedings. Again there was a discrepancy in the time limits of the newly revised Civil Rule and the proposed Bankruptcy Rule. It was decided the parenthetical phrase should be stricken so as to make the time limits comparable in both rules. The rule was approved after striking the parenthetical phrase and placing a period after "proceedings" in line 2.

RULE 7.35. Physical and Mental Examination of Persons.

This rule states that Rule 35 of the Federal Rules of Civil Procedure applies in adversary proceedings. There was no discussion on this rule. It was adopted as drafted.

RULE 7.36. Requests for Admission.

This rule states that Rule 36 of the Federal Rules of Civil Procedure applies in adversary proceedings. There was a difference in the time limits of newly revised Civil Rule 36 and the proposed Bankruptcy Rule. It was decided that the parenthetical phrase would be stricken so as to make the two rules comparable in the time limits prescribed. The rule was approved after striking the parenthetical phrase and placing a period after "proceedings" in line 2.

RULE 7.37. Failure to Make Discovery: Sanctions.

Professor Kennedy had drafted four alternatives of this rule. He stated the purpose of submitting four alternatives was to present stylistic rather than policy choices. He first read Alternative II. Mr. Treister questioned the need for the second sentence, which dealt with cross references to other rules in Civil Rule 37, since the Committee had already "picked up" all the referenced rules without change. Mr. Horsky stated the second sentence should be incorporated in a note. It was moved that Alternative II be adopted as amended. The motion carried. The amendment entailed the striking of the language following the first sentence. This was the last rule which dealt with depositions and discovery.

RULE 7.40. Assignment of Adversary Proceedings For Trial.

Professor Kennedy stated that this rule was very close to Rule 40 of the Federal Rules of Civil Procedure. The term "adversary proceedings" was used in lieu of "cases."

Judge Gignoux felt this rule presented a problem because of Bankruptcy Rule 7.4(a). Rule 7.4(a) makes reference to Bankruptcy Rule 7.40 which, however, does not require the court to set a trial date. Mr. Treister proposed that Rule 7.4 should provide that the court will set a trial date, and that Rule 7.40 would then be unnecessary. Professor Kennedy read an earlier version of Rule 7.40, which stated: "Upon the filing of a complaint, the bankruptcy judge shall cause a date to be set for trial, and notice thereof shall be served with the complaint." It was then decided that the "old" rule

(as read by the reporter) would be retained and that the proposed Rule 7.40 would be stricken. Mr. Treister's suggestion was accepted regarding the amendment of Rule 7.4(a) to provide that the court set the trial date and to strike the reference to Rule 7.40.

RULES 7.44 and 7.44.1. Proof of Official Record and Determination of Foreign Law.

Rule 7.44 states that Rule 44 of the Federal Rules of Civil Procedure applies in adversary proceedings. Professor Kennedy stated that Rule 44 would be superseded by the Evidence Rules.

Rule 7.44.1 states that Rule 44.1 of the Federal Rules of Civil Procedure applies in adversary proceedings. Final action on 7.44 and 7.44.1, along with Rule 9.43, was deferred until the Federal Rules of Evidence become effective.

RULE 7.55. Default.

There was a question as to what function an entry of "default" serves. Mr. Treister stated that one of the things that entry of "default" does is that it establishes liability, but where a party has to prove damages, there must be a proceeding to determine their amount. Otherwise, the fact of the default entry does not seem to make any difference in the entire rule.

In subparagraph (a), Entry, Mr. Horsky suggested "Order his default to be entered" in line 5 be changed to "enter a default judgment" and that line 12 read, "against the defendant, if he has defaulted for." He further stated if these changes were made, subdivision (c), Setting Aside Default, would require changing "an entry of default" on line 31 to "a default judgment." He then suggested the following sentence be added in line 14 after "incompetent person": "In all other cases the party entitled to a judgment by default shall apply to the court therefor." As in the other drafted rules, the word "action" will be changed to "proceeding."

There was disagreement as to how the drafted rule should read incorporating the suggested changes. Mr. Horsky stated the changes could be incorporated with some rewording.

There was a motion from Mr. Horsky for the reporter to incorporate the changes suggested and submit a redraft of the rule at the next meeting. The motion carried.

RULE 7.56. Summary Judgment.

This rule states that Rule 56 of the Federal Rules of Civil Procedure applies in adversary proceedings. Professor Kennedy noted there was a provision in Rule 56 that the motion shall be served at least 10 days before the time fixed for the hearing. Judge Snedecor moved the approval of the rule. The motion carried.

RULE 7.57. Declaratory Judgments.

This rule stated that Rule 57 of the Federal Rules of Civil Procedure applies in adversary proceedings, except for provisions referring to a trial by jury.

There was discussion of whether a bankruptcy court has jurisdiction of a proceeding for a declaratory judgment. Mr. Treister suggested that the exception of a jury trial be deleted. Judge Gignoux questioned whether the whole rule was necessary in view of the fact that Rule 7.57 was embraced by Rule 7.1. Professor Kennedy agreed that Rule 7.57 covered only situations which Rule 7.1 allows. There was a motion by Referee Snedecor to eliminate Rule 7.57 with a proviso that there be a note as to why it was eliminated. The motion carried.

RULE 7.64. Seizure of Person or Property.

This rule states that Rule 64 of the Federal Rules of Civil Procedure applies in adversary proceedings, with an exception that a proceeding in which any of the remedies referred to in Rule 64 are used shall be commenced and prosecuted pursuant to the Bankruptcy Rules.

Professor Kennedy explained the purpose of the exceptional clause. In Civil Rule 64 there is this clause: "The action in which any of the foregoing remedies is used shall be commenced and prosecuted after removal pursuant to these rules i.e., the [Federal Rules of Civil Procedure]." He stated that any proceeding in which a provisional remedy is referred to in Rule 64 should be commenced and prosecuted pursuant to the Bankruptcy Rule. He also stated that if there are jurisdictional limitations, this rule would do no harm. The members were in agreement with him.

Professor Seligson moved approval of the rule. Mr. Horsky suggested that the bracketed language should be stricken. Professor Seligson agreed. The parenthetical word "(provisional)" was also deleted from line 3. The motion to approve as amended was adopted.

Later in the meeting, Professor Riesenfeld moved to reconsider Rule 7.64. Mr. Horsky asked Professor Riesenfeld if he would agreed to asking the reporter to find out what the construction of the Civil Rule 64 has been and then adapt the bankruptcy rule to it. Professor Riesenfeld agreed.

Next Meeting.

The next topic of discussion was the dates on which to hold the next meeting of the Bankruptcy Rules Committee. It was tentatively set for June 10 through 13, 1970 (with a Style Subcommittee meeting on May 8 through 10, 1970).

RULE 7.67. Deposit in Court.

This rule states that Rule 67 of the Federal Rules of Civil Procedure applies in adversary proceedings. Mr. Nachman moved approval of the rule as drafted. The motion carried. Mr. Treister suggested that the word "plaintiff" in line 3 of the accompanying Note be changed to "party." His suggestion was accepted.

RULE 7.68. Offer of Judgment.

This rule states that Rule 68 of the Federal Rules of Civil Procedure applies in adversary proceedings. Mr. Horsky moved approval of the rule as drafted. The motion carried.

RULE 7.70. Judgments and Orders for Specific Acts; Vesting Title.

Professor Kennedy had drafted two alternatives of this rule. The second alternative simply stated that Rule 70 of the Federal Rules of Civil Procedure applies in adversary proceedings, subject to the provisions of Rule 9.41, the contempt rule. The first alternative was a longer version of the rule. In this alternative the word "court" was used in lieu of "clerk" where it appears in Rule 70 of the Federal Rules of Civil Procedure. The Committee decided to accept Alternative I.

Mr. Tresiter asked why the reporter had taken out the portion of the rule dealing with "contempt." Professor Kennedy stated that in view of the action of the Committee on Rule 9.41, he had put that portion back into the rule: "In proper cases, the party may also be held in contempt in proceedings under Rule 9.41."

The parenthetical language in lines 11 and 12 was deleted. Referee Whitehurst suggested "to real or personal property" be inserted in line 13 following "divesting the title." Professor Riesenfeld suggested "thereto" be inserted into line 13 after "divesting the title" instead of Referee Whitehurst's suggestion. Professor Kennedy agreed and said that "of real or personal property" should appear at the end of line 12 following "directing a transfer."

In line 12 "The court" begins a new sentence. With the insertion of the phrase at the end of line 12, the word "thereof" in line 13 was deleted. The parentheses surrounding "or order" in line 1 were deleted.

Professor Kennedy read the rule in its entirety. There was a motion to approve Rule 7.70 as amended. The motion carried.

RULE 7.71. Process in Behalf of and Against Persons Not Parties.

This rule states that Rule 71 of the Federal Rules of Civil Procedure applies in adversary proceedings. Mr. Horsky moved the approval of the rule. His motion carried.

Item (3) of the Agenda, Professor Kennedy stated, was a list of new rules, not before considered by the Committee.

RULE 1.15. Adjudication of Partnership When All Partners Are Adjudicated.

Professor Kennedy stated that this rule was an elaboration of § 5i of the Bankruptcy Act.

Professor Countryman suggested "court" in line 2 be changed to "party" and then add "in interest may petition any court." Professor Kennedy was in agreement, stating that the suggested language was more procedural. It was then decided "file a" would be inserted into Professor Countryman's suggested language.

The discussion turned to Bankruptcy Rule 1.4, which deals with Partnership Bankruptcy. It was decided Rule 1.15 would be more effective as subparagraph (d) of Rule 1.4. Professor Kennedy stated the rule would then be titled "Petition When All Partners are Adjudicated." There was a motion to transfer the rule into Rule 1.4. The motion carried.

RULE 1.22. Dismissal or Suspension of Case of Bankrupt Adjudged in a Foreign Jurisdiction.

Professor Kennedy stated this rule derived from § 2a(22) of the Bankruptcy Act and is a procedural rule.

Mr. Horsky asked, "If we adopt this rule and the Bankruptcy Act thereafter is amended to exclude 2a(22), does the court have the power to dismiss a case?" He felt the court should sustain its power to dismiss cases. Mr. Treister stated, "All the American requirements for the adjudication are present in such a case and there would be no provision to say that exercise of jurisdiction could be suspended because of pending bankruptcy elsewhere. I would be surprised if a rule could give that power."

Professor Kennedy stated he was inclined to leave § 2a(22) intact and also to have a Rule 1.22 even if there is an overlap. The overlap could be avoided somewhat by deleting the phrase, "having regard to the rights and convenience of local creditors and other relevant circumstances," from Rule 1.22 since it already appears in the Act.

Professor Riesenfeld suggested an elaboration of this rule to deal with the resumption of suspended proceedings. Professor Kennedy and Mr. Horsky were in agreement that such a provision would only be a very general one to the effect that the suspension would be terminated on motion. Professor Kennedy stated the Committee should decide whether a rule was necessary along the lines of Rule 1.22 before discussing Professor Riesenfeld's suggestion for elaboration. Mr. Horsky moved to have a rule such as the proposed Rule 1.22. The consensus was that the principle of the rule was necessary but not the wording of the proposed rule.

A discussion was held on the relationship of the proposed rule to Rule 1.50, which deals with dismissal. Mr. Treister stated Rule 1.22 was concerned with a different aspect of dismissal from that dealt with in Rule 1.50. Mr. Horsky stated everything that Rule 1.22 takes care of regarding dismissal could not be incorporated into Rule 1.50 but that Rule 1.50 should include the Rule 1.22 dismissal on "without prejudice."

Professor Kennedy stated the Committee was at the point of deciding whether to deal with the subject of unsuspending a suspended case and whether the Committee wanted some reference in Rule 1.50 to that kind of dismissal. Mr. Nachman stated these problems should be covered in a note

rather than in the body of a rule. Professor Seligson and Mr. Nachman agreed that the note accompanying Rule 1.22 should state, "A suspended proceeding may be reinstated on notice and hearing."

Professor Seligson moved approval of Rule 1.22 as drafted with the suggested language to be inserted in the note. The motion carried.

(The meeting adjourned at 4:30 p.m. to reconvene at 9:30 a.m. on Friday, November 21, 1969)

RULE 2.7. Duties of Bankrupt.

Professor Kennedy opened the meeting by stating that the Committee had not yet picked up a large part of § 7 of the Bankruptcy Act. He had attempted to pick these provisions up in Rule 2.7, Duties of Bankrupt. Discussion was held on the first clause of the rule. Professor Kennedy stated "lawfully" was not necessary in line 3. Mr. Horsky moved the approval of the first clause with the deletion of the parentheses surrounding "and any other meeting or hearing as ordered by the court." The word "lawful" in line 6 was deleted as suggested by Professor Kennedy. Mr. Treister stated that clause (4) beginning on line 6 should be more general to include a "catchall" type of phrase. Mr. Horsky suggested the deletion of clauses (5) and (6). Professor Kennedy agreed that clause (5) was embraced in clause (3). He added that clause (6) was taken from the statute, which in terms states that there is a duty on the part of the bankrupt to execute transfers without regard to whether there is any direction or not, but he felt it was omittable. There was agreement that both clauses should be more general.

As to clause (7), Professor Kennedy stated that (A) and (B) were predicated on Bankruptcy Rule 6.2 and could be conditioned on the filing of a schedule. As a stylistic matter, Mr. Horsky stated that part (C) of clause (7) was different from parts (A) and (B) and that the preliminary language of clause (7) should not apply to part (C). Professor Kennedy agreed. Professor Seligson stated he wanted it understood in the rule that the requirement for giving information applied only when schedules were not involved. The members agreed.

It was decided that if some general language could not be used in lieu of clause (7), the drafted language would be acceptable. Mr. Nachman stated he hoped there would be

a note accompanying this rule setting out that it was not the intention of the Committee to cut down the duties by using the general language. Professor Kennedy agreed. Mr. Seligson, on the subject of the general provision, stated that it should include some reference to "inventory."

No formal motions were made regarding this rule. Professor Kennedy was left to prepare several alternatives of this rule.

RULE 2.22.2. Privileged Communications.

This rule, Professor Kennedy noted, is one which involves the problem of intersection with the Federal Rules of Evidence. The rule was drafted with only a slight difference from § 21i of the Bankruptcy Act.

Professor Seligson stated he felt this rule would restrict communications between creditors, both written and oral. Mr. Treister moved that the Committee not create a privilege by rule. The motion carried. He then moved that the Committee not perpetuate such a rule. The motion carried.

It was decided the entire matter of privileged communications would be brought up at the next meeting.

RULE 5.13.2. Authorization of Trustee to Conduct Business of Bankrupt.

Professor Kennedy stated that § 2a(5) of the Act provides that the court of bankruptcy has jurisdiction to authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees. Rule 5.11 takes care of the receiver by providing that the court may appoint a receiver when necessary in the best interests of the estate to conduct the business of the bankrupt for a limited period (Rule 5.11(a)(2)). Under Rule 5.11.1 the court may appoint a marshal in lieu of a receiver. Since the rules as drafted do not recognize anywhere that a trustee could be authorized to conduct the business of bankrupt, Professor Kennedy proposed a short rule as follows: "The court may authorize the trustee to conduct the business of the bankrupt for a limited period if necessary in the best interests of the estate."

Professor Seligson asked the reason for the qualification "for a limited period." Mr. Treister stated he understood the limitation to recognize that the trustee liquidates rather than rehabilitates and should not be authorized by a court order to conduct the business indefinitely. Professor Seligson suggested the Committee (1) consider it a drafting

matter to get a word other than "limited" to suggest the authorization as an aid of liquidation or (2) have a note saying "limited" does not mean the court has to specify in the order how long it has to recognize that liquidation is the purpose of the operation.

Mr. Treister moved the excising of the words "for a limited period" and the substitution of "for such a period as may be necessary in the best interest of the estate." Professor Riesenfeld suggested the addition of a word which implies liquidation. A motion to delete "for a limited period" from line 2 of Rule 5.13.2 carried.

Mr. Treister made a motion to delete "for a limited period" from line 5 of Rule 5.11 under subdivision (2). The motion carried.

RULE 5.14. Trustees for Estates When Joint Administration Ordered.

Professor Kennedy stated that some of this rule was new language and a new idea but that the basis for it was § 5(c) of the Act, a provision in the partnership section which contemplates that when the creditors of a partnership elect a trustee, he is the trustee not only of the partnership estate but of each individual partner's estate. However, there is a proviso that the creditors of any general partner can elect their own trustee on showing cause to the court that there should be such a trustee. Professor Kennedy reminded the Committee that it had previously eliminated the idea of a joint petition in partnership cases.

Professor Kennedy read subdivision (a) and stated that it covers joint administration in any of the situations there contemplated. An alternative was a subdivision much more closely keyed to present § 5(c) and entitled, "Single Trustee for Partnership and Partner's Estates." Mr. Treister asked if there was no such rule, would the court be authorized to appoint the same trustee to jointly administer estates. Professor Kennedy replied that the only limitation in appointing one man to several estates is the prohibition on his having an interest adverse to the estate in Rule 5.13. Professor Countryman stated that he would not want the rules to prohibit the appointment of a single trustee but that if the rule is adopted, the court should satisfy itself that there would be no conflict of interest.

There was discussion regarding the possibility of omitting Rule 5.14 because of the partnership section now in the Act. Professor Kennedy stated it encourages conflict-of-interest situations by having a special rule that seems to contemplate it.

Professor Countryman suggested a rule providing that before making an appointment of a joint trustee or approving the election of one trustee the court should make inquiry as to whether a potential conflict of interest was involved and if it was, the court should not permit the joint administration. Professor Kennedy stated the discussion seemed to favor approving Rule 5.14(a) with the addition of a provision that would require the referee to satisfy himself before he approves the election of a single trustee that no conflict of interest was likely to occur, rather than the more restricted (a) in brackets. A motion to this effect carried.

It was moved for approval of subdivision (b), omitting "upon cause shown be permitted to." The motion carried.

Subdivision (c) with the addition of the safeguard about the referee's satisfying himself that there was no conflict of interest, was approved by the members.

Subdivision (d) was adopted without line 29 in parentheses.

RULE 5.51. (Examination of) Bankrupt's Transactions with His Attorney.

Professor Kennedy stated that this rule is based on § 60d of the Bankruptcy Act.

After reading subdivisions (a), (b), and (c) Professor Kennedy suggested the addition of "commenced by the trustee or any creditor or other party in interest" at line 20 to accord with § 60d, which authorizes the referee on his own initiative to make an examination of the debtor's attorney but not to be the initiator of a possible law suit to recover money or property.

Mr. Nachman said "or to be rendered" should be added to line 9 of (a) after the word "services." Professor Kennedy stated the words were inadvertently omitted.

Judge Gignoux believed subdivisions (a) and (b) dealt with a minor part of § 60d and questioned the need for Rule 5.51. Professor Kennedy stated that rules covering procedural matters are needed so that the Act would not have procedural provisions and that § 60d could be rewritten in the future without any procedural provisions. He suggested rewriting his draft so there is less overlap--for example, "Upon motion by the trustee or the court's own initiative, the court may examine any payment as provided in section 60d."

Mr. Treister stated that if there is no Rule 5.51, as preferred by Judge Gignoux, the limitation in the second paragraph of § 60d that provides relief only if the motion is made prior to discharge would remain in effect.

Professor Kennedy stated that there is an argument that the power of the court over lawyers is a procedural matter and that possibly § 60d should be taken out of the Act altogether. It was agreed that all of § 60d should be covered by a rule so that the entire provision could be deleted and there would be a complete rule. The motion carried.

There was discussion regarding the proper time for examination of the bankrupt's transactions. Mr. Treister questioned the need for spelling out the limitation that they be open to examination only before the proceeding is closed. Professor Seligson preferred to see it limited. The Committee voted on whether to put into subdivision (b) a limitation that the motion must be made during the pendency of the bankruptcy proceeding. The motion carried that there be no such limitation.

It was moved that "made prior to his discharge" on line 12 of subdivision (b) be deleted. The motion carried. Professor Seligson voted against the motion.

Professor Countryman suggested that the subject matter of subdivision (b) be limited to services related to the bankruptcy case. Judge Gignoux was opposed because it would open up opportunities for abuse, as in divorce cases. Based on this statement, Professor Countryman withdrew his suggestion. Professor Seligson reopened the matter by questioning the ability of the referee to determine whether there was a proper allocation of the charge for the bankruptcy or the divorce. A motion to limit the scope of subdivision (b) was lost 4 to 3.

Discussion began on the draft of a rule to supersede § 60d by considering Professor Kennedy's proposed phraseology in Rule 5.51. Mr. Treister asked if subdivision (c) should also cover the examination of a promise to pay. It was suggested that the words, "to avoid an obligation," be inserted after "property" in line 21. Professor Kennedy proposed insertion of "any party in interest" in lieu of "creditor" in line 3 and the addition in line 20 of "commenced by the trustee or any party in interest."

Professor Seligson asked why the bankrupt should be permitted to challenge the payment made before bankruptcy as stated in Professor Kennedy's proposed change. The court has authority if appropriate. He preferred to leave only

the words, "by the trustee or creditor," in relation to the payment made before the bankruptcy. The bankrupt should have the authority as stated in the second paragraph of the statute.

Professor Kennedy stated that the court cannot start any recovery proceeding under the first paragraph of § 60d. It can only start the examination, then the trustee has to start the law suit to recover the excess for the benefit of the estate if so determined by the court. Mr. Treister stated that if there was an excessive payment and no trustee had been appointed, the referee would direct it to be returned. It was agreed that this was a possible obstruction of § 60d, but if the rules in Part VII govern, they must be confined to the case where there is a trustee bringing the action. A referee cannot file a complaint under Part VII.

Professor Kennedy stated it would not be advisable to tell the bankrupt after his case is closed how to go about recovering money from a lawyer. Professor Riesenfeld and Mr. Horsky believed that if the court on its own initiative goes into examination of a payment and Part VII on adversary proceeding does not apply, the attorney is put in a difficult position.

Professor Seligson disliked the fact that if the trustee proceeds, you have an adversary proceeding, but if someone else proceeds, you don't. Referee Snedecor said the draft gives the referee on his own motion the right to examine because the trustee does not want to. Professor Seligson suggested the referee should be able to enter an order in the action. It was agreed that a proceeding to recover under subdivision (a) and (b) is not an adversary proceeding except when the trustee is proceeding. Requests for examination are not covered in Rule 7.1, and an examination is not an adversary proceeding. If the trustee should ask for an examination, that would be part of the proceeding to recover. The rule should be drafted so that the proceeding to recover is the main thing and the examination is an incident to it.

Mr. Nachman expressed doubts as to whether any action against a lawyer in this area should be an adversary proceeding. Professor Kennedy stated that this doubt raised the question whether Rule 7.1 should include a qualification of its coverage of proceedings to recover money or property so as to accept those under Rule 5.51. Mr. Nachman suggested the Committee not follow the adversary proceeding rules regarding the problem of fees. Mr. Treister took the opposite view saying small fees would be taken care of by the court

and the larger cases would come under the adversary proceeding rules. Mr. Nachman believed any complaints should be heard informally. Professor Countryman agreed.

Mr. Treister moved that the Committee proceed along the lines of the present draft, namely, that it is an adversary proceeding under this rule where the referee does not examine payment and that Rule 7.1 be revised accordingly. The vote was split 4 to 4. The Chairman voted for the motion and it was carried. There was no objection to changing Rule 7.1 to add "or avoid an obligation."

RULE 5.70. Death or Insanity of Bankrupt.

Professor Kennedy stated that this rule is an adaptation of § 8 of the Bankruptcy Act and "(the proceedings in)" appearing on line 2 is not needed. Mr. Treister moved adoption of this Rule with the deletion of the above-stated phrase and the addition of the second sentence in parentheses. The motion carried.

RULE 6.4. Assumption, Rejection, and Assignment of Executory Contracts.

Professor Kennedy stated that this rule is an adaptation of § 70b of the Act.

Mr. Treister questioned the policy or wisdom of the part of § 70b that requires the trustee to file a list of executory contracts which he rejected. He believed they should list only those which have been assumed.

Professor Seligson said the bankrupt should be required to file a list of executory contracts. Under the statute a contract not assumed or rejected is deemed to be rejected and the trustee must assume or reject within 60 days after adjudication or within 30 days after qualification, whichever is later. Then the trustee can look to the list compiled by the bankrupt immediately after his appointment. The question is whether the trustee should list those which are assumed or those which are rejected, as stated in the statute. If a creditor finds a contract that should be assumed upon looking at the list of contracts filed by the bankrupt and the trustee files a list of assumed contracts, the creditor has reference to both lists, provided there is still enough time left for the creditor to come in and ask that a contract be assumed that has not been.

Mr. Treister was against requiring the bankrupt to file a list of executory contracts because unless it serves a purpose, it merely increases a burden on him. After discussion Mr. Treister made a motion that no list of executory contracts be required of anyone unless the court directs it. The motion carried.

Another motion was made that one of the duties of the bankrupt be, if the court directs, to file a list of executory contracts. The motion carried.

Mr. Treister made a motion that the trustee shall only be required to file a list of executory contracts that have been assumed. The motion carried.

Professor Countryman stated the trouble with § 70b as it stands is that failure to assume becomes an automatic rejection at the same time the list of assumed contracts is supposed to be filed. Mr. Treister said confusion may result from the trustee's not specifically assuming and there may be argument that he assumed it by the time limit. Professor Seligson believed there should be a time gap so that the creditors could have an additional period after the trustee files the list within which to make application to the court for assumption of a contract.

Professor Kennedy stated that a sentence could be added about any contract not assumed within 90 days after adjudication or 60 days after qualification. Mr. Treister pointed out that the time is lengthy and perhaps line 1 should be modified to specify that within 30 days (or 45 days) after adjudication or within 15 days after qualification of the trustee, the trustee should file; also, in the same sentence, that any contract not assumed within 60 days after adjudication or within 30 days after qualification should be deemed rejected. Mr. Treister preferred the shorter length of time. Professor Seligson suggested the time run after qualification.

Mr. Horsky suggested a substitute: "Within 30 days after qualification of the trustee, unless the court for cause shown extends or reduces the time, the trustee shall file a statement showing which if any of the contracts of the bankrupt have been assumed. Any such contract not assumed within 60 days after the qualification of the trustee shall be deemed to be rejected. If a trustee is not appointed, any such contract shall be deemed to be rejected within 30 days after the date of the order directing that a trustee be not appointed."

Professor Kennedy stated he would rewrite this rule to include a clause dealing with a case where there is an extension of time to assume beyond the 60 days, as pointed out by Referee Snedecor. He asked if he should undertake to make clear Professor Seligson's idea that where practicable the trustee should be expected to get court approval but that if it was not so practicable, he could assume on his own. Section 70b does not now require the court to approve. The Committee agreed to Professor Seligson's sentence.

Mr. Horsky moved approval of lines 9 through 13, and the motion carried regarding court approval of the assignment of a contract assumed by the trustee.

RULE 6.3. Prosecution and Defense of Litigation and Proceedings on Behalf of Estate(, Bankrupt, Trustee, or Receiver).

Professor Kennedy stated that this rule was an adaptation of §§ 2a(2A) and (3) and 11b, c, d, and e of the Act. He read subdivision (a) and said it was a combination of subdivisions b and c of § 11 and, if the parenthesized sentence was included, § 2a(3) of the Act.

Mr. Treister stated the rule was misleading because the language implied that the trustee could bring an action without court approval. The purpose of the trustee in getting authorization is to get assurance that his litigation costs will be reimbursed. Therefore court approval should not always be necessary. Mr. Treister also stated he wanted the trustee to be able to intervene or not in pending litigation. It was agreed there should be no distinction between intervening in, defending, or beginning a suit.

There was discussion of Mr. Treister's motion to word the rule so that the trustee would be able to bring a suit or to intervene as plaintiff or defendant in any pending action without court approval. Professor Kennedy suggested use of the words, "may with or without court approval." The motion carried. Mr. Treister made the same motion to apply to receivers. The motion carried.

Mr. Horsky made a motion to eliminate the word "legislative" from line 7. It was agreed to leave out also "judicial" and "administrative" in lines 7 and 8. Also, the parenthesized sentence was deleted, and Mr. Horsky suggested the title sentence begin with "Authority" rather than "Authorization."

Professor Kennedy stated he had some doubts about the appropriateness of subdivision (b) because the words are jurisdictional, and since it deals with sovereigns, it might be better for Congress to handle it. He asked to withdraw the subdivision because there is no need for a procedural provision and it is beyond the Court's power to confer jurisdiction by the rule. Professor Riesenfeld made a motion to delete the subdivision and the motion carried.

Professor Kennedy stated that subdivision (c) was an adaptation of § 11e and that it was procedural. The statutes of limitations have always been considered procedural for most purposes such as conflict of laws. Mr. Treister stated he did not want this type of statute of limitations in the rules. If two parties agree in a contract that something should be done in 60 days and the Act gives the trustee an extra period of time, this is not a statute of limitations. Professor Kennedy said that it is appropriate in the rules to state how much time should be allowed for filing claims. Mr. Treister made a motion to delete subdivision (c), and Judge Gignoux seconded the motion. The motion carried.

Mr. Treister made a motion to delete subdivision (d), and the motion carried.

RULE 6.6. Enforcement of Partner's Liability to Bankrupt Partnership.

Professor Kennedy said that this rule was an attempt to clarify the procedure for enforcing a partner's liability to a bankrupt partnership. Mr. Treister stated that this rule merely described the procedure for rendering a judgment, and he made a motion to strike it. The motion carried.

RULE 6.7. Administration of Partnership Property When Partner is Bankrupt.

This rule was presented as an adaptation of the second sentence of § 5i of the Act. However, Professor Kennedy suggested that the "unless" clause in lines 4-6 should be replaced by "and if such general partners do not consent to administration of the partnership estate in bankruptcy."

Mr. Treister moved to delete Rule 6.7. The motion was carried.

RULE 6.10. Presumption As To Consideration Received by Bankrupt for His Property.

Professor Kennedy stated that this rule was derived from § 211 of the Act. The proposal required the Committee to consider the relationship of the Federal Rules of Evidence to the Bankruptcy Rules. Federal Rule of Evidence 3-03(a) says, "Presumptions in all cases not otherwise provided for by Act of Congress or by these rules are governed by this rule." Professor Cleary and the Advisory Committee on Rules of Evidence thus think that presumptions should be governed by Congress and by the Rules of Evidence.

Mr. Horsky stated the proposed bankruptcy rule declared an unconstitutional presumption because it is contrary to the facts in so many cases, and he was opposed to incorporating such a presumption in the rules. Under the Rules of Evidence if there is no rule and § 211 stays in the Act, the presumption continues. However, if the rule should be put in the Bankruptcy Rules and taken out of the Act, it would disappear unless the Rules of Evidence change.

It was suggested that the rule be rephrased to make it clear that it affected the burden of going forward with the evidence rather than the burden of persuasion. Mr. Treister said the statute should be eliminated by rule if possible. Referee Whitehurst suggested the Committee eliminate the rule and leave the statute alone to work its way up to the Supreme Court in due course. Referee Snedecor made a motion to delete Rule 6.10, and the motion carried.

RULE 6.12. Burden of Proof as to Validity of Post-Bankruptcy Transfer.

Judge Gignoux was against this rule because he felt burden of proof cannot be dealt with by rule. Professor Kennedy stated this is the only part of § 70d which he felt was procedural, and it would seem strange if there are some burden of proof rules but this presumption is left conspicuously alone. Mr. Horsky moved approval of Rule 6.12 in order to be consistent. The motion carried.

RULE 6.15. Preservation of Voidable Transfer (or Obligation).

Professor Seligson said that a transfer is "void" rather than "voidable" under the relevant provisions of the Act. Instead of saying "void" or "voidable," Professor Kennedy suggested the draft use "avoided" on line 2. He said this rule deals with the procedural aspects of the preservation part of the Act.

Judge Gignoux was concerned with the effect of the rule in destroying part of the statute. Professor Kennedy replied there may have to be some overlap but by promulgating procedural rules the Court is declaring some ground for the future, making it clear that this is a matter proper for the rules to deal with. There should be a presumption in favor of incorporating every procedural provision of the Bankruptcy Act into the rules.

Judge Gignoux did not think the rule accomplished anything procedural other than to say that this question may be determined in an adversary proceeding. Professor Kennedy agreed with Professor Countryman that there was need for recognition of preservation in the rules. According to Judge Gignoux the proposed rule said merely that the court may determine whether the lien or transfer shall be preserved. The statute says the court may on due notice order the lien to be preserved. Mr. Horsky suggested the draft should say, "shall be avoided or preserved."

Professor Seligson made a motion that there be a rule on preservation. The motion carried. Professor Kennedy was requested to change the rule to include the following changes: in line 2, deletion of "determined to be"; in line 7, addition of "avoided or" after "shall be." Professor Riesenfeld suggested "transfer" and "title" as used in the last sentence be changed because they are not appropriate.

RULE 6.17. Proceeding to Avoid Indemnifying (Lien or) Transfer to Surety.

Professor Kennedy explained that when a surety company puts up a bond to dissolve an attachment lien, the surety may insist on a transfer of some property from the debtor to indemnify the surety in case it is held liable. In such a case § 67a enables the trustee to proceed against the surety whenever the original attachment lien is held to be void and the surety company holds property of the bankrupt.

Mr. Horsky suggested the draft omit the parenthesized words except those on line 7 "to avoid the lien or transfer." His motion was carried.

Professor Kennedy stated "reasonable" on line 19 could be removed in order to be consistent with other comparable rules. Mr. Horsky amended his motion thereby striking it. The motion carried.

RULE 9.43. Evidence.

Professor Kennedy is corresponding with Professor Cleary about the need for a rule correlated with the Federal Rules of Evidence. He will suggest that Professor Cleary make it clear in the Rules of Evidence that they in turn will accept the Bankruptcy Rules.

Judge Gignoux moved approval of Rule 9.43 and the motion carried.

RULE 9.30. Secret, Confidential, Scandalous, or Defamatory Matter.

Professor Kennedy stated there is a Rule 5-08 on trade secrets in the Federal Rules of Evidence which is consistent with Bankruptcy Rule 9.30. However, the latter rule deals with more than a matter of privilege to refuse to disclose. It was agreed that these rules have the same requirements and both rules can be applied together. Professor Kennedy stated he intends to incorporate a Note to that effect and will talk with Professor Cleary concerning these rules.

RULE 9.70. Trustee Not Required to Elect.

Professor Kennedy stated this rule was a general declaration that the trustee is not required to elect between inconsistent positions. Judge Gignoux said the proposed rule was broader than the statute, which applies only to the rights and powers conferred in § 70c. This rule made a declaration with respect to all sections of the Act. Mr. Horsky made a motion to approve Rule 9.70, but the motion did not carry.

There was discussion of whether the proposal was a procedural matter or a matter of substantive law. Referee Snedecor stated it should be left in § 70c of the Act.

RULE 1.7(e). Interests Acquired or Arising After Bankruptcy.

The fourth item on the agenda was now reached. It included proposals for revising drafts on the shelf to accommodate provisions of the Act not previously considered.

The proposed new Rule 1.7(e) deals with prerequests, devises, inheritances, and other kinds of property that come to the bankrupt during the six months after the filing of a petition in such a way that the trustee is entitled thereto. The draft is based on a proposed amendment to § 7 of the Act approved by the National Bankruptcy Conference.

A question arose regarding imposition of a duty on the bankrupt as to the procedure when the bankrupt fails to obey. It was decided to require him to file a list of executory contracts if ordered by the court. In this rule the duty to schedule post bankruptcy acquisitions was assigned to the bankrupt without an order because the referee may not know about them.

Professor Seligson suggested the rule require the bankrupt to file a routine statement when the case is closed regardless of whether these things have occurred; then if no statement is filed the trustee can move against him. Referee Snedecor said this would not apply very well to no-asset cases since so many of them are closed before six months is up. He made a motion to approve Rule 1.7(e), and the motion carried. Judge Forman said an amendment had been proposed to make it an affirmative requirement that every bankrupt declare sometime before the case is closed that he had received no property belonging to the trustee. However, there would be a complication where cases are closed before six months. Mr. Horsky suggested a statement be added at the bottom of the rule that no case shall be closed without a statement with respect to whether or not these things have happened.

Referee Whitehurst was opposed because it would be too difficult to administer. He does not close a case before six months. If there is a sizable inheritance, the trustee will undoubtedly hear about it and take action.

Professor Seligson decided not to make a motion because the majority opposed his ideas.

RULE 2.21. Examination.

Professor Kennedy stated this rule involves the Federal Rules of Evidence. Upon examining the minutes of a previous meeting he found an addition of the words, "the trustee, receiver, or" in line 9 of Rule 2.21(b), Examination of Bankrupt at First Meeting. However, the Subcommittee on Style apparently removed the words upon his recommendation. Therefore, Referee Whitehurst made a motion to approve subdivision (b) without those words. The motion carried.

Professor Kennedy stated the difference between what is in the deskbook and what has been put on the shelf is a sentence dealing with spousal immunity. The first sentence of subdivision (d) has been approved. This language is a blend of §§ 21a of the Act and 7a(10) of the Act. The Committee also had approved a second sentence to this subdivision as follows: "Notwithstanding any state or federal marital privilege the spouse of a bankrupt may be examined concerning such spouse's transactions with or for the bankrupt or any other acts or conduct of the spouse affecting the estate." The Federal Rules of Evidence now contain some provisions and commentary that are quite relevant. Thus, a Note accompanying Rule 5-05, Husband-Wife Privilege reads

in part as follows: "With respect to bankruptcy proceedings the smallness of the area of spousal privilege under the rule and the general inapplicability of privileges created by state law render unnecessary any special provision for examination of the spouse of the bankrupt such as that now contained in § 21(a) of the Bankruptcy Act." There is other commentary indicating that Professor Cleary and the Committee do not think the spousal privilege provision of the Bankruptcy Act serves any function at all. On this basis Professor Kennedy deleted this sentence from subdivision (d) as unnecessary.

Judge Gignoux moved that Professor Kennedy's suggestion removing the sentence be approved, based on the comment accompanying the Evidence Rules. Professor Kennedy stated he would write a Note on the cross reference to that effect. The motion carried.

RULE 4.1. Exemptions.

Professor Kennedy suggested for Rule 4.1 a new subdivision (g), "Claim of Exemption by Surviving Spouse or Dependent Children When Bankrupt Dies" or revision of subdivision (f), "Claim of Exemption by Person Other Than Bankrupt." This proposal arose upon the consideration of the proviso of § 8 of the Act dealing with rights to exemptions after a bankrupt dies.

Professor Riesenfeld preferred the wording in the present subdivision (f) and suggested adding a reference to § 6 of the Bankruptcy Act. Professor Kennedy suggested the addition of "and the Bankruptcy Act" on line 36 of the new subdivision (f). Mr. Nachman made a motion to approve the new subdivision (f) with the approved modification. The motion carried.

RULE 5.44. Employment of Attorneys and Accountants.

Professor Kennedy stated he put the word "trustee" before "receiver" in all the rules where the two words appear as alternatives. Mr. Nachman made a motion that these changes be ratified. The motion carried.

Professor Kennedy said that subdivision (c) of this rule is an adaptation of 44c of the Act and is a new subdivision. Mr. Horsky questioned the use of "prior" in lines 36 and 39. Mr. Nachman made a motion to approve subdivision (c) eliminating "prior" and including "accountant."

Professor Riesenfeld questioned whether the term "general creditor" included secured creditor. Professor Kennedy replied the rules had never defined "general creditor" or "creditors without priority." He stated "general" refers only to creditors without security or priority. It does not include unsecured creditors having priority, because of the risk of special interest or conflict. Professor Kennedy stated he would write a Note dealing with this.

RULE 6.18. Appraisal and Sale of Property; Compensation and Eligibility of Appraisers and Auctioneers.

Professor Kennedy changed (b)(3), Sale Free of Lien, of Rule 6.18 to add language dealing with material in § 2a(7) of the Act. Mr. Nachman made a motion to approve the revision of Rule 6.18(b)(3) adding the parenthesized words, and the motion carried. As another amendment of Rule 7.1, wherein adversary proceedings are defined, Professor Kennedy suggested adding to the clause on sale free of a lien, "or other interest whenever the holder can be compelled to take a money satisfaction therefor."

Professor Riesenfeld suggested deletion of "bankrupt's spouse" from line 25. Everyone agreed to this in order to broaden the applicability of the rule. Professor Kennedy suggested using "holder" on line 26 and "therefor" instead of "for such interest." Mr. Horsky make a motion to modify the approved subparagraph (3) as indicated above and in Rule 7.1(3). The motion carried.

Professor Kennedy stated that subparagraph (4) of subdivision (b) of this rule is an adaptation of § 70g of the Act. Professor Seligson said that frequently the property is sold by the receiver. If it is real estate, later the trustee executes the deed. He pointed out that § 70f is general in referring to a sale of real or personal property of the bankrupt, which is made by or through an auctioneer employed by the receiver or trustee. Mr. Nachman asked why "transferred" was used rather than "conveyed" and Professor Kennedy replied that "conveyed" has a connotation restricted to real estate.

Professor Seligson stated that he approved subparagraph (4) as it stands because sales of intangibles might be made by a receiver with respect to which the trustee might be required to execute some kind of instrument of conveyance or transfer. There would be no harm, however, in putting receiver and trustee in the sentence. Professor Kennedy

stated he would try to find some authority for recognizing the validity of a transfer of titles by a receiver in order to put this into a note. Professor Seligson made a motion to that effect, and the motion carried.

OFFICIAL FORM No. 3 (Item #11-insert at p. 4). Statement of Affairs.

Professor Kennedy stated that Form No. 3 is on the shelf, but Professor Countryman has suggested that the question on loans repaid deal with payments on installment purchases of goods and services. If agreed that it is a desirable addition to make inquiry about installment purchase payments, a change would also be made in the comparable question in Official Form No. 4 for business debtors. Referee Whitehurst and Professor Kennedy preferred to use "are your relatives" on the last line in lieu of "are related."

Mr. Nachman wanted to know why Professor Countryman wanted to add the phrase to the form for nonbusiness bankrupts, and Professor Kennedy answered that Professor Countryman thought there should be that kind of question in both because it would develop information about possible preferences. It was decided to wait for Professor Countryman to be present to discuss this proposal.

RULE 6.8. Redemption of Property from Lien or Sale.

When Rule 6.8 was considered at the July 1969 meeting, Mr. Nachman made a stylistic suggestion that the first sentence begin, "On application by the trustee and after hearing upon such notice . . .," which Professor Kennedy accepted. Mr. Nachman also suggested inserting "or from a sale on execution or foreclosure" after lien on line 3. Professor Kennedy agreed with Professor Riesenfeld that it is questionable that redemption from a sale on execution or foreclosure is a payment of the debt secured by such property. A possible alternative would be to say the court may authorize the redemption of property from a lien or from a sale on execution or foreclosure in accordance with applicable law without saying how it is done. Mr. Horsky moved approval of the revision of Rule 6.8 leaving out "by payment of the debt secured by such property or redemption from a sale on execution or foreclosure." The motion carried.

OFFICIAL FORM No. 11. Adjudication of Bankruptcy.

Professor Kennedy stated that this form is appropriate only in an involuntary proceeding and should be abolished. Professor Seligson said the form should be uniform because of its recordability. It was agreed that there is no need for a form for an ordinary voluntary adjudication. However, there is need for a form when there is a creditor's petition or a petition by one partner against a partnership on which an order of the court is entered and there is a nonautomatic adjudication. Referee Whitehurst stated that another time is where a Chapter XI case is transferred to straight bankruptcy. There was no objection to Professor Kennedy offering a form for these isolated instances.

OFFICIAL FORM No. 12. Appointment and Oath of Appraiser.

Professor Kennedy asked if the referees felt that this is a form appropriate for the Administrative Office to prescribe. There was agreement that there is no need for an official form because a suitable one is supplied by the Administrative Office.

OFFICIAL FORM No. 16. Bond for Referee.

Professor Kennedy stated that since the bond requirement for referees has been abolished by the rules, Form No. 16 is unnecessary, and there was no need for discussion.

OFFICIAL FORM No. 17G. Order for Final Meeting of Creditors.

Professor Kennedy indicated that Form No. 17G could be incorporated into Form No. 17H with some modification. Referee Snedecor made a motion that 17G and H be combined and the motion was carried.

OFFICIAL FORM No. 17Y. Multiple Case Order for First Meeting of Creditors and Fixing Time for Filing Objections to Discharge.

Form No. 17Y permits a referee to enter an order and by an attachment list many first meetings. With one signature he can order many first meetings and also affix the time for filing objections to discharge.

Professor Kennedy stated that a rule has been approved which authorizes combining of the forms. The question was whether a Form No. 17Y as well as a Form No. 17Z was needed. Referee Whitehurst believed the purpose of having both is to

save a lot of mimeographing and clerical work. Professor Seligson made a motion that Form No. 17Y be eliminated as an official form and the appropriateness of such a form be left to the Administrative Office. The motion carried.

Provisions of the Act and General Orders Not Carried into the Rules.

Professor Kennedy asked the Committee to confirm his view that no rule is needed as a counterpart for any of the listed provisions in the memorandum dated November 11, 1969. Mr. Horsky stated some rules should be added to the list as a result of this meeting. This was agreed.

(The meeting adjourned at 12:05 p.m.)