MINUTES OF THE NOVEMBER 1963 MEETING OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

The fifth meeting of the Advisory Committee on Bankruptcy Rules convened in the Supreme Court Building on November 20, 1963, at 9:30 a.m. The following members were present during the session:

Phillip Forman, Chairman
Edwin L. Covey
Edward T. Gignoux
Norman H. Nachman
Stefan A. Riesenfeld
Charles Seligson
Roy M. Shelbourne
Estes Snedecor
Arthur J. Stanley, Jr.
Elmore Whitehurst
Frank R. Kennedy, Reporter

The Chairman announced that he had received a letter of resignation from Mr. Gibson, and stated that the Committee regretted that the pressure of work made it impossible for Mr. Gibson to continue as a member.

Others attending the meeting 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; and Joseph F. Spaniol, Jr., and Royal E. Jackson of the Administrative Office.

ITEM 1. General Order 35A and Official Forms No. 1A and No. 1B

Mr. Jackson stated that the Administrative Office was considering recommending an amendment to section 14b of the Bankruptcy Act which would permit a combined notice to be used in installment fee cases. This would necessitate a change in the General Order. The Committee agreed to continue to recommend the General Order as proposed, and to make any necessary changes when such a statutory change is enacted.

The Committee approved General Order 35A with the deletion of "or any adjournment thereof" in paragraph (2), as recommended by the Reporter.

Official Forms No. 1A and No. 1B were approved as drafted.

ITEM 2. Official Forms for Petitions

The Reporter briefly explained the changes made by the Style Committee in the drafts of Official Forms Nos. 1, 4, 5, 48, 48A and 53.

Professor Moore suggested that in Form 48A the first sentence be amended in part as follows: "Petitioner, the bankrupt named above, is qualified to file this petition, and is insolvent ...". He stated that eliminating "who" from this clause would result in better form, and the Committee agreed without objection to adopt this suggestion for use throughout the official forms for petitions.

Professor Moore further suggested that paragraph 5 of Form No. 53 be amended in part as follows: "Petitioner is qualified to file this petition under the Bankruptcy Act, and is insolvent [or unable to pay his debts as they mature]. He proposes an arrangement ...". This suggestion was adopted without objection.

Mr. Covey moved that the forms included in Item 2 be approved subject to the minor drafting changes which the Reporter was requested to make. This motion was carried.

ITEM 3. Official Forms Nos. 17A-17F, 49, 54, and 59
General Order 38

Official Forms Nos. 17A-17F.

Professor Riesenfeld felt that the word "appear" in Forms Nos 17A and 17C should be modified to make clear that the bankrupt must appear personally before the court. Professor Seligson agreed, and felt that a bracketed expression should be added to indicate that corporations and partnerships can be represented by an officer or partner. The Committee was in agreement that "in person" should be added after "appear", and that the forms should also deal with the appearance of corporations and partnerships. The Reporter was directed to make appropriate changes to carry out these suggestions.

After some discussion of the procedural problems arising out of a partnership, the Committee, on Professor Seligson's suggestion, agreed to refer these questions to the Reporter for further study and the formulation of a draft within the framework of the general orders and the Bankruptcy Act.

On motion of Professor Seligson, the Committee approved Official Forms Nos. 17A-17F, subject to the modification of 17A and 17C.

General Order 38.

The Reporter stated that he had considered the possible withdrawal of Forms Nos. 49, 54 and 59 as "official" forms, and that the Committee on Style had concurred in his recommendation that they be retained as "official" and promulgated in the normal manner, but that an amendment of General Order 38 make clear that these are only illustrative forms. The Committee approved this suggestion and approved the proposed amendment of General Order 38.

Official Form No. 49.

Professor Riesenfeld suggested that the bracketed expressions in Form No. 49 be amended to read as follows: "[If a copy of the proposed arrangement . . .". The Committee agreed without objection to insert "proposed" before "arrangement" at all appropriate places in the official forms.

Professor Riesenfeld further suggested a revision of the final paragraph on page 5 of the Reporter's memorandum, and after much discussion and drafting suggestions from various Committee members, the paragraph was split into two paragraphs and was adopted as follows:

> "Also accompanying this notice is a copy of the arrangement proposed by the debtor. At the meeting the court will act upon written acceptances by the creditors of the proposed arrangment. Such acceptances may be received at or before the meeting.
>
> "Unless written acceptances are received from all creditors affected by the proposed arrangement at or before the meeting, the written acceptances of only those creditors whose claims have been filed and allowed before the conclusion of the meeting can be considered in determining whether the arrangement is duly accepted. A claim filed without a written acceptance cannot be so considered. A claim may be filed in the office of the undersigned referee upon an official form prescribed for a proof of claim."

At Professor Seligson's suggestion, consideration of the last paragraph of the form was deferred so that the Reporter might consider any changes made necessary by P. L. 88-175, limiting the time within which claims may be filed in chapter XI cases.

Judge Gignoux suggested that the last sentence of the paragraph beginning at the bottom of page 5 be placed before the first bracketed expression on page 5, and made a separate paragraph, so that the information would apply to all claims covered by this form. The Committee was in agreement that this change should be made.

Official Form No. 54.

The Reporter stated that he would make conforming changes in this official form to correspond to those approved for Official Form No. 49. He further stated that the Style Committee had considered a suggestion made by Referee Whitehurst at the last meeting to include in this form information to the creditors as to the time allowed for filing a claim. The Style Committee concluded that this suggestion would necessitate an elaboration of the form, and disapproved the suggestion. Referee Whitehurst withdrew his suggestion in light of the amendment of G. O. 38 which would permit a referee to make alterations in the form.

Professor Seligson felt that the form should state where the claim may be filed, and suggested the following new sentence, proposed by the Reporter, be included at the end of the first paragraph of Form No. 54:

> "A claim may be filed with the clerk of the district court [or, if the proceeding has been referred, in the office of the undersigned referee] upon an official form prescribed for a proof of claim, except that if the claim is secured the proof of claim shall include a full description of the security."

Without objection, this new sentence was approved by the Committee.

Official Form No. 59.

The Reporter stated that conforming changes would be necessary in this form in accord with the actions taken on Forms 49 and 54. Professor Seligson suggested that the last sentence of the first paragraph of the form be amended as follows: "A claim may be filed in the office of the undersigned referee upon Official Form No. 29." The Committee approved this amendment.

The Committee voted to approve Forms Nos. 49, 54 and 59 as amended, subject to changes necessary as a result of newly enacted legislation.

ITEM 4. General Orders 35(3), 44, and 45

General Order 35(3).

At Mr. Covey's suggestion, "only" was inserted before "if" in the

last sentence of the section. General Order 35(3) was approved as thus amended.

General Order 44.

At Professor Riesenfeld's suggestion, the word "need" in the last sentence of paragraph (1) was changed to "necessity", in order to bring the language into conformity with the second sentence of the paragraph.

Mr. Covey suggested inserting "only" before "if" in paragraph (4), but this suggestion was not approved by the Committee. The Committee voted to retain the discretionary "may" in paragraph (2), rather than thanging the word to "shall".

Professor Kennedy called the attention of the Committee to the new provision on page 6 of the memorandum aurhotizing the employment of an attorney or accountant on salary. Referee Snedecor felt that any new attorneys or accountants should not be hired without the authority of the court. Professor Seligson explained that this provision covered persons employed solely in the operation of the business, and not in connection with the proceeding under the Act, and Judge Snedecor withdrew his objection.

The Committee approved the proposals contained in Item 4, as amended by the Committee.

ITEM 5, General Order 4, Official Forms Nos. 18 and 19.

Referee Whitehurst moved the approval of the proposals contained in Item 5 as drafted, and the motion was carried.

ITEM 6. General Order 21

Professor Kennedy stated that the draft of General Order 21 carries out decisions of the Committee at the last meeting, and had been reviewed by the Style Committee. After some discussion of the requirement of a statement of the transferor concerning the consideration for the transfer, the Committee voted, on motion of Professor Seligson, to approve paragraph (2) as drafted. Professor Riesenfeld later suggested that paragraph (2) be amended to read in part as follows: ". . . the proof of such claim may be filed only by the transferee . . .", and the Committee approved this amendment.

Paragraph (1) was approved as drafted. On motion of Professor Seligson, paragraph (3) was also approved as drafted.

Referee Snedecor moved the approval of paragraph (4), with the

addition of the bracketed portion of the last sentence as part of the text. This motion was carried. Judge Gignoux suggested that the second sentence of paragraph (4) read "If either the transferor . . .", and this suggestion was approved by the Committee.

Mr. Nachman suggested that the last sentence of paragraph (5) be amended to correspond to the last sentence of (4) which now includes the bracketed text, and this suggestion was adopted by the Committee.

Professor Kennedy suggested that the last sentence of paragraph (6) read as follows: "No dividend shall be paid upon the claim except upon satisfactory proof that the original debt will be diminshed by the amount so paid." This suggestion was adopted by the Committee. Professor Seligson suggested that the first sentence of (6) be amended to read as follows: "A person who is secondarily liable to, or who has secured, a creditor of the bankrupt or debtor . . .". The Committee discussed this suggestion at some length, and Professor Moore questioned whether this language would include a surety. After further discussion, the Reporter proposed the following language: "A person who is contingently liable for, or who has secured a creditor of, the bankrupt or debtor . . .", and this language was adopted on motion of Professor Seligson. Professor Riesenfeld requested that the Reporter give consideration to whether "contingently" or "secondarily" would be more appropriate in this sentence.

Paragraph (7) was approved as drafted.

ITEM 6A. Proposal to Authorize Filing of Proofs of Non-dischargeable Claims by Bankrupt

Professor Kennedy stated that a referee in the Southern District of California had proposed that the bankrupt be authorized to file proofs of claim on behalf of certain creditors -- namely, those who have nondischargeable claims against the bankrupt under § 17 of the Bankruptcy Act. He stated that there is a question whether this can be done by General Order, or whether legislation would be needed.

Professor Moore suggested that the Committee could draft a general order on this subject and call attention in the Advisory Committee Note to the problem involved. In this way, the comments of the bench and bar would be received. Professor Riesenfeld felt that the bankrupt should not file these types of claims himself, but that the bankrupt could move that a neutral party file the claims on his behalf. He also felt that the bankrupt

should not state the amount of a claim against him, as there would be a possibility of his falsifying the amount or inadvertently claiming the wrong amount. Professor Seligson felt that if the bankrupt stated the wrong amount, the actual claimant could come in and correct the amount. Judge Stanley suggested that a show cause order should issue to the claimant, and if after this notice the claimant does not appear, the bankrupt should be permitted to file the claim.

After further discussion of the problem, Referee Snedecor moved that the matter be referred back to the Reporter with instructions to prepare a general order on this subject in order to permit a claim to be filed on behalf of the bankrupt. This motion was carried.

ITEM 7. Official Forms for Proofs of Claims

Official Form No. 28.

Judge Gignoux suggested that paragraph 1(a) be amended to read "... at the following rate or rates of compensation ..." and to provide extra spaces at this point for listing the rates of compensation. This suggestion was approved by the Committee.

Professor Moore felt that there should be some qualification of the word " priority" in paragraph 2, and Judge Gignoux suggested "priority to the extent permitted by section 64a(2) of the Bankruptcy Act." This suggestion was adopted by the Committee, and Form No. 28 was approved as amended.

Official Form No. 29.

This form was approved as drafted.

Professor Moore stated that the statement of penalty for presenting a fraudulent claim should also be included in Form No. 28, and the Committee agreed to this addition.

ITEM 8. General Order 2

The Committee discussed the application of this general order in districts where the clerk's office and the referee's office are consolidated. The consensus of the Committee was that in this case papers may be filed with the clerk. Judge Stanley stated that since there is no referee in Kansas City, Kan., all bankruptcy papers are ordinarily filed with the clerk in Kansas City,

and duplicates are kept in the clerk's office after transmission of the papers to the referee. Judge Stanley felt that this type of procedure should be permitted by G. O. 2, and he suggested that language be inserted in paragraph (1)(a) as follows: "(a) unless otherwise ordered by the judge, after reference of a case to a referee ...".

The Committee discussed at length various suggestions for amendment of paragraph (2) relating to consolidated clerks' and referees' offices, and the following language was approved by the Committee:

> "Where the clerk of the district court is so authorized by rule of the court, all papers, including proofs of claim, may be filed with the clerk, who, after a reference, shall act for the referee in receiving any paper filed in the proceeding."

Paragraph (3) was approved as drafted.

Judge Gignoux suggested that in view of the provisions of paragraph (4), the following language could be deleted from paragraph (1): "... and any such paper received by the clerk shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the referee." The Committee agreed to this deletion, and adopted paragraph (4) as drafted, with the insertion of "forthwith" after "transmitted".

The meeting was adjourned at 5:30, November 20.
The meeting reconvened at 9:30, November 21.

ITEM 9. Official Forms Nos. 50-52, 55-57 and 60-62

At Mr. Nachman's suggestion the words "the" and "this" were deleted in the bracketed expression in all the forms in this item, and the words "by the court" were deleted in the second paragraphs of the forms in which it appears. The Committee approved the Reporter's formulation of the signature and address lines in these forms, and agreed that no different form was required in Form No. 60.

Professor Riesenfeld felt that a footnote should be added to the forms for orders confirming arrangements calling attention to § 371 of the Bankruptcy Act, which sets out debts which can be excepted from the order. After some discussion, the Committee agreed to call attention to § 371 in the Advisory Committee Note, and the Reporter was directed in include appropriate language.

The proposals contained in Item 9 were approved by the Committee as amended.

ITEM 10. General Order 40

Professor Kennedy outlined his correspondence with Referee Herzog, who has expressed the view that appointment of receivers, particularly in chapter XI cases, should be the exception rather than the rule, and that this should be specifically stated in the General Order.

Professor Riesenfeld suggested that the word "duties" be substituted for "acts" on the fourth line of the draft, and this suggestion was approved. Mr. Covey felt that the duties to be performed by the receiver should be specifically set out in the order appointing the receiver. Professor Kennedy stated that paragraph (2) provided for the duties of the receiver to be stated if he is to act other than as a custodian. Mr. Covey felt that reform in the practice of appointment of receivers was needed at the local level, and that a specific statement of his duties would aid in avoiding routine appointments in chapter XI cases.

Professor Riesenfeld suggested that the first sentence be amended to read as follows: "(1) An application for appointment of a receiver under the Act shall state the particular facts making the appointment necessary, and, if he is to serve otherwise than as a mere custodian, specify the duties to be performed by the receiver." Mr. Nachman felt that the applicant should not "specify the duties", but that they should be specified by the court in its order.

Referee Whitehurst suggested that the first sentence end after the word "necessary". He felt that the applicant doesn't know whether he will serve as more than a custodian -- that is for the court to determine on the basis of the particular facts presented by the applicant. He felt that the order should specify the duties to be performed by the receiver, and should state the type of receivership contemplated by the court.

Mr. Nachman suggested a revision of the first sentence of (1) as follows: "An application for an appointment of a receiver to act either as a custodian or with enlarged powers shall state the particular facts making the appointment necessary." He felt that paragraph (2) could include a requirement of a statement of the specific duties to be performed, in the order of the court.

Professor Riesenfeld suggested that paragraph (1) cover the application and hearing, that paragraph (2) begin with the sentence now in (1) concerning the order of the court. He further suggested that "chapter XI" be substituted for "section 332" in paragraph (1), and this last suggestion was adopted without objection.

On suggestions by Professor Seligson and Mr. Covey, the third sentence of (1) was amended to read as follows: "Every order appointing a receiver shall state why the appointment is necessary, specify the duties to be performed by the receiver, and, if entered without notice in cases other than chapter X or chapter XI, shall state what loss is to be prevented and why it would be irreparable." Professor Kennedy stated that on reflection he felt that it was improper to except cases under chapters X and XI from the limitations placed on appointments without notice.

After further discussion, the Committee voted to adopt the following as new paragraphs (2) through (5):

"(2) Unless immediate appointment is necessary to prevent irreparable loss to the estate, appointment of a receiver before adjudication, or before approval of a petition under chapter X, or in any case under chapter XI, may be made only upon due notice with opportunity for hearing afforded to the bankrupt or debtor and to any other parties in interest designated by the court. If the appointment is made without notice in any such case, the order of appointment shall state what loss is to be prevented and why it would be irreparable.

"(3) Every order appointing a receiver shall state why the appointment is necessary and shall specify the duties to be performed by the receiver. A receiver shall be a mere custodian within the meaning of section 48 of the Act, unless his duties and compensation are specifically enlarged by order of the court, upon proper cause shown, either at the time of the appointment or later.

"(4) A copy of every order of appointment shall be mailed immediately to the bankrupt or debtor at his last known address.

"(5) The provisions of this general order shall apply to the appointment of a marshal under the Act to take charge of property or otherwise to protect a bankrupt estate."

The Committee approved this draft in principle, and directed the Reporter to make any necessary drafting changes and submit it to the Style Committee for consideration before the next meeting of the Committee.

Mr. Nachman referred to the Reporter a further modification of the first sentence of G.O. 40, as follows: "Every application for appointment of a receiver under the Act to serve either as a mere custodian or with full powers as provided under the Act shall state the particular facts making such appointment necessary." The Reporter was directed to take this suggestion into consideration in redrafting paragraph (1).

The Committee specifically disapproved the suggestion of Referee Herzog that language be included in the general order stating that appointments of receivers shall be the exception and not the rule.

ITEM 11. New General Order Requiring Notice of Referees' Orders

Professor Kennedy stated that he proposed that this new general order be included as General Order 23, as the former 23 has been abrogated. The Committee discussed the question of the consolidated clerk's and referee's office, and felt that the general order should provide that either the referee or some other person designated by rule of court should be authorized to serve the notice.

Professor Moore stated that as drafted the general order would be difficult to apply, since there may be hundreds of persons who have filed claims against the bankrupt and would be entitled to notice under the Reporter's draft. After some discussion, the Committee agreed that the referee should designate the parties to whom notice should be given.

The Committee next discussed whether copies of all the referee's orders should be served on the parties. Professor Seligson felt that only orders subject to review under section 39c should be served. Professor Kennedy suggested requiring notice to be served only on parties "who may be aggreived by the order." After considerable discussion and suggestions from various Committee members, Professor Kennedy proposed the following language for G. O. 23:

> "Every order of a referee shall be set forth on a separate document, and shall be entered forthwith on the referee's docket. An order is effective only when so set forth and so entered. Immediately upon the entry of an order made by him, the referee, or such other person as may be designated by local rule, shall cause a notice of such entry to be served by mail in the manner provided for in FRCP 5 upon any party who opposed the making of the order and such other persons as may be designated by the referee. The mailing of such notice shall be noted in the referee's docket. Lack of notice of the entry, however, does not affect the time allowed for seeking review of the order or relieve or authorize the court to relieve a party for failure to seek review within the time allowed."

Referee Whitehurst suggested that the Reporter point out in the Advisory Committee Note that one document could include orders covering several questions in the case. Professor Riesenfeld suggested that the Note also include a statement of the reason for including the last sentence in

relation to section 39c of the Bankruptcy Act.

The Committee adopted General Order 23 as set out above, and the Reporter was directed to include in the Note the suggestions made by Referee Whitehurst and Professor Riesenfeld.

ITEM 2A. Forms Nos. 1C and 1D, Authority of an Attorney to Verify a Petition of a Creditor

On the suggestion of Professor Moore, the bracketed expression in 1C was amended to read "[or other officer or duly authorized agent]", and a bracketed expression added to 1D after "member" to read "[or duly authorized agent". This would include attorneys at law and attorneys in fact among those authorized to verify the petitions of corporations or partnerships.

Professor Seligson questioned whether less than all partners may file a verification for the partnership without the authority of the other partners. The Committee agreed that this should be permitted, and directed the Reporter to add a Note to the form making this clear.

Official Forms Nos. 1C and 1D were approved as amended.

ITEM 12. General Order 51

At Mr. Nachman's suggestion, the Committee agreed to delete the following from the first sentence of paragraph (1): "...in a bankruptcy proceeding pending in any other court of bankruptcy ...". After further suggestions from the Committee, paragraph (1) was amended as set out below, and paragraphs (2) and (3) were approved as drafted.

> "(1) An ancillary receiver may not be appointed in any court of bankruptcy except by leave of the court of primary jurisdiction granted upon the application of the primary receiver or of any party in interest. The application shall state the specific facts showing the necessity for such appointment."

ITEM 13. General Order 47

The Committee discussed at length the provisions of the draft of G. O. 47 presented by the Reporter. Several suggestions were made by the Committee -- (1) that the referee should be required to make specific findings of fact, and (2) that G. O. 47 should be confined to the scope of review by the district court of referees' orders. The Reporter received

numerous drafting suggestions from the Committee, and presented the following redraft of G. O. 47 during the next morning's session:

47
ORDERS AND FINDINGS OF REFEREES
AND REPORTS OF SPECIAL MASTERS

"(1) In all matters tried upon the facts, the referee shall find the facts specially and state separately his conclusions of law thereon. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. [Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).]

"(2) Upon review of an order of a referee, the judge after hearing may confirm, modify, or reverse the referee's findings of fact and order, or return them with instructions for further proceedings. The judge shall not set aside the referee's findings unless clearly erroneous, and shall give due regard to the opportunity of the referee to judge of the credibility of witnesses.

"(3) Unless otherwise directed in an order or reference to a referee or other person as a special master, his report shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

Mr. Nachman felt that the bracketed sentence of paragraph (1) was not necessary. Judge Gignoux and Professor Seligson agreed, and on motion of Professor Seligson the Committee approved paragraph (1) with the deletion of the bracketed language.

On motion of Judge Gignoux, the Committee approved paragraph (2) as set out above.

After some discussion, the Committee agreed to substitute the second alternative of paragraph (2) of the original draft for the draft of paragraph (3) presented by the Reporter. Paragraph (3), as adopted, will read as follows:

"(3) If a matter is referred to a referee or other person as a special master, the Rules of Civil Procedure for the United States District Courts applicable to masters shall be followed as nearly as may be."

The draft of General Order 47 was approved as amended.

The meeting was adjourned at 5:20, November 21.
The meeting reconvened at 9:30 on November 22.

ITEM 23. General Order 26 and Official Forms Nos. 46 and 47

Professor Kennedy stated that the Judicial Conference had resolved that the Administrative Office should assume actual responsibility of the operations of the referees' offices, and proposed that General Order 26 be amended to take account of this fact. He further proposed that Official Forms Nos. 46 and 47 be abrogated, as detailed forms for reports by referees are no longer required.

After some discussion, the Committee voted on motion of Mr. Covey to approve the proposed draft of G. O. 26 and the abrogation of Official Forms Nos. 46 and 47.

Judge Gignoux raised a question in connection with the requirement of G. O. 26 that referees sign all official checks issuing from their offices. He stated that in many districts the volume of checks is such that it is impractical for the referee personally to sign all the checks. He asked that the Reporter consider this problem and make a recommendation to the Committee at the next meeting.

ITEM 14. General Orders 14 and 15.

General Order 14.

The Committee discussed the Reporter's drafts of General Order 14 dated November 3 and November 10. The Reporter called the attention of the Committee to drafts submitted by Mr. Covey and Referee Snedecor. The Committee discussed the various proposals designed to prevent monopolies in the appointments of receivers and trustees, including the establishment of a panel of trustees.

Judge Gignoux felt that the panel system might lead to a "closed shop" and Professor Seligson added that this idea would be impractical in large districts such as New York and Chicago. Referee Whitehurst stated that he

maintained a list of eligible receivers and trustees -- a sort of informal panel -- but he felt that this practice should not be formalized by a general order. After further discussion, the Committee agreed that the panel system may engender more abuses than benefits, and voted (Mr. Covey dissenting) to eliminate all references in the general order to panels.

The Committee next discussed revisions in the first sentence of the Reporter's draft of November 10. Professor Seligson felt that the reference to G. O. 55 should be eliminated, and the Committee agreed that the words "classes of cases" should be eliminated, as there are varying interpretations of this phrase. These changes were made, and the Committee agreed that the Advisory Committee Note should explain the reason for the deletion of "classes of cases". At Mr. Whitehurst's suggestion, the first sentence of the General Order was amended to read "No standing receiver or trustee may be appointed by the court."

Professor Riesenfeld felt that "monopoly" was not the right word to use in the last sentence of the draft. He felt that the draft should make clear that a concentration of appointments in one or several persons leading to excessive compensation should be prohibited. After some discussion, the last sentence of the November 10 draft was amended to read as follows: "Appointments of receivers and trustees by the court shall be apportioned to avoid an undue concentration of such appointments, and to keep the aggregate compensation to any person for services rendered under such appointments from becoming excessive."

The Committee discussed adding a provision in the general orders which would prohibit the referee or the judge from appointing receivers or trustees who are related within first cousins of the judge or referee. The Committee voted to approve the application of this doctrine to receivers and trustees, and asked the Reporter to prepare a draft for the Committee's consideration, and to consider extending the prohibition to attorneys, accountants, auditors, and others involved in bankruptcy proceedings.

General Order 15.

The Reporter pointed out drafting suggestions made by Referees Snedecor, Frebolin and Herzog, and called attention to the alternative drafts presented in his memorandum of November 19. He asked the Committee to first consider what factors should be considered by the judge or referee in his decision not to appoint a trustee: (1) existence of property in the estate, (2) participation of creditors, (3) unavailability of a trustee, (4) the need for a trustee, and (5) the best interests of the estate and bankruptcy administration.

Professor Kennedy stated that he favored the first alternative presented in his memorandum, since he felt that an amendment of section 44a of the Bankruptcy Act would be necessary in order to implement alternative 2. Several members of the Committee felt that alternative 1 would lead to the appointment of a trustee in every case, since every bankrupt has some property, however little.

Mr. Nachman proposed the following language for G. O. 15: "If the creditors at the first meeting do not appoint a trustee, the court may, by order setting out the reasons therefor, direct that no trustee be appointed. At any time thereafter, for good cause shown, a trustee may be appointed." Mr. Nachman felt that the good judgment of the referees should be relied on in making this determination. He also stated that in his opinion a statutory amendment would be necessary if any of the alternatives, including his draft, were adopted.

After the luncheon recess, Professor Kennedy offered the following draft: "If, after examination of the bankrupt, the referee determines that there is no property not claimed as exempt, and, if the creditors do not elect a trustee or if the trustee elected fails to qualify, he may, by order setting out the facts, direct that no trustee be appointed."

Referee Snedecor felt that it is important for the referee to examine the bankrupt personally in every case. Professor Seligson felt that the appointment of a trustee should not be tied to the examination of the bankrupt as in the Reporter's last suggested draft, but if that is desired it should be made a separate requirement.

After further suggestions and discussion, Professor Kennedy offered the following draft: "If the creditors do not elect a trustee, and if, after examination of the bankrupt, the referee determines that there is no property other than that which can be claimed as exempt and that no other circumstances indicate the need for a trustee, he may, by order setting out the facts, direct that no trustee be appointed."

The Committee agreed that this draft was acceptable in principle, and approved it subject to possible drafting changes by the Reporter. It was agreed that a sentence referring to further meetings of the creditors was not necessary in G. O. 15, as section 55e of the Act covers the point.

ITEM 16. General Order 41 and Proposed General Order 44(4)

Professor Kennedy suggested that the Committee defer consideration of this item, as the subcommittee appointed to study the problem of attorneys for creditors' committees has not yet made its recommendation. The Committee was in agreement with this suggestion.

The Chairman announced to the Committee that President Kennedy had died of bullet wounds inflicted by an assassin in Dallas. After a brief recess, the meeting was adjourned for the day, and the Committee agreed to resume the meeting the next morning.

The meeting was adjourned at 3:00, November 22nd.
The meeting reconvened at 9:00, November 23rd.

Judge Forman appointed Referees Whitehurst and Snedecor and Mr. Covey as a subcommittee to work with the Reporter on the revisions of the schedules in bankruptcy proceedings.

The Committee agreed to tentatively set the dates for the next meeting as May 13-16, 1964.

ITEM 17. Solicitation and Voting of Proxies

After some discussion it was the consensus of the Committee that there is a need for a general order restricting the solicitation of proxies.

Professor Seligson felt that if a creditor's committee is truly representative of the creditors, it should be permitted to solicit and vote claims; but he felt that many committees are not representative of all the creditors. He suggested the possibility of control by the referee over the selection of the members of the committee, and expressed approval of a committee consisting of the 10 largest creditors.

Mr. Nachman felt that the purpose of the creditor's committee is to advise the bankrupt on the operation of his business, and that many times the composition of the committee is largely of lawyers, many of whom are not qualified to give good business advice. The Committee discussed briefly the possibility of prohibiting attorneys at law from serving on creditors' committees or from soliciting proxies.

Professor Seligson suggested that the general order provide that in order to be permitted to solicit and vote claims, a committee should be one which has been designated at a meeting of which the creditors have had notice. He felt that no court authorization need be given except as to the manner in which the committee has been formed. He suggested that a statement be required of the creditors' committees similar to the statement required under chapter X -- that the committee must represent the majority of claims in number and amount.

Professor Seligson suggested that sections (1)(c) and (1)(d) be eliminated from the Reporter's draft of the general order. Mr. Nachman agreed with this view. The Committee discussed at some length subsection (f), which would prohibit any attorney at law from soliciting claims, except from creditors who are already his clients. Mr. Nachman felt that solicitation by an attorney at law should be expressly prohibited by the general order, as there is some doubt in the practice whether this is ethical.

Professor Riesenfeld felt that only creditors or creditors' committees should be permitted to solicit claims, and any other person or group should be prohibited. He felt this should be stated positively, instead of listing those who are prohibited from soliciting.

The Committee discussed the question of solicitation of claims by collection agencies and trade associations. It seemed the consensus of the Committee that these associations should not be prohibited from soliciting claims among their own members where the members are creditors of the debtor, but that they should not solicit claims of those who are outside their organization.

Referee Snedecor moved that the Committee approve in principle the regulation of solicitation and voting of proxies, and that the matter be recommitted to the Reporter and the Style Committee for redrafting in the light of the discussion. This motion was carried.

ITEM 19. Proposal for Service of Notices by Attorneys

Professor Kennedy reported the proposal of Referee Lipkin that attorneys be permitted to send notices to parties in bankruptcy proceedings and certify the sending to the court. Professor Kennedy felt that this proposal would necessitate an amendment of the Bankruptcy Act. The Committee was in agreement, and voted, on motion of Professor Riesenfeld, to take no action on the proposal.

ITEM 20. General Order 5

After some discussion, the Committee voted, on motion of Mr. Covey, to amend the first sentence of paragraph (1) to read "All petitions, schedules, and other papers shall be clearly legible." The second sentence was approved as drafted.

Paragraph (2) was amended to read as follows:

"(2) Any petitioning creditor for an involuntary bankruptcy having a claim of which he is a transferor or transferee, whether transferred unconditionally or for security, shall annex to each of the triplicate petitions a copy of all instruments of transfer and an affidavit stating the consideration for and terms of the transfer and whether the claim was transferred for the purpose of instituting bankruptcy proceedings."

Paragraph (3) was approved as drafted.

Paragraph (4) was amended to insert "Under chapter X [XI] [XII] [XIII]" at the appropriate places.

Paragraph (5) was deleted as being unnecessary in view of the fact that its provisions have become common knowledge throughout the practice. The Committee agreed that an Advisory Committee Note explaining this deletion should be added.

After some discussion of the order of the paragraphs, it was agreed to move paragraph (2) to the last paragraph of the general order, and to renumber the paragraphs accordingly.

The meeting was adjourned at 12:05, November 23.

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