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Preface

Bankruptcy plays an essential role in market economies. Bankruptcy reduces the cost of credit by providing for fair and efficient debt collection. It furthers economic growth by releasing consumer demand. It facilitates entrepreneurial risk-taking by limiting the personal consequences of failure. It increases total social wealth by allowing rehabilitated debtors to resume productive activity. And, finally, it reallocates resources to more efficient uses. The development of bankruptcy law in America paralleled economic development, mirrored social change, and revealed power relations, but bankruptcy’s history has received scant scholarly attention.

Despite its obvious importance, only three scholars have published book-length histories of bankruptcy in America: Noel F. Regis in 1919, Charles Warren in 1935, and David Skeel in 1995.1 Recently, several important historical studies of specific periods in bankruptcy history have been published.2 The Second Circuit Committee on History and Commemorative Events published a collection of essays in 1995 celebrating the Second Circuit Court’s contribution to the development of bankruptcy law.3 To date, this is the only scholarly historical investigation of a particular bankruptcy court, its relationship to the bar, and its impact on the community.

This book is a social and institutional history of the Bankruptcy Court for the Northern District of Ohio. It is not a history of bankruptcy law. I discuss bankruptcy law only to the extent necessary to understand events as they unfold in and around the bankruptcy court. Instead, I seek to explain the development of the court itself, of the people who worked
there and of those who sought refuge in the bankruptcy court, within the context of northern Ohio’s changing economy. In the process of narrating the story of this particular bankruptcy court, this book also describes the historical evolution of bankruptcy as an American institution.

The structure of this book is straightforward narrative history. In general, the chapters follow the development of the bankruptcy court chronologically. As the narrative moves through time, the chapters address northern Ohio’s economic condition, the status of bankruptcy law and its practice in northern Ohio courts, the histories of the referees and bankruptcy judges, the development of the bankruptcy bar, and the evolution of the debtors. Because different issues become important at different times, different chapters focus on different themes. To the extent possible, the story is told from the point of view of northern Ohio’s bankruptcy lawyers and referees. Much of the story is told through the eyes of long-serving Cleveland referee Carl D. Friebolin, who achieved legendary status as author of the Cleveland City Club’s annual Anvil Revue from 1917 to 1965. Friebolin served as a referee in Cleveland from 1916 to 1967. His papers, which he donated to the Western Reserve Historical Society, are an invaluable resource on bankruptcy history.

This study originated as the brainchild of Randolph Baxter, then chief bankruptcy judge, who decided that the Northern District of Ohio needed a history of its bankruptcy court. He formed a historical committee, and the committee contacted the Western Reserve Historical Society for assistance. I heard about the project through historians’ word of mouth, and I am deeply grateful for the opportunity to write this book.

I have acquired innumerable debts in the course of this project. First and foremost, I wish to thank the members of the historical committee for their unfailing support and encouragement. In particular, I wish to thank Judge Baxter, Judge Marilyn Shea-Stonum, and Judge Jessica Price Smith, who served on the committee as representative from the Commercial Law and Bankruptcy Section of the Cleveland Metropolitan Bar Association before her appointment to the bankruptcy court. Clerk of bankruptcy court Ken Hirz provided necessary organizational support
for our meetings and uncomplainingly provided me with information, documentation, occasional office space, and access to the court’s automated record system, PACER. John Grabowski at the Western Reserve Historical Society has been an invaluable resource in every possible way.

Historians always incur debts to librarians that we can never repay or even adequately acknowledge. In particular, I would like to thank Lisa Peters at the Case Western Reserve University School of Law library, Cleveland, Ohio; Jordan Steel at the National Bankruptcy Archives, Biddle Library, University of Pennsylvania School of Law, Philadelphia; Ann Sindelar at the Western Reserve Historical Society, Cleveland, Ohio; Paul Richert at the University of Akron School of Law library, Akron, Ohio; Kenneth W. Rose at the Rockefeller Archive Center, Sleepy Hollow, New York; Irene Milan, sixth circuit librarian, Cleveland, Ohio; Rita Wallace, sixth circuit librarian, Cincinnati, Ohio; archivist Robert Ellis at the National Archives and Records Administration, Washington, DC; archivist Scott Forsythe at the National Archives and Records Administration, Chicago, Illinois; Bill Rule at the Bankruptcy Judges Division, Administrative Office of the United States Courts; and Gwen Mayer at the Hudson Library and Historical Society, Hudson, Ohio.

This project involved trying to track down the names of many long-deceased lawyers who served as commissioners, registers, and referees in bankruptcy, sometimes only for short periods. I am indebted to librarians and volunteers at more local history and genealogy departments of county libraries throughout Ohio than I can possibly name. You know who you are. I wish to especially thank John Ransom at the Rutherford B. Hayes Presidential Center in Fremont, Ohio.

Many lawyers who made their careers in northern Ohio’s bankruptcy courts have freely shared their memories and expertise with me. This book has been enriched immeasurably by their generosity. I wish to especially thank G. Christopher Meyer of the law firm Squire Sanders; Marvin Sicherman of the law firm Dettelbach, Sicherman & Baumgart; former bankruptcy judge Joseph Patchan, former United States trustee Saul Eisen; Case Western Reserve University professor Morris Shanker;
retired bankruptcy judges William J. Bodoh, David P. Snow, Harold F. White, and James H. Williams; and current bankruptcy judges Arthur I. Harris, Russ Kendig, Pat E. Morgenstern-Clarren, Richard L. Speer, Mary Ann Whipple, and Kay Woods.

This book has been improved immeasurably by the helpful comments of many generous readers. In particular, I wish to thank Case Western Reserve University Law School professor Kenneth F. Ledford, chief deputy clerk William A. Kurtz, Andrew L. Turscak Jr. of the law firm Thompson Hine, and his associate, James J. Henderson. Andy Turscak and Bill Kurtz proved especially valuable as readers because of the depth of their local knowledge in addition to their careful proofreading. The anonymous reviewers for the University of Akron Press offered perceptive suggestions for which I am deeply grateful. I also wish to thank Lisa Napoli for her patient editing.

No book gets written without financial support. In this case, I wish to thank the US District Court library fund, which provided most of the funds necessary to complete this project. I also wish to acknowledge the generous support from the Cleveland Metropolitan Bar Association, the Federal Bar Association, the Akron Bar Association, the Stark County Bar Association, the law firm Brouse McDowell, the law firm Squire Sanders, attorney Alan Lepene of the law firm Thompson Hine, Mary Bynum, and Ellen Toth.

One final note: I struggled with gendered pronouns and, ultimately, decided to use the old-fashioned system of male universals. Use of “he/she” proved too cumbersome, and substituting the plural “they” for the singular he or she grated on my ear. I am aware of the gendered implications of a male universal, but I know of no adequate substitute. Besides, in this story, until the 1980s almost all of the players were, in fact, men.
Chapter One

Introduction

The history of the Bankruptcy Court for the Northern District of Ohio is the history of the relationship between bankruptcy as a legal institution and the environment in which it operates. It is a complicated story, deeply influenced by the local legal culture, the careers of leading members of the bench and bar, and the economic history of the district. The economy of northern Ohio is highly representative of northern, midwestern, old-industrial America; northern Ohio pioneered modern industrial capitalism in the last quarter of the nineteenth century, and the tragedy of deindustrialization first appeared there one hundred years later. Consequently, the history of the bankruptcy court in the Northern District of Ohio offers a superb view of the relationship between law and society in modern industrial America, as both the institution of bankruptcy and the economic infrastructure of the society changed profoundly.

The Constitution authorized Congress to enact uniform bankruptcy laws, and Congress promptly did so, first in 1800 (repealed in 1803) and next in 1841 (repealed in 1842). In each case, financial panic preceded passage of bankruptcy legislation. The party in power was associated with northern commercial interests and secured passage of the bankruptcy legislation (Federalists in 1800 and Whigs in 1841), and when they lost power, the southern and western agricultural opposition (Jeffersonian Republicans in 1800 and Jacksonian Democrats in 1841) repealed the laws. Congress enacted the third federal bankruptcy law in 1867. The Panic of 1857 had returned bankruptcy to public attention,
and the Civil War created financial chaos on a vast scale. The 1867 bankruptcy law was unpopular, and Congress repealed it in 1878. Immediately upon the law’s repeal, commercial interests commenced lobbying for another bankruptcy law. In 1898, Congress finally enacted a bankruptcy law that, although highly contested at the time, proved to be permanent. Congress significantly revised the Bankruptcy Act of 1898 with enactment of the Chandler Act in 1938 and, again, with enactment of the Bankruptcy Code in 1978, but the basic structure of the bankruptcy law has endured.

This study follows the development of the Bankruptcy Court for the Northern District of Ohio from its prehistory in nineteenth-century Ohio insolvency law into the near present. Several interrelated threads twine together in telling this history. The bankruptcy courts changed over time from local, informal tribunals staffed by partisan political appointees paid on a fee basis to formal federal courts staffed by salaried judges with (almost) permanent tenure. The bankruptcy bar also changed as the bankruptcy courts and the bankrupts changed. The location of the story in northern Ohio furthers our understanding of the relationship between the bankruptcy courts and industrial society in America. Vitally important to the functioning of twentieth-century industrial capitalism, bankruptcy also facilitated American deindustrialization. The social and economic consequences of deindustrialization in the Midwest played out through the bankruptcy courts.

This book does not purport to expound a theory of historical development, but it informs important historiographic debates about the sources of institutional change. In particular, the history of the bankruptcy court resonates with an interdisciplinary social science theory called “American political development,” which uses institutional and political history to explain the evolution of American political institutions from a decentralized “small state” governance system to the modern regulatory state. Everything changed in America between 1880 and 1920. The American economy changed from a small-producer commercial economy to an urban industrial economy, and governmental institutions changed
simultaneously. American political development scholars assume that economic change caused institutional change.

A related theoretical tradition called “law and society” developed after World War II at the University of Wisconsin Law School among students of legal historian J. Willard Hurst. Law and society arose in opposition to an older tradition that saw law and legal development as relatively autonomous from society. Most often, law and society adopts a functionalist view of the relationship between changes in law and changes in society that parallels American political development: legal forms change to meet changing social needs. In the 1970s, a new academic movement emerged called “critical legal studies” that critiqued functionalism and argued that the relationship between law and society is not simple or one directional. Instead, a more subtle relationship exists in which law performs an ideological function that creates the hidden infrastructure of society; it is one of the reasons why a society is the way it is. Critical legal studies acknowledges that law is not indifferent to changes in society but contends that law and society change in complicated interrelated ways. Sometimes changes in law produce changes in society, not the other way around.²

This study suggests that changes in bankruptcy law did not occur as simple responses to social or economic pressures but emerged as a result of multiple, sometimes inconsistent impulses and often produced unintended consequences. Congress passed significant bankruptcy legislation in 1898, 1938, and 1978, and in each case the legislation was behind the curve of history not responsive to it. In each case, the law in action created new issues that the law reformers neither anticipated nor desired. Changes in bankruptcy law changed the way industrial capitalism developed in America.

Bankruptcy and Industrialization

A dynamic national economy needs an institution like bankruptcy. Creditors need an efficient, uniform national procedure for collecting debts and resolving or reorganizing insolvent organizations, and risk-taking entrepreneurs need to be able to escape from the burden of debts
resulting from economic failure in order to resume creative productive activity. Nonetheless, the American economy grew tremendously throughout the nineteenth century, even though there was no uniform national bankruptcy act except in a few short periods. After decades of lobbying, commercial business interests finally secured passage of the Bankruptcy Act of 1898. By that time, industrial capitalism was already well established and undergoing the first great merger movement.³

The Bankruptcy Act was enacted in the midst of the progressive state-building project at the end of the nineteenth century, and it is easy to imagine that bankruptcy evolved to meet the needs of an emerging industrial economy. But correlation is not causation, and it is not clear that the Bankruptcy Act of 1898 was enacted as a response to industrial capitalism. As enacted, the Bankruptcy Act of 1898 addressed a nineteenth-century economy that had already become a historical relic, at least in northern Ohio. The Bankruptcy Act of 1898 paralleled both the Bankruptcy Act of 1867 and the insolvency regime that Ohio had developed over the course of the nineteenth century. Most damningly, the Bankruptcy Act of 1898 made no provision for the two most important developments of the new economy: industrial corporations and consumer debtors.

Federal bankruptcy laws existed only for very limited periods before the enactment of the 1898 Bankruptcy Act, and state creditors’ remedies attempted to ensure the orderly liquidation of debtors’ estates for the benefit of creditors. State insolvency statutes attempted to mitigate the insolvent debtor’s hardship—sometimes by freeing debtors from debtors’ prison, sometimes by delaying the execution of creditors’ remedies, and sometimes by preventing creditors from seizing everything in satisfaction of unpaid obligations. Typically, an insolvent debtor was able to protect from execution a minimum decent level of clothing and household furnishings and the tools necessary to pursue a living.

Only bankruptcy could discharge debtors from their debts, however, and the Constitution limited the states’ ability to enact effective bankruptcy statutes. The Constitution prohibited states from passing laws impairing the obligations of contracts, and the Supreme Court ruled
that such prohibition meant states could not pass laws discharging debts incurred before passage of their bankruptcy laws or discharging debts incurred in a different state. Consequently, state bankruptcy laws had limited impact and were rarely enacted. Most states, including Ohio, passed insolvency statutes instead. In general, state insolvency laws adequately protected small producers who traded locally by allowing them to continue their lives in modest circumstances and reflected attitudes about the morality of debt that prevailed in many rural, interdependent communities in the nineteenth century.

Some scholars see the nineteenth-century American debate over bankruptcy as a proxy for the wider question: What kind of society would we be? Would we be a cosmopolitan commercial power on the world stage or a rural agrarian republic? The American economy grew enormously in the nineteenth century, but the growth occurred sporadically, in alternating cycles of booms and busts. Regular patterns of panic and depression produced recurring demands from commercial interests for a uniform national bankruptcy act. Less commercially oriented interests resisted, typically arguing that state insolvency laws adequately protected the legitimate concerns of honest debtors and morally condemning bankrupts as reckless and profligate. In Ohio, state court remedies remained very popular even after enactment of the Bankruptcy Act of 1898. Only after the enactment of the Chandler Act in 1938 did bankruptcy inevitably replace Ohio insolvency proceedings except in very rare, idiosyncratic circumstances.

A more aggressive, long-distance, larger-scale capitalism emerged in the nineteenth century, penetrating different sections of the country and different sectors of the economy at different rates. Entrepreneurs began taking big risks in the hope of big rewards, and they needed access to the credit and capital of commercial centers. These entrepreneurs desperately needed a national bankruptcy act. In order to trade efficiently on a national scale, they needed uniform laws governing relations between creditors and debtors in which out-of-state commercial interests did not suffer undue discrimination. They also needed to be able to discharge
debts in the event of failure. They could not resume their idea of a normal productive life with a small homestead and a few artisan tools. Instead, they needed renewed access to capital and credit and the ability to retain future profits for reinvestment in their enterprises. Historian Richard C. Sauer argues persuasively that the enactment of a permanent bankruptcy act in 1898 marked the final triumph of “commercial modernity” in a long-standing ideological struggle over the meaning of American freedom.6

The Bankruptcy Act eventually came to terms with industrial capitalism. The size and scope of industrial factories in the twentieth century changed everything. A community did not suffer greatly when a single small producer failed, but when a railroad or an industrial plant failed thousands of workers lost jobs and whole communities became endangered. Federal courts used receiverships to achieve corporate reorganizations not to save investors but to save workers’ livelihoods and the viability of communities.7 In 1938, Congress passed the Chandler Act, which brought corporate reorganization under the Bankruptcy Act. The Chandler Act also addressed consumer bankruptcies by creating wage-earner plans and other measures to enable debtors to make partial payment under the protection of the bankruptcy court.

Because passage of the Chandler Act corresponded with the Great Depression, it is tempting to think that the crisis of capitalism caused the reforms. However, the impetus for bankruptcy reform was fraud in the bankruptcy courts during the prosperous 1920s, not industrial collapse, and it is unclear what impact the reforms actually had. Corporate reorganization closely paralleled existing equity receivership practice in purpose and effect, and almost no consumer debtors used wage-earner plans, preferring simple discharge instead. Wage-earner plans benefited creditors, not debtors, and debtors generally avoided the plans. The Chandler Act’s greatest impact may have occurred in the composition of the bankruptcy bar. The Chandler Act adopted a rule of economy that generated lower attorneys’ fees in bankruptcy cases than in other areas of practice, and the elite corporate bar lost interest in reorganizations.