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Preface

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PREFACE

Back in the paleolithic era, when I was a law student, the eminent professor who doggedly tried to teach me corporation law spent an inordinate amount of time on the doctrine of ultra vires. I learned, for example, that a railroad could build and operate a resort hotel at the end of its line on the remote and uninhabited seacoast of Florida; people would ride the railroad in order to stay at the hotel, and so the hotel was an incident to the corporation's proper business. On like reasoning, street-car companies were allowed to run amusement parks, and many of them did. On the other hand, a railroad could not underwrite a music festival; that was a bit too far from railroading. There were hundreds and maybe thousands of such cases, for the courts were determined to keep corporate enterprise within bounds. Their policy was based in large part on the reasoning that stockholders and creditors had intended to invest their money only in the particular business specified in the charter. But the courts were probably also influenced by the fears which led legislatures, in the days before general incorporation laws, strictly to confine the business in which a newly created corporation could engage. A corporation was a dangerous beast, capable not only of immortality but of indefinite growth, a sort of genie in the bottle. If you let it expand into every business which seemed profitable, it could easily strangle small and independent businesses and perhaps grow stronger than the state itself. Strict limitation of the size and nature of a corporation's business was, in effect, a primitive method of dealing with the problems at which modern antitrust laws are aimed.

The genie could not be kept in the bottle. Even in the old days, corporate managements and their lawyers were sometimes too clever for the legislatures. In 1799 the New York legislature chartered the Manhattan Company (an ancestor of the Chase Manhattan Bank) as a water company. But its incorporators slipped into the bill an inconspicuous clause which gave it incidental power to employ its "surplus capital . . . in the purchase of public or other stock, or in any other monied transactions or operations not inconsistent with the constitution and laws of this State or of the United States," and it has been a bank ever since. Modern general incorporation statutes permit corporations not only to hold the stock of other companies but to include in their charters purpose clauses as broad as desired. The typical purpose clause of an American corporation in 1970 permits it to engage in just about any business in which a reasonably honest dollar is to be made.

And many of them do. A modern conglomerate may proliferate into all sorts of apparently unrelated businesses. One fairly typical specimen operates a railroad, a commercial finance company and grain elevators; it produces, *inter alia*, yachts, sewage disposal systems, fraternal jewelry and foundry equipment. Some corporations which are not generally thought

of as conglomerates have diversified into lines which would startle their founders. RCA rents automobiles, publishes books and sells frozen foods and data processing systems. United States Steel, not exactly a go-go outfit, recently entered the business of leasing and selling executive aircraft. Banks and railroads are eager to become holding companies. The motives behind the urge to agglomerate are as varied as the businesses acquired and the techniques of acquisition employed. Cigarette companies acquire producers of cat food and candy because the future of the weed is clouded. The Internal Revenue Code gives to corporations with negative earnings records a strong incentive to pick up profitable businesses. Some of the presiding geniuses of conglomerates seem to have Napoleon complexes. Some sincerely believe that central financing and control of diverse enterprises promotes efficiency.

The rise of the conglomerate has, of course, aroused plenty of opposition. Executives of established businesses do not like being taken over, to be moved to a strange city, or to be fired outright. They have developed ingenious and more or less legitimate techniques to impede take-overs. The SEC has been much concerned by the profusion of weird and wonderful securities — warrants, subordinated convertible debentures, etc., etc. — which take-over bidders have offered to public stockholders and which may contain the seeds of the most intricate reorganizations in bankruptcy since the Homeric age of Insull and Hopson. Economists and lawyers hotly debate the antitrust questions raised by the growth of the voracious conglomerates. The Department of Justice and Congress have attempted to slow that growth.

These and related problems are the subjects of the articles which follow. Whether the conglomerate is a passing phenomenon of this decade, like the utility holding company systems of the twenties, or is with us to stay, it deserves the close attention of lawyers.

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