merely an abuse of power, rather than a complete want of power. *Central Trust Co. v. Smurr & Kamen Machine Co.*, 191 Ill. App. 613 (1915); see Ill. Bus. Corp. Act Ann. 54 (1934). Thus it was urged by counsel for the plaintiff in the principal case that since the power of contract for old age benefits was given to one part of the organization, namely the local lodges, the association in contracting through the central office had not acted beyond its powers but had merely wrongfully used powers given it. The court did not discuss this argument. Indeed the major part of the court's emphasis was upon the hardship and injustice involved in refusing to enforce the contract, fully performed by the plaintiff. In support of its decision the court cited supreme court decisions made when the earlier "estoppel" rule prevailed and ignored later cases setting up the "void" rule.

Criticism of the appellate court for thus quietly asserting its independence is easy. But the whole doctrine of ultra vires has enjoyed little favor in recent legal opinion. The limited capacity theory is denounced as unsound, the corporation portrayed as a real thing, not merely a creature of the law which created it. Machen, Corporate Personality, 24 Harv. L. Rev. 253 (1911); Warren, Collateral Attack on Incorporation. B. in General, 21 Harv. L. Rev. 305, 307 (1908). Once the limited capacity theory loses its dominance, the doctrine of ultra vires ceases to be necessary. In its place is proposed the agency rule of apparent authority. See Stevens, A Proposal as to the Codification and Restatement of the Ultra Vires Doctrine, 36 Yale L. J. 297 (1927); Carpenter, Should the Doctrine of Ultra Vires be Discarded? 33 Yale L. J. 49 (1923); Ballantine, Proposed Revision of the Ultra Vires Doctrine, 12 Corn. L. Q. 453 (1927). Where it is not specifically prohibited or contrary to public policy, a contract would be binding even though not authorized if the parties reasonably supposed it to be within the authority of the corporation. Under this rule there would be no constructive notice of a statute unless it contains a specific prohibition. Injury to stockholders and to the state can be prevented to a certain extent by stockholder- and attorney-general suits but in any event such injury is outweighed by the greater injury to third persons under the void rule. The Illinois legislature apparently concurs in this argument since it recently abolished ultra vires as a defense for most corporations. Ill. Bus. Corp. Act § 8 (1933), Smith-Hurd Ill. Rev. Stats. 1935, c. 32, § 157.8. See also Cal. Civ. Code 1931, § 345; Mason's Minn. Stats. 1927, c. 58, § 7492—10, 11 (supp. 1936). Since the Business Corporation Act does not apply to fraternal beneficiary societies, however, such corporations are still subject to the existing law. If the legislature desires to impose extraordinary restrictions upon the contractual powers of insurance companies, it should rely on express legislation, not on the uncertain mercies of ultra vires.

Criminal Law—Director and Corporate Crime—Principal and Accessory—[Illinois].—The Illinois Motor Fuel Tax Act provides that distributors of gasoline who are not licensed and who wilfully fail to account for taxes collected under the Act should be subject to fine and imprisonment. Smith-Hurd Ill. Rev. Stats. ch. 120, § 431 (1930). For repeated violations of these provisions the Blue Rose Oil Co., a corporation, was dissolved under § 82 of the Business Corporation Act. *Blue Rose Oil Co. v. People*, 360 Ill. 397, 196 N.E. 456 (1935). The defendant, who was the president and active controller of the corporation's policies, was indicted as an accessory before the fact for aiding and abetting the corporation in its violations. From a judgment of the

lower court fining and imprisoning him, the defendant appealed. *Held*, judgment reversed. The corporation as principal was not subject to the penal provisions of the Act, because a corporation cannot be imprisoned. Since an accessory is not liable to greater punishment than his principal, the defendant is not subject to the penal provisions of the Act. *Duncan v. People*, 363 Ill. 495, 2 N.E. (2d) 705 (1936).*

Since the instant case, if followed, will take the teeth out of the penal provisions of the Motor Fuel Tax Act, a careful examination of the premises on which it rests is advisable.

The Illinois accessory statute provides that the accessory "shall be considered as principal and punished accordingly" and that the accessory can be convicted "whether the principal is convicted or amenable to justice or not . . . ." Smith-Hurd Ill. Rev. Stats. 1935 c. 38, §§ 582, 583. As early as 1846, the statute was construed as making the accessory guilty of the same offense as the principal. *Baxter v. People*, 8 Ill. 368 (1846). Other courts relying on similar accessory statutes have succeeded in imprisoning the directory-accessory of the corporate-principal. *Wood v. United States*, 204 Fed. 55, 58 (C.C.A. 4th 1913); *Kaufman v. United States*, 212 Fed. 613 (C.C.A. 2d 1914); *Rex v. Campbell*, 5 Dom. L. Rep. 370 (1912). Hence, it would seem that the court could easily have found the defendant guilty of the same violation as the corporation and punishable independently. But the court read into the statute the common law rule that an accessory is immune from more severe punishment than his principal. See 2 Stephens, History of the Criminal Law of England 229 ff (1883); Miller, Criminal Law 242 (1934). This rule could operate in three situations: (1) if the accessory is convicted although the principal has been acquitted; (2) if the accessory is given the maximum punishment although mitigating circumstances have operated to lessen the principal's punishment; (3) if the accessory is convicted although the principal is inaccessible and probably will never be actually punished. See *Commonwealth v. Phillips*, 16 Mass. 422 (1820) (accessory freed because of suicide of principal). The immunity afforded the accessory in the last situation was especially undeserved and inspired remedial legislation. Whether or not this legislation removes the immunity in the first two situations is disputed. Sears, Principal and Accessories, Some Modern Problems, 25 Ill. L. Rev. 845 (1931) (An accessory may be convicted after acquittal of the principal. *State v. Bogue*, 52 Kan. 79, 34 Pac. 410 (1893); *contra*, *State v. St. Philip*, 169 La. 468, 125 So. 451 (1929). An accessory may be guilty of a greater offense than the principal. *Goins v. State*, 46 Ohio St. 457, 21 N.E. 476 (1889); *contra*, *Nuthill v. State*, 30 Tenn. 247 (1850).) But it is universally agreed that the inaccessibility of the principal does not preclude the conviction of the accessory. See Miller, Criminal Law 242 ff (1934). In the instant case the court rested the defendant's immunity not upon the acquittal of the principal, nor upon the circumstances mitigating the "corporation's guilt," but solely upon the physical impossibility of imprisoning the corporation. The court should have found that the close analogy between the inaccessibility of the dead principal and the impossibility of imprisoning the corporate principal brought the situation within the minimum scope of the accessory statute.

A possible distinction, however, might be advanced between the dead principal and

* Compare two recent Illinois cases dealing with failure to pay taxes collected under the Motor Fuel Tax Act as embezzlement. People v. Strong, 2 N.E. (2d) 942 (Ill. 1936) (indictment against director quashed); People v. Kopman, 358 Ill. 479, 193 N.E. 516 (1934) (indictment against partner sustained).

the corporation. The inaccessibility of the former is fortuitous; the inaccessibility of the latter is inherent in the nature of the criminal. The force of this objection rests upon the difference between a natural person and a jural entity. But it is precisely this difference which makes the principal-accessory alliance between the corporation and its director a fiction. And once a court has assumed the existence of the principal-accessory relationship, the fictional nature of such a relationship can no longer be made the basis of exonerating the accessory.

A court even though determined to use a fiction could easily have selected a less treacherous one. Thus, the court could have regarded the director as a co-principal, as principal in the second degree since he was "present" when the crime was committed, or regarded the director as the principal and the corporation as accessory, or even regarded the corporation as the innocent agent of the defendant. Any one of these fictions might have been used without danger of affording undeserved immunity to the defendant. It is noteworthy, moreover, that even using the principal and accessory approach and even assuming the validity of the premise that an accessory is immune from greater punishment than his principal, the court should have imposed, at least, a fine, without imprisonment for non-payment, upon the defendant. Perhaps the magnitude of the punishment which might have been imposed ($36,000 or 65 years in jail) made the court reluctant to impose any punishment at all. But compare the Illinois court's attitude toward severe punishment in *People v. Elliott*, 272 Ill. 592, 185 N.E. 605 (1916).

But a resort to fiction was unnecessary. Since corporate acts and omissions are ultimately attributable to human agents, a more literal approach would be to apply the ordinary tests of criminality to the acts and omissions of these agents. Lee, Corporate Criminal Liability, 28 Col. L. Rev. 1,181 (1928). When the duty violated by the individual is one that rests on him apart from his relation to the corporation, the application of this test is simple. Thus, the case of a director who commits a murder designed to further corporate ends and authorized by the board of directors and stockholders involves merely the problem of a group of natural individuals collaborating in the commission of a crime. But when the duty is one that rests on the entity and must be delegated, the problem is whether the law renders one in the defendant's relation to the corporation criminally accountable for non-performance of the corporate duty. See *Rex v. Pittwood*, 19 T. L. R. 37 (1902). In the instant case, since the defendant is not a distributor within the intendment of the statute, his failure to pay taxes is not a crime apart from his relation to the corporation. Since there is no common law rule imposing liability on a director for failing to perform this corporate duty, the court could have imposed criminal liability only by relying on the Motor Fuel Tax Act. Thus, the court might well have resorted to the following argument: The legislature must have intended the penal provisions to apply equally to all violators and hence, to corporate violators. But since the penal provisions can only apply to natural persons, the legislature must have "intended" some natural persons within the corporate personnel to be subject to the provisions. The only candidates are the stockholders and the directors and employees. But since the directors are the only persons who could have prevented the commission of the crime, the legislature must have intended to impose liability on them.

Statutes drafted with greater care than the Motor Fuel Tax Act are necessary if courts are not to be compelled to choose between the principal-accessory metaphor,

and intricate statutory construction in order to reach those in control of a corporation. A statute which defines a crime that may possibly be committed by a corporation should sharply distinguish: (1) the punishment of the entity by a fine; (2) the punishment of the directors, active or passive, by fine or imprisonment; (3) punishment of the stockholders by imprisonment or fine that operates *directly* rather than *indirectly* by a *pro rata* diminution of corporate assets; (4) the punishment of the employee personally guilty of the wrongful act or omissions. See Lee, Corporate Criminal Liability, 28 Col. L. Rev. 181, 189 (1928). It may be noted that the employee as such will seldom be actually punished. See *State v. Parsons*, 12 Mo. App. 205 (1882); *United States v. Mullen*, 53 Fed. 229 (D.C. Kan. 1892). Since the primary purpose of penal provisions is to deter violations of the law, they should be concentrated upon directors and officers whose control enables them to prevent corporate criminality. The imposition of criminal liability upon the directors exclusively would have two beneficial effects: (1) It would relieve the stockholders from what is, in effect, vicarious criminal liability. In view of the increasing separation between ownership and control, such stockholder immunity seems highly desirable. (2) It would enable courts to imprison culpable directors even though they could not solve the long-standing riddle of how to imprison the jural entity.

Equity—Trade Regulations—Price Fixing by Equitable Decree—[Illinois].—Members of the plaintiff association, comprising most of the cleaners and dyers of Chicago, agreed to maintain a minimum price list. The association attempted to persuade independent cleaner shops outside the association to maintain the same list price or sell out to the association. The defendants, independent cleaners and dyers, cut prices. Racketeering and reduction in wages for workers in the industry resulted. The plaintiff association seeks to enjoin the defendants from cutting prices. From decree enjoining the defendants and plaintiffs from selling their services for less than a fixed price, the defendants appeal. *Held*, decree reversed. Price-cutting does not, of itself, constitute unfair competition; and equitable relief from the consequences of fair competition will not be granted. *Cleaning and Dyeing P. O. Ass'n v. Sterling Cleaners and Dyers et al.*, 2 N.E. (2d) 149 (Ill. 1936).

Members of the plaintiff association, comprising most of the barbers of Chicago, agreed to maintain a minimum price list. The defendants, independent barbers as well as members of the association, cut prices. Racketeering and reduction in wages for workers in the industry resulted. The plaintiff seeks to enjoin the defendants from cutting prices. *Held*, decree granted. Price-cutting below a fixed minimum will be enjoined to protect industry from ruinous practices. *Master Barbers' Ass'n v. Baiata et al.*, Chicago Daily Tribune, July 30, 1936, p. 3.

Price-cutting *per se* has never been regarded as unfair competition. See *School Master's Case*, Y.B. 11 Hen. IV 47 (1410); *U.S. v. Sutherland*, 9 F. Supp. 204, 206 (Mo. 1934); Nims, Unfair Competition § 300 (3d ed. 1929). But price-cutting effected under varying conditions has been so regarded. For price-cutting incidental to temporary competition which is designed to injure others rather than to promote the defendant's economic interests, liability has been imposed. *Tuttle v. Buck*, 107 Minn. 145, 119 N.W. 946 (1909) (banker entered barber business for sole purpose of eliminating plaintiff and retired after its withdrawal); *Dunshee v. Standard Oil Co.*, 152 Iowa 618, 132 N.W. 371 (1911) (wholesaler entered retail business for the sole purpose of driving out