assets in addition to bank stock or a substantial business exclusive of dealings in such stock. Despite the existence of language to the contrary,[20] such cases are not to be explained by the absence of a fraudulent intent.[21] It is suggested that where the purpose of the holding company was primarily to profit from the *banking* business of its subsidiaries, the policy of the statute that those who profit from banking shall assume an additional liability justifies the "piercing of the corporate veil" even where the corporation had substantial assets in addition to bank stock. Conversely, where there was operated a non-banking business, as in *Burrows v. Emery*,[22] which business only incidentally dealt in bank stock, such considerations of policy do not apply. On the other hand, it may be argued in support of both cases that whatever the purpose of the holding company, the fact that it held substantial assets in addition to bank stock, presumably sufficient to meet the reasonable strains of the business, will protect its stockholders from further liability on ordinary principles. But where the stockholder's defense is that he was assured that only industrial stock would be purchased,[23] it is difficult to see why this should be available as against creditors of the bank, or anyone other than the promoters themselves.[24] Cases denying liability may also be in accord with the tendency to repeal the statutes creating it.[25] The usefulness of this device as a protection to bank depositors has been questioned[26] and in recent years it has generally been superseded by deposit insurance. But any argument in favor of the restriction of liability on analogy with the policy of these statutes must overcome the objection that they contemplate the existence of a different type of protection for creditors.

Contracts—Statute of Frauds and Formalities of Agreement To Arbitrate—[New York].—The petitioner entered into nine oral contracts of sale with the respondent, each exceeding the value of fifty dollars, and confirmed by written standard forms of sales notes, mailed to and retained by the respondent without objection. Each note contained a provision that "any controversy arising under or in relation to the particular contract should be settled by arbitration." The respondent failed to perform three of the contracts. *Held*, the statute of frauds was no bar to a motion to compel arbitration. The existence of a written contract,[1] although not signed by the party to be charged, satisfies the formal requirements of the New York Arbitration Act.[2] *In re Exeter Mfg. Co.*[3]

[20] Burrows v. Emery, 280 N.W. 120, 124 (Mich. 1938).

[21] See note 15 *supra*.

[22] 280 N.W. 120 (Mich. 1938).

[23] Nettles v. Rhett, 24 F. Supp. 304 (S.C. 1938).

[24] This case may be explained as a result of the state statute which made the purchase of bank stock by a corporation illegal.

[25] Double liability of bank stockholders has been recently abolished or modified as to national banks, 48 Stat. 189 (1933), 12 U.S.C.A. 64a (1936) and as to state banks in a majority of states. But an attempt to repeal the double liability provisions in Illinois by a constitutional amendment submitted to the voters failed in the November, 1938, election.

[26] See the statement in Nettles v. Rhett, 20 F. Supp. 48, 52 (S.C. 1937).

[1] The question of whether a written contract was actually formed by the respondent's retention of the sales notes without objection is referred to the lower court.

[2] Gilbert-Bliss, Civil Practice Act of New York §§ 1448, 1449 (1938).

[3] 5 N.Y.S. (2d) 438 (1938).

It is uniformly held that a contract which is within the statute of frauds as to some of its provisions, is unenforceable in any part.[4] Under such a rule it would seem that the arbitration clauses in the contracts in the instant case were equally unenforceable.[5] To enforce the arbitration clause is tantamount to taking the main contract out of the statute of frauds and is thus opposed to the spirit of the act.[6] A similar problem is presented where, in conjunction with a contract within the statute of frauds, a subsidiary promise to reduce it to writing is made.[7] The great weight of authority is that the subsidiary promise is unenforceable.[8] The dissenting opinion in the principal case sets out why the arbitration statute involved should not be interpreted to repeal the statute of frauds.[9]

The instant case is another illustration of how the courts nullify the effect of the statute of frauds,[10] because of the widespread dissatisfaction with it.[11] In the novel borderline case, the essentially determining factor is said to be the underlying attitude of the court toward the policy of the statute.[12] Furthermore in this case there was sufficient corroborative evidence of the contracts[13] to avoid the evils which the statute of frauds was designed to combat. In such a situation, courts have, in many instances, withdrawn from the operation of the statute, cases that appear to be plainly within its letter.[14] It has been submitted that the statute of frauds has remained practically unchanged in phraseology because the courts have construed it so as not

[4] Traiman v. Rappaport, 41 F. (2d) 336 (C.C.A. 3d 1930); 2 Williston, Contracts § 532 (rev. ed. 1936).

[5] This problem has arisen mostly in regard to the enforceability of personal property provisions which form part of a contract coming within the statute of frauds applicable to real property and vice versa.

[6] McNeill, Agreements to Reduce to Writing Contracts within the Statute of Frauds, 15 Va. L. Rev. 553, 561 (1929).

[7] It is termed "subsidiary promise" because the problem of whether it is unenforceable by reason of being a part of one entire contract within the statute of frauds does not seem to have been decided in any specific case. *Id.* at 560 note 34.

[8] Deutsch v. Textile Waste Merchandising Co., 212 App. Div. 681, 209 N.Y. Supp. 388 (1925).

[9] 5 N.Y.S. (2d) 438, 441 (1938).

[10] ". . . . the famous Statute, ... has so suffered in the process of judicial distillation that there is nothing left of it but a *caput mortuum.*" 12 Can. Bar Rev. 660, 661 (1934).

[11] 2 Williston, *op. cit. supra* note 4, at § 524. Willis, the Statute of Frauds—a Legal Anachronism, 3 Ind. L. J. 427, 528 (1928).

[12] Vold, Application of the Statute of Frauds under the Uniform Sales Act, 15 Minn. L. Rev. 391, 440 (1931).

[13] The facts that respondent retained the nine sales notes without objection and actually performed six of the contracts certainly corroborate the existence of the three contracts involved.

[14] Arant, Suretyship 105 (1931). See also Arant, A Rationale for the Interpretation of the Statute of Frauds in Suretyship Cases, 12 Minn. L. Rev. 716 (1928).

to interfere with legitimate transactions or changing business conditions.[15] But the attempts to modify or repeal the statute of frauds by judicial interpretation[16] have brought about many complexities and overrefined distinctions.[17] The result is a conflict of decisions not only between the various jurisdictions[18] but within one jurisdiction.[19] This situation illustrates the need for legislative action. Many writers urge

[15] Costigan, Has There Been Judicial Legislation in the Interpretation and Application of the "Upon Consideration of Marriage" and other Contract Clauses of the Statute of Frauds? 14 Ill. L. Rev. 1, 40 (1919).

[16] The late Professor Costigan argued that the courts are not revising or repealing the statute of frauds but have been engaged in legitimate legal work. *Id.* at 28 ff.; but see notes 10 and 14 *supra.*

[17] Vold *op. cit. supra* note 12, at 440; Williams, The Statute of Frauds: Section IV 281 (1932).

[18] Vold, *op. cit. supra* note 12, at 391; Costigan, *op. cit. supra* note 15, at 39.

[19] For a few reviews of the cases within a specific jurisdiction, see: Hutton, The Need to Simplify the Formal Requisites of Contracts in Mississippi by Revising the Doctrine of Consideration and the Statute of Frauds, 7 Miss. L. J. 294 (1935); Carey, Guaranties and the Statute of Frauds in Wisconsin, 2 Wis. L. Rev. 193 (1923). Starke, Part Performance and the Statute of Frauds in Colorado, 2 Rocky Mt. L. Rev. 209 (1930); Williams, Vendor and Purchaser—Statute of Frauds—Sufficiency of Memorandum, (No. Car.), 15 No. Car. L. Rev. 81 (1936); Williams, Missouri Law on Performance of Oral Contracts as a Method of Validation When Statute of Frauds Is Invoked, 20 St. Louis L. Rev. 97 (1935); Kingsley, Some Comments on the Sections of the Minnesota Statute of Frauds Relating to Contracts, 14 Minn. L. Rev. 746 (1930).

For a few close and questionable decisions in Illinois, see: Decker v. West, 273 Ill. App. 532 (1934) (partners' agreement not to compete with each other within five years of dissolution not within one-year clause of statute of frauds because death may intervene); White v. Murtland, 71 Ill. 250 (1874) (contract to support a twelve year old girl until she is eighteen years of age is not within one year provision of the statute of frauds as death may intervene); compare with Washburn v. Hoxide Institute, 249 Ill. App. 194 (1928); Butcher Steel Works v. Atkinson, 68 Ill. 421 (1873); Comstock v. Ward, 22 Ill. 249 (1859) (contract to lease for one year held to be within the statute of frauds although might possibly be performed within a year).

Faith v. Yocum, 51 Ill. App. 620 (1893) (parol license to enter and cut timber is not within statute of frauds for no interest in land is involved). Contrast with Lear v. Chouteau, 23 Ill. 37 (1859) (right to take and remove coal is an interest in land).

Gary v. Newton, 201 Ill. 170, 66 N.E. 267 (1903) (release of an expectancy in realty by an heir is a contract for an interest in land); but see, Galbraith v. McLain, 84 Ill. 379 (1877) (holding an expectancy not to be such an interest in land under the statute of frauds).

Edmonds v. Gourley, 362 Ill. 147, 199 N.E. 287 (confirmation of oral contract); Morley v. Holding Corp., 261 Ill. App. 313 (1931) (sufficiency of waiting to take contract out of the statute); Burnett v. Meisterling, 327 Ill. 564, 158 N.E. 806 (1927) (incorporation into the memorandum); Ward v. Davis, 82 Ill. 311 (1876) (incorporation of a newspaper advertisement into a memorandum); Work v. Cowhick's Adm'r, 81 Ill. 317 (1876) (incorporation of note and writing to form sufficient memorandum); DeVares v. Corea, 202 Ill. App. 465 (1916) (sufficiency of memorandum); Gentleman's Driving Club v. Union Biscuit Co., 151 Ill. App. 324 (1909) (sufficiency of memorandum); Spangler v. Danforth, 65 Ill. 154 (1872) (sufficiency of description in memorandum).

Gould v. Elgin City Banking Co., 136 Ill. 60, 26 N.E. 497 (1891) (part performance); Scott v. Desire, 175 Ill. App. 215 (1912) (part performance); Ramsey v. Leston, 25 Ill. 98 (1860) (part

complete repeal of the statute[20] and in England, where the dissatisfaction with the statute seems to be greater than in America, the Law Revision Commission has recommended complete repeal of section 4 of the statute of frauds, section 4 of the Sales of Goods Act, and section 3 of the Mercantile Law Amendment Act.[21] In America, however, while the judicial trend is to withdraw cases from within the scope of the statute, there seems to be no decided trend in state legislation.[22] Of significance is the fact that the drafters of the proposed Federal Sales Act, sponsored by the Merchants Association of New York, have reduced the figure of $500 in the Uniform Sales Act to $50 in the federal act with the avowed purpose of covering a larger volume of transactions. While such developments do indicate that some kind of formality of transaction is desired by the business and commercial world and thus complete repeal of the statute of frauds is not necessary, they do not mean that the statute is well drafted.[23] A possible statutory change might be to exclude from its operation those contracts which are proved by sufficient corroborative evidence. It is hoped that provision for law revision commissions or "ministers of justice" will be made in more and more states.[24] One undertaking of such a commission might be to make recommendations to the

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performance); Flannery v. Woolverton, 329 Ill. 424, 160 N.E. 762 (1928) (part performance); Simpson v. Wrate, 337 Ill. 520, 169 N.E. 324 (1929) (fraud as a bar to a plea of the statute of frauds).

[20] T. Williams *op. cit. supra* note 15, at 281. Willis, *op. cit. supra* note 11, at 427, 528 and authorities cited.

[21] Report of the English Law Revision Committee, The Statute of Frauds and the Doctrine of Consideration, 15 Can. Bar J. 585 (1937).

[22] Statutory changes since 1926 which seem to be drafted with a view of narrowing the scope of the statute are: Iowa L. 1925, c. 185, 171 (adds provisions to section 4 of Uniform Sales Act that contracts not denied in pleadings will be enforced and further oral evidence of the maker against whom a written contract is sought to be enforced shall be competent to establish the same). Miss. L. 1926, c. 152, 240–41 (statute now covers contracts not to be performed in fifteen months instead of one year as in previous statute). Ohio L. 1931, 110–111 (repeals extension of statute made in 1925). Cal. L. 1931, c. 1071, 2260–2262 (replaces old statute covering transactions of $200 and over with section 4 of Uniform Sales Act covering transactions of $500 or over).

Those which seem to broaden the statute are: Miss L. 1926, c. 152, 240–241 (requires authority of agent to be in writing for any contract not to be performed in fifteen months).

Penn. L. 1925, 310–11 (court held statute inapplicable to choses in action because not contained in title of act. This act revised the title so as to cover choses in action). Del. L. 1933, c. 157, 568 (inserts section of statute applying to contracts to will or devise by deceased in actions against personal representative or heirs). Del. L. 1933, c. 158, 570 (adopts Uniform Sales Act). N.Y. L. 1933, c. 574, 1188 (statute of frauds made to apply to contracts performance of which is not to be completed before the end of a lifetime; likewise to a contract to bequeath property or make a testamentary disposition of any kind; likewise to a contract to establish a trust). N.Y. L. 1934, c. 750, 1528 (applies statute of frauds to certain real property transactions and requires agent's authority to be in writing).

[23] Poor draftsmanship has been a big criticism of the act. Willis, *op. cit. supra* note 11, at 536. Also Report of English Law Revision Committee *op. cit. supra* note 21, at 590.

[24] MacDonald, The Law Revision Commission of the State of New York, 26 Georgetown L. J. 60 (1937); Shientag, A Ministry of Justice in Action—The Work of the New York State Law Revision Commission, 22 Cornell L. Quar. 183 (1937).

legislature as to desirable changes in the local statute of frauds with a view of bringing about greater uniformity in the cases and yet to conform to business and commercial practices.[25]

Corporations—Readjustment of Preferred Stockholders' Rights to Arrearages—[Wisconsin].—In an attempt to scale down arrearages on cumulative first preferred stock, the defendant corporation, among other amendments to the charter, authorized and directed the directors to declare a dividend of $20 on each share of first preferred stock, payable in non-interest bearing dividend warrants maturing in ten years and convertible into 1¼ shares of common stock. The warrants were to be offered in full discharge of all accumulated and unpaid dividends, which totaled $35 per share. By separate resolution, the board was directed to purchase the warrants at fifty per cent of face value ($10) from those desiring to sell to the corporation. The plaintiff shareholder sued to enjoin. *Held* (two judges dissenting), injunction denied. The court, however, gave the dissenting stockholder judgment for a cash dividend of $20 per share. *Johnson v. Bradley Knitting Co.*[1]

After periods of depressed earnings corporations whose capital structures contain cumulative preferred stock are often faced with accumulations of dividend arrearages which it apparently will require several years of normal earnings to discharge and which, meanwhile, prevent payment of dividends on common stock. Many corporations, in order to appease stockholders, or for other reasons such as raising new capital or improving the credit of the corporation, have attempted to meet this situation by plans of readjustment involving charter amendment. These plans may be grouped into two types: compulsory and voluntary. Under the former a charter amendment eliminating arrearages applies to all shares; under the latter stockholders are given at least an apparent option to retain their arrearages. Obviously the compulsory plan, if sanctioned by the courts, is the better from the point of view of the corporation, since all stockholders are forced to participate in the plan of readjustment.

The propriety of amendments providing for the compulsory adjustment of arrearages is largely a matter of construction of the statutes authorizing charter amendment.[2] Compulsory elimination of accrued cumulative dividend arrearages has received no favor in the courts.[3] It seems probable that a very specific statute, such as

[25] Costigan points out however that legislation cannot cover every conceivable point. Costigan, *op. cit. supra* note 15, at 35.

[1] 280 N.W. 688 (Wis. 1938).

[2] For a discussion of the background of the present practice of reserving to the state the power to alter or repeal the corporate charter, see 7 Fletcher, Cyclopedia Corporations 79 ff. (perm. ed. 1931). For a discussion of recent developments, see 46 Yale L.J. 985 (1937) and 4 Univ. Chi. L. Rev. 139 (1936).

The corporate charter may be amended either by the state or by stockholders in pursuance of an act of the legislature under the reserved power authorizing change in that manner. This note deals solely with the latter type of situation.

The constitutional problem of impairment of contract or impairment of vested rights would arise if an attempt was made to authorize by statute a change in the contract of stockholders who purchased stock before the operation of the statute.

[3] See Berle and Means, The Modern Corporation and Private Property 268 (1934); Morris v. American Public Utilities Co., 14 Del. Ch. 136, 122 Atl. 696 (1923); Keller v. Wilson & Co.,