If the agreement is an indemnity, liability is clear; *Anson's Law of Contract* states:[9]

> In a contract of guarantee there must always be three parties in contemplation: a principal debtor (whose liability may be actual or prospective), a creditor, and a third party, who in consideration of some act or promise on the part of the creditor, promises to discharge the debtors liability *if the debtor should fail to do so.* In a contract of indemnity, however, the promisor makes himself primarily liable and undertakes to discharge the liability *in any event.*

Many cases distinguishing between a guarantee and indemnity arise due to the provision in the Statute of Frauds that a guarantee must be under seal. In *Cheshire and Fifoot, Contracts* it is stated:[10]

> If the undertaking was collateral and within the Statute it was to be described as a "guarantee", if original and outside it, as an "indemnity". Such terminology is doubtless of service in clarifying the issues to be faced. But contracting parties cannot be expected to use words as legal terms of art, and it remains for the Court to interpret the sense of their language at its face value. If its purpose is to support the primary liability of a third party, it is caught by the statute (guarantee) whatever the words by which this intention is expressed. If there is no third party primarily liable the statute does not apply.

The intentions of the parties must be determined from the words used in the assignment. A review of the authorities distinguishing between a guarantee and indemnity is contained in *Crown Lumber Co. Ltd.* v. *Engel.*[11] After a review of the authorities the Alberta Supreme Court Appellate Division held the document in that case to be guarantee. Smith, C. J. looked to the purpose of the document and stated:[12]

> I am satisfied the purpose of the document of June 22, 1956 was to support the primary liability of (the borrower).

Once having made this finding the Court had no alternative but to find that the undertaking was an undertaking to the effect that if the debtor did not pay the creditor the defendant would and hence the undertaking was found to be a guarantee.

To predict the interpretation that the Alberta Appellate Division would place on the terms of such a contract is at best a difficult task and it can only be urged that the practitioners carefully examine the terms of any assignment agreement.

—E. F. MURPHY*

9 21 ed., 1959, at p. 67.
10 6th ed., 1964 at 162.
11 (1961), 36 WWR 128.
12 *Id.*, at 765.
* E. F. Murphy, Q.C., of the Alberta Bar.

REAL ESTATE COMMISSION—WHEN DUE—THE EFFICIENT CAUSE OF SALE

Seldom is there a volume of reports published, to say nothing of the many unreported cases, that does not contain a case raising the issue of when is a real estate agent entitled to commission. The problem in law is not a difficult one. The rule as borne out by the numerous cases was formulated by His Honour Mr. Justice Egbert in *Campbell & Haliburton Limited* v. *Turley*:[1]

1 (1951) 2 W.W.R. 257 at 265.

> The very simple but salutary rule that a real-estate agent is entitled to his commission if he performs the service for which he was employed and its converse but complementary rule that a real-estate agent is not entitled to his commission if he does not perform the services for which he was employed.

The problem, however, becomes difficult in applying the rule to any given set of facts. The question of whether an agent is entitled to commission is a question of fact[2] and each case must stand on its own facts.[3] It is, therefore, the author's object merely to set out a few guidelines which may be helpful in analyzing any given set of facts.

The listing of property with a real estate agent constitutes the formation of a contract and, therefore, the logical place to begin an investigation into the rights and liabilities of a real estate agent is at the listing itself.

For our purposes listings may be classified: exclusive, special, general. An exclusive listing is one where a prospective vendor has given to only one agent the right and authority to sell his house for a certain length of time. A special listing, for the purpose of this article, is a listing containing very specific conditions and stipulations governing the relationship of principal and agent. Examples of such conditions constituting a special listing are listing lands for sale for a certain period,[4] or the vendor requiring a certain amount net to him.[5] A general listing is that situation under which an agent is hired to find a purchaser who is ready, willing and able to purchase the land of the vendor.

Consider first the exclusive listing. Where a principal has signed a listing of this type and the principal's property is sold during the duration of the listing agreement, commission is payable even though the agent has done nothing to bring about the sale.[6] This proposition holds true even if the sale is not actually concluded during the period of the exclusive listing. So long as the eventual purchaser was "found" during the said period. This was the issue in the case of *Circle Realty Ltd.* v. *Bert Long & Kingsway Refrigeration Co. Ltd.*[7] However, on the facts the Court held that the purchaser was not found during the listing period but after the expiration thereof. It is a question of fact whether or not a purchaser was found during the listing period.

A contract of special agency, or a special listing, is a different matter. Contracts of this nature specify the exact terms under which the agent is engaged. Where these exact terms are not complied with the agent is not entitled to his commission.[8] To use the words of Mr. Justice Egbert, the real estate agent is not entitled to his commission if he does not perform the work for which he was employed. However, because the agent under this type of a listing has not the exclusive right to conclude a sale, a sale may result because of the efforts of another. Therefore, where a sale results under this type of a listing the agent must be in a position to show that his efforts were the efficient cause of the sale in order to entitle him to commission.[9] What amounts to the efficient cause

2 Note however that in Alberta as well as in most other Provinces a real estate agent must be licenced to entitle him to bring an action for commission. See *Real Estate Agents Licencing Act*, R.S.A. Ch. 279 s. 21 and s. 22.
3 Mr. Justice Beck in *Nicholson* v. *Debuse* (1927), 3 W.W.R. 799.
4 *Fitchell* v. *Lawton* (1919), 3 W.W.R. 728.
5 *Spracklin* v. *Knull*, [1951] 1 W.W.R. (N.S.) 413.
6 *Sumner* v. *Bosner* (No. 2) [1949] 1 W.W.R. 676.
7 (1961), 25 D.L.R. (2d) 184.
8 *McLaughlin Co.* v. *Dupins Freres Ltd.*, [1927] 2 D.L.R. 96.
9 C.E.D. (Western) Vol. 1, at 198.

of the sale will be discussed later. Therefore, the agent under a special listing is entitled to commission if he can show:

(a) That a sale was concluded on the terms as set out in the listing agreement

(b) That his efforts were the efficient cause of the sale.[10]

The final type of listing to be discussed is the general listing, where the agent is hired merely to find a purchaser with whom the vendor can negotiate a sale.[11] Then even if the purchaser, whom he has introduced to the vendor, purchases on terms different from those in the listing so long as the agent can show that his introduction was the beginning of the negotiations leading to the sale. The agent is also entitled to his commission even though the owner was unaware that the agent had introduced the purchaser to the property.[12] However, because it is often very difficult to say with any degree of certainty whether an introduction was actually the cause of an eventual sale there must be some discussion relating to the efficient cause of sale.

In *Taylor* v. *Silver Giant Mines*[13] the plaintiff agent claimed commission on a sale to a purchaser whom he originally interested in the property. However, negotiations broke down. The same two parties later re-entered negotiations and a sale was concluded. Mr. Justice Locke said:[14]

> . . . the appellant did not negotiate the sale of the Silver Giant property, within the meaning of the offer made to him, and that the services rendered by him were not the effective cause of the sale.

In contrast, it is interesting to look at *Toole Peet & Co. Limited et al* v. *Vishloff*.[15] In this case the agent introduced the eventual purchaser to the property. However, the listing was terminated and a sale subsequent thereto took place between the same parties. The Court held that the agent was entitled to his commission. In other words the Court found that the agent was the efficient cause of the sale. It should be pointed out that on the facts the above two cited cases are almost identical except that *Taylor* v. *Silver Giant Mines* dealt with a special listing while in *Toole, Peet & Co. Limited et al* v. *Vishloff* the listing was general.

In *Circle Realty Ltd.* v. *Bert Long & Kingsway Refrigeration Co. Ltd.*[16] the Court was confronted with an exclusive listing. Nevertheless, it is useful in a discussion of the efficient cause because the Court had to decide when the eventual purchaser was found. The Court decided that because the vendor had contacted the eventual purchaser before the period of the exclusive listing, such purchaser was not found during the period of the said listing. Hence the efforts of the agent could not be termed the efficient cause of the sale. The efficient cause of a sale is then that act without which the eventual sale would not have come about. It is obvious after discussing the above cases that the facts of each case must be very carefully examined in order to pinpoint the efficient cause.

—R. D. WILDE*

10 *Taylor* v. *Silver Giant Mines* [1954] 3 D.L.R. 225.
11 C.E.D. (Western) Vol. 1, at 204.
12 *Campbell & Haliburton Ltd.* v. *Turley, ante*, n. 1.
13 *Ibid.*
14 *Id.*, at 245.
15 (1965), 51 W.W.R. 577.
16 (1961), 25 D.L.R. (2d) 184.

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