should be taken in the examination and preparation of share purchase options, stock option interests and conversion privileges in bonds.

Alberta practitioners are particularly vulnerable, for in the petroleum and mining industries one frequently has to cope with agreements whereby the right or option is granted to select lands owned by the grantor described as "common interest areas" or "after acquired lands". Indeed, on any occasion when the rights of a party to an agreement are deferred to a future time and the interest of such party is not immediately vested, a warning note should sound in the ear of the examiner or draftsman.

In conclusion, the question might well be asked if the rule against perpetuities should be applied in modern times with all its vigour and rigidity. It has been suggested that the rule should not apply to options of any kind and that it is unwise to apply it to commercial transactions where lives in being or the period of 21 years clearly have no significance. The argument follows that it is unfair when the option, which may form a material part of a commercial contract, violates the rule against perpetuities that the entire option is void rather than the period in excess of the time limit prescribed by the rule. This results in one party losing an advantage thought to have been given him for valuable consideration when the other party may be equally to blame for the inclusion of the invalid option. As is said in *Morris and Leach*[6] the rule against perpetuities thus, "becomes a destroyer of bargains which in all conscience ought to be performed."

In view of the decision of the Supreme Court in the *Harris* case it would appear that if reform is to be had, it must come from the legislature and not the courts.

—R. A. MacKimmie*

6 *Id.*, at 219.
* R. A. MacKimmie, Q.C. of the Alberta Bar.

COMMERCIAL LAW—SECTION 19 OF THE CONDITIONAL SALES ACT—THE EFFECT OF AMENDMENT ss. 5—VOLUNTARY REPOSSESSION—EXTINGUISHING INDEBTEDNESS

Two Parts: *

THE CONDITIONAL SALES ACT[1]

19. (1) subject to subsections (6) to (8) this section applies only to a sale or agreement for the sale of goods made *before or after the commencement of this section of any of the following kinds, namely,*

(a) an agreement for sale under which the right of property in the goods remains in the seller until the purchase price is paid in full or until some other condition is fulfilled, and ....

(5) When goods

(a) are surrendered by the buyer to the seller with the seller's consent, or

(b) are seized pursuant to the agreement....

the indebtedness of the buyer under the agreement or under the judgment, to the extent that it is based on the purchase price of the goods is extinguished, and

* Editorial note—each part was contributed independently but are presented together here as both deal with s. 19 of the Act.
1 1965 S.A., c. 15.

any monies thereafter paid in respect of the purchase price, or judgment therefor, are recoverable by action against the seller.

PART I:

THE RELATIONSHIP OF PURCHASER AND LENDER FINANCE CO. In an unreported action of *Beneficial Finance Company* v. *Pritchard* the plaintiff Finance Company commenced action against the defendants claiming a balance owing by virtue of a promissory note. The evidence advanced by the plaintiff was that it had advanced a sum of money to the defendants who intended to use it for the purchase of an automobile. A promissory note was executed in favour of the plaintiff by the defendants as primary security for the loan and the money was advanced. A chattel mortgage on the said vehicle was then executed in the plaintiff's favour as collateral security. The defendants defaulted in payments, the plaintiff regained possession and sold the subject vehicle under the terms of the chattel mortgage and a Quit Claim and Authorization to Sell executed in their favour by the defendants. The action brought was for a deficiency balance after the sale proceeds were applied to the indebteness.

The defendants called no evidence but raised the argument that the action was, in substance, for the purchase price of the chattel and relied upon Section 19(5) (a) of *The Conditional Sales Act* as amended in 1965 (see above).

From the evidence it was abundantly clear that the plaintiff could not, in any way, be deemed to be the seller of the vehicle but rather as merely providing funds by way of a loan to the defendants to enable them to purchase the vehicle. The promissory note and chattel mortgage were taken from the defendants directly and not by way of endorsement or assignment from the seller of the automobile. No evidence was adduced to support an argument that the transaction was one intending to defeat the purposes of *The Conditional Sales Act* and therefore, the *ratio decidendi* of *Personal Loan and Finance Corporation* v. *Kennedy*[2] could not be applied.

Since the relationship between the plaintiff and defendant was not one of buyer and seller but rather as lender and borrower it was held Section 19 would not apply even though the indebtedness is related, indirectly, to the purchase price of the vehicle.

In *Beneficial Finance Co. of Canada* v. *Ockey*,[3] an unreported judgment of His Honour Judge A. Beaumont, His Honour, on facts almost identical, came to the conclusion that Section 19 had no application to such a relationship . In the *Ockey* case the plaintiff (lender) had made the funds payable solely and directly to the car dealer who sold the vehicle to the defendants which fact goes one step farther than the *Pritchard* case.

Quoting from his judgment:

> In my opinion the the Defendants borrowed $310,78 from the Plaintiff, gave it to Rambler Motors (Calgary) Ltd., in payment for a car, and then, having obtained clear title to the car, mortgaged same to the Plaintiff as collateral security for their said Note. The Rambler Motors (Calgary) Ltd., couldn't have cared less

2 [1948] 1 W.W.R. 318.
3 District Court of the District of Southern Alberta, Judicial District of Calgary, number C 32954.

whether the Defendants ever paid their indebtedness to the Plaintiff. They had been paid in full the purchase price of the car sold.

The Defendants plead Section 19 of The Conditional Sales Act, Ch. 54, R.S.A. 1955. I am of opinion this Act does not apply to the transaction in question. I consider this is a fact because the defendants could not have given the plaintiff a valid "Lien Note" on the car as security for the said Promissory Note.

—W. KEMPO*

PART II:

THE RELATIONSHIP OF DEALER AND ASSIGNEE FINANCE COMPANY—WHETHER GUARANTEE OR INDEMNITY. It is to be noted that the recent amendment to section 19 (5) of the Conditional Sales Act differs substantially from the previous section 19. Under the old section 19 a deficiency balance or the full amount of purchase price due was recoverable by the seller or his assignee when goods were merely repossessed by consent. The vendor or his assignee was only prevented from suing for any deficiency if there was a seizure of the goods.

Another perhaps more significant difference in the effect of the amendment to section 19 is the use of the words "the indebtedness of the buyer under the Agreement . . . . is extinguished". Under the prior section 19 the indebtedness was not stated to be extinguished but the section merely restricted the vendor's rights to recover the unpaid purchase price to his lien on the goods or chattels. That the effect of section 19 prior to the amendment was not to extinguish the debt but merely make the vendor's right of action unenforceable is clearly set out in the judgment of Aikens, J. in the case of *Industrial Acceptance Corporation Limited* v. *White*:[1]

> Secondly, I am of the opinion that the effect of section 19 (1) is not to extinguish the debts but merely to take away any right of action otherwise maintainable under the Conditional Sales Agreements against the purchasers or any part of the purchase price constituting a deficiency after repossession and resale. In my opinion, the reasoning of Judson, J. delivering the judgment of the Supreme Court of Canada in *Edmonton Airport Hotel Co. and Superstein* v. *Credit Foncier Franco-Canadian* (1965), 51 WWR 431, at 434; (1965) SCR 414, affirming (1964) 48 WWR 641, with reference to Section 164, applies, namely, the statutory provision is a procedural limitation. The debts are not extinguished but do become unenforceable against the purchasers.

In the *White* case Aikens, J. was interpreting the Conditional Sales Act prior to the amendment to section 19 and although he refers to repossession and re-sale his opinion relates to the liability of a guarantor as if there had been seizure and sale prior to the amendment.

The law is clear that if the primary obligation under a guarantee is void then the guarantor cannot be made liable. This is set out in the decision of Lord Porter in *Mahanth Singh* v. *U Ba Yi*,[2] where Lord Portor states at page 620:

> Not every unenforceable contract is declared void but only those unenforceable *by law* and those words mean not unenforceable by some procedural regulation but unenforceable by the substantive law. . . . A mere failure to sue within the time specified by the statute of limitations or an inability to sue . . . would not cause a contract to become void.[3]

The case of *Commercial Bank of Tasmania* v. *Jones* is often referred to as authority for the proposition that a release of the principal debtor

* W. Kempo, Magistrate, Edmonton.

1 (1965), 54 W.W.R. 312 at 135.

2 [1939] W.W.R. 613.

3 See also *Swan* v. *Bank of Scotland* (1836), 6 E.R. 231; *Brown* v. *Movie* (1902), 32 S.C.R. 93.

or extinguishment of the principal debt elimates any remedy against the surety. Lord Morris states:[4]

> It may be taken as settled law that where there is an absolute release of the principal debtor, the remedy against the surety is gone because the debt is extinguished, and where such actual release is given no right can be reserved because the debt is satisfied and no right or recourse remains when the debt is gone. . . . But a covenant not to sue the principal debtor, is a partial discharge only, and, although expressly stipulated, is ineffecutal, if the discharge given is in reality absolute.

In the *Jones* case there was a novation of the debt to a third party and it was held to have necessarily operated as an absolute release of the principal debtor.

The decision of Duff, J. in *Morrin* v. *Hammond Lumber Co.*[5] also indicates the necessity of a principal obligation:

> Such being the facts, it seems clear that the undertaking by the respondent to pay was an independant undertaking and not a contract of suretyship. A contract of guarantee necessarily presupposes the existence of a principal obligation.[6]

The amendment now clearly differs from section 19 of the Conditional Sales Act as it previously read and also differs from section 34 (17) of the Judicature Act as considered in the *Superstein* case. The amendment clearly specifies that the primary obligation is extinguished and by operation of law the guarantor cannot be held liable.

A fairly recent Alberta Supreme Court Appellate Division case indicates that the terms of a guarantee may be such that the guarantor is liable and a remedy is preserved against him even though there is no primary obligation. The head note in *Re Winding Up Act, Canada, Re: McDonnell Holdings Canada Limited* states as follows:[7]

> When the goods the subject of a lien are seized by the vendor section 19(1) of the Conditional Sales Act RSA 1965 Chapter 54 operates as to take away the right of the purchaser's surety to sue the purchaser and, therefore the surety is released from his guarantee, his rights having been prejudiced by the seizure without his consent unless the terms of his guarantee preserve a remedy against him in such a case.

This head note was quoted with approval by Aikens, J. (British Columbia Trial Court) in *Industrial Acceptance Corporation Limited* v. *White* where it is stated:[8]

> I refer here to the particular words embodied in the quotation from the guarantee bond which I have already given: "Nor by the termination for any cause whatsoever of any right of the corporation against any person.

In the *McDonnell Holdings* case it was found that the assignment did not contain any provisions by which the guarantor agreed to remain liable under its guarantee notwithstanding that the creditor might elect to seize and therefore lose its rights to maintain any action against the primary debtor. In the *White* case the guarantor was found liable on the words above quoted which had the effect of maintaining the liability of the guarantor.

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4 [1893] A.C. 313 at 315.
5 [1923] S.C.R. 140.
6 See also *Canadian Acceptance Corporation Limited* v. *Fisher* (1956), 20 WWR 119 and *Shaffer* v. *O'Neil* (1943), 2 WWR 641, and appeals of same.
7 (1963), 41 WWR 699.
8 *Ante*, n. 1, at 316.
See also, *Canadian Acceptance Corporation Limited* v. *Albert A. Roth et al*, unreported judgment, Supreme Court of Alberta (Trial Division) Feb. 8, 1961.

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.