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REAL ESTATE—The Wyoming Installment Land Contract: A Mortgage in Sheep's Clothing? or What You See Isn't What You Get. *Metropolitan Mortgage & Securities Co. v. Belgarde*, 816 P.2d 868 (Wyo. 1991).

On May 4, 1982, Charles P. Belgarde entered into an Agreement for Warranty Deed with Del and Caroline Schilling for the purchase of property in Gillette, Wyoming.¹ The terms of the Agreement called for a total purchase price of \$495,000, of which \$200,000 was to be paid to the Schillings in monthly installments of \$2,500.² On January 31, 1986, the Schillings assigned their interest in the Agreement for Warranty Deed to Metropolitan Mortgage & Securities Co. (Metropolitan), a Washington corporation.³ When Belgarde defaulted on his monthly payments to Metropolitan in August of 1988,⁴ Metropolitan's counsel elected not to declare the Agreement null and void or to retake possession of the property,⁵ but instead elected to pursue an action for specific performance of the Agreement.⁶

Both Metropolitan and Belgarde filed motions for summary judgment, claiming a lack of any genuine issue of material fact.⁷ Metropolitan sought a decree ordering Belgarde to complete payment, justifying the equitable remedy of specific performance by contending that the lack of an acceleration clause⁸ in the Agreement would

1. *Metropolitan Mortgage & Securities Co. v. Belgarde*, 816 P.2d 868 (Wyo. 1991) (No. 89-253).

2. *Id.* at 870. The Agreement provided that the Schillings would execute at closing a warranty deed conveying the property to Belgarde, and, similarly, that Belgarde would execute a quitclaim deed conveying his interest back to the Schillings. Both documents were placed in an escrow which provided for delivery of all the documents to the Schillings upon Belgarde's default, or, alternatively, to Belgarde upon full payment under the Agreement. Possession of the property passed to Belgarde upon execution of the Agreement.

3. *Id.* At the time of the assignment to Metropolitan, unpaid principal in the amount of approximately \$190,761 remained owing by Belgarde. *Id.*

4. When notice of default was served, Belgarde was in arrears for approximately \$17,995. Affidavit in Support of Plaintiff's Motion for Summary Judgment, Exhibit B, Record at 26.

5. The default clause of the Agreement for Warranty Deed provided that, "[S]ellers, at their option, may declare this agreement null and void and may, with or without process of law, take immediate possession of the said premises" Memorandum of Law in Support of Defendant's Motion for Summary Judgment, Exhibit A, Record at 45.

6. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, Record at 17-18.

7. *Metropolitan*, 816 P.2d at 870.

8. *Id.* at 878 (Macy, J., dissenting). In a typical installment land contract, the parties provide that, upon the buyer's default, his right to purchase the property through installment payments is terminated and the full purchase price is due. 3 RICHARD R. POWELL, LAW OF REAL PROPERTY § 450[1][b][ii] (1992). In the absence of a clause giving the vendor the option of accelerating the remaining purchase price upon a buyer's default, a vendor is prevented from bringing suit to force a purchaser to pay the entire outstanding balance. G. Booker Schmidt, Note, *The Decline of the Contract for Deed in Oklahoma*, 14 TULSA L.J. 557, 564, n.49 (1979).

otherwise force the company to pursue the inadequate legal remedy of bringing serial actions.⁹ In the Defendant's Motion for Summary Judgment, Belgarde argued that the Agreement for Warranty Deed limited Metropolitan to executing a forfeiture and retaking possession of the property.¹⁰ The district court judge determined that Wyoming law allowed specific performance to buyers under an installment land contract, but did not allow a vendor to obtain a specific order requiring the purchaser to complete his purchase.¹¹ The judge granted Belgarde's Motion for Summary Judgment, holding that the only remedy available to Metropolitan lay in retaining the sums paid by Belgarde and retaking the property.¹²

Metropolitan appealed to the Wyoming Supreme Court, presenting two issues relating to the propriety and availability of specific performance as a vendor's remedy under an installment land contract in Wyoming.¹³ The court found that it was precluded from addressing these issues insofar as there existed a genuine issue of material fact relating to whether the transaction was intended as an installment land contract or as a mortgage transaction.¹⁴ The Wyoming Supreme Court reversed the district court's summary judgment and remanded the case for trial to determine the nature of the transaction as intended by the original parties.¹⁵ Though it carefully avoided ruling on the question whether vendors having installment land contracts like that in *Metropolitan* would be limited entirely to the remedy of forfeiture as a matter of law, the supreme court did suggest such a limitation.¹⁶

This casenote addresses the status of installment land contracts in Wyoming real estate law, focusing particularly on the limitations imposed on such transactions by the Wyoming Supreme Court's holding in *Metropolitan Mortgage & Securities Co. v. Belgarde*. It will suggest that the Wyoming Supreme Court is looking toward

9. Hearing on Motion for Summary Judgment, August 9, 1989, Record at 85. Pursuing serial actions, as the name implies, refers to bringing a series of identical actions. See Robert Isham, Note, *The Default Clause in the Installment Land Contract*, 42 MONT L. REV. 110, 115 (1981). Due to the original drafter's failure to include an acceleration clause in the Agreement for Warranty Deed, Metropolitan had no contractual right to seek Belgarde's payment of amounts that had not yet come due. Only when and as the amounts became past due each month would Metropolitan be allowed to seek payment of those amounts.

10. *Metropolitan*, 816 P.2d at 871.

11. Hearing on Motion for Summary Judgment, August 9, 1989, Record at 68.

12. *Metropolitan*, 816 P.2d at 871.

13. The issues were presented as follows:

- I. Did the trial court err in ruling that specific performance was not an appropriate seller's remedy in this case?
- II. Did the trial court err in ruling that the seller was limited to the remedy of forfeiting the contract and taking the property back?

Id. at 869.

14. *Id.*

15. *Id.* at 875.

16. See *infra* note 125.

forfeiture as the sole remedy under such a contract¹⁷ and is sharply restricting the terms which can be drafted into the instrument itself. As an element of this suggestion, the casenote will submit that the inclusion of any remedy beyond forfeiture within the language of the contract, or an attempt to pursue any other remedy will lead the court to interpret and enforce the contract as a mortgage.

BACKGROUND

A mortgage is a transaction by which a mortgagor retains his title, but subject to a lien which allows the mortgagee to assert an ownership claim over the mortgagor's property should the mortgagor default.¹⁸ If the mortgagor defaults on his payments, the mortgagee is entitled to invoke a foreclosure proceeding by which he may sell the mortgaged property for satisfaction of the mortgagor's debt.¹⁹ Upon satisfaction of the mortgagor's obligation, the mortgage is discharged and the mortgagor's title is cleared.²⁰

Like the mortgage, payment for real property purchased under an installment land contract²¹ occurs through installment payments made over a period of years.²² Although the purchaser obtains possession of the property upon execution of the contract, legal title is retained by the vendor.²³ Unlike the mortgagor, however, the installment land contract vendor is not required to pursue foreclosure in the event of a purchaser's default. Instead, because of the contractual nature of the installment land contract, the vendor can include a contract clause allowing forfeiture of the purchaser's interest in the property, improvements to the property, and any payments made under the contract.²⁴ This allows vendors to bypass many of the mortgagor protections which states have enforced in mortgage transactions.²⁵

17. *But see infra* note 120.

18. BLACK'S LAW DICTIONARY 1009 (6th ed. 1990). The mortgage is not an independent transaction but is given only as security for the payment of an underlying debt or promised performance. 3 AMERICAN LAW OF REAL PROPERTY § 25.03[1][a] (Arthur R. Gaudio ed., 1992) [hereinafter GAUDIO].

19. *Id.* § 25.02[1][a].

20. *Id.* § 25.07[1][a].

21. Installment land contracts are alternatively referred to as contracts for deed, installment land sale contracts, and long-term land contracts. GRANT NELSON & DALE WHITMAN, REAL ESTATE FINANCE LAW § 3.26 (1985).

22. 7 POWELL, *supra* note 8, ¶ 938.20[1]; 3 GAUDIO, *supra* note 18, § 25.02[3][c].

23. NELSON & WHITMAN, *supra* note 21, § 3.26; GEORGE RUDOLPH, THE WYOMING LAW OF REAL MORTGAGES 147-8 (1969).

24. *See infra* notes 55-57 and accompanying text.

25. *See infra* notes 59-61 and accompanying text.

The parties in an installment land contract may select the contract over a mortgage for two primary reasons. First, in case of default, installment land contracts allow a vendor to avoid the expense and delay involved in executing a foreclosure.²⁶ Avoiding foreclosure allows the vendor to bypass the considerable time and expense involved in the public sale necessary to dispose of the property.²⁷ The second benefit of the installment land contract over the mortgage is twofold. The installment land contract allows those who are purchasing property for the first time or who are unable to obtain adequate financing to fund the purchase price through the vendor.²⁸ Additionally, because a purchaser is willing to waive his rights to foreclosure and redemption, he may be able to obtain financing from the vendor at a lower interest rate²⁹ or to initiate the purchase with a smaller down payment than would be required under an ordinary purchase money mortgage.³⁰

The Installment Land Contract in Wyoming

In one of the earlier Wyoming cases dealing with installment land contracts, the Wyoming Supreme Court recognized the installment land contract as a unilateral instrument rather than a bilateral one.³¹

26. RUDOLPH, *supra* note 23, at 146. The installment land contract also traditionally allowed the vendor to avoid the purchaser's equity of redemption. The avoidance of the time and expense of foreclosure *and* the purchaser's right to redeem would allow the vendor to follow the purchaser's default with a quick and simple assertion of fee simple title to the property. NELSON & WHITMAN, *supra* note 21, § 1.7.

Wyoming's statutorily granted right of redemption allows a defaulting purchaser to redeem property from a mortgage foreclosure up to three months *after* the date of the foreclosure sale. WYO. STAT. § 1-18-103(a) (1977) provides:

(a) [I]t is lawful for any person . . . whose real property has been sold by virtue of an execution, decree of foreclosure, or foreclosure by advertisement and sale within three (3) months from the date of sale, to redeem the real estate by paying to the purchaser . . . the amount of the purchase price or the amount given or bid if purchased by the execution creditor or by the mortgagee under a mortgage, together with interest at the rate of ten percent (10%) per annum from the date of sale plus the amount of any assessments or taxes and the amount due on any prior lien which the purchaser paid after the purchase, with interest. On payment of this amount the sale and certificate granted are void.

27. See WYO. STAT. §§ 34-4-101 to 34-4-113 (1977) for the Wyoming foreclosure procedures and WYO. STAT. § 1-18-101 (1977) for the requirement that there be a public sale.

28. 7 POWELL, *supra* note 8, ¶ 938.20[2]; NELSON & WHITMAN, *supra* note 21, § 1.7.

29. The benefit of a lower interest rate should not be dismissed. On a 30 year note for \$50,000, an interest rate increase from 9% to 10% makes a difference of \$36.48 in the monthly payment, or \$13,132.80 over the life of the debt.

30. Schmidt, *supra* note 8, at 569. See also 7 POWELL, *supra* note 8, ¶ 938.20[2]. Note that in *Metropolitan*, Belgarde made a down-payment of \$6,042 on the total purchase price of \$495,000. This reveals a down payment of marginally more than 1.2% of the total purchase price. *Metropolitan*, 816 P.2d at 870.

31. *Olds v. Little Horse Creek Cattle Co.*, 140 P. 1004, 1007 (Wyo. 1914). *But see* 7 POWELL, *supra* note 8, ¶ 938.24[2]; *In Re Estate of Ventling*, 771 P.2d 388 (Wyo. 1989); and *McKone v. Guertzen*, 811 P.2d 728 (Wyo. 1991) (acknowledging the proposition of a purchaser's equitable interest in property purchased under an installment land contract).

In a typical contract for the sale of real estate,³² the parties' obligations are mutually dependent; one party's promise to perform is given in exchange for, and is conditional upon, the other party's promise to perform. The vendor's conveyance of title is dependent on the purchaser's payment of the purchase price and, similarly, the purchaser's payment of the purchase price is dependent on the vendor's conveyance of title. Under the unilateral installment land contract, however, there is no mutuality of obligation; the vendee's promise is independent of the vendor's, and only through complete performance under the contract can the vendee accept the vendor's offer to sell the property at the purchase price.³³

In *Baldwin v. McDonald*,³⁴ the Wyoming Supreme Court took a large step in distinguishing the Wyoming installment land contract from the mortgage. In *Baldwin*, the lender had loaned money to a borrower in return for a deed to the premises as security.³⁵ Additionally, a conditional sales contract had been entered into with the lender promising to reconvey the deed to the borrower upon repayment.³⁶ The contract provided that, upon default, either the agreement would become null and void and all payments made under it would be forfeited to the lender/vendor, or, at his option, the vendor could pursue a collection action against the borrower/purchaser to recover all amounts remaining due under the contract.³⁷ Upon the purchaser's default, the vendor initiated an action, requesting, *inter alia*,³⁸ that

32. The difference between the typical land purchase agreement and the installment land contract is of paramount import and should be noted here. The former is merely an instrument to bind the parties for the relatively short period between execution of the purchase contract and the closing of the transaction. The latter is an executory contract for the purchase of land which governs the parties' interactions during the life of the transaction. NELSON & WHITMAN, *supra* note 21, § 3.26.

33. 3A ARTHUR L. CORBIN, CORBIN ON CONTRACTS §664 (1964). See also Schmidt, *supra* note 8, at 561 n.34, "When one party must perform or stand ready to perform before the other party is required to perform, the promise of the party who must perform first is said to be independent and the other party's performance is said to be dependent"; and *Metropolitan*, 816 P.2d at 874:

Under a true unilateral contract, the concept normally applicable to an installment land contract because it provides for acceptance only through performance of the stated conditions, the offeree or buyer would be bound to no obligations whatsoever, including any duty to pay liquidated damages. Until he had accepted by paying according to the instrument, no contract existed. It was only an offer until the buyer had completely performed the conditions attached to the offer to sell.

34. 156 P. 27 (Wyo. 1916).

35. Though this is more recognizable as a security deed than an installment land contract, the issues dealt with in *Baldwin*, particularly those of intent and the availability of a deficiency judgment to an installment land contract vendor, are fundamental to the court's analysis and resolution of *Metropolitan*.

36. *Baldwin*, 156 P. at 28.

37. *Id.* at 33.

38. The vendor's complaint also requested (1) that he be given a judgment for the principal sum and interest, (2) that he be given a judgment for the taxes paid, with interest, (3) that the decree order the sale of the premises and the proceeds applied to the amount owed him by the purchaser, and (4) that the purchaser be barred and foreclosed of all rights to the property, including the equity of redemption. *Id.*

the deed and contract be adjudged a mortgage and that the purchaser's interest in the mortgaged property be foreclosed.³⁹ The Wyoming Supreme Court considered the district court's judgment granting the vendor's request for foreclosure to be based upon "equitable principles" and determined the remedy to be a proper one often used in ordinary foreclosure proceedings.⁴⁰ Perhaps most importantly to an analysis of *Metropolitan*, the court determined that the transaction's classification as a mortgage or as an installment land contract depended finally upon the intentions of the parties,⁴¹ and that under an installment land contract, a vendor should be precluded from obtaining a deficiency judgment.⁴²

In *Cliff & Co. v. Anderson*,⁴³ the court again dealt with questions regarding the true nature of an installment land contract. Cliff & Co. purchased all of the stock of a corporation owning the assets of a bar and hotel in Gillette. Payment for the stock was to be made in monthly installments to an escrow account at Stockmens Bank & Trust Company.⁴⁴ Cliff & Co. executed a number of closing documents, including a purchase agreement, a promissory note to the vendors for the balance of the purchase price, and a mortgage granting the vendors a security interest in the property.⁴⁵ However, the default

39. *Id.*

40. *Id.* at 35. Though the court concluded that the transaction was a mortgage, it found the form of the vendor's foreclosure to be technically deficient in its failure to provide the purchaser with an adequate period of redemption and remanded the action for a new trial. *Id.* at 36.

41. *Id.* at 37. The *Metropolitan* court relied heavily upon *Baldwin* and its progeny for the proposition that a mortgage will not be found without some showing of the parties' intentions to create a security transaction.

The court dealt with the intent issue again in *Angus Hunt Ranch, Inc. v. REB, Inc.*, 577 P.2d 645 (Wyo. 1978) in which the purchasers argued that the presence of a redemption clause within the text of the installment contract indicated that the transaction should be treated as an equitable mortgage. *Id.* at 649. The court disagreed, commenting that there was little possibility that an installment land contract not deviating too far from the usual contract terms would be misconstrued as a mortgage. *Id.* (citing *RUDOLPH*, *supra* note 23, at 147). Shortly after *Angus Hunt*, the court relied on *Baldwin* and *Angus Hunt* for the proposition that there must be shown a clear *intent* by the parties to establish a mortgage rather than an installment land contract. *Barker v. Johnson*, 591 P.2d 886 (Wyo. 1979). See also George Santini, Note, *Installment Land Sale Contracts: Avoiding the Harshness of Forfeitures*, 15 LAND & WATER L. REV. 773 (1980). Later, in *Marple v. Wyoming Production Credit Association*, 750 P.2d 1315 (Wyo. 1988), the court seemingly resolved the issue of intent by observing that when the nature of the arrangement could not be determined, it should be defined as a mortgage so as to protect the purchaser from forfeiture and to safeguard his right of redemption. *Marple*, 750 P.2d at 1318 (citing *Martino v. Frumkin*, 462 P.2d 853 (Ariz. 1970)).

42. *Baldwin*, 156 P. at 37. The deficiency judgment allows a mortgagee to sue and obtain a judgment against the mortgagor's obligation. The mortgagee may then enforce the judgment against the personal property of the mortgagor. *NELSON & WHITMAN*, *supra* note 21, § 8.1.

43. 777 P.2d 595 (Wyo. 1989).

44. *Id.* at 597.

45. *Id.* Also executed were (1) a security agreement granting appellees a security interest in various furniture and equipment of the corporation, (2) an assignment back to the appellees of the corporation's stock, and (3) escrow instructions to Stockmens Bank & Trust Company. *Id.*

provisions of these documents differed: the purchase agreement permitted forfeiture, the promissory note allowed acceleration of the full remaining balance for collection, and the mortgage provided a 30-day period in which to cure any default and an express consent by the purchasers to the entry of a personal deficiency judgment.⁴⁶ The vendors then conveyed a warranty deed for the property directly to the purchasers. Following the purchasers' default, the vendors filed suit seeking judgment on the promissory note, foreclosure on the mortgage, and a deficiency judgment.⁴⁷

In their answer, the purchasers asserted that the vendor's only remedy was enforcement of the purchase agreement's forfeiture provision,⁴⁸ arguing that the inconsistency of the default provisions created an ambiguity in the documents which precluded the lower court's summary judgment.⁴⁹ The Wyoming Supreme Court found that the presence of more than one remedy did not create any ambiguity, but merely entitled the vendors to alternative remedies under the terms of the agreement.⁵⁰ However, the court went beyond the district court's holding to examine whether the transaction was accomplished under an installment land contract or a conveyance with a mortgage back, recognizing that the forfeiture provision would be unenforceable under the latter.⁵¹ Because fee simple title vested in the purchaser Cliff & Co., and because the agreement contained a mortgage back to the

46. *Cliff & Co.*, 777 P.2d at 599.

47. *Id.* at 597.

48. Justice Macy, writing for the court, noted the curious state of affairs wherein the purchasers were arguing for the imposition of forfeiture:

The posture of appellants in this case is diametrically opposed to that normally taken by purchasers in cases of this sort. In the usual situation, the purchaser wishes to avoid the harshness of a forfeiture and seeks to have the agreement construed as a mortgage with the attendant protections afforded by mortgages, including the right of redemption and the right to surplus proceeds upon foreclosure sale. Appellants' position is again a reflection of the previously noted deflated property values in Campbell County.

Cliff & Co., 777 P.2d at 598 n.6. Like the purchaser in *Cliff & Co.*, *Metropolitan's* purchaser, Belgarde, sought the enforcement of a forfeiture. Due to the deflation in property values, sale of the properties in *Cliff & Co.* and *Metropolitan* would have been unlikely to recoup the full amount of the purchaser's indebtedness. A deficiency judgment would have allowed the vendor recourse directly against the purchaser for the balance remaining owing. However, the purchasers in *Metropolitan* and *Cliff & Co.* separately argued that if the vendor's remedy lay solely in forfeiture, no deficiency should result, for the recovery of the property and retention of payments fully recompensed the vendor's damages.

49. The district court's summary judgment had granted appellee Anderson the right to pursue foreclosure and to obtain a judgment for any deficiency, treating the transaction with *Cliff & Co.* as a mortgage. *Cliff & Co.*, 777 P.2d at 596.

50. *Id.* at 600.

51. *Id.* at 600-01. As in many other jurisdictions, the validity of a purchaser's quitclaim deed executed with the mortgage remains open to question in Wyoming. The equitable doctrine which prohibits "clogging the mortgagor's equity of redemption" provides that no agreement contained in or executed contemporaneously with the mortgage can cut off the mortgagor's equity of redemption without the mortgagee's resort to foreclosure. NELSON & WHITMAN, *supra* note 21, § 3.1; 7 POWELL, *supra* note 8, ¶ 938.21[1]; RUDOLPH, *supra* note 23, at 147.

vendor which was expressly stated to be security for the balance of the purchase debt, the court found the requisite intent to create a mortgage transaction,⁵² and, on that basis, invalidated the forfeiture provision of the purchase agreement.⁵³ The court reiterated in *Cliff & Co.* its stance from *Baldwin* that the vendor will not be entitled to a deficiency judgment when a transaction is accomplished under an installment land contract.⁵⁴

The Remedy of Forfeiture

Forfeiture is one of the primary installment land contract remedies available to vendors that does not result in a deficiency judgment.⁵⁵ Installment land contracts almost always contain a forfeiture clause that enables the vendor, upon the purchaser's default, to terminate the contract, recover the property, and retain all installments paid either as rent for the property⁵⁶ or as liquidated damages.⁵⁷ Traditionally, American courts were more than willing to strictly enforce forfeiture provisions in favor of the vendor, leaving installment land contract purchasers unprotected from the harshness of the forfeiture remedy.⁵⁸ While the mortgagor was protected by an equity of redemption,⁵⁹ a foreclosure sale requirement,⁶⁰ and an inability to waive any of these mortgagor protections at the time of mortgage execution,⁶¹ generally no such protections were afforded to the purchaser under the installment land contract. Indeed, the installment land contract purchaser has traditionally been given very little relief. He is without the right of redemption that protects the mortgagor and he is unable to recover his payments should those payments exceed the vendor's damages.⁶²

Because installment land contract purchasers have been viewed as "poorly advised and lower in wealth and business expertise,"⁶³ "credit risks,"⁶⁴ "low-income,"⁶⁵ and "unsophisticated,"⁶⁶ and per-

52. *Cliff & Co.*, 777 P.2d at 601.

53. *Id.* at 602.

54. *Id.* at 601 (citing *Baldwin*, 156 P. 27, 37 (Wyo. 1916)).

55. 7 POWELL, *supra* note 8, ¶ 938.20; 3 GAUDIO, *supra* note 18, §§ 25.02[3][c][i], 25.02[3][c][iii][A].

56. 5 CORBIN, *supra* note 33, § 1098A.

57. 7 POWELL, *supra* note 8, ¶ 938.22[2].

58. *Id.* ¶ 938.20[3]; NELSON & WHITMAN, *supra* note 21, § 3.27.

59. WYO. STAT. § 1-18-103 (1977), *supra* note 26; NELSON & WHITMAN, *supra* note 21, §§ 1.3, 1.4.

60. WYO. STAT. § 1-18-101 (1977).

61. RUDOLPH, *supra* note 23, at 147; 7 POWELL, *supra* note 8, ¶ 938.20[3]; NELSON & WHITMAN, *supra* note 21, §§ 1.4, 1.7. See also *supra* note 51.

62. Isham, *supra* note 9, at 116.

63. 7 POWELL, *supra* note 8, ¶ 938.23[4].

64. Jeffrey W. King, Comment, *Forfeiture: The Anomaly of the Land Sale Contract*, 41 ALB. L. REV. 71, 75 (1977).

65. *Id.*

66. NELSON & WHITMAN, *supra* note 21, § 3.33.

haps because courts have recognized the harshness of forfeiture on purchasers, judicial protection of purchasers has generally been strengthened in recent years.⁶⁷ Forfeiture is often viewed as an equitable remedy, so courts may feel justified in molding their enforcement and altering the rights of the parties so as to achieve a "fair" result.⁶⁸ To protect a purchaser's substantial equitable interest in the property,⁶⁹ courts may bar the forfeiture remedy entirely, requiring instead that the seller foreclose on the purchaser's interest.⁷⁰ Consequently, the forfeiture remedy has become much less certain and much less reliable in many jurisdictions.⁷¹

In Wyoming, however, forfeiture remains a remedy for the installment land contract vendor. In *Younglove v. Graham & Hill*,⁷² for instance, the Wyoming Supreme Court expressed its belief that a purchaser should be relieved from forfeiture only if he were able to establish "some special ground of equitable cognizance."⁷³ The court declined to accept a forfeiture of 29% of the purchase price as sufficient to constitute such an equitable factor, particularly in light of similar forfeitures allowed in previous Wyoming cases.⁷⁴ The court allowed forfeiture again in *Barker v. Johnson*⁷⁵ and *Marcam Mortgage Corp. v. Black*.⁷⁶ In *Barker*, the court looked more toward strict contractual interpretation to find grounds for forfeiture, claiming that if the purchasers did not perform in a timely fashion, their rights would be forfeited.⁷⁷ In *Marcam*,⁷⁸ the court qualified its allowance of forfeiture by suggesting that a forfeiture enforced against a default that had occurred in the last few months of the contract would not be allowed.⁷⁹ At the present time, though, it seems that

67. 7 POWELL, *supra* note 8, ¶ 938.20[3].

68. *Id.* ¶ 938.22[2].

69. A purchaser's equity can arise or increase as a result of his continued payments on the purchase price, his improvements to the property, and through the inflation of property values. *Id.* ¶ 938.20[3].

70. *Id.* ¶ 938.24[5]. Colorado, for instance, has taken this approach to installment land contract enforcement. See *infra* note 128.

71. 7 POWELL, *supra* note 8, ¶ 938.20[3].

72. 526 P.2d 689 (Wyo. 1974).

73. *Id.* at 693.

74. See *Lawrence v. Demos*, 244 P.2d 793 (Wyo. 1952), (allowing a forfeiture of approximately 28½% of the total purchase price) and *Quinlan v. St. John*, 201 P. 149 (Wyo. 1921), (allowing a forfeiture of over 57% of the purchase price plus an additional 23% in improvements which the purchaser had made to the property).

75. 591 P.2d 886 (Wyo. 1979).

76. 686 P.2d 575 (Wyo. 1984).

77. *Barker*, 591 P.2d at 889. The court relied on *Younglove* for the general concept that equity's abhorrence of forfeiture did not justify total disregard of the contractual obligations of the parties without the intervention of some particular equitable reason. See generally Santini, *supra* note 41.

78. In *Marcam*, the court returned to its analysis of the forfeiture as a percentage of the total purchase price. See *supra* note 74. The forfeiture enforced in *Marcam* was only 18.75% of the purchase price.

79. *Marcam*, 686 P.2d at 582. See also *infra* note 122.

the installment land contract remedy of forfeiture remains a viable option in Wyoming.

With this history as background, it becomes easier to view the Wyoming Supreme Court's installment land contract decisions as a whole. The court's earlier decisions evidenced strong reluctance to find an equitable mortgage⁸⁰ in the absence of a *clear* intent to create a security transaction. However, in *Marple v. Wyoming Production Credit Association*,⁸¹ the court can be seen to distance itself from this pro-vendor approach in favor of protecting the purchaser from forfeiture and maintaining the right of redemption.⁸² This trend is continued in *Cliff & Co.*, where the court strengthened the distinction between the installment land contract and the mortgage and began to place explicit restrictions on the application of installment land contract remedies. The court's decision in *Metropolitan Mortgage & Securities Co. v. Belgarde* can only be seen as the next step in tightening the application of law surrounding installment land contracts.

PRINCIPAL CASE

The Wyoming Supreme Court's most recent decision relating to installment land sale contracts dealt primarily with the role the parties' intentions play in establishing an installment land contract and the options available to the vendor once the instrument is determined to be an installment land contract. The court opened its discussion of *Metropolitan Mortgage & Securities, Inc. v. Belgarde* by restating its analysis of parties' rights in land sale transactions from *Cliff & Co. v. Anderson*⁸³ and quoting *Olds v. Little Horse Creek Cattle Company*.⁸⁴ The court's reference to *Olds* seems to be no more than

80. An equitable mortgage is defined as an instrument that was not properly prepared or executed to satisfy the requirements for a legal mortgage. *Marple v. Wyoming Production Credit Association*, 750 P.2d 1315, 1319 n.5 (1988).

81. 750 P.2d 1315 (Wyo. 1988).

82. See *supra* note 41.

83. *Metropolitan*, 816 P.2d at 871-72 (quoting *Cliff & Co., Ltd. v. Anderson*, 777 P.2d 595, 600-01 (Wyo. 1989) (citations omitted)). The *Metropolitan* court quoted:

A mortgagee's only remedy upon mortgage default is foreclosure and public sale, either by power of sale pursuant to WYO. STAT. §§ 34-4-101 to -113 (1977) or by judicial sale in accordance with WYO. STAT. §§ 1-18-101 to -112 (1977). * * * Conversely, when a transaction is accomplished by means of an installment land contract, the seller, while often able to enforce a forfeiture provision, is not entitled to a deficiency. * * *

The fundamental difference distinguishing a mortgage from an installment land contract, at least in states applying a lien theory to mortgages, is that, in a mortgage, fee title has vested in the purchaser/mortgagor. When a question as to the nature of the transaction arises, however, and in order for a court to find a mortgage, it must be shown that the parties intended a mortgage transaction rather than an installment land contract; i.e., there must have been an intent to create a security, as construed from the written agreement and the surrounding circumstances.

84. *Metropolitan*, 816 P.2d at 872 (quoting *Olds v. Little Horse Creek Cattle Company*, 140 P. 1004, 1007 (Wyo. 1914)).

an attempt to establish the concept of the installment land contract as a unilateral instrument—an idea on which the court relies heavily in *Metropolitan*.⁸⁵

Though the questions presented to the court related to the availability of specific performance as an installment land contract vendor's remedy,⁸⁶ the court merely deemed these questions "intriguing," and concluded that the issue could not be addressed without first determining the nature of the transaction intended by the parties.⁸⁷ The factors that appear to have been most relevant to the court's inquiry were Metropolitan's assertion of a claim for specific performance and Belgarde's countering assertion that Metropolitan was limited to forfeiture. The court regarded Metropolitan's claim for specific performance as the functional equivalent of a claim for a deficiency judgment and stated that, in order for such an award to be appropriate, a bilateral contract or security interest would have to be found.⁸⁸ Thus, the court interpreted Metropolitan's position as requesting treatment of the instrument as a mortgage. The court recognized in Belgarde's claim the Wyoming view "that forfeiture is the sole remedy under the normal construction of an installment land contract"⁸⁹ and accepted this as a claim for construction of the document as an installment land contract. Basing its conclusion almost exclusively on these differing interpretations of the contract, the court determined that the instrument was indeed ambiguous,⁹⁰ and, relying on standard doctrine,⁹¹ concluded that the presence of such an ambiguity merited both reversal of the lower court's summary judgment and remand for further findings by the trial court.⁹²

Observing a presumption that instruments like *Metropolitan's* Agreement for Warranty Deed are installment land contracts,⁹³ the court concluded by commenting that such a presumption could be refuted by either party and would then likely require a trial on the merits for resolution.⁹⁴ The court also suggested that parties should

85. The court most likely chose the 1914 *Olds* case to establish the "unilateral contract" concept because this distinction does not appear to have re-surfaced in Wyoming case law since 1914. *But see infra* note 115.

86. *See supra* note 13.

87. *Metropolitan*, 816 P.2d at 873.

88. *Id.*

89. *Id.*

90. *Id.* at 874.

91. *Metropolitan*, 816 P.2d at 873 (citing *Weaver v. Blue Cross-Blue Shield*, 609 P.2d 984 (Wyo. 1980); *Meuse-Rhine-Ijssel Cattle Breeders of Canada, Ltd. v. Y-Tex Corporation*, 590 P.2d 1306 (Wyo. 1979); *Centric Corp. v. Drake Bldg. Corporation*, 726 P.2d 1047 (Wyo. 1986); *Wyoming Game and Fish Commission v. Mills Co.*, 701 P.2d 819 (Wyo. 1985); *Kuehne v. Samedan Oil Corp.*, 626 P.2d 1035 (Wyo. 1981); and *Madison v. Marlatt* 619 P.2d 708 (Wyo. 1980)).

92. *Metropolitan*, 816 P.2d at 875.

93. *Id.*

94. *Id.*

specify in the agreement itself whether the instrument was intended as an installment land contract, and thus limited to the remedy of forfeiture, or as a bilateral mortgage transaction.⁹⁵

In a series of separate opinions⁹⁶ that perhaps lend credence to the court's determination of ambiguity, the justices referred to both installment land contracts and mortgages as bilateral contracts.⁹⁷ Concurring with the court's resolution of the case, Chief Justice Urbigkit⁹⁸ agreed with Justice Macy's characterization of the agreement as unambiguous and bilateral.⁹⁹ Given the court's use of "bilateral" to indicate a mortgage-like transaction and Justice Macy's reference to the instrument as both bilateral and a contract for deed, however, it is unclear whether Justice Urbigkit agreed that the instrument represented a bilateral *installment land contract*, or a bilateral *mortgage*. Nor does Justice Urbigkit's preference for reversal and further findings shed light on his interpretation of the unilateral/bilateral distinction.

Alternatively, Justice Cardine's dissent examined the language of the contract which referred to the purchaser's responsibilities and found a conditional sales contract in which payment was a prerequisite to Belgarde's receipt of a warranty deed.¹⁰⁰ Justice Cardine also interpreted the language in the contract's default provision to mean that the seller could either choose to declare a default, or not.¹⁰¹ Although

95. *Id.* at 875. The court said, "[Parties] have the opportunity, and the power, to specify in their agreement whether it is an installment land contract limiting the remedy to forfeiture or, in the alternative, whether it is intended to be a bilateral agreement invoking the doctrine of equitable conversion." *Id.*

96. The majority in *Metropolitan* was comprised of Justices Thomas, Golden and Urbigkit. Justice Urbigkit also wrote an opinion concurring in the result. Justices Cardine and Macy wrote separate opinions to dissent from the majority's holding.

97. Though it is correct that both mortgages and installment land contracts can be either unilateral or bilateral, *see infra* note 115, the court's implication that installment land contracts can *only* be unilateral is confusing when combined with references of the other justices to the *Metropolitan* instrument as bilateral.

98. Justice Urbigkit was succeeded by Justice Macy as Chief Justice in July 1992.

99. *Metropolitan*, 816 P.2d at 875 (Urbigkit, C.J., concurring). *See generally supra* notes 31-33 and accompanying text.

100. *Id.* at 877 (Cardine, J., dissenting). By deeming Belgarde's payment merely a "prerequisite" to his receipt of the warranty deed, it seems that Justice Cardine implied a unilateral contract in which Belgarde was under no obligation to perform.

101. *Id.* Thus, Justice Cardine disagreed with the position maintained by *Metropolitan* that the "at their option" language would allow them to, at their option, either declare default or choose some alternative remedy, e.g., specific performance. The relevant portion of the default provision in the Agreement for Warranty Deed provided that:

In the event of such a default Sellers, *at their option, may declare this agreement null and void* and may, with or without process of law, take immediate possession of the said premises and regard any persons thereon as guilty of forcible detainer; hold and retain all monies paid hereunder as liquidated damages, rent, and compensation for the use and benefit of the property. Sellers shall be entitled to any additional damages incurred as a result of Buyers' holding over.

Memorandum of Law in Support of Defendant's Motion for Summary Judgment, Exhibit A, Record at 45 (emphasis added).

Justice Cardine's opinion did not directly address the availability of specific performance as a vendor's remedy, it did deny the availability of any remedy not specified in the agreement as well as any remedy not enforceable by the court, such as one entitling the installment land contract vendor to a deficiency judgment.¹⁰² Justice Cardine's dissent concluded that the trial court's finding that forfeiture was the only remedy available to Metropolitan was correct and should have been affirmed.¹⁰³

In a separate dissent, Justice Macy also found the contract to be unambiguous, bilateral, and a contract for deed.¹⁰⁴ Relying on the recent Wyoming case of *Walters v. Michel*,¹⁰⁵ Justice Macy first argued that the remedies provided in a contract are not exclusive unless there is some "exclusivity clause" so limiting them.¹⁰⁶ Because he found no such clause in the Agreement for Warranty Deed which would act to limit Metropolitan's available remedies, Justice Macy argued that the court should have reversed and permitted recovery under the terms of the contract.¹⁰⁷ Recognizing the Agreement for Warranty Deed to have no acceleration clause, Justice Macy acknowledged that the form of the recovery should have been limited to successive actions for each payment as it became due.¹⁰⁸ Notable for its absence in Justice Macy's dissent, however, was any discussion reconciling or distinguishing this position with the view previously maintained by the court in *Cliff & Co. v. Anderson* and earlier in *Baldwin v. McDonald*, that would prevent the vendor under an installment land contract from recovering a deficiency judgment.

ANALYSIS

While the law surrounding contracts for deed is admittedly much more complex than it needs to be,¹⁰⁹ the court's opinion in *Metropolitan Mortgage & Securities Co. v. Belgarde* has certainly made no

102. *Metropolitan*, 816 P.2d at 877 (Cardine, J., dissenting).

103. *Id.*

104. *Id.* at 877 (Macy, J., dissenting).

105. 745 P.2d 913 (Wyo. 1987). In *Walters*, the court allowed recovery under a remedy not specifically enumerated in the contract, recognizing that the remedies mentioned in a contract are generally not exclusive. *Id.* at 915.

106. *Metropolitan*, 816 P.2d at 877-78 (Macy, J., dissenting) (quoting *Glacier Campground v. Wild Rivers, Inc.*, 597 P.2d 689 (Mont. 1978)). Justice Macy footnoted his recognition that the real estate purchase agreement in *Walters* and the installment land contract in *Metropolitan* are directed at different time periods in the transaction but suggested that this did not necessarily dictate a different result. *Id.* at 877 n.1 (Macy, J., dissenting).

107. *Id.* at 878.

108. *Id.* See also *supra* note 9.

109. 3 GAUDIO, *supra* note 18, § 25.02[3][c].

great inroads toward clarifying the area.¹¹⁰ Bypassing the issues presented,¹¹¹ the court began by addressing the nature of the transaction. Though the parties clearly indicated in the court documentation that the transaction was intended as an installment land contract,¹¹² the court disregarded the parties' intentions and expectations to find a genuine issue of material fact surrounding the nature of the instrument. While one justice went so far as to find the Agreement for Warranty Deed a "contract for deed in its purest form,"¹¹³ the majority accepted the very existence of the parties' dispute regarding remedies as determinative of ambiguity.¹¹⁴

The court went on to suggest that, in the enforcement of any installment land contract wherein a purchaser asserts the intention of a bilateral contract (i.e., a mortgage or security transaction¹¹⁵), a trial

110. *E.g.*, there appears to be a rift in the court regarding the nature of the installment land contract. While Justice Thomas implied in the opinion of the court that the installment land contract must be unilateral in nature, Justice Urbigit's concurrence in the result and Justice Macy's dissent both referred to the instrument as unambiguous and bilateral. Justice Macy additionally recognized the instrument as a bilateral contract for deed. Justice Cardine, wisely staying away from the court's confusing unilateral/bilateral distinction, went so far as to say that the Agreement for Warranty Deed in *Metropolitan* represented a "contract for deed in its purest form." *Metropolitan*, 816 P.2d at 877 (Cardine, J., dissenting).

111. *See supra* note 13.

112. *See, e.g.*, Defendant's Motion for Summary Judgment, Record at 28; Memorandum of Law in Support of Defendant's Motion for Summary Judgment, Record at 35; Hearing on Motion for Summary Judgment, August 9, 1989, Record at 61, 72; Defendant's Supplemental Brief on Issue of Damages, Record at 97 and 102; and Hearing on Motion for Summary Judgment, September 15, 1989, Record at 113, *Metropolitan Mortgage & Sec. Co. v. Belgarde*, 816 P.2d 868 (Wyo. 1991).

113. *Metropolitan*, 816 P.2d at 877 (Cardine, J., dissenting).

114. The Wyoming Supreme Court has stated repeatedly that the interpretation and construction of contracts, as well as questions of ambiguity, are matters of law to be determined by the court. *Farr v. Link*, 746 P.2d 431, 433 (Wyo. 1987). In *Metropolitan*, however, the court seems to have moved away from this position.

The primary instrument involved in *Metropolitan*, the Agreement for Warranty Deed, provided for: (1) both the vendor's warranty deed and the purchaser's quitclaim deed to be placed in escrow pending completion of the contract or default under it; (2) retention of legal title in the vendor; (3) monthly installment payments on the purchase price over a period of 10 years; and (4) a transfer of possession to the purchaser. Though these factors correctly indicated to the two dissenting justices the clear nature of the transaction as an installment land contract, the majority instead chose to realize an ambiguity regarding the nature of the parties' differing interpretations. The court's opinion then held this disagreement as sufficient reason to refuse resolution and remand the case for trial. Following this line of reasoning, it would seem that summary judgment would never be appropriate—the maintenance of opposing interpretations of *any* instrument or situation would create a sufficiently genuine issue of material fact to preclude summary judgment.

115. The court's distinction between the installment land contract and the security transaction is unconvincing. Security is that which is given to secure the fulfillment of an obligation; in a security transaction some interest or right to an interest in the conveyed property is retained by the seller to secure payment by the purchaser. GEORGE A. PINDAR, *AMERICAN REAL ESTATE LAW* § 19-10 (1976); WILLIAM ATTEBERRY, *MODERN REAL ESTATE FINANCE* 364 (1980). In the installment land contract, the ultimate interest is retained by the seller—the fee simple interest. Therefore, all installment land contracts are decidedly security transactions. *See generally* 3 GAUDIO, *supra* note 18, §§ 26.01[1][b][i] to 26.01[1][b][iii].

The line of demarcation drawn by the court between unilateral *installment land contracts*

will almost inevitably be necessary to consider the phraseology of the written document and any surrounding circumstances which might assist in determining the parties' intentions.¹¹⁶ By advising the parties to specify the nature of their transaction within the body of the document itself,¹¹⁷ the court presumed every possibility that the installment land contract would be interpreted as a mortgage. Erring on the side of caution, the court's exhortation might be viewed as an implication that installment land contracts which do *not* include such an indication of the parties' intentions will be treated as mortgages, leaving vendors with the sole remedy of statutory foreclosure. It would seem of paramount import to the practitioner preparing the installment land contract, then, to ensure that the document itself clearly indicates its nature *as* an installment land contract and not a mortgage.¹¹⁸

However, even if the agreement itself specifies its nature as an installment land contract, there remain two significant problems raised by *Metropolitan*. First, even if the contract is drafted to indicate that it is intended as an installment land contract, the presence within the contract of: (1) any promise by the purchaser to pay the purchase price,¹¹⁹ (2) any remedy beyond forfeiture,¹²⁰ or (3) any reference to

and bilateral *mortgages* also appears to be misplaced insofar as there is nothing requiring all mortgages to be bilateral or all installment land contracts to be unilateral. An installment land contract which specifically provides for the imposition of a deficiency judgment would more than arguably seem to be a bilateral instrument just as a nonrecourse mortgage would seem to be a unilateral instrument. See generally MICHAEL T. MADISON & JEFFRY R. DWYER, *THE LAW OF REAL ESTATE FINANCING* ¶ 3.10[5] (Supp. 1992).

116. The court stated:

In the absence of any admission by the seller, the claim that a bilateral contract is present would require a trial in most cases because of the necessity to consider the written agreement and the surrounding circumstances to discern intent. It appears that, once the question is raised, any presumption that favors an installment land contract can be rebutted by the party asserting a bilateral contract if that party can demonstrate an intent to create a mortgage.

Metropolitan, 816 P.2d at 875. Note that this is *not* the situation in *Metropolitan*, as neither party argued the intent to create a mortgage transaction or other security arrangement. Instead, the parties were in agreement as to the nature of the transaction as an installment land contract; it was on the remedies available under such an instrument that the parties differed. See *supra* note 112 and accompanying text.

117. See *supra* note 95.

118. One suggestion to this effect might be a clause specifying, "The parties understand and accept that this agreement is to be interpreted and construed as a contract for deed and is in no way to be interpreted or construed as a mortgage or other security transaction or instrument."

119. *Metropolitan*, 816 P.2d at 874.

120. Though the court has heretofore been adverse to awarding restitution of the purchaser's payments, see *Lawrence v. Demos*, 244 P.2d 793 (Wyo. 1952); *Angus Hunt Ranch, Inc. v. REB, Inc.*, 577 P.2d 645 (Wyo. 1978); and *Greaser v. Williams*, 703 P.2d 327 (Wyo. 1985), it appears that rescission of the installment land contract and restitution of the payments may be available in limited circumstances.

In *Racicky v. Simon*, 831 P.2d 241 (Wyo. 1992), the personal representative of the deceased buyer, Simon, brought suit against a defaulting seller for rescission of the installment land contract and restitution of all amounts paid under the contract. Racicky, the seller, had pur-

the property in question or improvements thereon as "security,"¹²¹ may evidence to the court the presence of a mortgage transaction. Because installment land contracts almost always contain a promise by the purchaser to pay the contract amount, it seems that all installment land contracts have effectively become mortgages under the *Metropolitan* analysis. In the alternative, it would appear that the Wyoming Supreme Court will lean toward requiring a trial to determine clearly the parties' intentions in any instance where a transaction has been achieved through an installment land contract. Therefore, the only way for a vendor to use the installment land contract as a land transfer alternative and to avoid a determination by the court that the instrument constitutes a mortgage, is to draft it without a promise by the purchaser to pay the purchase price and to pursue no remedy other than forfeiture—i.e., to obligate the purchaser to nothing and to forego all recourse against him.¹²²

However, it would appear that this result is exactly what the Wyoming Supreme Court intends.¹²³ The parties originally presented

chased the property under an installment land contract and had defaulted, forfeiting his interest under the contract. Because he no longer held any interest in the property, Racicky's performance under his installment contract with Simon became impossible, even though Simon had completely performed. *Id.* at 242. The court held that rescission was available to Simon because Racicky was unable to convey the property described in the contract. *Id.* at 244. Further, the court affirmed a grant of restitution in the amount of all the payments made by Simon plus 10% interest from the time Racicky's performance became impossible. *Id.* at 242.

121. The court attempted in *Metropolitan* to construe, as evidence of the parties' intent to create a mortgage transaction, the contract's reference to subsequent improvements made by the purchaser as "additional security." *Metropolitan*, 816 P.2d at 874.

122. The contract for deed that is prepared without any obligation laid on the purchaser sounds like a particularly risky proposition. However, this is the form of the instrument required by *Metropolitan's* limitation of the contract to a forfeiture remedy. The purchaser is under no obligation and, therefore, the vendor will have no recourse against him in the event of default. If the purchaser defaults, the vendor retakes the property and retains the payments made. Note, however, the court's caveat in *Marcam Mortgage Corp. v. Black*, 686 P.2d 575 (Wyo. 1984), that a forfeiture would not be allowed "in the last few months" of the contract. *Id.* at 582. It is unclear whether the court means by this the last three months, the last twelve months, or the last twenty-four months of the contract, particularly in light of its analysis of the forfeiture as a percentage of the total purchase price. Query whether the court would enforce a forfeiture on a contract which loaded a substantial portion of the purchase price into a balloon payment in such a way that a forfeiture occurring in the last year of the contract would only forfeit 50% of the purchase price?

123. If the court in *Metropolitan* meant to judicially eliminate the Wyoming installment land contract, it failed to accomplish its task. For those Wyoming attorneys who have been wondering at the insecurity of the installment land contract in this state, the court has merely added another question mark. The Wyoming legal community needs some clear indication from the court whether this type of transaction remains a viable alternative or whether property transfers must be effectuated in some other way.

One alternative to the installment land contract may be the deed of trust. This kind of transaction involves a transfer of the property to an impartial third party who holds the deed in trust for the purchaser and as security for the vendor. Such instruments generally contain a power of sale exercisable by the third party upon purchaser default. NELSON & WHITMAN, *supra* note 21, § 1.6.

A second alternative to the installment land contract is the tried-and-true mortgage, either recourse or non-recourse. Though these forms do not avoid the time, expense and uncertainty

the court with questions relating to whether specific performance was a valid installment land contract vendor's remedy under Wyoming law.¹²⁴ Though it avoided the question by realizing a genuine issue of material fact, the court suggested that installment land contracts may be limited to the remedy of forfeiture as a matter of law.¹²⁵ Such an interpretation makes the installment land contract a much less appealing method of selling property, but public policy would more than arguably suggest that this is exactly how it should be. If the vendor wishes to leave open the possibility of a deficiency judgment against the purchaser, he should not also be allowed to select a mortgage substitute that will eliminate the purchaser's equity of redemption. Conversely, if it is efficiency, low cost, and avoidance of foreclosure that the vendor seeks, the purchaser should be entitled to protection from the additional burden that a deficiency judgment would undoubtedly present.

In the same way that the inclusion of a purchaser's promise to pay may indicate a bilateral transaction, so may the pursuit—or even the presence—of some remedy beyond forfeiture indicate a mortgage.¹²⁶ Even if specific performance¹²⁷ or foreclosure¹²⁸ remedies would

of either the foreclosure or the purchaser's equity of redemption, it is likely that a contested forfeiture under an installment land contract will take much longer and be more expensive to resolve. See also Mary J. Hertz, Note, *Default Clauses in the Contract for Deed: An Invitation to Litigation?*, 28 S.D. L. REV. 467, 474 (1983) (suggesting a stipulated clause converting the installment land contract to a purchase money mortgage upon payment of a certain percentage of the contract price).

124. Those issues are repeated here for convenience.

- I. Did the trial court err in ruling that specific performance was not an appropriate seller's remedy in this case?
- II. Did the trial court err in ruling that the seller was limited to the remedy of forfeiting the contract and taking the property back?

Metropolitan Mortgage & Sec. v. Belgarde, 816 P.2d 868 (Wyo. 1991).

125. Such an inference seeps through the court's opinion in the following passages:

1. "These parties chiefly question whether an installment land contract is limited entirely to the remedy of forfeiture as a matter of law."

Metropolitan, 816 P.2d at 873.

2. "A bilateral contract is the predicate for any conclusion that the real intent . . . of the parties was to create a security interest in Metropolitan's predecessor *that would justify a remedy alternative to forfeiture.*"

Id. (Emphasis added.)

3. "Our cases structure a presumption that an instrument such as this is a 'unilateral contract' *pursuant to which the seller is limited to forfeiture as a remedy . . .*"

Id. at 875. (Emphasis added.)

[If

4. "[The parties] have the opportunity, and the power, to specify in their agreement whether it is an installment land contract *limiting the remedy to forfeiture* or, in the alternative, whether it is intended to be a bilateral agreement invoking the doctrine of equitable conversion."

Id. (Emphasis added.)

126. *But see supra* note 120.

127. The aim of specific performance is to compel the party breaching the contract to render the performance which he was promised to do. 5 CORBIN, *supra* note 33, § 1102. The order for specific performance is directed personally to the party breaking the contract, directing

not result in a deficiency judgment against the purchaser, or would be unenforceable to the extent that they did, their presence might be construed by the Wyoming Supreme Court as an indication that the parties intended some avenue of direct purchaser recourse to be available to the vendor. Because action against the purchaser would be available only if he were obligated in some way, *any* contractual term that provides for recovery directly from the purchaser upon default might well impel a decision that the instrument was intended as a mortgage.¹²⁹

CONCLUSION

It appears that installment land contracts will no longer enjoy a favored status in Wyoming property law. The Wyoming Supreme Court has indicated that even the presence of a promise to pay the purchase price will be sufficient to make the contract a bilateral one and, thus, a mortgage instrument burdened with all the time, expense, and purchaser's rights which vendors seek to avert. Installment land contracts, to be construed as such, must remain unilateral—the purchaser under such an instrument must remain unobligated to perform¹³⁰ and his failure to perform must provide no avenue for direct recovery against him by the vendor. Further, the presence of any remedy which might provide for recovery of a deficiency judgment against the purchaser may also be considered an indication of the parties' consid-

him to render his promised performance or be subject to personal penalties for disobedience. *Id.* Under such an action, a vendor would sue for the property's purchase price and, once paid, would convey to the purchaser a deed for the property. 5A CORBIN, *supra* note 33, § 1145.

Although specific performance is not a remedy allowed in Wyoming, other states, including Montana, will enforce a vendor's suit in specific performance against a defaulting purchaser. See *Belue v. Gebhardt*, 784 P.2d 396 (Mont. 1989); *SAS Partnership v. Schafer*, 653 P.2d 834 (Mont. 1982); and Robert Isham, Note, *The Default Clause in the Installment Land Contract*, 42 MONT. L. REV. 110 (1981).

128. A vendor may choose to pursue recovery from a defaulting purchaser under either judicial foreclosure or foreclosure under power of sale. The only difference, though a substantial one in terms of time and expense savings, is that the latter does not require the judicial intervention necessary in the former—the property is simply sold at public sale by a public official, a third party, or the mortgagee himself. NELSON & WHITMAN, *supra* note 21, § 7.19.

Again, although Wyoming does not specifically recognize foreclosure as an installment land contract remedy, other states, including Colorado, treat such instruments as mortgages and require that they be foreclosed as such. See *Grombone v. Krekel*, 754 P.2d 777 (Colo.App. 1988) and *Rocky Mountain Gold Mines, Inc. v. Gold, Silver & Tungsten, Inc.*, 93 P.2d 973 (Colo. 1939). Some states, particularly Oklahoma, have gone so far as to statutorily abolish the installment land contract, treating it instead as a mortgage. See generally Drew L. Kershen, *Contracts for Deed in Oklahoma: Obsolete, But Not Forgotten*, 15 OKLA. CITY U. L. REV. 715 (1990); and OKLA. STAT. tit.16, § 11A (1981).

129. Query whether there might be an exception for a vendor's recovery of damage caused to the property by the purchaser?

130. There does appear to remain some question in the court's mind whether commencing performance might invoke a binding promise by the purchaser to completely perform. *Metropolitan*, 816 P.2d at 874.

eration of a mortgage. Though these elements would probably not be dispositive evidence that the instrument was a mortgage, it seems clear in light of *Metropolitan* that they would be sufficient to preclude summary judgment and require a trial on the merits to determine the parties' intentions.

Perhaps most importantly to the post-*Metropolitan Securities* practitioner, it is essential to be aware of the court's apparent requirements that, first, the nature of the transaction be specified within the body of the instrument, and second, that the contract contain no references to remedies or securities that might indicate a conflicting intention to create a mortgage transaction. Practitioners who continue to execute land sales using the installment land contract may indeed be practicing on a slippery slope that provides *very* little certainty or guidance. Shying away from Wyoming's very popular and widely used installment land contract may be difficult. However, the attorney who continues to use such a precariously-positioned instrument without being aware of the court's new-found willingness to strictly scrutinize the parties' intentions in such transactions may place his clients in litigational situations that prove to be both financially and professionally painful.

Metropolitan has also laid to rest the specter of personal recovery which has haunted the defaulting purchaser. The vendor who wishes to retain his right to a deficiency judgment against the purchaser cannot do so through the installment land contract. He must utilize a more structured transaction and choose a remedy which the court can more closely supervise. If the vendor wishes to avoid the time and difficulty of such a remedy, he may still utilize the installment land contract. There will be a price, however; his only remedy will be forfeiture.

MATTHEW COLE BORMUTH