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pay back the supplement of the just price, this might often be greater than any profit he might have received on resale.<sup>27</sup> For example, A sells to B an immovable for \$4,000. B sells to a third party for \$7,000. The just price of the the immovable is \$10,000. If B were compelled to pay A the supplement of the just price, he would have to pay \$6,000. Yet, by following the approach outlined above and used in *O'Brien*, if B only had to account for the profits, he would pay A \$3,000.

Therefore, it is submitted that the *result* reached by the court is a just one. There is no reason, either on theoretical or equitable grounds, for holding a purchaser who has not practiced violence or fraud to the stringent requirement of paying the supplement of the just price when he cannot, in fact, return the immovable. The vendor is still protected in that he can demand the profits whenever the purchaser resells.

*David Levingston*

#### TERMINATION OF A DECLARED UNIT

In current practice voluntary units for drilling for and producing oil and gas fall into either of two categories: "contractual" or "declared." "Contractual" units are formed by an agreement among all the parties who have an interest in the unit (lessors and lessees).<sup>1</sup> "Declared" units result from exercise by a mineral lessee of a pooling power, usually granted in the lease, and are normally effectuated by filing of a pooling declaration in the public records. Once a voluntary unit has been formed, there is uncertainty as to what events or occurrences will terminate the unit. It is within the power of contracting parties to provide expressly for conditions which will resolve any type of voluntary unit or vary the basis upon which production or costs are to be shared. For example, the unit agreement may contain a provision either limiting its duration to a fixed number of years or perpetuating it until a commissioner's unit might be formed or unit production might cease.<sup>2</sup> Also, the parties may simply

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27. See Justice Summers' dissent in *O'Brien v. LeGette*, 254 La. 252, 260, 223 So.2d 165, 169 (1969).

1. Note, 24 LA. L. REV. 935, 937 (1964). See *Texaco, Inc. v. Vermillion Parish School Bd.*, 145 So.2d 383, 394 (La. App. 3d Cir. 1962) (concurring opinion); Comment, 10 LOYOLA L. REV. 224 (1960).

2. See 6 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW—POOLING AND UNITIZATION § 931 (1964).

rescind the unit agreement or terminate the old unit to form another one.<sup>3</sup> Contractual unit agreements are typically very detailed, and there is usually some provision indicating an intent on the part of the signatory parties as to what events will bring about a termination or alteration of the unit agreement or under which the effect of most future events on the rights of the parties can be determined. To the contrary, in units formed by declaration under a pooling power, standard lease forms<sup>4</sup> do not contain any express conditions regarding termination of units or alteration of sharing arrangements. There is, however, a statement as to the purposes for which the unit may be formed, essentially, for the purpose of conservation. The concern of this Note is to determine whether, in light of the stated purposes for which units may be declared by the lessee, certain events or occurrences should be interpreted as resolving a declared unit because the purpose for which it was formed can no longer be served.

In *McDonald v. Grande Corp.*,<sup>5</sup> plaintiff-lessor argued that the unit created by the defendant-lessee together with adjoining lessees, pursuant to the pooling power granted by their respective leases, terminated upon the drilling of a dry hole on the unit acreage. The court of appeal, recognizing the novel question presented, rejected plaintiff's demand and, relying on the opinion of the trial court, found that there was no evidence to show that the unit had become "inappropriate to serve its original intended purpose"<sup>6</sup> and "until such a revision [of the unit] should come about, the agreement must be enforced in accordance with the terms there provided, and as said in the *Creslenn* case, without concern as to the disproportionate advantages which may ultimately result."<sup>7</sup>

The decision by the court that the unit agreement under consideration was not terminated by the completion of a dry

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3. *Jackson v. Hunt Oil Co.*, 208 La. 156, 23 So.2d 31 (1945).

4. See Bath-Form 42 CPM-New South Louisiana Revised Five (5)-Pooling.

5. 214 So.2d 795 (La. App. 3d Cir. 1968). This case was originally considered on motion for summary judgment. *McDonald v. Grande Corp.*, 148 So.2d 441 (La. App. 3d Cir. 1962), *cert. denied*, 244 La. 128, 150 So.2d 588 (1962).

6. *McDonald v. Grande Corp.*, 214 So.2d 795, 806 (La. App. 3d Cir. 1968). The unit agreement expressly provided that its purpose was "to provide maximum conservation, and to insure to each of the parties hereto its fair share of the gas and gas condensate produced from the unitized property." *Id.*

7. *Id.* at 807.

hole may be questionable under the circumstances presented in the case, as the opinion does not reveal evidence indicating that a significant portion of the unit was not unproductive. However, the court found that the purpose for the unit's existence had not ceased and reached this result by characterizing the unit agreement as an aleatory contract, concluding that the parties intended that their interests be frozen. This reasoning may indicate that the decision stands for the general proposition that the drilling of a dry hole will not under any circumstances terminate a declared unit. It is this proposition with which the writer takes issue. An aleatory contract is defined in the Louisiana Civil Code as a "mutual agreement of which the effects with respect both to the advantages and losses, whether to all the parties or to one or more of them, depend on an uncertain event."<sup>8</sup> The court in *McDonald* by designating the unit formed by declaration as an aleatory contract found that the parties had intended to "freeze" their interests in the unit. But it did not adequately consider the question of whether a declared unit terminates upon the failure of the purposes for its formation. In attempting to justify its decision the court analogized the unit agreement in *McDonald* to the operating agreement under consideration in *Southwest Gas Prod. Co., v. Creslenn*.<sup>9</sup> This comparison is not apposite in light of the different factual situations that existed in these two cases. In construing an operating agreement, the court in *Creslenn* held that "so long as the elements of error or fraud are not involved, it is the purpose of the law to enforce voluntary agreements without concern as to the disproportionate advantages which may ultimately result."<sup>10</sup> The court concluded that because "all the parties to the agreement were experienced operators, completely familiar with both the possible hazards and benefits involved in oil and gas operations,"<sup>11</sup> they should be presumed to have intended to freeze their interests in the absence of any provision in the contract to the contrary. The court's reliance in *McDonald* on the statement of another court about an operating agreement seems to this writer to be an improper analogy. An operating agreement is formed by experienced oil and gas operators for the purpose of designating an operator to drill for minerals and to manage the well if production is ob-

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8. LA. CIV. CODE art. 2982.

9. 181 So.2d 63 (La. App. 2d Cir. 1965).

10. *Id.* at 68.

11. *Id.* at 67.

tained. If by the provisions of such an agreement, the parties express the intent to freeze their interests, they should be forced to abide by the terms of their contract. Such was the case in *Creslenn*. In *McDonald*, there was no problem as to the formula by which the parties would participate in production. The question was whether, if there were failure of the purpose for which the unit was formed, this would bring into operation a resolatory condition that would terminate the unit.

A better approach would have been to rely on *Humble Oil and Refining Co. v. Jones*<sup>12</sup> in which a declared unit was involved, as opposed to the operating agreement under consideration in *Creslenn*. The court in *Humble*, upholding a commissioner's unit over a declared unit, held that when the commissioner had found the true participation, "the parties should not be presumed to have agreed to share their interest on the old declared unit unless they show a specific and positive intention to freeze the old unit."<sup>13</sup> The court added: "It does not appear . . . that the lessor could be said to have frozen his royalty interests in the voluntary unit unless he so declared in the lease agreement. The very purpose for which a lessor signs an individual lease contract with his lessee with a pooling agreement therein is for the purpose of getting his equitable and just share of oil and gas in the pool and to prevent drainage of his land."<sup>14</sup> In distinguishing the unit agreement in *Humble* as opposed to the operating agreement involved in *Monsanto Chemical Co. v. Southern Natural Gas Co.*,<sup>15</sup> the court concluded that with respect to the latter, "It properly should be assumed that the operators intended to freeze their original participations unless they expressly contracted to the contrary."<sup>16</sup>

Even though the court in *Humble* did not use the articles of the Louisiana Civil Code dealing with resolatory conditions, the effect of its decision is that once the purpose of a declared unit can no longer be fulfilled, in the absence of a provision to the contrary, a superimposed commissioner's unit will terminate it by bringing into operation a resolatory condition implied by the

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12. 157 So.2d 110 (La. App. 3d Cir. 1963), *cert denied*, 245 La. 563, 159 So.2d 284 (1964), *aff'g* 125 So.2d 640 (La. App. 3d Cir. 1960).

13. *Humble Oil & Ref. Co. v. Jones*, 125 So.2d 640, 646 (La. App. 3d Cir. 1960).

14. *Id.* at 647.

15. 234 La. 939, 102 So.2d 223 (1958).

16. *Humble Oil & Ref. Co. v. Jones*, 125 So.2d 640, 646 (La. App. 3d Cir. 1960).

parties through their statement of the purposes for which such units can be created. The unit in *McDonald* had been formed to ". . . provide maximum conservation and to insure to each of the parties thereto its fair share of the gas and gas condensate produced from the unitized property."<sup>17</sup> It is submitted that the failure of the purpose (for the unit) should be construed as the occurrence of a resolatory condition terminating the unit.

According to Louisiana Civil Code article 2047, "When the resolatory condition is an event, not depending on the will of either party, the contract is dissolved of right." Such conditions may be implied "wherever they result from the operation of law, from the nature of the contract or from the presumed intent of the parties."<sup>18</sup> A resolatory condition should be found in the type of pooling clause involved in *McDonald* to the effect that if the purposes for which the unit was formed can no longer be fulfilled, it is dissolved. In such a situation the court should find that the intent of the parties and the nature of the contract were such that if the unit as formed can no longer promote conservation or insure to the owner of each tract his just and equitable share of production from the unit acreage, it is dissolved.

An analogous situation was presented in the Texas case of *Struss v. Stoddard*.<sup>19</sup> The unit agreement under consideration provided that it was to become "null and void" if drilling operations were not commenced within 120 days from the effective date of the agreement. Upon the drilling of a dry hole, the lessees abandoned drilling operations under the agreement and began paying delay rentals as provided for in their respective leases if a well was not drilled. The court held that the lessors by accepting these delay rentals waived any rights that they might have had in the unit. Although the court's decision seems to be grounded in some form of estoppel, the practical result of the case indicates that a producing well was contemplated by the unit agreement to maintain its existence. As one author has pointed out,<sup>20</sup> the court indicated in dictum that even in the absence of an express provision for termination, a dry hole will cause such termination as a matter of law. In *Texaco, Inc. v. Letterman*,<sup>21</sup> the court was faced with a similar problem of deter-

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17. *McDonald v. Grande Corp.*, 214 So.2d 795, 805 (La. App. 3d Cir. 1968).

18. LA. CIV. CODE art. 2026.

19. 258 S.W.2d 413 (Tex. Civ. App. 1953).

20. L. HOFFMAN, VOLUNTARY POOLING & UNITIZATION 129 (1954).

21. 343 S.W.2d 726 (Tex. Civ. App. 1961).

mining whether a unit had terminated. In that case, two of the three leases included within the unit had expired. The court, concluding that the unit had expired, stated: "With two of the three leases making up the . . . unit terminating by their own terms, we fail to see how the unit could survive. A unitized unit is wholly dependent upon existing mineral leases."<sup>22</sup>

Obviously, the problem of determining the time at which a declared unit terminates can be avoided by including in the unit agreement an express provision to the effect that if the purpose for the unit cannot be achieved, it will terminate. However, such a provision is unlikely to be found in a standard pooling clause. The landowner-lessor usually has no control over the pooling provision in the lease in that the lessee prepares the lease and is in such a bargaining position as to give the landowner little or no voice in the terms of the lease. It is submitted that the courts should hold a declared unit subject to a resolatory condition that would terminate the unit if the purposes for its existence should cease. The *McDonald* case has the practical effect of continuing the existence of a declared unit beyond the point at which the parties should be presumed to have intended it to terminate. Despite evidence in the record to the contrary, the court found that a significant portion of the unit had not been proven totally unproductive. The dry hole had been drilled into the shale sheath of a salt dome. Consequently, any drilling south of the dry hole would be into this shale sheath and non-productive. In light of these facts the court's conclusion that the purpose for the unit's formation had not ceased, appears questionable, and it is hoped that under a similar factual situation in the future, the court will undertake to reconsider its view.

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22. *Id.* at 731.