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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2010-2011

2091045

James Clayton

v.

Camden Clayton

Appeal from Etowah Circuit Court
(CV-09-534)

THOMAS, Judge.

James Clayton ("James"), the son of Estellene Clayton ("Ms. Clayton"), appeals from the trial court's judgment holding that Camden Clayton ("Camden"), James's son, is entitled to one-half of the royalties from a sublease of the

mining rights in property that James had leased from Ms. Clayton ("the property"). James had leased the property from Ms. Clayton before he and Camden inherited the property as joint tenants from Ms. Clayton.

Facts and Procedural History

Before her death on July 28, 2009, Ms. Clayton was the sole owner of a 182-acre piece of land. In October 1999, Ms. Clayton leased the property, which comprises approximately 103 acres of the 182-acres tract to James. The lease was for a 10-year term with the option to renew the lease for another 10-year term, which James exercised before Ms. Clayton's death. On December 10, 1999, James subleased the mining rights to Blount Springs Sand & Gravel Co., Inc. ("Blount Springs"), "for the purpose of exploring for, mining, taking out, and removing therefrom the merchantable limestone and sandstone"; Ms. Clayton was not a party to the sublease and was not entitled to the royalties resulting therefrom. The sublease required Blount Springs to pay James $10,000 per year. The sublease also required Blount Springs to pay James royalties in the amount of 20 cents per ton for marketable and/or saleable limestone and sandstone (hereinafter referred

to as the "tonnage royalty" or "tonnage royalties"); the $10,000 payment was credited to the tonnage royalty owed to James. The sublease was for a 20-year term.

Ms. Clayton died testate on July 28, 2009. James's lease was still operative at the time of Ms. Clayton's death. Ms. Clayton's will named James as personal representative of her estate and devised the 182-acre tract, including the property to James and Camden as joint tenants with the right of survivorship. James filed a petition to probate Ms. Clayton's will in the Etowah County Probate Court on August 4, 2009. On September 9, 2009, Camden filed a petition to remove the proceedings to the Etowah Circuit Court ("the trial court"); the trial court granted Camden's petition and entered an order of removal on September 15, 2009.

On October 2, 2009, Camden filed a petition alleging that James had collected tonnage royalties from Goodhope Contracting, Inc. ("Goodhope"),[1] and that James had not given Camden the one-half interest in the tonnage royalties to which Camden alleged he was entitled as a joint tenant of the

[1]In his petition, Camden improperly named Goodhope as the mining company to whom James had sublet the mining rights to property; the error was later corrected, and Blount Springs was properly named as the mining company, as explained infra.

property. Camden requested that the trial court order Goodhope to pay all future tonnage royalties to the clerk of the trial court to be held pending a final decision as to James's and Camden's rights to the tonnage royalties. The trial court granted Camden's petition on November 10, 2009.

On December 23, 2009, Camden filed a contempt motion against James, alleging that "at least two rental payments have occurred since the entry of the [November 10, 2009,] order and neither have been paid into the court by [James]." Camden further alleged that James had attempted to oust Camden and that James had committed, and would continue to commit, waste on the property. On January 14, 2010, the trial court again ordered that Goodhope pay all tonnage royalties to the clerk of the trial court. The trial court also set the matter for a hearing to occur on February 2, 2010.

On January 29, 2010, Camden filed a motion to amend the January 14, 2010, order of the trial court, requesting that the order require Blount Springs, the company that James had entered into the sublease with, rather than Goodhope, to pay the tonnage royalties to the clerk of the trial court. The trial court granted Camden's motion on February 1, 2010.

On February 10, 2010, James filed a "motion to set aside order for payment of royalties." The trial court set James's motion and all related issues for a hearing to occur on March 1, 2010.

On March 29, 2010, following a nonjury trial, the trial court entered an order in favor of Camden, stating in pertinent part:

> "2. That all royalty payments from Blount Springs Sand & Gravel, paid or payable since the death of [Ms.] Clayton, belong equally to Petitioner, Camden Clayton, and Respondent, [James] Clayton. Since the death of [Ms.] Clayton, royalties have been paid in the amount of $39,860.00. Petitioner Camden Clayton is entitled to one-half (½) of said royalties in the sum of $19,930,00. There is currently held by the Clerk of this Court, pursuant to prior Orders of this Court, the sum of $23,751.89. It is ordered that the Clerk shall pay to Camden Clayton the sum of $19,930,00 and pay to [James] Clayton the sum of $3,821.89.
>
> "3. All future royalty payments from Blount Springs Sand & Gravel commencing with all payments due on or after April 1, 2010, shall be divided such that one-half (½) of royalties shall be payable to Camden Clayton ... and one-half (½) to [James] Clayton ...."

On April 27, 2010, James filed a motion to alter, amend, or vacate the trial court's March 29, 2010, order. The trial court denied James's motion on May 10, 2010. On June 9, 2010, James filed a motion requesting that the trial court set aside

its May 10, 2010, order denying James's motion to alter, amend, or vacate the March 29, 2010, order. Camden filed a motion to strike James's motion to set aside the May 10, 2010, order, which the trial court granted on June 15, 2010. Also on June 15, 2010, the parties filed a "joint motion to certify [the trial court's] May 10, 2010, order" as a final judgment pursuant to Rule 54(b), Ala. R. Civ. P. The trial court granted the parties' joint motion, and James appealed to our supreme court. Our supreme court transferred the appeal to this court on August 5, 2010, pursuant to § 12-2-7(6), Ala. Code 1975.

Standard of Review

This court set forth the well established standard by which we review trial court judgments based on ore tenus evidence in Farmers Insurance Co. v. Price-Williams Associates, Inc., 873 So. 2d 252 (Ala. Civ. App. 2003):

> "'When ore tenus evidence is presented, a presumption of correctness exists as to the trial court's findings on issues of fact; its judgment based on these findings of fact will not be disturbed unless it is clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence. J & M Bail Bonding Co. v. Hayes, 748 So. 2d 198 (Ala. 1999); Gaston v. Ames, 514 So. 2d 877 (Ala. 1987). When the trial court in a nonjury case enters a judgment without

> making specific findings of fact, the appellate court "will assume that the trial judge made those findings necessary to support the judgment." Transamerica Commercial Fin. Corp. v. AmSouth Bank, 608 So. 2d 375, 378 (Ala. 1992). Moreover, "[u]nder the ore tenus rule, the trial court's judgment and all implicit findings necessary to support it carry a presumption of correctness." Transamerica, 608 So. 2d at 378. However, when the trial court improperly applies the law to [the] facts, no presumption of correctness exists as to the trial court's judgment. Allstate Ins. Co. v. Skelton, 675 So. 2d 377 (Ala. 1996); Marvin's, Inc. v. Robertson, 608 So. 2d 391 (Ala. 1992); Gaston, 514 So. 2d at 878; Smith v. Style Advertising, Inc., 470 So. 2d 1194 (Ala. 1985); League v. McDonald, 355 So. 2d 695 (Ala. 1978). "Questions of law are not subject to the ore tenus standard of review." Reed v. Board of Trustees for Alabama State Univ., 778 So. 2d 791, 793 n. 2 (Ala. 2000). A trial court's conclusions on legal issues carry no presumption of correctness on appeal. Ex parte Cash, 624 So. 2d 576, 577 (Ala. 1993). This court reviews the application of law to facts de novo. Allstate, 675 So. 2d at 379 ("[W]here the facts before the trial court are essentially undisputed and the controversy involves questions of law for the court to consider, the [trial] court's judgment carries no presumption of correctness.")."

873 So. 2d at 254-55 (quoting City of Prattville v. Post, 831 So. 2d 622, 627-28 (Ala. Civ. App. 2002)).

Discussion

Initially, we note that the trial court did not set forth specific findings of fact upon which it based its judgment that the tonnage royalties were to be split evenly between James and Camden. However, as noted earlier, "it is well

settled that where the trial court does not make specific factual findings, this court will assume that the trial court made such findings as would support its judgment." Berryhill v. Reeves, 705 So. 2d 505, 507 (Ala. Civ. App. 1997) (citing Transamerica Commercial Fin. Corp. v. AmSouth Bank, N.A., 608 So. 2d 375, 378 (Ala. 1992)).

James argues on appeal that he lawfully leased the property from Ms. Clayton before her death, that he lawfully sublet the mining rights to the property to Blount Springs, and, thus, that he is the "sole legal recipient" of the tonnage royalties generated from the property. James further argues that Ms. Clayton's interest in the property did not include an interest in the tonnage royalties from the sublease and, thus, that Camden's interest in the property likewise does not include an interest in the tonnage royalties. Relying on Kelly v. Kelly, 250 Ala. 664, 35 So. 2d 686 (1948), and Kellum v. Balkum, 93 Ala. 317, 9 So. 463 (1891), James argues that Ms. Clayton's death did not terminate his lease; rather, he argues, upon Ms. Clayton's death, he and Camden were substituted as the "'landlords of their ancestor's tenants ....'"

The present case is distinguishable from Kelly and Kellum. In the present case, unlike in Kelly and Kellum, James, the lessee, inherited from Ms. Clayton, the lessor, the property as a joint tenant with the right of survivorship. Under Alabama law, our supreme court has held that "[i]n a joint tenancy each tenant is seized of some equal share while at the same time each owns the whole." Porter v. Porter, 472 So. 2d 630, 634 (Ala. 1985) (citing Nunn v. Keith, 289 Ala. 518, 268 So. 2d 792 (1972)). Therefore, Ms. Clayton's reversion interest in the fee and James's tenancy interest vested in James when he and Camden inherited the property from Ms. Clayton as joint tenants. Accordingly, James's lease was destroyed under the doctrine of merger. See Whigham v. Travelodge Int'l, Inc., 349 So. 2d 1078, 1085 (Ala. 1977) (citing McMahan v. Jacoway, 105 Ala. 585, 17 So. 39 (1894); Otis v. McMillan & Sons, 70 Ala. 46 (1881); and Martin, Bradley & Co. v. Searcy, 3 Stew. 50, 52 (1830)); see also Welsh v. Phillips, 54 Ala. 309, 316 (1875) ("The general rule of law is, that when a greater and less, or a legal and equitable estate, meet and coincide in the same person, they are merged, the one drowned in the other."). Holding

otherwise would result in the absurdity our supreme court warned against in Otis, 70 Ala. at 59: "There can be no greater absurdity, than to place [a man] in the relation of being his own landlord, and his own tenant, at one and the same time; bound himself to pay, and to receive rent." Our conclusion that James's lease terminated at the moment James and Camden inherited the property from Ms. Clayton as joint tenants negates James's further arguments.

The dissent asserts that, "[i]n this case, the same persons have never held and do not hold both the freehold interest and the leasehold interest in the property at issue" because James and Camden inherited the property from Ms. Clayton as joint tenants. ___ So. 3d at ___. The dissent further asserts that "Alabama law should recognize that a merger of estates does not occur when a lone tenant under a lease acquires ownership of the freehold estate as a joint tenant with another." ___ So. 3d ___. However, in order to reach the dissent's conclusion this court would have to ignore the long-held principle noted above that "[i]n a joint tenancy each tenant is seized of some equal share while at the same time each owns the whole." Porter, 472 So. 2d at 634. Under

Alabama law, James is considered to own an undivided interest in the whole property; thus, the merger doctrine applies to terminate James's lease.

In reaching the conclusion that it does, the dissent relies upon a case from the Supreme Court of New Mexico, Tri-Bullion Corp. v. American Smelting & Refining Co., 58 N.M. 787, 277 P.2d 293 (1954). The dissent asserts that in Tri-Bullion "the New Mexico Supreme Court denied application of the merger doctrine in circumstances almost identical to those at issue in this case." ___ So. 3d at ___. Though "almost identical," the facts in Tri-Bullion present a significant distinction from the present case. In Tri-Bullion, American Smelting, a corporation that held a lease allowing it to mine certain real property, later acquired fee-simple ownership of the same real property as tenant in common with Tri-Bullion. 58 N.M. at 792, 277 P.2d at 296. In the present case, James and Camden acquired fee-simple ownership of the property as joint tenants with the right of survivorship.

Alabama law has long recognized a distinction between joint tenants and tenants in common. Under Alabama law, joint tenants share the unities of interest, title, and possession.

See Nunn v. Keith, 289 Ala. 518, 524, 268 So. 2d 792, 797 (1972) (noting that the unity of time, though a requirement at common law to create a joint tenancy, is not required under Alabama law in order to create a joint tenancy); see also 48A C.J.S. Joint Tenancy § 8 (2004) ("[I]n ... a joint tenancy ... each of the owners must have one and the same interest; conveyed by the same act or instrument; ... and each must have the entire possession of every parcel of the property held in joint tenancy as well as of the whole." (footnotes omitted)). Conversely, tenants in common share only the unity of possession. Porter, 472 So. 2d at 633 (citing Van Meter v. Grice, 380 So. 2d 274 (Ala. 1980))("[A] tenancy in common requires only one unity, that of possession."). Further, tenants in common are not considered to own the entirety of the parcel, as in a joint tenancy; rather, each tenant in common owns an undivided part of the parcel. Kellum v. Williams, 252 Ala. 71, 72, 39 So. 2d 573, 574 (1949) ("A tenancy in common may be defined as that character of tenancy where two or more persons are entitled to property in such manner that, while there are several freeholds, the possession is not divided but is a single unity ...."); see also 86

C.J.S. Tenancy in Common § 3 (2006). Therefore, our conclusion that the merger doctrine applies to terminate the lease between Ms. Clayton and James is consistent with Alabama law.[2]

The dissent also asserts that, "even if the joint tenancy with a right of survivorship somehow could be viewed as a unification of the freehold estate and the leasehold estate in the same person, the doctrine of merger would not apply" based on the rules of equity. ___ So. 3d ___. However, as the dissent notes, James did not raise this argument to the trial court and does not raise it on appeal. Thus, we will not reverse the trial court's judgment based on an argument not presented for its consideration. See Ex parte Wiginton, 743 So. 2d 1071, 1072-73 (Ala. 1999) ("The appellate courts will sustain the decision of the trial court if it is right for any reason, even one not presented by a party or considered or cited by the trial judge, Morrison v. Franklin, 655 So. 2d 964 (Ala. 1995), even though the appellate courts will not reverse

[2]We also recognize the dissent's reliance upon Sisson v. Swift, 243 Ala. 289, 9 So. 2d 891 (1942), and, although we question the applicability of a trust-law case to the situation presented in this case, we note that our conclusion is consistent with the proposition in Sisson upon which the dissent relies.

the trial court on an issue or contention not presented to the trial court for its consideration in making its ruling, Smith v. Equifax Services, Inc., 537 So. 2d 463 (Ala. 1988).").

James's argument that Camden's interest in the property is limited to the interest that Ms. Clayton held is correct. However, James's conclusion that because Ms. Clayton was not entitled to the tonnage royalties likewise bars Camden from the tonnage royalties does not follow. Rather, James and Camden inherited the property as joint tenants. "In a joint tenancy each tenant is seized of some equal share while at the same time each owns the whole." Porter, 472 So. 2d at 634 (citing Nunn, supra). James's relationship with Ms. Clayton was that of lessor-lessee. However, James's relationship with Camden is that of joint tenants, which "have a common right to possess and enjoy the property." Porter, 472 So. 2d at 633. Further, our supreme court has held that

> "'...[i]t has become a settled rule in this country that a cotenant who has received money from third persons for the use of the common property becomes a trustee for the amount collected for the benefit of his cotenants ....' 14 Am. Jur. pp. 99, 100. For money so received, he must account. Henderson v. Stinson, 207 Ala. 365, 92 So. 453; 27 A.L.R. page 188 [(1922)]."

Faust v. Faust, 251 Ala. 35, 37, 36 So. 2d 232, 233 (1948). Therefore, we affirm the trial court's judgment that James and Camden are entitled to an equal share of the tonnage royalties.

James also argues that Camden produced no evidence indicating that James had committed waste. However, based on our previous holding, we need not address this argument. See Favorite Market Store v. Waldrop, 924 So. 2d 719, 723 (Ala. Civ. App 2005) (stating that this court would pretermit discussion of further issues in light of dispositive nature of another issue).

Conclusion

Based on the foregoing, we affirm the trial court's judgment.

AFFIRMED.

Pittman, J., concurs.

Thompson, P.J., concurs in the result, without writing.

Moore, J., dissents, with writing, which Bryan, J., joins.

MOORE, Judge, dissenting.

I respectfully dissent.

In the proceedings below, Camden Clayton, the grandson of Estellene Clayton ("Ms. Clayton"), removed the probate proceedings relating to Ms. Clayton's estate to the Etowah Circuit Court ("the trial court"). Before the removal, it was established that, in her will, Ms. Clayton had named James Clayton, her son and Camden's father, as the administrator of her estate and that Ms. Clayton had devised certain real property ("the property") to James and Camden as joint tenants with the right of survivorship. Upon removal, Camden requested the trial court to resolve the issue whether, based on his status as a joint tenant with the right of survivorship, he had the right to share in the royalties from a mining lease relating to the property.[3] The trial court

[3]In his appellee brief, Camden argues other theories for why he should receive a share of the royalties; however, he did not present any of those theories to the trial court and did not notify James of his reliance on those theories. Although ordinarily we can affirm a judgment on any valid legal ground presented in the record, we cannot take that action when to do so would violate the due-process rights of the opposing party. Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003).

initially ordered James to pay the royalties to the clerk of the court, but later, after an ore tenus hearing, it entered a judgment awarding Camden one-half of the royalties of the mining lease dating from the death of Ms. Clayton and into the future.

The evidence from the brief hearing conducted by the trial court indicates that, at some point in the late 1990s, James leased a portion of the property from Ms. Clayton.[4] Subsequently, on December 10, 1999, James entered into a limestone and sandstone mining lease with Blount Springs Sand & Gravel Co., Inc. ("Blount Springs"), relating to the property. Thereafter, James received annual and monthly mineral royalties from Blount Springs as specified in the mining lease. James testified that the mineral royalties constituted his sole source of income, so he would daily

[4]James did not introduce a copy of the written lease at trial, but he did attach a copy of the written lease to his motion to alter, amend, or vacate. Because the record is unclear as to whether the trial court considered that lease, I do not rely on its contents on appeal. See J.S.M. v. P.J., 902 So. 2d 89, 91 n.2 (Ala. Civ. App. 2004) (this court refused to consider an affidavit submitted in support of a valid postjudgment motion when it was unclear whether the trial court had considered that evidence).

supervise the mining operations conducted by Blount Springs on the property. James did not share the royalties with Ms. Clayton during her lifetime, and he did not remit any payments to her estate after her death on July 28, 2009.[5] At some point in 2009, before the death of Ms. Clayton, James renewed his lease on the property, and the lease was set to expire at some point in 2019.

The trial court evidently concluded that Camden, by virtue of his inheritance of a joint interest in the property, obtained a right to share equally in the royalties from the mining lease. The main opinion affirms that judgment on the

[5]Early in his testimony, in response to a question regarding whether he was collecting the royalties remitted after the death of Ms. Clayton as the personal representative of her estate, James responded: "Yes, I have, due to my contract with [the mining company]." However, James later clarified that rather ambiguous response by stating that he had retained the royalties on his own behalf and had not remitted any payments to the bank accounts of the estate. The whole of his testimony indicates that James never acknowledged that any part of the royalty payments belonged to the estate; rather, he maintained throughout the proceedings that he was the rightful owner of the royalties unless the court ruled otherwise. See McGough v. G & A, Inc., 999 So. 2d 898 (Ala. Civ. App. 2007) (requiring court to review the entirety of a witness's testimony to determine its substantialness). Thus, I reject Camden's contention that James admitted that the estate had an interest in the royalty payments.

theory that James's lease terminated upon the death of Ms. Clayton, reasoning as follows:

> "Ms. Clayton's reversion interest in the fee and James's tenancy interest vested in James when he and Camden inherited the property from Ms. Clayton as joint tenants. Accordingly, James's lease was destroyed under the doctrine of merger. See Whigham v. Travelodge Int'l, Inc., 349 So. 2d 1078, 1085 (Ala. 1977) (citing McMahan v. Jacoway, 105 Ala. 585, 17 So. 39 (1894); Otis v. McMillan & Sons, 70 Ala. 46 (1881); and Martin, Bradley & Co. v. Searcy, 3 Stew. 50, 52 (1830)); see also Welsh v. Phillips, 54 Ala. 309, 316 (1875) ('The general rule of law is, that when a greater and less, or a legal and equitable estate, meet and coincide in the same person, they are merged, the one drowned in the other.'). Holding otherwise would result in the absurdity our supreme court warned against in Otis, 70 Ala. at 59: 'There can be no greater absurdity, than to place [a man] in the relation of being his own landlord, and his own tenant, at one and the same time; bound himself to pay, and to receive rent.'"

___ So. 3d at ___. The main opinion further concludes that, once James's lease was destroyed, James and Camden, as joint owners of the leased property, were entitled to share in the proceeds of the mining royalties equally. ___ So. 3d at ___.

I respectfully disagree. Most of the cases cited in the main opinion involve fact situations in which, by one form of conveyance or another, a lone tenant acquires in his or her individual capacity a fee-simple interest in property that is

subject to a lease. The rule of law applicable to that situation is that, when the same person holds both the lesser leasehold interest and the greater freehold interest, the lease is extinguished. See Whigham v. Travelodge Int'l, Inc., 349 So. 2d 1078, 1084 (Ala. 1977) (noting that, when lone tenant purchases leased property at a foreclosure sale, his or her new ownership of the freehold estate destroys the lease); McMahan v. Jacoway, 105 Ala. 585, 588, 17 So. 39, 39 (1894) (holding that a sublease merged into the lease when individual sublessee purchased lease from individual sublessor); Otis v. McMillan & Sons, 70 Ala. 46, 49 (1881) (stating the general rule that, when an individual becomes both landlord and tenant, the lease is destroyed by merger); and Welsh v. Phillips, 54 Ala. 309, 311 (1875) (stating that merger doctrine applies when the "same person" holds greater and lesser interest in same property). The fact situation in Martin, Bradley & Co. v. Searcy, 3 Stew. 50 (1830), is slightly different because, in that case, the owner of the fee-simple interest in the property sold the property to his tenants, plural. However, the same result inured. In Martin, Bradley & Co., the court held that, when the transfer of

ownership resulted in the tenants owning both the freehold estate and the leasehold estate, the doctrine of merger extinguished the leasehold interest because the same persons cannot hold both interests. 3 Stew. at 52. The holdings in the foregoing cases are consistent with the common law as stated in the current Corpus Juris Secundum, which describes the necessary elements for merger as

> "[t]wo or more distinct estates of greater and lesser rank; a valid greater estate; a meeting of the estates in one person or class of persons; coincidence in time of meeting; absence of intervening estates; and a holding of the estates in the same right."

31 C.J.S. Estates § 156 (2008).

In this case, the same persons have never held and do not hold both the freehold interest and the leasehold interest in the property at issue. Upon Ms. Clayton's death, pursuant to the terms of her will, her freehold interest in the property fell to James and Camden as joint tenants with rights of survivorship. However, that freehold interest remained subject to the leasehold interest, see Kellum v. Balkum, 93 Ala. 317, 9 So. 463 (1891), and Kelly v. Kelly, 250 Ala. 664, 35 So. 2d 686 (1948) (holding that death of lessor does not terminate lease, but passes freehold estate to heirs subject

to lease), which was vested solely in James. Hence, the entire basis for the merger doctrine, the coincidence of ownership of the freehold estate and the leasehold estate in the exact same person or persons, does not exist in this case.

In Sisson v. Swift, 243 Ala. 289, 9 So. 2d 891 (1942),[6] the court recognized that, despite the merger doctrine, one could act both as a trustee and a beneficiary of a trust when the trust also benefited others. 243 Ala. at 297, 9 So. 2d at 898. Sisson apparently recognizes the common-law rule that the doctrine of merger depends upon a complete identity of ownership in both the greater and the lesser estates so that any deviation prevents a merger of estates. Extending the reasoning in Sisson to the present factual situation, Alabama law should recognize that a merger of estates does not occur when a lone tenant under a lease acquires ownership of the freehold estate as a joint tenant with another.

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[6]The main opinion questions my reliance on Sisson because it is a trust case. As illustrated by Sisson, the principles of the doctrine of merger apply equally to coincidental ownership in legal and equitable estates in property. Thus, although this case involves the merger of greater and lesser estates in real property, that distinction does not affect the relevancy of the holding in Sisson on the issue whether Alabama law recognizes merger when the ownership of two estates in the same property varies.

Although Alabama law has not directly addressed that point, the New Mexico Supreme Court denied application of the merger doctrine in circumstances almost identical to those at issue in this case. In Tri-Bullion Corp. v. American Smelting & Refining Co., 58 N.M. 787, 277 P.2d 293 (1954), American Smelting acquired a lease allowing it to mine certain real property. American Smelting later acquired fee-simple ownership of the same real property as a tenant in common with Tri-Bullion. The New Mexico Supreme Court held that the cotenancy did not extinguish the lease. The court stated:

> "In the instant case we are of the opinion and so hold that there was no merger because the same party never became the owner of the larger (fee) and of the smaller (leasehold) estates in this property. We deem this situation similar to the following: A, the owner of a building, leases office space to B, the tenant; B, the tenant, and C, a third party, purchase A's interest as owner of the building. The doctrine of merger does not apply to kill B's lease. 51 C.J.S., Landlord and Tenant, § 257, p. 894; Patterson v. United Natural Gas Co., 263 Pa. 21, 105 A. 828 [(1919)]; Vucinich v. Gordon, 51 Cal. App. 2d 434, 124 P.2d 868 [(1942)]."

Tri-Bullion Corp., 58 N.M. at 794, 277 P.2d at 297. Based on Sisson, and the basic principles of the merger doctrine, it appears that, if our supreme court were addressing this case,

it would use the same reasoning and reach the same holding as did the court in Tri-Bullion.

The main opinion points out that the cotenancy at issue in Tri-Bullion differs from the joint tenancy with right of survivorship at issue in this case. Although I recognize that distinction, I do not believe it compels a different result. The principle to be derived from Tri-Bullion and Sisson is that merger occurs only when a complete identity of ownership concurs in two estates in the same property. See First Alabama Bank of Tuscaloosa, N.A. v. Webb, 373 So. 2d 631, 637 (Ala. 1979) ("Sisson described the doctrine of merger in terms of the same person owning both the legal and equitable estates."). The characterization of the ownership rights may make a difference when the owner is the same, but that factor does not control when the identity of the owner or owners of the two estates differs. The main opinion does not cite a single case in which any court has held that a lease is extinguished upon the lessor's acquiring the property along with another as a joint tenant with the right of survivorship. It would seem such a holding would invalidate many presently

existing business relationships by which property is leased by one joint tenant to or from all joint tenants.

At any rate, even if the joint tenancy with a right of survivorship somehow could be viewed as a unification of the freehold estate and the leasehold estate in the same person, the doctrine of merger would not apply. Our supreme court has long recognized that the common-law rule of merger is highly disfavored and will not be applied rigorously when to do so would be to the disadvantage of the prior owner of one of the estates. Kidd v. Cruse, 200 Ala. 293, 296, 76 So. 59, 62 (1917). In Kidd, the court surveyed the law in other jurisdictions in order to declare Alabama law on the doctrine of merger. The present state of the law is best summarized as follows:

> "It was an inflexible rule at common law that a merger always took place when a greater and a lesser estate met in the ownership of the same person without any intermediate estate, but modernly the doctrine of merger is not favored either at law or in equity. Consequently, the courts will not compel a merger of estates where the party in whom the two interests are vested does not intend such a merger to take place, or where it would be inimical to the interest of the party in whom the several estates have united ..., nor will they recognize a claim of merger where to do so would prejudice the rights of innocent third persons. 19 Am. Jur. 589, Estates, §

> 136; 21 C.J. 1034, Estates, § 234; 31 C.J.S., Estates, § 124."

Mobley v. Harkins, 14 Wash. 2d 276, 281-82, 128 P.2d 289, 291 (1942) (emphasis added). See also IP Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96, 108-09 (Miss. 1998) ("'"Termination does not, however, always follow the acquisition of the landlord's title by the tenant. The question whether or not a merger affecting a termination of the lease results depends on what will best serve the interests of justice and the intention of the parties."'" (quoting Zouboukos v. Costas, 232 Miss. 860, 870, 100 So. 2d 781, 785 (1958), quoting in turn 51 C.J.S. Landlord and Tenant § 94, p. 666)).

In this case, James obtained a lease from Ms. Clayton, which allowed him to enter the mining lease that has generated his sole source of income for over 10 years and which he was relying upon to continue to generate income for the next 8 years. If the court applied the merger doctrine mechanically so as to terminate James's lease, the mining lease would attach to the property and James would be required to share one-half of the mineral royalties with Camden as a joint tenant. See Faust v. Faust, 251 Ala. 35, 37, 36 So. 2d 232,

233 (1948). In other words, James would experience a loss of half of his income through no action of his own. Because that result would be inimical to James's interest, the doctrine of merger cannot be applied.[7]

Because, in the present case, the leasehold estate did not merge into the freehold estate upon the devise of the property to James and Camden as joint tenants, the leasehold estate remains the separate estate of James, as does the mining lease, which was entered into solely between James and the mining company. Moreover, even if the doctrine of merger could be applied, it would be inequitable to do so under the facts of this case. Thus, James, alone, is entitled to the royalty payments unless the trial court had some other valid reason for apportioning those royalties.

Having reviewed the record and the briefs of the parties thoroughly, I do not find any legal or factual justification supporting the trial court's decision that James and Camden are entitled to equally share in the royalties. I would

[7]I recognize that James has not specifically argued this point. However, I point out the inequity of applying the merger doctrine in order to show that, based on the record before us, the doctrine does not present a valid legal ground for affirming the judgment of the trial court.

reverse the trial court's judgment and remand the case to the trial court with instructions to vacate that portion of the judgment awarding Camden one-half of the past and future royalties from the mining lease.

Bryan, J., concurs.