

1957

# H. Knight and Orson Doyle Stilson v. Flat Top Mining Co. et al : Petition for Rehearing and Brief of Plaintiffs and Appellants and Respondents on Cross-Appeal

Utah Supreme Court

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Hanson and Ruggeri;

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# IN THE SUPREME COURT of the STATE OF UTAH

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H. KNIGHT and ORSON DOYLE STILLSON,  
sometimes otherwise known as ORSON  
DOYLE,

*Plaintiffs and Appellants and  
Respondents on Cross-Appeal*

vs.

FLAT TOP MINING COMPANY, a corpora-  
tion, et al,

*Defendants and Respondents  
and Cross-Appellants,*

and

LORAN HUNT, et al,

*Defendants, Cross-Plaintiffs  
and Joint Appellants.*

Case  
No. 8439

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**PETITION FOR REHEARING and  
BRIEF OF PLAINTIFFS AND APPELLANTS  
AND RESPONDENTS ON CROSS-APPEAL.**

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**HANSON and RUGGERI,**  
*Attorneys for Plaintiffs,  
Appellants and Respondents  
on Cross-Appeal.*

**FILED**  
FEB 11 1957  
Clerk, Supreme Court, Utah

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Case  
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## PETITION FOR REHEARING

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HANSON and RUGGERI,

*Attorneys for Plaintiffs,  
Appellants and Respondents  
on Cross-Appeal.*

TO THE HONORABLE CHIEF JUSTICE, and  
TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

The petitioners, H. Knight and Orson Doyle Stilson, sometimes otherwise known as Orson Doyle, plaintiffs and appellants and Respondents on Cross-Appeal, hereby respectfully request a rehearing in the above entitled cause, and that the decision be modified (or, amplified) as hereinafter suggested for the reasons and upon the grounds following, to-wit:

1. That the Court erred in finding that Abe Glassman, one of the defendants, had any privity of interest in the mining claims in dispute; and in holding that in the latter part of the year 1937 Jeanette Glassman transferred her interest in those claims to her brother, Abe Glassman.
2. That the Court erred in holding that the relationship of co-tenants existed between your petitioners, and the defendant, Flat Top Mining Co., and its predecessors in interest.
3. That since Abe Glassman had no privity of interest in those claims, but in reality was a stranger thereto; and that since the Flat Top Mining Co., and its predecessors in interest, had no color of title thereto, and no relationship of co-tenancy existed between your petitioners and the defendant, Flat Top Mining Co., the title to Battle Mountain Claims Nos. 1 to 4 should be quieted in your petitioners, the plaintiffs and appellants and respondents on cross-appeal in this cause.

Therefore, your petitioners respectfully submit that a rehearing should be had and the decision revised both as to law and fact, believing that re-examination of the record made by the Court after rehearing wherein counsel will be able to assist the Court better to examine and understand the (voluminous and cumbersome) record certified, will result in a revision and reversal of the decision herein, and that a miscarriage of justice will occur if the case is not reversed.

HANSON and RUGGERI,  
By Frank B. Hanson

*Attorneys for Petitioners, H.  
Knight and Orson Doyle Stilson,  
sometimes otherwise known as  
Orson Doyle, plaintiffs and appel-  
lants and Respondents on Cross-  
Appeal.*

# IN THE SUPREME COURT of the STATE OF UTAH

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*Defendants and Respondents  
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and

LORAN HUNT, et al,

*Defendants, Cross-Plaintiffs  
and Joint Appellants.*

Case  
No. 8439

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## BRIEF OF PLAINTIFFS AND APPELLANTS AND RESPONDENTS ON CROSS-APPEAL.

---

HANSON and RUGGERI,  
*Attorneys for Plaintiffs,  
Appellants and Respondents  
on Cross-Appeal.*

## STATEMENT OF FACTS

This action is a quiet title action, involving the title to certain unpatented mining claims. The litigation seeks to determine the validity of the title thereto. The defendants, respondents and cross-appellants claim good title thereto, but your petitioners, the plaintiffs, appellants and respondents on cross appeal, respectfully state there are two vital links missing therefrom, and which, in the opinion of your petitioners, makes their title fatally defective. The petition for rehearing is grounded upon these defects in title, the invalidity of which arise both in law and in fact.

A careful reading of the Court's decision in this cause reveals that it rests upon two assumptions, namely: The alleged transfer by the sister-in-law, Jeanette Glassman, of those claims to the defendant, Abe Glassman and the alleged existence of the relationship of co-tenancy between the defendants, Flat Top Mining Co., and its predecessors in interest, and your petitioners, the plaintiffs, appellants and respondents on cross appeal.

To uphold the chain of title stemming from Abe Glassman he must have a privity of interest in those claims. That privity of interest is based on the so-called "lost" paper or deed, allegedly given to him by his brother, Oscar Glassman, from his sister-in-law, Jeanette Glassman, allegedly purporting to transfer to him her interest in those claims. The existence of said "lost" unrecorded paper or deed was denied by your petitioners and was never proved in this cause. (See Tr. of Ev.,



30, p. 603, lines 1 to 20, p. 629, lines 8 to 30, p. 631, Vol. 2, D. & C. Test. Abe Glassman, p. 602, lines 4 to lines 1 to 12, p. 663, lines 8 to 30; Also, Tr. of Ev., D. H. Moulton, Vol. 4, p. 1549, lines 1 to 11, p. 1551, p. 1553, lines 9 to 19, p. 1554, lines 1 to 23, p. 1556, p. 1561, lines 1 to 5, 23 to 27.)

To uphold the imposition of a trust upon your petitioners, there must be established a co-tenancy relationship existing between the defendant, Flat Top Mining Co., and its predecessors in interest, and your petitioners, the plaintiffs, appellants and respondents on cross-appeal. To establish such a relationship it is assumed that the Flat Top Mining Co., and its predecessors in interest, had some color of title to those claims, which it, or its predecessors in interest, never had or could acquire.

## STATEMENT OF POINTS

### POINT I.

THE COURT ERRED IN FINDING THAT ABE GLASSMAN, ONE OF THE DEFENDANTS, HAD ANY PRIVITY OF INTEREST IN THE MINING CLAIMS IN DISPUTE, AND IN HOLDING THAT IN THE LATTER PART OF THE YEAR 1937 JEANETTE GLASSMAN TRANSFERRED HER INTERESTS TO HER BROTHER-IN-LAW, ABE GLASSMAN.

### POINT II.

THE COURT ERRED IN HOLDING THAT THE RELATIONSHIP OF CO-TENANTS EXISTED BETWEEN YOUR PETITIONERS, THE PLAINTIFFS, APPELLANTS, AND RE-

SPONDENTS ON CROSS-APPEAL, AND THE DEFENDANT, FLAT TOP MINING CO., AND ITS PREDECESSORS IN INTEREST.

## ARGUMENT

### POINT I.

The Court erred in finding that Abe Glassman, one of the defendants, had any privity of interest in the mining claims in dispute, and in holding that in the latter part of the year 1937 Jeanette Glassman transferred her interest to her brother-in-law, Abe Glassman.

The existence of the alleged unrecorded "lost" instrument or paper was never proved legally; the only testimony being the mere statement of Abe Glassman that his brother-in-law, Oscar Glassman, had given him some paper or instrument, and he did not know what the contents were but he assumed that it had to do with those claims.

Under our Statute, Sec. 78-25-16, Vol. 9, Utah Code Annotated, 1953, that is not sufficient to make such testimony admissable to establish such "lost" instrument or paper allegedly conveying an interest in those claims, the purpose of the statute being to require far more definite proof of execution and contents, and which rule of law has been repeatedly upheld. See *Lampe v. Kennedy*, 14 N. W. page 45, *Capal et al v. Fagan*, 77, page 55, *Cross v. Patch*, 297 page (2nd) 329.

## POINT II.

The Court erred in holding that the relationship of co-tenants existed between your petitioners, and the defendants, Flat Top Mining Co., and its predecessors in interest.

It was found by the Trial Court that at the time Flat Top Mining Co., or its predecessors in interest, attempted to locate those claims under invalid locations, entitled Flat 1 to 4, that the public domain attempted to be located, was not open for relocation; and the Flat Top Mining Co., or its predecessors in interest, did not then, or ever could, by virtue of attempted locations, acquire or bring into being any rights whatsoever. See *Argentine Mining Co. v. Benedict*, 18 Utah, 183, 55 P. 559; *Lockhart v. Farrell*, 31 U. 55, 86 P. 1077; *Holde v. Blazzard*, 110 Cal. App. 440, 102 P. 540; *Geyman v. Boniware*, 47 Nev. 409, 224 P. 409, *Copper State Mining Co. v. Kelin, L. & S. Co.*, 227 S. W. 938, *Biglow v. Conradt*, 159 Fed. 868.

To have a relationship of co-tenancy there must be at least a color of title in the parties in some thing or property; and since the defendant, Flat Top Mining Co., or its predecessors in interest, had no such right in those claims, (and could never acquire such rights; the attempted locations being void from the beginning, as no legal right can be created which is dependent upon a trespass or tortious entry for its validity), there was no tenancy in common, or co-tenancy, of the alleged claims for which a trust is imposed on your petitioners' valid and

subsisting claims, Battle Mountain Nos. 1 to 4. And there being no co-tenancy in those alleged claims of the defendant, Flat Top Mining Co., and its predecessors in interest, no fiduciary relationship can be imposed upon your petitioners. See Robinson v. Bledsoe, Vol. 139, P. 245.

## CONCLUSION

We respectfully submit that the decision rendered in this cause is, in our opinion, based upon two fatally defective assumptions, to-wit: the alleged transfer of Jeanette Glassman's interest to Abe Glassman, vitally necessary if the chain of title is to be upheld, and the alleged existence of a co-tenancy in those claims which did not in fact or could ever exist between your petitioners and the defendant, Flat Top Mining Co., and its predecessors in interest; and for that reason a rehearing should be had, and the decision revised, both as to law and fact, so that a miscarriage of justice will not result in this case.

RESPECTFULLY SUBMITTED,  
HANSON and RUGGERI,  
By Frank B. Hanson