

1980

Penelko, Inc., A Utah Corporation v. Price Rentals,  
Inc., A Utah Corporation And John Price  
Associates, Inc., A Utah Corporation, Et Al. :  
Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

- - - - -

PENELKO, INC., a Utah  
Corporation,

Plaintiff and Appellant,

vs.

PRICE RENTALS, INC., a  
Utah Corporation,

Defendant and Respondent,

No. 16601

and

JOHN PRICE ASSOCIATES, INC.,  
a Utah Corporation, et al.,

Defendants.

APPELLANT'S BRIEF

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL  
DISTRICT COURT OF SALT LAKE COUNTY  
HONORABLE BRYANT H. CROFT

- - - - -

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### NATURE OF THE CASE

Action for damages and injunctive relief and attorney's fees for alleged willful violation of appellant's lease.

### DISPOSITION BY THE LOWER COURT

In a jury trial a general verdict was rendered in favor of appellant in the amount of \$65,000. The judgment on this verdict is the subject of respondent Price Rentals, Inc. appeal in Appeal No. 16588. Following the jury's verdict and judgment thereon, the lower court, the Honorable Bryant H. Croft presiding, on July 2, 1979, denied plaintiff's motion for injunctive relief and by an order filed September 12, 1979, denied appellant's motion to assess attorney's fees. (1216, 1659)

### RELIEF SOUGHT ON APPEAL

Appellant, Penelko, Inc. seeks reversal of the lower court's order filed July 2, 1979, denying plaintiff's motion for injunctive relief and an order of the Supreme Court ordering injunctive relief as prayed for in the complaint.

Appellant, Penelko, Inc. also seeks reversal of the lower court's order filed September 12, 1979, denying appellant's motion for attorney's fees and an order of the Supreme Court directing the lower court to fix appellant's attorney's fees including reasonable attorney's fees for work on Price Rentals, Inc. Appeal No. 16588, and Penelko, Inc. Appeal

## MATERIAL FACTS OF THE CASE

The facts of this cause are set forth in Penelko, Inc.'s Respondent's Brief in Appeal No. 16588. We adopt these facts by reference and set forth below only such additional facts as are particularly relevant to this appeal by Penelko, Inc. (appellant) seeking reversal of the trial court's orders denying it equitable relief and denying it attorney's fees.

### 1. Particular Facts Relating to Appellant's Motion for Injunctive Relief

On March 24, 1979, the jury brought in a general verdict in favor of plaintiff, Penelko, Inc., the appellant herein, on this appeal. (1104)

Based on this verdict, which constituted a finding by the jury that Price Rentals, Inc. had violated appellant's lease, appellant on June 14, 1979, moved for injunctive relief. (1134) The motion for injunctive relief was denied by the court on July 2, 1979. (1216, 1217)

### 2. Particular Facts Relating to Appellant's Motion for Attorney's Fees

The jury's findings by its general verdict was that Price Rentals, Inc. had violated appellant's lease. Paragraph 20 of the lease provided that in the event either party shall fail to perform this lease and agreement according to its terms, such party hereby agrees to pay all costs and expenses (including reasonably attorney's fees). (See paragraph 20 Exh. 1-P)

Paragraph 2 of Malstroms's lease to Price Rentals, Inc. dated December 1, 1977, provides that respondent lessee Price

Rentals, Inc. shall be in full possession and control of the leased premises and that the Penelko lease described in Exhibit "A" attached to the agreement is sold, assigned and transferred in its entirety by the lessor to lessees Price Rentals, Inc. (Paragraph 2 page 3 of Malstrom's lease to Price Rentals, Inc. Exh. 7-P)

Exhibit "A" of Malstrom's lease to Price Rentals, Inc. provides that Price Rentals, Inc. is subject to Penelko's lease. (See page 2 Exhibit "A" of Exh. 7-P) The lease is signed by the Malstroms and by Price Rentals, Inc. by John Price, president. John Price guarantees the prompt and faithful performance of all of the obligations of the tenant in the lease. (See page 20 of Exh. 7-P)

All the violations of appellant's lease were committed by respondent Price Rentals, Inc. as is set forth in "MATERIAL FACTS OF THE CASE" in Penelko's respondent's brief, Appeal No. 16588 incorporated herein by reference.

Prior to the conclusion of the trial in this cause, appellant submitted instructions to the jury on attorney's fees. These instructions were not given by the court. The court writing on the instructions: "Denied--to be determined by the court." And this was reiterated in chambers by the court. (See Judge Croft's memorandum decision, 1653) Consequently, appellant adduced no evidence to the jury regarding attorney's fees.

After the jury's verdict and the judgment thereon, and on July 9, 1979, appellant moved for attorney's fees.



(1104 - 1108, 1221) Thereafter, on July 19, 1979, Price Rentals, Inc. filed its Motion for Appeal. (1231)

Appellant's attorney, William H. Henderson, filed a detailed affidavit showing the services performed in this cause and requesting attorney's fees for his work in the amount of \$15,000. (1225 - 1230) Co-counsel Mark Miner also filed a like affidavit in support of attorney's fees for his services in the amount of \$15,000 making a total amount requested for attorney's fees of \$30,000. (1245 - 1247)

On September 11, 1979, Judge Croft filed his memorandum decision denying appellant's attorney's fees. (1649 - 1645)

In Judge Croft's memorandum decision the court found that appellant had not waived its claim for attorney's fees by not submitting evidence inasmuch as appellant was in effect precluded from submitting evidence by reason of the court's denial of its instruction on attorney's fees. (1654)

The court also found that it did not lose jurisdiction to rule on attorney's fees because Price Rentals, Inc. had filed its notice of appeal before it had ruled on appellant's motion for attorney's fees. The court ruled that it retained jurisdiction on this undecided issue. (1653 - 1654)

The court also ruled that the issue of attorney's fees was for the court. (1653)

The court further found that the cause was submitted to the jury, "Based upon a breach of plaintiff's [appellant's] lease". And in such case it mattered not "whether the alleged breach of the lease smacks of tort or contract." (1655)

The lower court, per Judge Croft in his memorandum decision, denied appellant's motion for attorney's fees on the sole ground that there was lack of privity between appellant and Price Rentals, Inc. and that as the covenant for attorney's fees in appellant's lease was not one running with the land, it was not binding on Price Rentals, Inc., citing Latses v. Nick, Inc. 99 Utah 214, 104 p. 2d 619, (1655 - 1656)

On September 14, 1979, formal order denying appellant's motion for attorney's fees was filed with the court. The court wrote in this order denying attorney's fees, "For the reason set forth in the memorandum decision." (1659)

#### ARGUMENT

1. Respondent's Willfull Tresspass on Appellant's Property and Willful Violation of its Lease Relating to Appellant's Property Entitled Appellant to Injunctive Relief as a Matter of Law

One property right willfully violated by respondent was its landscaping over appellant's leased parking space, including erection of the flagpole and the building of a roadway over such space. This was done with knowledge of appellant's lease and over its protests, as mentioned in "MATERIAL FACTS OF THE CASE", Penelko's Respondent's Brief.

The very least that Penelko, Inc. owned under paragraph 3 of its lease, was to use the leased parking place "in common with . . . tenants of adjoining properties", which in this case was Perkins' Cake & Steak Restaurant. (See

paragraphs 3 and 7, page 2, Exh. 1-P) Consequently, Price Rentals' construction on the parking and preventing Penelko's use of it in common with Perkins' Cake & Steak or otherwise, entitled appellant to a mandatory injunction as a matter of law, removing the roadway and the landscaping over this leased parking space.

Another property right, willfully violated by respondent Price Rentals, Inc. was the construction of the Perkins' Cake & Steak Restaurant. As is pointed out in "MATERIAL FACTS OF CASE" Penelko's appellant's brief; paragraph 7 of Penelko's lease provided that its lessor, the Malstroms, must provide in the leases of adjoining properties, "similar agreements and agreements on use of parking in common" and that neither Malstroms "Offer to Lease" or lease to Price Rentals or Price Rentals' lease to Perkins' Cake & Steak contained a similar covenant. Further, Perkins' Cake & Steak Restaurant was constructed on approximately all the land leased and did not provide any common parking space. It did not even provide 24 spaces required by the Sandy City C. U. P. Ordinance. This factual situation stands uncontradicted in the record, and is found by the jury in its award of damages to appellant. Consequently, as a matter of law, the court should order respondent Price Rentals, Inc. to remove the Perkins' Cake & Steak Restaurant.

The court has authority to grant a mandatory injunction. Rule 65A, URCP, §(e)(4) provides for injunctive relief, "in all other cases where an injunction would be proper in equity."

In Henderson v. Ogden City Ry Co., 7 U. 199, 26, p. 286, (1891), the court granted a mandatory injunction as well as a preventive writ when defendant piled obstructions on plaintiff's road bed.

Mandatory injunction should not be denied where encroachment was intentional.

This fundamental rule was pronounced and applied in Agmar v. Solomon, 87 Cal. App. 127, 261, p. 1029 (1927),

But as the encroachment was intentional and was not the result of accident or innocent mistake, the cost of removing it or the absence of damage to owner of the land encroached on will not defeat the right of such owner to a mandatory injunction.

See to same effect: Lusk v. Krejci, 187 Cal. App. 2d 553, 9 Cal. Rptr. 703 (1960); Branch Realty, Inc. v. Waldbaum, Inc. 249 N.Y.S. 2d 32 (1964); City of Dunsmuir v. Silva, 154 Cal. App. 2d 925, 317 P. 2d 653 (1957); Peters v. Davis, 426 Pa. 231, A. 2d 748 (1967).

If a property owner, deliberately and intentionally violates a valid express restriction running with the land or intentionally 'takes a chance' the appropriate remedy is a mandatory injunction to eradicate the violation. (our emphasis)

Defendant Price Rentals, Inc.'s encroachment on plaintiff's parking space is by its nature, continuous. This calls for a mandatory injunction.

Needle v. Scheinberg, 187 Md. 169, 49 A 2d 334 (1946).

It has long been recognized that, though a fugitive and temporary trespass will not be enjoined, a continuing trespass will be enjoined if it would be ruinous or irreparable, or would impair the just enjoyment of the property.

See Barrell v. Renehan, 114 Vt. 23, 39 A2d 330 (1944).

See also Ercanbrack v. Clark, 79 Utah 233, 8 P2d P. 1093 (1932).

2. Respondent Price Rentals, Inc. Assumed the Obligations of Appellant's Lease and Consequently is Responsible for Attorney's Fees as is Provided in the Lease.

As is mentioned above, respondent Price Rentals, Inc. by written agreement, specifically agreed to take the assignment of appellant's lease subject to appellant's lease. Price Rentals, Inc. took possession of the property and did all the acts complained of in violation of Penelko, Inc.'s lease.

Authorities are not numerous. For where an assignee signs an agreement accepting a lease subject to a prior lease, it would appear A Fortiori that under contract law, the assignee is subject to the terms of the prior lease.

The authorities appellant has found and cites below all agree that when a subsequent lease agrees in writing to take a lease subject to the prior lease, it is bound by the provisions of the prior lease, whether or not the provision is one that is appurtenant to and would run with the land.

In Pickler v. Mershon (Iowa) 236 NW 382 (1931) by the provisions of the assignment, "the lessees assigned and the assignee accepted the lease." At issue was the subsequent assignee's liability for rent under the original lease which provision was not appurtenant and not running with the land.

If a mere naked assignment of the right, title, and interest of the lessees was all that was

intended, the signature of the appellees thereto was unnecessary. Where the lessee, in a written lease of land, assigns the lease to another, who accepts in writing the assignment, the latter executes a contract in writing, binding him to perform the conditions of the lease though in the writing there may be no mention of the obligations assumed.

See Schmidt v. Louisville & N. R. Co., 139 Ky. 81, 129 332, 335. In Schmidt the lessee assigned its lease. The original lessee had agreed to operate the railroad line and apply the net earnings to payment of bonds. The issue was whether the assignee was bound by this covenant inasmuch as it was not one that was appurtenant to or ran with the land. The assignment and the acceptance was in writing. The question at issue was whether this acceptance by the assignee bound it on all provisions of the lease including the obligations to run the railroad and pay on the bonds. It was argued that it was not binding in that nowhere in the papers was there any mention of the fact that this obligation was assumed. The court ruled:

It would be idle, in view of what has been written in the other opinions supra concerning the effect of the various writings between these corporations, to say that the Louisville & Nashville Railroad Company did not assume all the obligations imposed by the lease that it purchased, or that it only took over so much of it as was beneficial to it and rejected the balance. It took it with all its burdens and has acted under and by virtue of it. When it signed the paper of which the lease was a part, it was the same in effect as if it had signed the lease itself. If the lessee, in a written contract concerning land, assigns his lease to another, and that other accepts in writing the assignment, we cannot doubt that this is a contract in writing signed by him to perform the conditions of the lease accepted, although in the specific writing that he sign there may be no mention of

what obligation he has assumed. It is not necessary that there should be. Why should he accept in writing a lease, and substitute himself for the lessee, unless it be to do all the lessor had agreed to do? If the party accepting the lease does not desire or intend to do this, or if it is not the purpose of the acceptance of the lease to take it with all its burdens as well as benefits, the assignee can easily insert conditions in the acceptance that will exempt him from such liability as he does not care to assume. (our emphasis)

Realty & Rebuilding Co. v. Rea, 184 Cal. 565, 194

P. 1024 (1920) also so holds. The lease contained a provision obligating the lessees to erect buildings, pay rent, and provide repairs. The lease was assigned. The lessee elected to extend the terms of the lease by a Notice of Election that provided that election was "subject to all the terms and conditions in said lease contained." In holding that the lessee and assignee were equally bound by the covenants, the court ruled:

This express declaration that the parties were to be governed by the covenants of the lease, signed by the assignee, and accepted by the lessor definitely created and established a contractual relation between the lessor and the assignee, and the covenants of the lease were made the measure of the rights and liabilities of the parties for the extended three-year period.

The case of Latses v. Nick Floor, Inc. 99 Utah 214, 104 P2d 619 (1940) cited by Judge Croft in support of his order denying plaintiff's attorney's fees does not support Judge Croft's holding. In Latses, there was no sale or transfer or subsequent lease by their original lessor in writing whereby the lease was transferred subject to the terms of the original lease. Nor was there any assignment by the lessor



by written document wherein it was taken subject to the terms of the lease. There was no prior contract whatsoever between the parties.

In Latses the plaintiffs purchased the property. The defendant was a tenant in possession. The tenants had a lease with the former owners. The purchasers had no actual knowledge of the provisions of the lease but by the possession of the tenant was put on inquiry of defendant's occupancy. The court held them bound by such claims relating to those running with the land, but as there was no contract or privity, they were not bound on the personal covenant for attorney's fees.

In the instant case there was privity of contract between Malstroms and Price Rentals, Inc. As mentioned, Price Rentals, Inc., by written agreement, purchased (and subleased) Malstroms' Penelko lease subject to the obligations of the Penelko lease.

3. Respondent's Contention in the Lower Court That by Reason of this Appeal the Trial Court was Divested of Jurisdiction to Rule on Attorney's Fees is Likewise Without Merit.

As the court pointed out in its memorandum decision, the appellant's motion for allowance and assessment of attorney's fees was filed July 9, 1979. And subsequent to that, July 19, 1979 respondent filed its Notice of Appeal. As the lower court pointed out, the appeal did not deprive the court of jurisdiction to rule on the undecided issue before the appeal was filed; namely, the issue of attorney's fees.

(1649)

4. Respondent's Contention in the Lower Court that Because Respondent's Breach of Appellant's Lease



Was Tortious in Nature, Appellant was not Entitled to Attorney's Fees is Clearly Without Merit as was Ruled by the Trial Court in its Memorandum Decision

The court's instructions to the jury disclosed that the case was submitted to the jury based upon a breach of appellant's rights under its lease. And the trial court ruled that it matters not whether alleged breach of the lease was tortious in nature. It would appear on the face of it that a tortious violation of the lease is even more demanding of a right to attorney's fees than a non-tortious violation. And the courts so hold.

In Stockton Theaters v. Palermo, 124 Cal. App. 2d 872, 53 Cal. Rptr. 628 (1966) (a case strikingly similar to the instant case) the court allowed plaintiff lessee attorney's fees for defendant's tortious violations of the lease, ruling:

Plaintiff's action sought relief against the defendants (lessors) for their tortious invasion of the plaintiff's rights arising out of the lease. The defendants did not prevail in the action but the plaintiff did prevail. Under the provisions of the lease the plaintiff was entitled to an award of reasonable attorney's fees. (Ansco Const. Co. v. Ocean View Estates, 196 Cal. App. 2d 235, 337, p2d 146.) (our emphasis)

The case of Malibu Lake Mountain Club, Ltd. v. Smith, 18 Cal. App. 31, 95 Cal. Rptr., 553 (1971) is on all fours with the instant case except that the contract involved was not a lease but the by-laws of the club.

In Malibu, the club brought suit under the by-laws against the club members. The by-laws covered contractual violations and tortious ones and provided for attorney's fees to enforce the obligation of the members under the by-laws.

The court gave short thrift to defendants' contention that attorney's fees cannot be given for tortious acts when provided for by contract, ruling:

The validity of contractual provisions for the payment of attorney fees in case of litigation is too well settled to allow of re-examination at this date. (See, for example, Heidt v. Miller Air Conditioning Co. (1969) 271 Cal App 2d 135, 74 Cal Rptr 695, and authorities there cited there can be no question that the by-laws, above quoted, apply to any and all litigation between the club and its members, whether sounding in tort or in contract and whether by way of suit, defense, cross-complaint or counterclaim. Appellant, however, argues that assuming the validity of contracts to pay attorney fees in actions sounding in contract, it is against public policy to allow such a contract in cases of torts. However, we do not deal here with a cause of action quite independent of the basic contractual arrangement between Smith and the club. The counterclaim, admittedly based on the Tooke theory, rested upon the alleged breach by the club of the implied covenants attached to Smith's membership. As such it was clearly within the provisions of section 6 of the by-laws and not against any public policy of which we are aware.<sup>3</sup> (Citing authorities) (our emphasis)

Our Supreme Court, in Petersen v. Hodges, 121 Utah 72 239 P2d 180, (1951) recognized the well-settled rule that there may be recovery of attorney's fees in a lease provision providing for same.

We have checked authorities from such sources as the ALR Reports, Amer Jur 2d and CJS and have Shepardized cases touching the issue. We have found no case denying a litigant attorney's fees when same is provided for by lease or contract and whether such violation is tortious or otherwise. Appellant respectfully submits it should not be denied attorney's fees in the instant case.

5. Respondent's Basic Contention in the Lower Court That the Issue of Attorney's Fees Was One in Fact For the Jury and Not for the Court, Likewise Lacks Merit.

As we have pointed out above, the trial court foreclosed appellant's introduction of evidence to the jury by the refusal to accept its proposed instructions and also stating that this was an issue for the court. Consequently, whether or not the issue of attorney's fees was for the jury or the trial judge, the cause should be reversed and submitted to either a trial judge or a jury for determination.

But appellant submits (after review of the authorities) that the issue is clearly one for the trial judge to decide--not the jury.

In the lower court, respondent cited State v. Kendrick, (Oregon) 363 P 2d 1078 (1961) as holding that the amount of attorney's fees to be awarded was to be determined by the jury. (1261) Respondent's statement was out of context with the holding and most misleading. Kendrick was a condemnation action. The case was tried by a jury which fixed the damages to be paid defendants (as in the instant case). Thereafter, the judge held a hearing and fixed the attorney's fees. The court mentioned that a prior Oregon statute providing for attorney's fees in condemnation actions had been interpreted and meaning that the attorney's fees must be fixed by the jury. It further pointed out that the prior statute had been amended, "to provide for the recovery of attorney's fees . . . to be fixed by the court". (our

emphasis) The court held that under such statute and since 1947, it had been a uniform practice for the judge to fix attorney's fees. Consequently, in Kendrick, the trial judge's fixing of attorney's fees was affirmed on appeal.

As is mentioned above, paragraph 20 of appellant's lease provided,

In the event that either party shall fail to perform this lease and agreement according to its terms, such party hereby agrees to pay all of the costs and expenses of enforcing this agreement, either by suit or otherwise, including reasonable attorney's fees.

When attorney's fees are based on such a contractual provision, attorney's fees are in the nature of costs and are fixed by the trial judge, not by the jury.

In FMA Financial Corp. v. Build, Inc., 17 Utah 2d 80, 404 P 2d 670 (1965) the Supreme Court stated as to attorney's fees,

Because both judges and lawyers have special knowledge as to the value of legal services, this is not always required to be proved by sworn testimony. It is sometimes submitted upon stipulation: as to the amount; or that the judge may fix it on the basis of his own knowledge and experience; and/or in connection with reference to a Bar approved schedule. Any one of these would have provided an evidentiary basis for making the determination.

Mabee v. Nurseryland Garden Centers, Inc., 88 Cal. App. 3d 42, 152 Cal. Rptr. 31 (1975) involved a breach of a written lease containing a provision that the prevailing party should recover attorney's fees as set by the court. The case had been tried by a jury. It presented the issue of whether the judge or the jury should set the amount of

attorney's fees. The court ruled that the judge, not the jury, should set them, stating,

Therefore, of necessity we must focus on this precise language of this attorney fee provision. Its plain, explicit, unambiguous language evidences this intent. It is the court, i. e. the judge, not the jury who determines the right to and amount of attorney fees.

A legion of cases without comment equate "court" with the "judge" or judges are frequently used synonymously in statutes.

See also Genis v. Krasne, 47 Cal 2d 241, 302 P 2d 289 (1956),

But attorney's fees are not like the usual item of damages, for the court may allow a reasonable attorney's fee in the judgment without hearing evidence or making a finding as to the amount of such fee.

Caldwell v. Trans-Gulf Petroleum Corp., (a) 312 So. 2d 171 (1975) also involved the fixing of attorney's fees by the court. The Affidavit of the plaintiff on attorney's fees was not before the appellate court. In ruling that the trial court (by the judge) should fix attorney's fees. The court stated,

We do not question the authority of the trial court to fix reasonable attorney's fees in the absence of expert testimony and to establish the value of the services where the services are rendered under the eye of the court. Also, where the nature and extent of services are shown by the record, no expert testimony is necessary.

This was the ruling made by the trial judge and we believe it should stand.

Respectfully submitted this 11 day of July, 1980.

WILLIAM H. HENDERSON and  
MARK S. MINER

CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing Appellant's Brief by mailing the same, postage prepaid, to the office of Snow, Christensen & Martineau, 700 Continental Bank Building, Salt Lake City, Utah, 84101, this 11 day of July, 1980.

William H. Henderson