
**Scaffold Act - Control of Construction as a Requisite of Liability -
Gannon v. Chicago, M., St. P. & P. Ry., 22 Ill. 2d 305, 175 N.E. 2d
785 (1961)**

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not redeemed.¹⁶ The certificate in itself does not convey title to the purchaser, and on this basis it is difficult to understand why the purchaser should be protected against unrecorded interests.

The dissent as expressed by Chief Justice Schaefer points out that the result of the holding is that there is no one who can redeem from the tax sale involved in this litigation. The Chief Justice also mentions what he considers to be the unsoundness of the proposition set forth that redemption can only be effected by those whose interests were actually or constructively known to the purchaser at the time of the tax sale.

Future decisions will have to clarify just how far recording of a deed is a *sine qua non* of redemption. Would, for example, one who acquired title to property by adverse possession but whose interest was not recorded or known to the purchaser at the time of the tax sale be allowed to redeem? The statutes hold that "persons interested" and "unknown owners" may redeem. It must be left to future cases to determine how there can be rights of "unknown owners" if it is required that their interest be recorded in order to have any effect as against the purchaser at the tax sale.

¹⁶ Chicago Title & Trust Co. v. Wabash Randolph Corp., 388 Ill. 376, 57 N.E.2d 881 (1944).

SCAFFOLD ACT—CONTROL OF CONSTRUCTION AS A REQUISITE OF LIABILITY

John Gannon, the plaintiff, was employed by an independent contractor as a bricklayer. The contractor was engaged in rebuilding a freight dock pursuant to a contract entered into with the defendant-owner. All construction, including scaffold erection, was done by the contractor. Although the defendant's architects made frequent inspections of the building activity to see that the work conformed to specifications prepared by them, they neither inspected the scaffold erection nor exercised control over the manner in which the work was done. In the course of his employment, the plaintiff ascended a ladder which was in place against a portion of scaffolding. As he was about to step onto the scaffold, the ladder slipped out from under him causing him to fall to the floor. No employee of the defendant was present at the scene when the accident occurred; further, there was no evidence of any defect in the scaffold or ladder other than the fact that the ladder was not nailed to the scaffold as was customary in the trade. Suit was brought by the plaintiff, under the civil liability provisions of the Structural Work Act, to recover damages from the defendant-owner for personal injuries sustained as a result of his fall. A judgment for the plaintiff was subsequently reversed

in the Appellate Court on the grounds that the instructions failed to include, "the clear statutory mandate that liability is to be imposed only upon persons 'having charge of' the erection,"¹ and were therefore prejudicial to the defendant. On appeal, the Supreme Court of Illinois, in a five to two opinion, affirmed the Appellate Court's decision and remanded with directions. *Gannon v. Chicago, M., St.P. & P. Ry.*, 22 Ill. 2d 305, 175 N.E. 2d 785 (1961).

In an attempt to remedy the injustices² which accrued to employees engaged in structural work upon their being injured as a result of, or in the course of employment, the Illinois legislature, in 1907, enacted the Structural Work Act,³ commonly called the Scaffold Act. The purpose of the act was to reduce the hazard of work to the fullest possible extent by requiring structural work equipment, such as scaffolds, to be erected in a safe, suitable and proper manner. These standards were maintained by imposing civil and criminal liability upon the owner, contractor or other person in charge of the erection or construction, for any injury to person or property occasioned by any wilful violations of the act or wilful failures to comply with any of its provisions.⁴ The act greatly benefited injured workmen inasmuch as it aided them in maintaining actions against employers or other persons in charge of the work, by providing a statutory standard of conduct not subject to the common law defenses of contributory negligence and assumption of risk.⁵ However, as a result of passage of the Workmen's Compensation Act⁶ in 1911, common law actions by an injured employee against his employer were barred. That act also barred, by virtue of section 29,⁷ actions by employees against third party tortfeasors. Since structural workers came under the act, these bars had the effect of limiting the use of the Scaffold Act as a civil remedy.⁸ Recently, however, section 29 has been declared unconstitutional,⁹ and the civil liability provisions of the Scaffold Act are frequently invoked.¹⁰

¹ *Gannon v. Chicago, M., St. P. & P. Ry.*, 25 Ill. App.2d 272, 284, 167 N.E.2d 5, 11 (1960).

² Estimated percentage of non-compensable personal injuries suffered in industry at that time: 70%, 1 SCHNEIDER, WORKMEN'S COMPENSATION, 1 (2d ed. 1932); 80%, Lumberman's Reciprocal Ass'n. v. Behnken, 226 S.W. 154 (Tex. Civ. App. 1920).

³ ILL. LAWS 1907, at 312.

⁴ ILL. REV. STAT. ch. 48 §§ 60-69 (1959).

⁵ *Schultz v. Ericsson*, 264 Ill. 156, 106 N.E. 236 (1914).

⁶ Ill. Laws 1911, at 315.

⁷ Ill. Laws 1911, at 359.

⁸ *Gannon v. Chicago, M., St. P. & P. Ry.*, 22 Ill.2d 305, 175 N.E.2d 785 (1961).

⁹ *Grasse v. Dealer's Transport Co.*, 412 Ill. 179, 106 N.E.2d 124 (1952).

¹⁰ Observe that the Scaffold Act, since enacted prior to the Workmen's Compensation Act, was not intended to provide an additional remedy.

At the time of the decision of the *Gannon* case,¹¹ the law was unsettled as to the liability of an owner under section 9 of the Scaffold Act.¹² The *Gannon* court, recognizing that there was no unanimity as to the meaning of the language in the act, or as to the scope of the decisions construing it, considered both the statutory history and the objectives which the legislature sought to attain by passage of the act, before rendering its decision. In determining legislative intent, it looked not only at the language of the act, but at the evils which it sought to remedy.¹³ The issue in the *Gannon* case was the nature of the owner's liability under section 9.¹⁴ The court was thus confronted with two recent Illinois cases involving the same issue, but which rendered decisions as to the liability of the owner that were diametrically opposed to one another. The first case, *Kennerly v. Shell Oil Co.*,¹⁵ held that the owner has an independent and non-delegable duty of compliance under the act, *irrespective of control* over the scaffold erection. Opposed to that view, is the opinion of the Appellate Court¹⁶ from which the plaintiff in *Gannon* appealed. It held that the owner is liable under section 9, *only* if he is proven to be in charge of the work and wilfully violates the act. To better understand the logic employed by the *Gannon* court in evaluating the relative merits of the two interpretations of the owner's liability, it is necessary to examine the cases and the socio-legal climate which constitute the statutory history of the Scaffold Act.

The question of civil liability of an owner under section 9 was never unequivocally interpreted by the Illinois Supreme Court until the *Ken-*

¹¹ The provisions of the Scaffold Act essential to an understanding of the *Gannon* case are set forth herein: ILL. REV. STAT. ch. 48 §§ 60-69 (1959).

Section 1—"all scaffolds, hoists, cranes, stays, ladders, . . . erected . . . by any person, firm or corporation in this state for the use of erection, repairing, alterations, removal or painting of any . . . building . . . shall be erected in a safe suitable and proper manner and shall be so erected and constructed, placed and operated as to give proper and adequate protection to the life and limb of any person or persons employed or engaged thereon. . . ."

Section 9—"Any owner, contractor, sub-contractor, foreman or other person having charge of the erection, construction, repairing, alteration, removal, or painting of any building . . . or other structure within the provisions of this act shall comply with all the terms thereof and any such owner, contractor, sub-contractor, foreman or other person violating any of the provisions of this act shall . . . be fined . . . or imprisoned. . . . For any injury to person or property, occasioned by any wilful violations of this act, or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured, for any direct damages sustained thereby."

¹² *Gannon v. Chicago, M., St. P. & P. Ry.*, 22 Ill.2d 305, 175 N.E.2d 785 (1961).

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ 13 Ill.2d 431, 150 N.E.2d 134 (1958).

¹⁶ *Gannon v. Chicago, M., St. P. & P. Ry.*, 25 Ill.App.2d 272, 167 N.E.2d 5 (1960).

merly case.¹⁷ However, just two years prior to *Kennerly*, the Appellate Court in *Taber v. Defenbaugh*,¹⁸ a case involving a factual situation similar to the one in *Kennerly*, refused to impose liability upon the owner without proof that he actually was in charge of the construction. In the *Kennerly* case, an employee of an independent contractor sued the owner of the premises under section 9 of the Scaffold Act for injuries sustained as a result of a fall from a scaffold constructed by employees of the contractor. In rejecting the defendant's contention that the act imposes liability only on the person "having charge of" the work, the court said that, "[T]he Scaffold Act deals with highly dangerous activities. It has been regarded from the outset to fix an independent, non-delegable duty of compliance upon the owner of property and upon each contractor and sub-contractor engaged in the work. Neither this court nor the Appellate Court has deviated from this construction of the statute, first announced almost fifty years ago."¹⁹ To support its position that there was, "a long history of interpretation that refutes the defendant's position,"²⁰ the Court cited two Illinois Supreme Court decisions as authority.

The first of these was *Claffy v. Chicago Dock & Canal Co.*²¹ In that case, an employee of an independent contractor fell down an unguarded elevator shaft and brought an action against the owner of the building under section 7²² of the act. That section is distinguished from section 9 by the absence of the words "having charge of" after the word "owner." Not only was the case concerned with a different section of the act, but under the facts of the *Claffy* case, "the owner never parted with the control and supervision of the building. . . ."²³ Thus it is evident, that the statements made in *Claffy* to the effect that control is not a necessary element in determining the liability of an owner under section 9 are mere dictum and should not be relied upon in subsequent proceedings as authority.²⁴ The fact that the *Claffy* case only construed the language of section 7 and not that of section 9 was recognized by the Appellate Court in *Mindrop v. Gage*,²⁵ which involved liability under section 9 for the im-

¹⁷ *Kennerly v. Shell Oil Co.*, 13 Ill.2d 431, 150 N.E.2d 134 (1958).

¹⁸ 9 Ill. App.2d 169, 132 N.E.2d 454 (1956).

¹⁹ *Kennerly v. Shell Oil Co.*, 13 Ill.2d 431, 435, 150 N.E.2d 134, 137 (1958).

²⁰ *Id.* at 434, 150 N.E.2d at 136; *Contra*, *Gannon v. Chicago, M., St. P. & P. Ry.*, 22 Ill.2d 305, 175 N.E.2d 785 (1961), where the court finds no such settled course of case law.

²¹ 249 Ill. 210, 94 N.E. 551 (1911).

²² ILL. REV. STAT. ch. 48 § 67 (1959).

²³ *Claffy v. Chicago Dock Co.*, 249 Ill. 210, 222, 94 N.E. 551, 555 (1911).

²⁴ *Kennerly v. Shell Oil Co.*, 13 Ill.2d 431, 150 N.E.2d 134 (1938) (dissenting opinion).

²⁵ 189 Ill. App. 599 (1914).

proper operation of a derrick. The court, as reported in abstract, held that, "[T]he statute concerning structural work . . . does not operate to impose a . . . duty on all persons connected with a given structural construction, and belonging to any one of the classes named, irrespective of their having control or 'charge' of the work."²⁶ The distinction in language between section 7 and section 9 was again emphasized in *Breton v. Levinson*,²⁷ where the court held that the duty to comply with the terms of the act is to be placed only upon those actually constructing the scaffold, and not upon the owner where he does not have charge of the scaffold erection.

The second case relied on by the *Kennerly* court is *John Griffiths & Son Co. v. National Fireproofing Co.*²⁸ In that case, the court said that the "act of 1907 imposes upon the contractor and the owner, as well as upon . . . others engaged in the work, the duty of complying with the . . . act so far as civil liability is concerned."²⁹ This, and similar statements, are cited as being controlling upon the issue by the *Kennerly* court.³⁰ But, as plainly stated in *Griffiths*, the validity of an indemnity agreement was the only issue involved.³¹ Therefore, the language with which the court commented upon the owner's liability under the act was dictum, and therefore not necessary to the decision.³² It follows that the *Griffiths* case is not of any value as precedent in the *Kennerly* case.³³

A federal court case, *Schmid v. United States*,³⁴ pointed out that the *Griffiths* case was not authority in determining the liability of an owner under section 9, and further stated that the act designates the persons who are to be held liable in the "disjunctive" rather than the "conjunctive" and includes the words "having charge of" which were obviously not intended to be idle.³⁵ The court emphasized repeatedly, that under the language of the act, the owner's liability, as well as the liability of the other individuals enumerated in section 9, is predicated upon proof of control over the work being done.³⁶ That the purpose of the act is to

²⁶ *Id.* at 603.

²⁷ 207 Ill. App. 406 (1917).

²⁸ 310 Ill. 331, 141 N.E. 739 (1923).

²⁹ *Id.* at 335, 141 N.E. at 740.

³⁰ *Kennerly v. Shell Oil Co.*, 13 Ill.2d 431, 150 N.E.2d 134 (1958).

³¹ *John Griffiths & Son Co. v. National Fireproofing Co.*, 310 Ill. 331, 141 N.E. 739 (1923).

³² *Schmid v. United States*, 154 F. Supp. 81 (E.D. Ill. 1957); *Village of Lombard v. Ill. Bell Tel. Co.*, 405 Ill. 209, 90 N.E.2d 105 (1950).

³³ *Gannon v. Chicago, M., St. P. & P. Ry.*, 22 Ill.2d 305, 175 N.E.2d 785 (1961).

³⁴ 154 F. Supp. 81 (E.D. Ill. 1957).

³⁵ *Ibid.*

³⁶ *Ibid.*

hold liable any of the enumerated persons who are in charge of the work and not to hold the owner liable without proof of his having control of the project was the interpretation given by the act by the *Schmid* court. Although convinced that the correct interpretation of the act required an owner to be in charge of the work in order to be liable, the court was forced to render final judgment contrary to its analysis because of the *Kennerly* case, which had been decided prior to a rehearing in the *Schmid* case, under the principle that federal courts are bound to follow the law as interpreted by the highest court of a state.³⁷

From the analysis of case law, it is apparent that the law in Illinois, until the *Kennerly* case in 1958, was clearly that in order for an owner to be liable under section 9 of the Scaffold Act, it was necessary that he be proven to have been in charge of the work.³⁸ Subsequent to the *Kennerly* case, however, in a number of appellate and federal court cases,³⁹ the owner was held liable regardless of control over work being done on his premises. However, thus to interpret the statute would be to hold that every enumerated person in section 9, in addition to his regular duties of employment, has a duty to see that every other enumerated person complies with the act, or sustain liability.

The decision in *Kennerly* was not followed by the Appellate Court⁴⁰ in the *Gannon* case. The court held that the *Kennerly* decision did not reflect the intention of the legislature. The court stated that, "[I]f the legislature had wanted to make all owners liable, whether they had charge of the work or not, it would have been a simple matter—and certainly the logical solution—to omit the qualifying phrase 'having charge of' . . ."⁴¹ Thus it is apparent that to hold the owner liable when he is not in charge of the work is to extend his liability beyond the scope that the legislature originally intended. The court added that, "[U]nder the clear and unambiguous language of the statute liability is imposed on the owner where the owner (1) is *in charge of* the erection of a building and (2) *wilfully violates* the act."⁴²

The plaintiff contended, in both the Appellate and Supreme Court,

³⁷ *Schmid v. United States*, 273 F.2d 172 (7th Cir. 1960).

³⁸ *Schmid v. United States*, 154 F. Supp. 81 (E.D. Ill. 1957); *Taber v. Defenbaugh*, 9 Ill. App.2d 169, 132 N.E.2d 454 (1956); *Breton v. Levinson*, 207 Ill. App. 406 (1917); *Mindrop v. Gage*, 189 Ill. App. 599 (1914).

³⁹ *Bounougias v. Republic Steel Corp.*, 277 F.2d 726 (7th Cir. 1960); *Schmid v. United States*, 273 F.2d 172 (7th Cir. 1960); *Pankey v. Hiram Walker & Sons*, 167 F. Supp. 609 (S.D. Ill. 1958); *Moroni v. Intrusion Prepakt Inc.*, 24 Ill. App.2d 534, 165 N.E.2d 346 (1960).

⁴⁰ *Gannon v. Chicago, M., St. P. & P. Ry.*, 25 Ill. App.2d 272, 167 N.E.2d 5 (1960).

⁴¹ *Id.* at 279, 167 N.E.2d at 8.

⁴² *Id.* at 277, 167 N.E.2d at 7.

that the owner's duty is independent and non-delegable; but the plain words of the act preclude such an interpretation. The intent was to make the owner liable only if in charge of the scaffold erection.⁴³

After the Supreme Court had examined the statute, it concluded that, "[I]n our opinion the words of section 9 construed in the light of statutory history impose a duty of compliance upon an owner or other enumerated person having charge of the work. Any other interpretation would do violence to the act by deleting from it an integral phrase and by substituting the word 'and' for 'or.'"⁴⁴ The act therefore, must necessarily be construed with the qualifying phrase "having charge of" included.

The *Gannon* court did not expressly overrule the *Kennerly* case, but did declare it to be erroneous in so far as it indicated that the owner is liable irrespective of control. It should be noted that *Gannon* is authority only as to the liability of owners under section 9.

Dispelling any fears that the Scaffold Act had been repealed as a civil remedy by this decision, the court said that any employee injured by a wilful violation of the act, by any one of the persons enumerated in section 9 having charge of the structural work, still has an action against such person.⁴⁵ Whether the owner or other person can be deemed to be in charge of the construction within the meaning of the act is a question of fact for a jury, under proper instructions, to determine.⁴⁶

Thus in order to recover from an owner, the plaintiff, in a case brought under the Scaffold Act must allege and prove that the owner had charge of the work.

While recognizing that no one has a vested right in any decision,⁴⁷ the court remanded the case because the plaintiff, in reliance on ambiguous decisions, suffered a hardship. The case will be retried in the light of the interpretation of the act as set forth in the *Gannon* case.

The dissenting opinion⁴⁸ written by Mr. Justice Hershey, with Chief Justice Schaefer concurring, maintains that because the legislature did not act on proposed amendments to the act in 1959, this expressed approval of the construction given the act by the decision in *Kennerly* in 1958, and therefore *Kennerly* should be upheld. The majority rejected this

⁴³ Liability without fault was not favored in the law at the time of passage of this act. See, *Gannon v. Chicago, M., St. P. & P. Ry.*, 22 Ill.2d 305, 175 N.E.2d 785 (1961).

⁴⁴ *Id.* at 321, 175 N.E.2d at 793.

⁴⁵ *Gundich v. Emerson Comstock Co.*, 21 Ill.2d 117, 171 N.E.2d 60 (1960); *Fetterman v. Production Steel Co.*, 4 Ill. App.2d 403, 124 N.E.2d 637 (1954).

⁴⁶ *Gannon v. Chicago, M., St. P. & P. Ry.*, 22 Ill.2d 305, 175 N.E.2d 785 (1961).

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

argument stating that action or inaction by the legislature in 1959 is not indicative of legislative intent in 1907.⁴⁹

The interpretation of the act as set forth in *Gannon* has been followed by the court in *Kiszkan v. The Texas Co.*⁵⁰ decided in the same term. The owner of the property in that case was a lessor and not in possession of the premises. The plaintiff, a workman employed by an independent contractor pursuant to a contract between the contractor and the lessee, was injured in a fall from a scaffold. Suit was brought against the lessor-owner. At the trial, the lessor was granted a summary judgment on the grounds that it was not in charge of the work, was not consulted about it and was not a party to the contract. Holding that the lessor was a mere title holder out of possession and therefore not an owner within the meaning of section 9 of the act, the Appellate Court affirmed.

Rejecting the Appellate Court's *ratio decidendi* and relying instead on the reasoning employed in the *Gannon* case, the Supreme Court in affirming held: "the criterion, according to the plain words of the statute, is not whether the owner is in or out of possession, but whether the owner has charge of the construction, erection, et cetera, of the designated structure. This is the standard imposed by the statute. . . ."⁵¹

⁴⁹ *Ibid.*

⁵⁰ 22 Ill.2d 326, 175 N.E.2d 401 (1961)

⁵¹ *Id.* at 329, 175 N.E.2d at 403.

TORTS—INTENTIONAL INFLICTION OF MENTAL SUFFERING: A NEW TORT IN ILLINOIS

Plaintiff brought a civil suit against the convicted murderer of her husband. In her complaint, she alleged that the defendant's threat to kill her husband together with the fulfillment of that threat caused her to suffer great mental anguish and nervous exhaustion. It was not alleged that any physical injury resulted. The trial court held that no cause of action was stated. The plaintiff appealed directly to the Illinois Supreme Court.¹ The Court, after analyzing and evaluating the traditional rationalizations for the refusal to recognize intentional infliction of emotional distress as a separate tort, concluded that peace of mind is an interest of sufficient importance to receive the protection of the law from flagrant, unreasonable acts of this type. The Supreme Court, in reversing the trial court, stated that an unwarranted intrusion intended to cause severe emo-

¹ The constitutionality of the Dram Shop Act, ILL. REV. STAT. ch. 43 §§ 131-35 (1959) was involved, therefore an appeal directly to the Supreme Court was allowed. ILL. REV. STAT. ch. 110 § 75 (1959).