DOCKET NO.: X07-HHD-CV-16-6072009-S	:	SUPERIOR COURT
SCHAGHTICOKE TRIBAL NATION	:	COMPLEX LITIGATION
v.	:	JUDICIAL DISTRICT OF HARTFORD
STATE OF CONNECTICUT	:	DECEMBER 27, 2017

Memorandum of Decision Partially Dismissing Takings Claims

To sue the state for taking your property, first you have to have some property.

The Schaghticoke Tribal Nation says the Schaghticoke Tribe owned vast tracts of land that the state took without paying for it. But the state appears to be right in saying the tribe never owned the land and therefore the state had no reason to pay for it.

The state is right because STN relies for its claim on two legislative resolutions: one in 1736 and one in 1752. Neither of them makes them owners of the land at issue. The 1736 act only allows the Schaghticokes to "continue" on the land until the General Assembly (then called the "General Court") decides otherwise:

> This Assembly being informed that a percell of Indians that some time dwelt at New Milford are removed & settled on the west side of Housatunuck River in a bow on the west side thereof, about three or foure miles above New Fairfield, upon a piece of plaine land there, and

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> have a desire to continue at said place; whereupon it is resolved by this assembly that the said Indians do ***continue*** **where they are now settled during the pleasure of this Court,** and no person shall lay out any grant or farm on said plaine piece of land, without the special leave of this assembly. And it is further hereby enacted and declared that whosoever shall contrary to this order survey or cause to be surveyed or laid out any grant of this Court in ye place aforesaid shall not thereby procure any title thereto. (Emphasis added.)

The 1752 act grants the Schaghticokes the "liberty" to improve and cut wood on the land so long as it pleased the General Assembly to allow it:

> Resolved by this Assembly that the said Indians, the memorialists, shall have the liberty, and they have hereby ***liberty granted*** to them, ***for their improvement and for the cutting of wood and timber for their own use only,*** the whole of the twenty-fifth lot, as the lots are now laid out, and also the equal half of the twenty-fourth lot on the southward part thereof adjoyning to such twenty-fifth lot, and this to be improved by said Indians as aforesaid ***during the pleasure of this Assembly***. (Emphasis added.)

Non-lawyers reading this language using common sense would likely conclude that these two statements don't make the Schaghticokes the owners of this land. And that's a pretty good place to start. Telling someone they can stay somewhere, fix it up, and cut wood for themselves on it until the owner says otherwise doesn't sound very much like the owner is giving that person the land. This conclusion is even easier to reach under the legal rules governing land transfers that applied in the 18th Century and before and still apply today. For a statement—in this case a legislative resolution—to transfer land it must use the recognized language of conveyance.

That necessary language was discussed in 1828 by our Supreme Court in *New Haven v. Hemingway*. In considering what made a 17th century act of the legislature a conveyance, it used words familiar to every law student and real estate lawyer from then until now: "By the operative words give, grant and ratify, [the act] was not only a confirmation, but a grant."[1]

Likewise, in *Golden Hill Paugussett Tribe v. Southbury*, this court in 1993 showed that as early as 1686, the General Court (the General Assembly) knew the language of conveyance when it confirmed land transfers with the words: "by these presents doe give, grant, rattify, and confirm unto named proprietors and their heirs and assignees and other inhabitants all that aforewayd Tract or parcells of lands."[2]

Indeed, the legislature has not only demonstrated its knowledge now and in the 18th Century that it knows, that to convey the land, the conveyance must say that it gives and grants the land, but in 2005 our Supreme Court in *Southern New England Telephone Co. v. Dept. of Public Utility Control* reminded us that the courts are required to presume that "the legislature does not choose statutory language without reason."[3]

If this weren't enough, the context of the 1752 act is illuminating. The parties both agree that the act was a response to Indians who "pray[ed]" that the General

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[1] 7 Conn. 186, 186.
[2] Superior Court, judicial district of Waterbury, Docket No. CV 116468 (September 27, 1993, *McDonald, J.)* (10 Conn. L. Rptr. 129, 131), aff'd, 231 Conn. 563 (1995).
[3] 274 Conn. 119, 129.

Assembly would "grant them some lands." Having this language before it, the General Assembly could have simply used it to grant them some lands. Its 1752 decision to grant them only the "liberty" to improve and cut wood on this land makes clear that the General Assembly chose to do something different then "grant them some land."

The General Assembly did not grant the Schaghticokes ownership of the land they claim. While both parties say the court should resolve any doubts in their favor, the court doesn't have any. No competent court at that time or this would hold that either of these acts of the General Assembly gave this land to the Schaghticokes. Having no ambiguities to resolve, the court doesn't have to decide how any would be resolved.

That the General Assembly didn't give the Schaghticokes the land means a lot, but it isn't everything. STN also claims that if the Schaghticokes didn't get the state's whole interest in the land, the Schaghticokes at least received a right to occupy the land that the state can't take away without compensation. The full bundle of rights in land is typically called the "fee simple" interest in the land.[4] But lesser valuable rights in land exist too: easements, covenants, and tenancies for instance. STN seems to be saying the lesser interest the Schaghticokes might have in the land is a perpetual right to occupy it.

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[4] See, e.g., *American Trading Real Estate Properties, Inc. v. Trumbull*, 215 Conn. 68 (1990).

"Seems" is the right word though because STN equivocates on this point. STN knows that both the 1736 act and the 1752 act end by saying that the right to "continue where they are" or the "liberty" of "improvement and for the cutting of wood and timber" was theirs only "during the pleasure" of the General Assembly. In other words, the General Assembly could do as it pleased with land, and it had the right to take away tomorrow anything it gave today.

Yet STN still wants the court to believe that if the General Assembly wanted to do something else with the land it would have to pay the Schaghticokes for taking away their rights in it. More than equivocal, STN's reasoning on this point is circular. It says that the state would have to pay the Schaghticokes to take away their rights in the land and that the Schaghticokes have rights in the land because the state would have to pay to take them away. All of this spins round and round without saying how any property rights were granted to them in the first place. The only place to look for the Schaghticokes' rights in the land is in the acts the General Assembly that supposedly granted them.

With only the 1736 language and the 1752 language to look to, it becomes obvious that rights that can be instantly and capriciously taken away are no rights at all. The final language of both acts make it clear that whatever it is the General Assembly is letting the Schaghticokes do has no value because it is all about the

pleasure of the General Assembly and nothing about granting any *rights* to the Schaghticokes.

STN says its view should prevail because the 1752 language "during the pleasure of this Assembly" applies only to the improvements and not to the occupation of the land, but this suffers from two mistakes. First, the language doesn't say anything about the Schaghticokes occupying the land. It is at best implied in 1752 or it is derived from the 1736 resolution. Second, STN might confine the application in the way it suggests if the resolution said it granted the Schaghticokes liberty ***and*** the right to improve the land and cut wood during the pleasure of the General Assembly. In that instance, the court-created interpretive tool known as the "last antecedent canon" would apply the restriction of the General Assembly's pleasure only to the improvements and the cutting.[5] But here, there are no multiple antecedents before the limiting language about the General Assembly's pleasure. Instead, the resolution gives the Schaghticokes liberty ***"for"*** improvement and cutting during the Assembly's pleasure. The General Assembly expressed in that language just one thought to which the restriction then directly applies.

And yet it wouldn't change the outcome of STN's claim if we applied the words about the General Assembly's pleasure only to part of the resolutions or took the language about the General Assembly's pleasure out of the resolutions entirely. After

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[5] See, A. Scalia and B. Garner, READING LAW, THE INTERPRETATION OF LEGAL TEXTS 144 (Thomson/West 2012).

all, what property right can anyone claim from the state telling them without more that they may "continue where they are?" Continuing on the land of a private property owner might ripen into adverse possession—an ownership interest that can come from long, uninterrupted use as provided in laws like General Statutes § 47-37 or § 52-575. But the law has been clear ever since our Supreme Court's ruling in 1888 in *Clinton v. Bacon*.[6] You can't get rights in state land by adverse possession regardless how long you have occupied it.

What about the "liberty" to improve and cut wood? Since we have to assume that the General Assembly chose the word "liberty" intentionally, its meaning might matter if it weren't already limited by being revocable anytime the legislature pleases. But the liberty language wouldn't help either. Granting someone liberty to do something is now, and was in 1752, little more than giving them a "license" to do something and licenses are personal rights, not real property rights.

Jacob's Law Dictionary, a resource in circulation in 1752, made this clear enough. It defined a license as "a personal liberty" and said that if the license was not given for a specified time it may be "countermanded" at any time.[7]

The Massachusetts Supreme Judicial Court gave its state's 1750 language about the term "liberty" the status of a license in its 1855 decision in *Hadley v. Hadley Mfg.*

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[6] 56 Conn. 508; *See also*, 55 A.L.R. 2d 554.
[7] G. Jacob, A NEW LAW DICTIONARY: CONTAINING THE INTERPRETATION AND DEFINITION OF WORDS AND TERMS USED IN THE LAW; AS ALSO THE WHOLE LAW AND PRACTICE THEREOF, UNDER THE PROPER HEADS AND TITLES (8th ed. 1762), *q.v.* "License."

Co. In that case, a town granted certain individuals "the liberty of erecting a grist mill on Fort River . . . ."[8] Those individuals then claimed that this grant of "liberty" gave them some ownership interest in the land. But the Court disagreed, holding that: "The term 'liberty' is commonly used to designate some privilege, license or authority, and is quite inappropriate to the grant of land."[9]

Our courts too have held that a license is not real estate and that it may be taken away at any time. In 1993, our Appellate Court in *Clean Corp. v. Foston* held that:"[A] license in real property is a mere privilege to act on the land of another, which does not produce an interest in the property"[10] In 1992, the Supreme Court in *Walton v. New Hartford* held that "[g]enerally, a license to enter [a]premises is revocable at any time by the licensor[.]"[11]

This court in 1992 even specifically addressed the issue of licenses in cases where the government exercises its power of eminent domain. In *Commissioner of Transportation v. Hartford*, this court held that: "A license is generally revocable at will, so that the owner thereof has no remedy for an invasion of his rights. Consequently, a mere license is not generally considered compensable in eminent

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[8] 4 Gray 140, 143.
[9] *Id.*
[10] 33 Conn. App. 197, 203.
[11] 223 Conn. 155, 163.

domain."[12] As Nichols' *Law of Eminent Domain* reports, this appears to be the generally accepted view in the country.[13]

For support, the Schaghticokes point to cases where federal courts have ordered compensation to Indians when the government has infringed their federal land grants. These cases certainly seem well reasoned and morally admirable, but they all suffer from the same flaw as precedent for this case: they all involve express and irrevocable government grants in the land. Representative of these cases is the United States Supreme Court's 1938 decision in *United States v. Shoshone Tribe of Indians*. The Court in that case recognized the value of Indian rights in reservation land, but the Shoshone rights there stemmed from a promise singularly unlike the resolutions in this case. It concerned a promise that reservation land would be "set apart for the absolute and undisturbed use and occupation of the Shoshone Indians," a right the Court held was indistinguishable from owning the land.[14]

If the Schaghticokes owned the land at issue here by legislative grant, they too might make a claim. But they don't. So they can't. No more than with the 1736 resolution, the 1752 resolution giving a "liberty" to improve the land and cut wood "for their own use only" can't be seen as conveying any interest in the real estate that must

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[12] Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 702780 (August 24, 1992, *Alexander, J.T.R.*).
[13] See, e.g., 2 Nichols, THE LAW OF EMINENT DOMAIN (3rd Ed.) §5.23.
[14] 304 U.S. 111, 113.

be paid for if taken away. This is so with or without the already fatal language giving the General Assembly the authority to withdraw whatever it gave anytime it pleases.

And without any legislative grant of a property right, the Schaghticokes' claim falls prey to the United States Supreme Court's 1955 analysis in *Tee-Hit-Ton Indians v. United States*. In that case, the Court held that any claim of Indian ownership must arise from the legislative branch's "definite intention . . . to acccord legal rights" and it may not rest on "merely permissive occupation."[15] Its conclusion is equally fatal here: "Indian occupancy, not specifically recognized as ownership by action authorized by [the legislative branch], may be extinguished by the Government without compensation."[16]

This means that when in the 19th Century the government transferred the land claimed by STN here, it had every right to do so without compensating the Schaghticokes. But STN points out that the Schaghticokes still occupy and use some land today, and no one is suggesting they can be put off of it now. So, the Schaghticokes suggest that if they can't be put off the land now how can we square that with concluding the legislature never granted them ownership of it in the first place?

This question doesn't require a definite answer now. The Schaghticokes may still occupy the land because of state inaction, or more likely because under General Statutes § 47-60, the state began holding the remaining Schaghticoke land in trust as

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[15] 348 U.S. 272, 279.
[16] *Id.* at 288-89.

of 1989. The land must now— as the statute says for all land held in trust for Indians as of 1989 — "continue to be held in trust in perpetuity." In any case, nothing about that statute now changes anything about what was done then. When the land was transferred, the Schaghticokes had no compensable ownership rights in it.

In 1992 in *Tamm v. Burns*, our Supreme Court said that a complaint for just compensation for a government taking of property must be dismissed on sovereign immunity grounds when it doesn't "allege sufficient facts to support a finding of a taking of land in a constitutional sense."[17] As a matter of law, STN hasn't asserted a claim for violating the Schaghticoke's constitutional right against the government taking property without just compensation. Therefore, its claims for compensation over the alleged lost real estate must be dismissed.

The claims STN asserted for the alleged lost real estate are barred by the doctrine of sovereign immunity and are dismissed. STN's other remaining claims, including its alleged ownership of certain mortgages, are unaffected by this ruling.

BY THE COURT

Moukawsher, J.

[17] 222 Conn. 280, 284.