

**Mckee Vs. Gratz**

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**Court :** US Supreme Court

**Decided On :** Nov-13-1922

**Appeal No. :** 260 U.S. 127

**Appellant :** Mckee

**Respondent :** Gratz

**Judgement :**

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U.S. Supreme Court McKee v. Gratz, 260 U.S. 127 (1922)

**McKee v. Gratz**

**No. 61**

**Argued October 13, 16, 1922**

**Decided November 13, 1922**

**260 U.S. 127**

*CERTIORARI TO THE CIRCUIT COURT OF APPEALS*

*FOR THE EIGHTH CIRCUIT*

## SYLLABUS

1. The Missouri statute declaring that title to all birds, game, and fish shall be in the state, Rev.Stats. Mo.1909, 6508; 1919, 5581, speaks only in aid of the state's power of regulation, leaving the land owner's property in these things otherwise unaffected. P. [260 U. S. 135](#) .

2. Unlike wild birds and fish, live mussels, which have practically a fixed habitat in the bottom of a stream and little ability to move, are in the possession of the owner of the land, as are, even more obviously, the shells taken from such mussels and piled upon the bank. P. [260 U. S. 135](#) .

3. Such possession is enough to warrant recovery of substantial damages for conversion by a trespasser. P. [260 U. S. 136](#) .

4. But a license to take such mussels from unenclosed and uninhabited places may be implied from custom, the more readily where statutory prohibitions are limited to enclosed and cultivated land and private ponds, as by Rev.Stats. Mo.1919, 5662, 3654. P. [260 U. S. 136](#) .

5. The existence of such custom and license, and whether it extends beyond occasional uses to systematic extraction of mussels in large quantities for commercial purpose, *held* for the jury. P. [260 U. S. 136](#) .

6. Live mussels in a stream are not part of the realty within the meaning of Rev.Stats. Mo.1909, 5448; 1919, 4242, allowing triple damages in certain cases for the digging up and carrying away

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of stones, mineral, etc.," or other substance or material being part of the realty." P. [260 U. S. 137](#) .

7. Damages recoverable by the landowner for mussels taken by trespass but in a belief of right due to a mistaken interpretation of the state game laws are limited to the value at the time of conversion. P. [260 U. S. 137](#) .

270 F. 713 affirmed.

Certiorari to a judgment of the circuit court of appeals reversing a judgment for the present petitioners in an action for damages brought by the respondent Gratz to recover the manufactured value of over 300 tons of mussel shells which were dug from a stream bed on his land (then of his assignor) and converted into buttons; also for triple damages under a Missouri statute.

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MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit brought by the respondent, who is also a cross-petitioner, to recover the value of mussel shells removed from the lands of the respondent's assignor and manufactured by the petitioners into buttons. It was brought in a court of the State of Missouri, but was removed to the district court of the United States. There were two counts; one simply for the conversion of the shells and a second alleging that the shells were part of the realty, and that the plaintiff was entitled to treble damages under Rev.Stats.Mo.1909, 5448 (Rev.Stats.Mo.1919, 4242). At the trial, the district court directed a verdict for the defendants, and the judgment was affirmed by the circuit court of appeals. *Gratz v. McKee*, 258 F. 335. The main question was disposed of on the ground that, by the Statutes of Missouri, Rev.Stats.1909, 6508, 6551, the title to the mussels was in the state.

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As to the second count, it was held that the mussels were not part of the realty. Later, a rehearing was granted, and while the Court adhered to its former opinion on the second count, it rightly, as we think, held that the statutes declaring the title to game and fish to be in the state spoke only in aid of the state's power of regulation, and left the plaintiff's interest what it was before. See *Missouri v. Holland*, [252 U. S. 416](#) , [252 U. S. 434](#) . It assumed that the defendants were trespassers, and sent the case back for a new trial on that footing, the damages to be confined to the value of the shells at the date of conversion, and not to include

that subsequently added by manufacturing them into buttons. *Gratz v. McKee*, 270 F. 713.

The mussels were taken alive from the bottom of what seems to have been at times a flowing stream at times a succession of pools, were boiled on the banks, and the shells subsequently removed. As to the plaintiff's title, it is not necessary to say that the mussels were part of the realty within the meaning of the Missouri Statutes or in such sense as to make the plaintiff an absolute owner. It is enough that there is a plain distinction between such creatures and game birds or freely moving fish, that may shift to another jurisdiction without regard to the will of land owner or state. Such birds and fishes are not even in the possession of man. [252 U. S. 252](#) U.S. 434; 2 Kent, Comm. 349; *Young v. Hichens*, 6 Q.B. 606. On the other hand, it seems not unreasonable to say that mussels, having a practically fixed habitat and little ability to move, are as truly in the possession of the owner of the land in which they are sunk as would be a prehistoric boat discovered underground, or unknown property at the bottom of a canal. *Elwes v. Brigg Gas Co.*, 33 Ch.D. 562; *Reg. v. Rowe, Bell*, C.C. 93; *Barker v. Bates*, 13 Pick. (Mass.) 255. This is even more obvious as to the shells, when left piled upon the bank, as they were, to

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await transportation. *Northern Pacific R. Co. v. Lewis*, [162 U. S. 366](#) , [162 U. S. 378](#) , [162 U. S. 382](#) . Possession is enough to warrant recovery of substantial damages for conversion by a trespasser. We say nothing about the character of the stream as to navigability. The jury at least might find that there was nothing in that to prevent the application of what we have said. We are slow to believe that there were public rights extending to the removal of mussels against the landowner's will.

But it cannot be said as matter of law that those who took the mussels were trespassers, or even wrongdoers, in appropriating the shells. The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of unenclosed and

uncultivated land in many parts, at least, of this country. Over these it is customary to wander, shoot, and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country. *Marsh v. Colby*, 39 Mich. 626. In Missouri, the implication is fortified by the limit of statutory prohibitions to enclosed and cultivated land and private ponds. Rev.Stats.1919, 5662, 3654. There was evidence that the practice had prevailed in this region. Whether those who took these mussels were entitled to rely upon it, and whether, if entitled to rely upon it for occasional uses, they could do so to the extent of the considerable and systematic work that was done, were questions for the jury. They could not be disposed of by the Court. The implication of a license of the kind that we have mentioned from general understanding and practice does not encounter the difficulties that have been suggested in implying a license from conduct alone in cases where the same conduct, after twenty years, might generate an easement, it being a plain contradiction to imply and interim a license which would prevent the acquisition of a prescriptive

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right. *Chenery v. Fitchburg R. Co.*, 160 Mass. 211, 212.

As to the rule of damages in case the plaintiff recovers, in the absence of a decision by the supreme court of the state, we should not regard the mussels as part of the realty within the meaning of the statute relied upon in the second count, and, so far as appears at present, we see no reason for charging the defendants, if at all, with more than the value of the mussels at the time of conversion as ruled below. *Wetherbee v. Green*, 22 Mich. 311; *Wooden-Ware Co. v. United States*, [106 U. S. 432](#) ; *Union Naval Stores Co. v. United States*, [240 U. S. 284](#) . The result is that this judgment of the circuit court of appeals is affirmed, but not all the principles laid down by it, and that the case will stand for trial by jury in the district court.

*Judgment affirmed.*

