The case of Dennick v. Railroad Co., 103 U. S. 11, has no application whatever. The question now decided was not there presented. Mr. Justice Miller, in concluding the opinion in that case, said:

"Let it be remembered that this is not a case of an administrator appointed in one state, suing in that character in another state, without any authority from the latter. It is the general rule that this cannot be done. The suit here was brought by an administratrix in a court of the state which had appointed her, and of course no such question could be made."

If the appellant company had been sued in the courts of Ohio, a very different question would have arisen. The question we have to decide is as to whether, under the law of Kentucky, the Ohio administrator of the decedent could maintain a suit in the courts of Kentucky for the death of his decedent. If he could, then the diverse citizenship of the parties gave the federal courts jurisdiction. If he could maintain no suit in the courts of Kentucky by reason of the terms of the act creating the right, then he cannot have a status in a federal court, for no statute has vested in him any right of action in any court.

The demurrer should have been sustained, and the suit dismissed, because the plaintiff stated no cause of action, either at common law or under the statute. The judgment will be reversed, and the cause remanded for further proceedings in accordance with this opinion.

BOARD OF COM'RS OF MAHONING COUNTY et al. v. YOUNG.

(Circuit Court of Appeals, Sixth Circuit. October 26, 1893.)

No. 89.

1. DEDICATION—ABANDONMENT OF PUBLIC USE.
   Where land is dedicated for a burying ground, whether by a common-law dedication, under which the fee remains in the owner, or pursuant to Acts Ohio, Dec. 6, 1800, and March 3, 1831, under which the fee is vested in the county in trust for the purposes named only, the lawful and effectual abandonment of the land as a burying ground restores the former owner to his right of possession.

2. DEED—ESTATE CONVEYED—REFERENCE TO STATUTE.
   A quitclaim deed to an incorporated village, for a valuable consideration, of all the grantor's right and title to lands previously dedicated for a burying ground by a common-law dedication, only the naked legal title remaining in the grantor, with a possibility that his right of possession might be restored, contained absolute words of conveyance, followed by a declaration that the land was to be under the control of the municipal authority, "in conformity with" a certain act of the state legislature, which purported to vest in incorporated cities and villages the title to public burial grounds therein dedicated as such, but not according to the requirements of law for a statutory dedication, by which the fee would have been vested in the municipality in trust for the public use. *Held*, that such declaration was only declarative of the use, and directory as to the administration of the trust; and the fee conveyed was not thereby rendered a mere qualified fee, or subject to be defeated by the happening of a condition subsequent, but was an absolute fee, subject to the trust. 51 Fed. 585, reversed.

3. SAME—CONVEYANCE TO MUNICIPALITY FOR PUBLIC USE—ABANDONMENT OF USE.
Where land has been conveyed to a village for use as a public burying ground, the village council, in their character as trustees, cannot abandon the use, and thereby defeat the beneficial interest of the public.

4. SAME—CONDITION SUBSEQUENT—USE PREVENTED BY ACT OF LAW.
Even though such conveyance be subject to forfeiture for breach of a condition subsequent as to such use, the breach is excused when the act of the law has prevented such further use of the land. 51 Fed. 585, reversed.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

At Law. Action by Charles C. Young against the board of commissioners of Mahoning county, Ohio, the city of Youngstown, Ohio, and others, to recover lands. Judgment for plaintiff. 51 Fed. 585. Defendants bring error. Reversed.

Statement by LURTON, Circuit Judge:

This is an action of ejectment. The plaintiff was Charles C. Young, a citizen of the state of New York. The defendant was the county of Mahoning, one of the counties of the state of Ohio. The property involved is lot No. 96 of John Young's original plat of the village of Youngstown, upon which now stand the courthouse, jail, and county offices of Mahoning county. A jury was waived, and the cause submitted to the Honorable W. H. Taft, circuit judge, who rendered judgment for the plaintiff. Subsequently, a jury was impaneled, under the statute of Ohio, to ascertain the value of the improvements. Upon final judgment there was an appeal by the defendant to this court.

The facts necessary to be stated for the purpose of this opinion are these: John Young, the ancestor of the plaintiff below, and the common source of title for plaintiff and defendants, signed and recorded, in 1802, a town plat of 100 lots in the township of Youngstown, then in the county of Trumbull, but now in that of Mahoning. This plat was defectively acknowledged under the Ohio statute regulating the acknowledgment and registration of town plats. The result was that the legal title to the streets, alleys, and other open public places was not vested in the village authorities, but remained in Young. Lots Nos. 95 and 96 on this plot were each marked with the words, "Burying ground." From the date of this dedication, down to 1868, these lots were used as a burying ground. In 1865 an adjoining lot owner fenced in a part of lot 95. Suit was brought against him in the name of the county commissioners, but failed upon the ground that the title was not in them. Another suit was instituted in the name of certain citizens of Youngstown for the benefit of the public. One B. F. Hoffman was counsel in this second suit for the plaintiffs. To meet the supposed difficulty about the title, Hoffman procured the passage by the legislature (April 3, 1867) of an act entitled "An act for the protection of certain graveyards and burial grounds." The first section of this act is the only one important to this contention. It was in these words:

"That the title, right of possession and control to and in and of all public graveyards and burial grounds located within incorporated cities and dedicated by the owners, and dedicated as graveyards and burial grounds, but which have not been dedicated according to the forms and requirements of law, be and the same are hereby vested in the cities, towns and villages respectively, where any such graveyards and burial grounds may be located; and the council of such towns, cities and villages are hereby authorized and required to take possession, control and charge of all such grounds within their respective limits and protect and preserve the same, and make such ordinances, sales and regulations as may be necessary and proper for said purposes and consistent with the health and welfare of the inhabitants; and they are also authorized and required, when necessary, to institute suits in the names of said municipal corporations to recover possession of said grave-

yards and burial grounds, remove trespassers therefrom and recover damages for injuries thereto for any part thereof, or to any tomb or monument therein."

Pending that suit, and after the passage of this act, Hoffman procured from the plaintiff, Charles C. Young, who was then living in Whitestown, N. Y., and in whom was vested the legal title by descent from his father, John Young, and by deeds from his brothers and sisters, a quitclaim deed to both lots 95 and 96. This deed is in these words:

"C. C. Young to Village of Youngstown.

"Quitclaim Deed.

"To all to whom these presents shall come, greeting: Know ye, that I, C. C. Young, of Geneva, in the state of New York, for divers good causes and considerations thereunto moving, especially for one dollar received to my full satisfaction of the incorporated village of Youngstown, in the county of Mahoning, in the state of Ohio, have given, granted, remised, released, and forever quitclaim, and do by these presents absolutely give, grant, remise, release, and forever quitclaim, unto the said incorporated village of Youngstown and its successors forever, to be under the authority and control of its proper council and municipal authority, in conformity with the act of the legislature of Ohio in that behalf, all such right and title as I, the said C. C. Young, as one of the heirs, and as the assignee and grantee of the other heirs and devisees, of John Young, the original proprietor of said township and village lands, have or ought to have in and to the following described lands: Situate in the said village, and known and designated on the original plat of said village made by said John Young and recorded in Trumbull County Records of Deeds, Book A, p. 118, as burial grounds, and being inlots numbers ninety-five and ninety-six, and used as burial grounds by the citizens of said village and township since about the year 1799. Said inlot No. 95 lies on the west side of Market street, and extends westerly to inlot No. 94, and covers all the ground inclosed and used as a burial ground for over fifty years; and said inlot No. 96 lies on the east side of said Market street, and includes the grounds inclosed and used as a burial ground for a like period. To have and to hold the premises aforesaid unto the said grantee, said incorporated village of Youngstown, and its successors, forever. In witness whereof I have set my hand and seal this 10th day of July, A. D. 1867. C. C. Young. [L. S.]

"Signed, sealed, and executed in the presence of
"John W. Smith.
"Samuel Louthrop."

The city council of Youngstown accepted this deed, and the suit against the trespasser was thereafter conducted in its name and in its behalf. The consideration for this deed was the sum of $15, paid to Hoffman on account of Charles Young, being a debt due from Young to Hoffman about other matters. Young required the city of Youngstown to assume this debt to Hoffman, and pay the same as a consideration for the conveyance.

In 1868 the council of Youngstown, which had then ceased to be a village and become a city, passed an ordinance by which all interments in the old burying ground were thereafter forbidden, and the remains of those already interred there, which should not be removed by friends and relatives before April 1, 1869, were ordered removed at public expense. This ordinance was executed, and all bodies removed. From that time until 1874 the lots lay open and unused. In 1874 the legislature provided that the county site of Mahoning county should be removed from Canfield to Youngstown, on condition that Youngstown should donate a lot, and erect thereon the county courthouse, jail, and offices at a cost of not less than $100,000, free of expense to the county. This condition was accepted, and by ordinance passed in 1875 it was directed that a deed in fee to said lots 95 and 96 be made to a committee of five citizens, who were constituted a building committee, charged with the duty of erecting the courthouse and other public buildings, and then making conveyance, when completed, to the county commissioners

of Mahoning county. The buildings were duly erected, and in August, 1876, the lot on which they stood was conveyed to the county commissioners, and since that date have been occupied by the courts and county officers of Mahoning county. Lot No. 95 was not used by the building committee, and the title remains in that committee. The present suit involves only lot No. 96, and was begun in December, 1891.

Disney Rogers, A. W. Jones, and Geo. F. Arrel, for plaintiffs in error.

F. E. Hutchins, T. W. Sanderson, and M. A. Norris, for defendant in error.

Before BROWN, Circuit Justice, LURTON, Circuit Judge, and SEVERENS, District Judge.

LURTON, Circuit Judge, (after stating the facts.) We quite agree, upon the facts of this record, that the plaintiff's title is good, and that he is entitled to recover, if the case is to turn alone upon the effect of the common-law dedication made by John Young in 1802. The dedication under the unacknowledged plat of that year was good only as a common-law dedication. The plat was only evidence of the purpose of the dedicator with regard to lots 95 and 96. The acceptance and use by the public of them as a burying ground, taken in connection with the plat, operated as a dedication for burying purposes. This sort of dedication operated only by estoppel. The acquiescence of the owner, and that use by the public, estopped him from asserting any right of possession hostile to such use. The public acquired an easement for that purpose, and that only. This seems to be the well-settled ground upon which a common-law dedication becomes operative and effective. Fulton v. Mehrenfield, 8 Ohio St. 440; Wisby v. Bonte, 19 Ohio St. 238. The right of the public being a mere easement, the owner of the fee may resume possession whenever there has been a full and lawful abandonment of the use for which the dedication was made. The estoppel ceases to operate when the use ceases. "The dedication," as forcibly put by the circuit judge, "has spent its force" whenever the use becomes impossible. This is the well-settled rule concerning public roads, streets, and alleys, when the fee remains in the owner of land over which a public road has been established. Barclay v. Howell's Lessee, 6 Pet. 498.

The result would be the same under the construction placed upon the Ohio acts of December 6, 1800, and March 3, 1831, by the court of that state. The acts referred to provide that the due acknowledgment and proper registration of a town plat "should be deemed a sufficient conveyance to vest the fee of such parcels of ground as are therein expressly named and intended to be for public uses in the county in which such town lies, in trust to and for the uses and purposes therein named, expressed or intended, and for no other uses or purposes whatever." Under this statute the Ohio court held this statutory title and dedication conferred "no power of alienation discharged of the use by which the purpose of the dedication might be defeated," and that, "should the sole uses to which the property has been dedicated become impossible of execution, the property

would revert to the dedicators or their representatives." Board of Education v. Edson, 18 Ohio St. 226. The case of Zinc Co. v. City of La Salle, 117 Ill. 411, 8 N. E. 81, was under a like statute, and is in accord with the Ohio case. It follows, under the law of Ohio, that whether the fee be in the dedicator, or be in the town or county, by virtue of the statute concerning properly registered town plats, the dedicator, or his heirs, may repossess himself whenever it is no longer possible to use the property for the purposes indicated by the dedication, or whenever there has been a full and lawful abandonment of the easement by the beneficiaries. The lawful and effectual abandonment of these lots as a burying ground would therefore operate to restore the owner to his right of possession by the termination of the easement.

The case of Campbell v. City of Kansas, 102 Mo. 326, 13 S. W. 897, goes to this extent, and no further. The parcel of land involved in that suit had been marked upon a town plat as donated for burying purposes. The city council afterwards, by ordinance, caused the bodies there buried to be removed, and converted the plot into a public park. The plat was never properly acknowledged or registered, and the title therefore remained in the dedicator. The heirs of the original owner sued in ejectment, and recovered; the Missouri court holding that the public had only an easement for burial purposes, and that the lawful abandonment of this easement revested the dedicator with the right of possession. It was not a case of an estate upon condition, but a case of a mere easement for a specified use.

This brings us to a consideration of the effect of the deed made in 1868 by the plaintiff to the village of Youngstown. Is this deed equivalent only to a statutory dedication? Is it a grant subject to be defeated by any subsequent event? To entitle the plaintiff to recover, he must show that the estate conveyed by him has terminated, and that he now is entitled to re-enter. The construction put upon this deed by the circuit judge was governed by his view of the act of 1867, and, by treating it as a part of the deed, he thought that that act only undertook "to confer upon the village the power and control over the burying ground which the public would have in such grounds, dedicated for burial purposes, at common law;" that it fixed "the trustee to preserve the rights of the public in a common-law dedication;" and that "the authority and control of the council is limited by the act to the preservation of such rights, and, by reading the act into the deed, the same limitation upon the fee therein conveyed is created." The result of this construction of the act of 1867, when read into the deed, he sums up in his conclusion thus: "The effect of the deed here was to put the parties in exactly the same situation that they would have been in had the dedication of John Young, in 1802, been in accordance with the statute then in force." This is a strong position. Its error seems to lie in confounding the distinction between the effect of a grant by deed for a public use and a common-law or statutory dedication for a like purpose. To say that, by reading the act of 1867 into the deed, the effect is to cut it down into an instrument operating only as if the