

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

grantees held under a statutory or common-law dedication, is to assume the whole point in controversy.

We shall not antagonize the soundness of the construction put on the act of 1867. If it had been possible, by retrospective legislation, to divest a legal title out of one and vest it in another, the result, after all, would have been but a statutory dedication. Under the Edson Case, such a dedication, though operating to pass the title for the uses and purposes specified in the instrument, would terminate when the use became impossible. That case may be treated as recognizing no distinction between the duration of a common-law dedication and a statutory dedication operating to pass the legal title. The well-settled distinction between a grant by deed and a dedication for a particular use is not touched upon in the Edson Case. Subsequently, the same court, in *Taylor v. Binford*, 37 Ohio St. 262, expressly treated the question as undecided, and reserved its consideration. The circuit judge, whose opinion we are now considering, clearly recognized this distinction, and undertook to take this case without the rule affecting grants by deed.

On this subject he said:

"Counsel for the defendants contend that there is a distinction between a grant by deed and a dedication for a particular or specific use, and that a condition subsequent cannot be created in a deed by limiting the use, unless there be a clause of re-entry for forfeiture; and several strong cases are cited to sustain the claim with respect to a deed. *Raley v. Umatilla Co.*, 15 Or. 180, 13 Pac. 890; *Packard v. Ames*, 16 Gray, 327; *Ayer v. Emery*, 14 Allen, 67; *Brown v. Caldwell*, 23 W. Va. 187; *First M. E. Church of Columbia v. Old Columbia Public Ground Co.*, 103 Pa. St. 608. In *Taylor v. Binford*, 37 Ohio St. 262, the supreme court of Ohio declined to decide whether the law of Ohio was in accordance with these authorities, and the question is an open one in this state. But these cases do not apply to the construction of the deed at bar. Here the conveyance is in fee to the village to exercise certain defined possession and control over the land, namely, that possession and control exercised by the public over an easement acquired by common-law dedication. The fee reverts, not by entry after condition broken, but by a simple termination of the estate on the impossibility of exercising the possession and control for which it was given."

What is the character of the fee conveyed by this deed? Three solutions are possible:

(1) That it operated, as held by the circuit court, only to pass such qualified fee "as would pass under a statutory dedication," and that the fee reverts, "not by entry after condition broken, but by a simple termination of the estate on the impossibility of exercising the possession and control for which it was given."

(2) That it conveyed the fee, subject to be defeated by the happening of a condition subsequent.

(3) That it conveyed an absolute fee, subject to a trust that it should be preserved as a burial ground.

Let us take these solutions up in the order stated. At the outset it may be confidently said that the cases relied upon as supporting the first solution were not cases of voluntary grants by deed. They were, with one exception, all cases under statutory dedications, and the court only considered the effect of an abandonment of the public use to which the property had been devoted by statutory dedication. The cases were: Board of Education