Syllabus.

Unwise laws and such as are highly inexpedient and unjust are frequently passed by legislative bodies, but there is no power vested in a Circuit Court nor in this court, to determine that any law passed by a State legislature is void if it is not repugnant to their own constitution nor the Constitution of the United States.

Vague apprehensions seem to be entertained that unless such a power is claimed and exercised inequitable consequences may result from unnecessary taxation, but in my judgment there is much more to be dreaded from judicial decisions which may have the effect to sanction the fraudulent repudiation of honest debts, than from any statutes passed by the State to enable municipal corporations to meet and discharge their just pecuniary obligations.

BASEY ET AL. *v.* GALLAGHER.

1. Where in an equity case a demurrer is filed to the complaint and the record does not disclose what disposition was made of it, and an answer is subsequently filed, upon which the parties proceed to a hearing, it will be presumed on appeal that the demurrer was abandoned.
2. Although by the organic act of the Territory of Montana common-law and chancery jurisdiction is exercised by the same court, and by legislation of the Territory the distinctions between the pleadings and modes of procedure in common-law actions and those in equity suits are abolished, the essential distinction between law and equity is not changed. The relief which the law affords must be administered through the intervention of a jury, unless a jury be waived; the relief which equity affords must be applied by the court itself, and all information presented to guide its action, whether obtained through masters' reports or findings of a jury, is merely advisory.
3. The provision in the statute of Montana of 1867 regulating proceedings in civil cases declaring "that an issue of fact shall be tried by a jury, unless a jury trial is waived," does not require the court in an equity case to regard the findings of a jury called in the case as conclusive, though no application to vacate the findings be made by the parties, if in its judgment they are not supported by the evidence.
4. In the Pacific States and Territories a right to running waters on the public lands of the United States for purposes of irrigation may be

acquired by prior appropriation, as against parties not having the title of the government. The right, exercised within reasonable limits, having reference to the condition of the country, and the necessities of the community, is entitled to protection. This rule obtains in the Territory of Montana, and is sanctioned by its legislation.

5. By the act of Congress of July 26th, 1866, which provides "that whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same," the customary law with respect to the use of water, which had grown up among occupants of the public land under the peculiar necessities of their condition, is recognized as valid. That law may be shown by evidence of the local customs, or by the legislation of the State or Territory, or the decisions of the courts. The union of the three conditions in any particular case is not essential to the perfection of the right by priority; and in case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, will control.

APPEAL from the Supreme Court of the Territory of Montana. The case was thus:

The organic act of the Territory just named recognizes the distinction between the jurisdictions of law and equity, but requires that proceedings in both be in the same court.

By a statute of the Territory regulating proceedings in such cases in courts of the Territory, only one *form* of civil action is allowed; and it is there enacted that "issues of fact shall be tried by a jury, unless a jury is waived or a reference ordered," in a way which the statute provides.

In this state of the law Gallagher and others filed a bill in one of the District Courts of the Territory, against Basey, Stafford, and others, *praying for an injunction* to restrain them from diverting the water of a stream known as Avalanche Creek, in the said Territory, to which they, the plaintiffs, asserted a right by prior appropriation for the purposes of irrigation. They alleged that in the year 1866 they and their predecessors in interest took up for settlement and cultivation certain farms, designated by them as "ranches," on the public lands of the United States near the creek, in the county of Meagher, in that Territory; and that they or their predecessors in interest had ever since occupied and

cultivated the same; that it was necessary to irrigate the land for its successful cultivation, and to raise grain, hay, and vegetables; that they accordingly, during that year and the following spring, constructed, at great labor and expense, a ditch by which they intersected the creek a short distance from its junction with the Missouri River, and conveyed its water to their farms and used it for irrigation; that at this time the water was not appropriated by any person, and was subject to appropriation by them; that by their ditch they appropriated the water to the extent of five hundred inches, according to the measurement of miners; that this amount was necessary to the successful cultivation of the land, and by means of it they and their predecessors in interest were enabled to cultivate the farms and raise large and valuable crops of grain, hay, and vegetables.

They further alleged that subsequent to this appropriation by them, and during the years 1867 and 1870, and the intervening period, the defendants erected dams across the creek above the head of their ditch and diverted the water of the stream, and thereby wholly deprived them of its use and enjoyment, preventing their cultivation of the farms and rendering them useless; that had the water been permitted to flow, unobstructed by the dams of the defendants, there would have been a sufficient supply for irrigating and cultivating the farms. They therefore sought the aid of the court to restrain the defendants from diverting the water, except so much as might be in excess of the five hundred inches appropriated by them.

To this complaint the defendants demurred, on the ground, 1st, that the cause of action alleged was barred by the statute of limitations; and, 2d, that the complaint did not state a cause of action. The record did not disclose what disposition was made of the demurrer.

An answer was subsequently filed which denied the several allegations of the complaint, except the one which averred the possession by the plaintiffs of their farms.

The record was a very defective one, and presented the case obscurely. Gathering, however, what could be gath-

ered from its imperfect statements, it would seem that at the May Term of the District Court of the Territory in 1871, previous to the final hearing, which was had at the subsequent July Term, a jury was called in the case, to which certain questions were submitted and its answers taken. The jury found substantially that parties by the name of White and Torvais, prior to September or October, 1866, had appropriated the water of the creek to the extent of thirty-five inches; that these parties, during one of those months, gave the plaintiffs and their predecessors the right to connect with their ditch, and to extend and enlarge the same; that the plaintiffs and their predecessors commenced such enlargement during those months, and increased the capacity of the ditch to two hundred and fifty inches; that White and Torvais afterwards, in 1867, sold their water-right and ditch to the defendant, Stafford; that the defendant, Basey, had no interest in privity with the other defendants, and diverted the water for his own use by agreement with the plaintiffs, and that neither of the other defendants had diverted water to the injury of the plaintiffs previous to the commencement of the action.

Upon these special findings both parties moved the court for judgment; the defendants, that the complaint be dismissed; the plaintiffs, that a decree pass in their favor. On these motions the court heard the whole case "on the pleadings, evidence, and proceedings therein, and the findings of the jury," and rendered a decree adjudging that the defendant, Stafford, was entitled to thirty-five inches of the water, and that as against the defendants, saving this amount, the plaintiffs were entitled to two hundred and fifteen inches of the water, and decreed an injunction against any diversion of the water by the defendants which would prevent its flow to this extent in the stream to the ditch of the plaintiffs. From this decree an appeal was taken to the Supreme Court of the Territory, and there the decree was affirmed. From that affirmance this appeal was taken.

In rendering the decree, the District Court disregarded a portion of the findings of the jury and adopted others, and

this action was approved by the Supreme Court of the Territory, and constituted one of the errors assigned here for the reversal of its decree.

The correctness or incorrectness of the decree appealed from, depended perhaps, in part, upon certain statutes.

They were thus: One was an act of Congress of July 26th, 1866,* which enacted as follows:

"SECTION 9. Whenever *by priority of possession* rights to the use of water for mining, agricultural, manufacturing or other purposes, have *vested* and accrued, *and the same are recognized and acknowledged by the local customs, laws, and decisions of courts*, the possessors and owners of such vested rights shall be maintained and protected in the same. And the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed."

The other statutes were Territorial acts. The first was an act passed on the 12th of January, 1865, entitled "*An act to protect and regulate the irrigation of land in Montana Territory.*" The first section of this act thus enacted:

"All persons who claim, own, or hold a possessory right or title to any land, or parcel of land, within the boundary of Montana Territory, as defined in the organic act of this Territory, when those claims are on the bank, margin, or neighborhood of any stream of water, creek, or river, shall be entitled to the use of the water of said stream for the purpose of irrigation, and making said claim available to the full extent of the soil for agricultural purposes."

The fourth section was thus:

"In case the volume of water in said stream or river shall not be sufficient to supply the continual wants of the entire country through which it passes, *then the nearest justice of the peace shall appoint three commissioners, as hereinafter provided, whose duty it shall be to apportion, in a just and equitable proportion, a certain amount of said water, upon certain alternate weekly days, to different localities, as they may in their judgment think best*

* 14 Stat. at Large, 253.

for the interest of all parties concerned, and with a due regard to the legal rights of all."

In 1870 this act of 1865 was repealed and another act was passed, making provision for the construction of ditches and the irrigation of agricultural lands. This enacted in its second, fifth, and sixth sections as follows:

"SECTION 2. Any person or persons, corporation or company, who may have or hold a title or possessory right or title to any agricultural lands within the limits of this Territory, as defined by the organic act thereof, shall be entitled to the use and enjoyment of the waters of the streams or creeks in said Territory for the purposes of irrigation and making said land available for agricultural purposes to the full extent of the soil thereof.

"SECTION 5. In all controversies respecting the rights to water under the provisions of this act *the same shall be determined by the date of the appropriation as respectively made by the parties.*

"SECTION 6. The waters of the streams or creeks of the Territory may be made available to the full extent of the capacity thereof for irrigating purposes, without regard to deterioration in quality or diminution in quantity, so that the same do not materially affect or impair the rights of the prior appropriator, but in no case shall the same be diverted or turned from the ditches or canals of such appropriator, so as to render the same unavailable."

In 1871 and 1872, when the statutes of Montana were revised, and a code of laws and practice was established for the Territory, this last act was incorporated into the system and re-enacted as part of it.*

Mr. Montgomery Blair, for the appellants:

The Supreme Court of the Territory erred in affirming the decree of the District Court:

1. Because in rendering that decree the District Court disregarded the findings of the jury, and by the laws of the Territory those findings were conclusive upon the court.

* Laws of Montana; Codified Statutes, 1871 and 1872, p. 498.

In the Territory of Montana only one form of action is allowed, and all distinctions in actions are abolished. And issues of fact are required to be tried by a jury in all cases, unless a jury is waived, or a reference is ordered, as provided for in the act. And the jury are made the *exclusive* judges of all questions of fact. Now in *Taylor* v. *Person*,* a case from North Carolina, in which the distinction between law and equity is fully recognized, but where a statute requires just what the Montana statute requires, it has been adjudged that if the record does not show that the facts had been found by a jury, it is error for which the decree will be reversed.

2. Because the decree proceeds upon the assumption that the appellees acquired a vested right in the water in question by being the first appropriators of it.

The law governing this subject is found in the act of Congress of July 26th, 1866. By the terms of that act the right in question is made to depend upon the existence of three several conditions: *First*, "it must be recognized and acknowledged by the local customs of the Territory;" *second*, by "the (local) laws;" and, *third*, "by the decisions of the courts."

The fourth section of the act of the Territory of 1865 is inconsistent with the doctrine of right by prior appropriation, and so Chief Justice Wade held in his separate opinion in the case of *Thorp* v. *Freed*.† It is true that his associate, Knowles, J., differed from him, and that the case was decided on other grounds. In commenting upon the statute mentioned the Chief Justice says:

"The whole purpose of the statute was to utterly abolish and annihilate the doctrine of prior appropriation." . . . "If the section does not mean that there shall be an equal distribution among all the parties concerned in such water, without any regard whatever to the date of appropriation, then I am utterly unable to comprehend the language used."

* 2 Hawks, 298.

† 1 Montana, 653.

Argument for the appellees.

Mr. R. T. Merrick, contra:

I. The case was a chancery case, and was tried as such, and the decree is in the usual form of decrees in chancery.

The issues submitted to the jury were so submitted only to *aid* the chancellor in ascertaining, from the evidence before him, the ultimate facts upon which to rest his decree. The two jurisdictions of law and equity in Montana are recognized as separate and distinct, and even though one *form* of action prevail, must be exercised as separate and distinct from each other in all cases, and equitable or legal relief administered according to the rules appertaining to the jurisdictions respectively.

II. The first appropriation of the water of a stream passing through the public lands of the United States for some beneficial purpose confers the right to the use and enjoyment of the water to the extent of the original appropriation.*

In this case there is no riparian owner except the United States, and the record does not show that either of the parties even occupy along the margin of the stream. The lands being open to appropriation the rule of time is the rule of right, and the first taker is to be protected in his entry and possession. Blackstone says:†

"If a stream be *unoccupied* I may erect a mill thereon, and detain the water; yet not so as to injure my neighbor's *prior* mill, or his meadow, for he hath by his first occupancy acquired à property in the current."

In *Williams* v. *Morland*,‡ and in *Liggins* v. *Inge*,§ and in the earlier cases in Massachusetts and Connecticut a similar principle was announced. Later adjudications in England establishing a different doctrine rest upon the fact that the

* Irwin *v.* Phillips, 5 California, 140; Bear River Co. *v.* The York Mining Co., 8 Id. 332; Butte Canal Co. *v.* Vaughn, 11 Id. 152; McDonald *v.* Bear River Co., 13 Id. 220; Phœnix Water Co. *v.* Fletcher, 23 Id. 482; Hill *v.* Smith, 27 Id. 476; Smith *v.* O'Hara, 43 Id. 371; Lobdell *v.* Simpson et al., 2 Nevada, 274; Ophir Mining Co. *v.* Carpenter, 4 Id. 534; Hobart *v.* Ford, 6 Id. 80; Dalton *v.* Bowker, 8 Id. 201.

† 3 Commentaries, 403.

‡ 2 Barnewall & Cresswell, 913.

§ 7 Bingham, 692.

right to the use of the water of the stream had never been detached as *property* from the ownership of the adjacent soil, and that such use was claimed and held only as a riparian right.

The act of Congress of July 26th, 1866, clearly recognizes a right to the use of water as independent of any right or title to land, and assures protection to this right whenever it has "*vested*" by "*priority of possession*," provided the "local customs, laws, and decisions of courts," recognize such a right and such a mode of acquiring it.

Congress is here dealing with the public domain.

The question then arises, is the case of the complainant within the provisions of the act of Congress of July 26th, 1866?

Do the *local customs, laws, and decisions of the courts* of Montana recognize the acquisition of a right to the use of the water of a stream by appropriation, as separate and distinct from the ownership of land adjacent to the stream, and is such right to be determined by the priority of possession among respective claimants?

What is the fact as to the local customs, laws, and decisions of Montana, as they affect this question?

[The counsel here cited and commented upon the laws of the Territory which are given in the statement of the case; and contended that they established that "rights to the use of water for agricultural purposes" may be acquired and become vested by priority of possession.]

The "local customs and decisions of the courts" of the Territory also recognize and establish a similar rule of property.

In *Thorp* v. *Freed*, Knowles, J., says:

"Ever since the settlement of this Territory it has been the custom of those who settled themselves upon the public domain and devoted any part thereof to the purposes of agriculture, to dig ditches and turn out the water of some stream to irrigate the same. This right has been generally recognized by our people. *It has been universally conceded that it was a necessity of agricultural pursuits.* So universal has been this usage that I

do not suppose there has been a parcel of land, to the extent of one acre, cultivated within the bounds of this Territory that has not been irrigated by water diverted from some running stream."

Wade, C. J., in a separate opinion in the same case, denies that any custom exists recognizing the right to appropriate water for the purposes of agriculture and irrigation, whilst apparently admitting the existence of the custom as applied to mining and the mineral lands of the public domain.

But if a usage exists recognizing the right to divert and appropriate water, the *purpose* for which the appropriation may be made is immaterial, provided it be useful or beneficial and not for speculation.*

This right has been recognized, too, by the courts. The cases referred to show that it has been uniformly recognized and established in California and Nevada, and the courts of Montana have, on this subject, followed the decisions of the courts of those States.†

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court, as follows:

The record does not disclose what disposition was made of the demurrer to the complaint, but as an answer was subsequently filed upon which the parties proceeded to a hearing, the presumption is that it was abandoned.

By the organic act of the Territory, the District Courts are invested with chancery and common-law jurisdiction. The two jurisdictions are exercised by the same court, and, under the legislation of the Territory, the modes of procedure up to the trial or hearing are the same whether a legal or equitable remedy is sought. The suitor, whatever relief he may ask, is required to state "in ordinary and concise lan-

* Ortman et al. *v.* Dixon, 13 California, 33; Davis *v.* Gale, 32 Id. 26; Woolman *v.* Garringer, 1 Montana, 535.

† Caruthers *v.* Pemberton, 1 Montana, 111, 113; Thorp *v.* Woolman, Ib. 171, 172; Woolman *v.* Garringer, Ib. 535, 543; Atchison *v.* Peterson, Ib. 564.

guage" the facts of his case upon which he invokes the judgment of the court. But the consideration which the court will give to the questions raised by the pleadings, when the case is called for trial or hearing, whether it will submit them to a jury, or pass upon them without any such intervention, must depend upon the jurisdiction which is to be exercised. If the remedy sought be a legal one, a jury is essential unless waived by the stipulation of the parties; but if the remedy sought be equitable, the court is not bound to call a jury, and if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. The decree which it must render upon the law and the facts must proceed from its own judgment respecting them, and not from the judgment of others. Sometimes in the same action both legal and equitable relief may be sought, as for example, where damages are claimed for a past diversion of water, and an injunction prayed against its diversion in the future. Upon the question of damages, a jury would be required; but upon the propriety of an injunction, the action of the court alone could be invoked. The formal distinctions in the pleadings and modes of procedure are abolished; but the essential distinction between law and equity is not changed. The relief which the law affords must still be administered through the intervention of a jury, unless a jury be waived; the relief which equity affords must still be applied by the court itself, and all information presented to guide its action, whether obtained through masters' reports or findings of a jury, is merely advisory. Ordinarily, where there has been an examination before a jury of a disputed fact, and a special finding made, the court will follow it. But whether it does so or not must depend upon the question whether it is satisfied with the verdict. This discretion to disregard the findings of the jury may undoubtedly be qualified by statute; but we do not find anything in the statute of Montana, regulating proceedings in civil cases, which affects this discretion. That statute is substantially a copy of the statute of California as it existed in 1851, and it was frequently held by the Supreme

Court of that State, that the provision in that act requiring issues of fact to be tried by a jury, unless a jury was waived by the parties, did not require the court below to regard as conclusive the findings of a jury in an equity case, even though no application to vacate the findings was made by the parties, if in its judgment they were not supported by the evidence. That court only held that the findings, when not objected to in the court below and the judge was satisfied with them, could not be questioned for the first time on appeal.*

The question on the merits in this case is whether a right to running waters on the public lands of the United States for purposes of irrigation can be acquired by prior appropriation, as against parties not having the title of the government. Neither party has any title from the United States; no question as to the rights of riparian proprietors can therefore arise. It will be time enough to consider those rights when either of the parties has obtained the patent of the government. At present, both parties stand upon the same footing; neither can allege that the other is a trespasser against the government without at the same time invalidating his own claim.

In the late case of *Atchison* v. *Peterson*,† we had occasion to consider the respective rights of miners to running waters on the mineral lands of the public domain; and we there held that by the custom which had obtained among miners in the Pacific States and Territories, the party who first subjected the water to use, or took the necessary steps for that purpose, was regarded, except as against the government, as the source of title in all controversies respecting it; that the doctrines of the common law declaratory of the rights of riparian proprietors were inapplicable, or applicable only to a limited extent, to the necessities of miners, and were inadequate to their protection; that the equality of right

* Still *v.* Saunders, 8 California, 287; Goode *v.* Smith, 13 Id. 81; Duff *v.* Fisher, 15 Id. 376. See, also, Koppikus *v.* State Capitol Commissioners, 16 Id. 248; and Weber *v.* Marshall, 19 Id. 447.

† *Supra*, p. 507.

recognized by that law among all the proprietors upon the same stream, would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream; that the government by its silent acquiescence had assented to and encouraged the occupation of the public lands for mining; and that he who first connected his labor with property thus situated and open to general exploration, did in natural justice acquire a better right to its use and enjoyment than others who had not given such labor; that the miners on the public lands throughout the Pacific States and Territories, by their customs, usages, and regulations, had recognized the inherent justice of this principle, and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories, and was finally approved by the legislation of Congress in 1866. The views there expressed and the rulings made are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in those States and Territories by the custom of miners or settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one.

In the case of *Tartar* v. *The Spring Creek Water and Mining Company*, decided in 1855, the Supreme Court of California said: "The current of decisions of this court go to establish that the policy of this State, as derived from her legislation, is to permit settlers in all capacities to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner. In evidence of this, acts have been passed to protect the possession of agricultural lands acquired by mere occupancy; to license miners; to provide for the recovery of mining claims; recognizing canals and ditches which were known to divert the water of streams from their natural channels for mining purposes; and others of like character. This policy has been extended equally to all pursuits, and no partiality for one over another has been evinced, ex-

cept in the single case where the rights of the agriculturist are made to yield to those of the miner where gold is discovered in his land. . . . The policy of the exception is obvious. Without it the entire gold region might have been inclosed in large tracts, under the pretence of agriculture and grazing, and eventually what would have sufficed as a rich bounty to many thousands would be reduced to the proprietorship of a few. Aside from this the legislation and decisions have been uniform in awarding the right of peaceable enjoyment to the first occupant, either of the land or of anything incident to the land."*

Ever since that decision it has been held generally throughout the Pacific States and Territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection. Water is diverted to propel machinery in flour-mills and saw-mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual. The act of Congress of 1866 recognizes the right to water by prior appropriation for agricultural and manufacturing purposes, as well as for mining. Its language is: "That whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

It is very evident that Congress intended, although the lan-

* Per Heydenfeldt, J., 5 California, 397.

guage used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legislation of the State or Territory, or the decisions of the courts. The union of the three conditions in any particular case is not essential to the perfection of the right by priority; and in case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, must necessarily control.

This law was in force when the plaintiffs in this case acquired their right to the waters of Avalanche Creek. There was also in force an act of the Territory, passed on the 12th of January, 1865, to protect and regulate the irrigation of land, which declared in its first section that all persons who claimed or held a possessory right or title to any land within the Territory on the bank, margin, or neighborhood of any stream of water, should be "entitled to the use of the water of said stream for the purpose of irrigation and making said claim available to the full extent of the soil for agricultural purposes." Another section provided that in case the volume of water in the stream was not sufficient to supply the continual wants of the entire country, through which it passed, an apportionment of the water should be made between different localities by commissioners appointed for that purpose. This last section has no application to the present case, for it is not pretended that there was not water enough in the district, where Avalanche Creek flows, to supply the wants of the country; and, the section itself was repealed in 1870.*

In January of that year another act was passed by the legislature of Montana upon the same subject, which recognizes the right by prior appropriation of water for the purposes of irrigation, and declares that all controversies respecting the rights to water under its provisions shall be

* Session Laws of 1865, 367.

determined by the date of the appropriation as respectively made by the parties, and that the water of the streams shall be made available to their full extent for irrigating purposes, without regard to deterioration in quality or diminution in quantity, "so that the same do not materially affect or impair the rights of the prior appropriator; but in no case shall the same be diverted or turned from the ditches or canals of such appropriator so as to render the same unavailable."*

Several decisions of the Supreme Court of Montana have been cited to us recognizing the right by prior appropriation to water for purposes of mining on the public lands of the United States, and there is no solid reason for upholding the right when the water is thus used, which does not apply with the same force when the water is sought on those lands for any other equally beneficial purpose. In *Thorp* v. *Freed* the subject was very ably discussed by two of the justices of that court, who differed in opinion upon the question in that case, where both parties had acquired the title of the government. The disagreement would seem to have arisen in the application of the doctrine to a case where title had passed from the government, and not in its application to a case where neither party had acquired that title. In the course of his opinion Mr. Justice Knowles stated that ever since the settlement of the Territory it had been the custom of those who had settled themselves upon the public domain and devoted any part thereof to the purposes of agriculture, to dig ditches and turn out the water of some stream to irrigate the same; that this right had been generally recognized by the people of the Territory, and *had been universally conceded as a necessity of agricultural pursuits.* "So universal," added the justice, "has been this usage that I do not suppose there has been a parcel of land, to the extent of one acre, cultivated within the bounds of this Territory, that has not been irrigated by water diverted from some running stream."†

* Session Laws of 1870, 57.

† 1 Montana, 652, 665.

We are satisfied that the right claimed by the plaintiffs is one which, under the customs, laws, and decisions of the courts of the Territory, and the act of Congress, should be recognized and protected.

DECREE AFFIRMED.

ERRATUM.

The reader will please to consider what is below as inserted on page 591, after the last clause of the syllabus of *Murdock* v. *City of Memphis*, and as paragraph 9 thereof; and also to consider the same thing as inserted in the Index, on page 698, as a paragraph between the paragraphs 2 and 3 of the title "Jurisdiction," now there.

Where an act of Congress calls into operative effect a provision in a deed, in virtue of which provision thus called into effect, a party claims title and right in such a way that, confessedly, but for the act, no suit would lie, the party so claiming claims a "title" and "right" "under" a statute of the United States within the meaning of the act of February 5th, 1867; and if the decision is against the title and right thus set up and claimed, jurisdiction exists here to re-examine.