should be carried out, does not make it the less unconscionable, that she should hold her brother's land, conveyed to her under a family compact, made for their mutual benefit, which has failed of execution through default of neither of them, but of a third party. She accepted the land under the family arrangement; that arrangement has fallen through. The position of the complainant is of some consideration with the court. He was one of the heirs-at-law of Robert G. Johnson. He is not only a sufferer by the father's violation of the agreement, but without cause has been disinherited; and that, which in law and justice belonged to him by his double right as heir and by contract, is all, or nearly all, bestowed upon his sister and her children. Under such circumstances, to permit the sister to enjoy, without any consideration, a part of that inheritance which the complainant derived from his mother is unjust, and a court of equity ought to prevent it.

This relief the complainant is not entitled to under the present bill as it is framed. The demurrer is therefore well taken, and must be sustained with costs. The complainant is at liberty to amend his bill, if he sees proper, upon the usual terms, so as to adapt it to the views I have expressed and relief suggested.

CERTIFIED DECISIONS OF THE SUPREME COURT OF CALIFORNIA, 1856.

HEYDENFELDT, J.—The current of decisions of this court goes 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, except in the single case where the rights of the agriculturist is made to yield to those of the miner, when gold is discovered in his land. This exceptional privilege is, of course, confined to public lands, as we held in *Stokes* vs. *Barrett et al.*, at the last January term. The policy of the exception is obvious. Without it, the entire gold region might have been enclosed 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 according the right of peaceable enjoyment to the first occupant either of the land or anything incident to the land. In the case of *Irwin* vs. *Phillips*, at the January term, the question was as to the use of water, and it was decided upon the principle of prior occupancy.

The appellants insist that as the State has granted the franchise of digging gold, all the incidents necessary to that purpose, wood, water, &c., must follow. This is certainly the doctrine of the common law, and would be held decisive in this case, in the absence of any other right to contradict it. But in previous decisions we have shown that there is nothing sufficiently expressive in the character of our legislation, which warrants an invasion upon the already acquired rights of individuals, except in the single case of agricultural lands. In the case of *Stokes* vs. *Barrett*, we declared that "to authorize an invasion of private property in order to enjoy a public franchise, would require more specific legislation than any yet resorted to." In *Irwin* vs. *Phillips*, we say "that however much the policy of the State, as indicated by her legislation, has conferred the privilege to work the mines, it has equally conferred the right to divert the streams from their natural channels." And further, we say, "the miner who selects a piece of ground to work, must take it as he finds it, subject to prior rights, which have an equal equity on account of an equal recognition by the sovereign power."

In the case of *Fitzgerald* vs. *Urton*, at the July term, it appeared that a party of miners invaded, for mining purposes, a town lot built upon and used as a tavern and stable yard. The defendants there relied upon the statute which gives mining privileges upon public lands in the possession of others for agricultural and grazing purposes. In referring to that statute we say, "in permitting miners, however, to go upon public lands occupied by others, it has legalized what would otherwise have been a