That about fifteen years ago lots began to sell more freely in said town and this deponent thinks and believes that between that time and the present about twenty or thirty lots or more have been sold and improved by the erection of houses and other buildings upon them. That the said Neff before his removal to his present residence, passed through the said town, once or oftener every day. And since his removal to his present residence has been in the said Town at least once a week and this deponent believes that the said Neff must have known of all the said sales and improvements. Sworn before. S. M. Strong J.P.

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Gentlemen. You have discovered when in discharge of your duties, that a portion of the Land mentioned in the Commission &c has been conveyed by one or two of the parties prior to the filing of the Bill, in the cause to various persons, and is now part of the Town of Frostburg &c and held and claimed in fee simple adverse to the parties Complainant and defendant &c. It is insisted that you should as Commissioners ascertain the value of the parts thus conveyed and held &c. and deduct from the portion unaffected by conveyances, and adverse rights &c the third of the value of the parts so held and conveyed &c. And you wish to know from me whether you can and should make the deduction insisted upon. I have had some difficulty in coming to an opinion upon the question you have submitted, but after reflection and investigation of the subject, my advise is that you cannot as Commissioners ascertain the value of the parts so held and claimed &c for the purpose of deducting from the share and part of either one of the parties, in that portion of the land which may be unaffected by deeds &c. There is no case known to me in which persons acting in your capacity have undertaking to ascertain the proportions of the parties &c that I regard as a power which can be exercised only by a Court. And when decided such Court is to clothe Commissioners with the right to divide and allot the proportion of each &c. so as to give each an equal share as directed in the Commission.

If in the discharge of your duties you find strangers, persons who are not parties to the suit claiming and in possession by deed in fee simple. From either of the suitors &c it is not in your power to determine who shall take less out of the land remaining and unbroached by claims of others, That I repeat is a question to be decided by a Court. You may have opinions in regard to what is equitable between the parties but while you are acting in a ministerial capacity as Commissioners You have to follow the directions of the Commission (that which gives you authority to act) and you cannot adjust the equities of the Complainant or defendants by augmenting or abating the share of either on account of matters which belong to a Court to decide &c. You cannot look to the Bill and other proceedings to see what has been alleged or omitted to determine the rights and proportions of each — You can only follow the command of the Court and give to each an equal share — each an equal third part of the Coal &c.

I have been referred to the case of Phelps vs. Green. 3rd Johnson Chancery Report 304. to establish your right to ascertain the proportions and make an abatement from a share of one or two of the parties &c. This case so far from sustaining the position; I think maintains the views I have taken of your powers. The Chancellor there determined that the Court must first ascertain the Estate and interest of the parties before the Commission to make partition can be awarded, and he Ordered that partition should be made

by metes and bounds, quality and quality relatively considered, exclusive of improvements &c. The Order of the Court to make partition exclusive of improvements, it is urged proves the right in case of partition to adjust the Equity of the parties. This may be the case before a Court (and of which it is not necessary for me to give an opinion) and yet that does not give you the same right. There it was a question disposed of before a Chancellor of a Court and not left to the decision of Commissioners — not left for them to say whether such improvements should be exclusive or inclusive. The case of the Earl of Clarandon vs. M. Bligh and wife vs. Hornby 1st Ver Williams 447 has been submitted to me to show that in the cases of partition recompense is to be made in money, to such of the owners as received property of less value than their equal part, and that you have power to make an allowance or deduction from shares &c.

I think it will be found by examination that this case also sustains my views, and shows that a Court of Equity can alone dispose of such a question, by petition though a party whose interest may prompt him to petition to the Court for a decision &c.

The Question there decided came before the Lord Chancellor, upon a petition and in a Court of Equity after a decree for partition and while the matter was in the hand of the Commissioners. See 17. Veg. 543 Ager vs. Fairfax it is decided that the Court is to ascertain the proportions and right of the parties and when that is done the duty of the Commissioners begin to make the divisions in those ascertained proportions. You have no power to ascertain the proportions of the land unaffected by deeds &c. that is alone for the Court you can only make a division or allotment in accordance with the Commission in equal shares, by courses &c. And you cannot decide that either is not entitled to one Equal third part of the Coal; on account of moral or other circumstances of an equitable nature not mentioned in your Commission.

It has been urged that the decree of the Court of Appeals has settled the rights of the parties and given you the power to make the abatement. The Court of Appeals in my opinion has not given you the power to allot to either one of the parties more than one third, each must have an equal share, you have no power to abate from any one share and give him less than a third. There is nothing in the case to show that such has been determined upon by that Court, and for ought you know Equitable circumstances attending the transfer of the Land may be shown by which such ought not to be done.

Respectfully Yours &c
Thomas Perry.

To Messrs Atkinson and others.
Commissioners

And afterwards to wit on the thirteenth day of October in the year Eighteen hundred and forty nine, the Complainant by his Solicitor aforesaid filed in the cause his exceptions to the report of the Commissioners in the words following to wit

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The Complainant excepts to the report of the Commissioners to make partition in this case, and to the partition made by them as shown by the plat returned in this cause.

1st Because the Commissioners have made no allowance to the Complainant in making said partition of the Coal under the Lots of the Town of Frostburg, sold by Meshack and Isaiah Frost, as prayed by the Complainant in his petition to this Court, filed on 7th October 1848, and as mentioned in the agreement