Construction of a Crown Grant

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Abstract

This paper reports the judgement by the Supreme Court of New South Wales, Equity Division, regarding the construction of a Crown Grant in the case Sunlea Investments Pty Ltd v The State of New South Wales, proceedings No. 1183/94.

The land in question was Portion 12, Parish of Fens, County of Gloucester surveyed on the 10 April 1875 being situated between Port Stephens and the Myall River at Hawks Nest, New South Wales. The question for adjudication was whether the land was bounded by a natural feature (in this case Mean High Water Mark) or by right lines (ie. lines defined by bearings and distances without reference to other features). If the land is bound by the natural feature then the land may benefit from a substantial amount of accretion, approximately 30 hectares.

At the time of writing this paper the decision had been handed down favouring the State of New South Wales. The plaintiff (Sunlea Investments Pty Ltd) has appealed this decision. Therefore, before any conclusions can be decided, the appeal must be obtained.

Case Summary

The preliminary question for decision was whether the benefit of accretion attaches to the northern boundary of the land in Certificate of Title Folio Identifier 1/739877 (part of Portion 12).

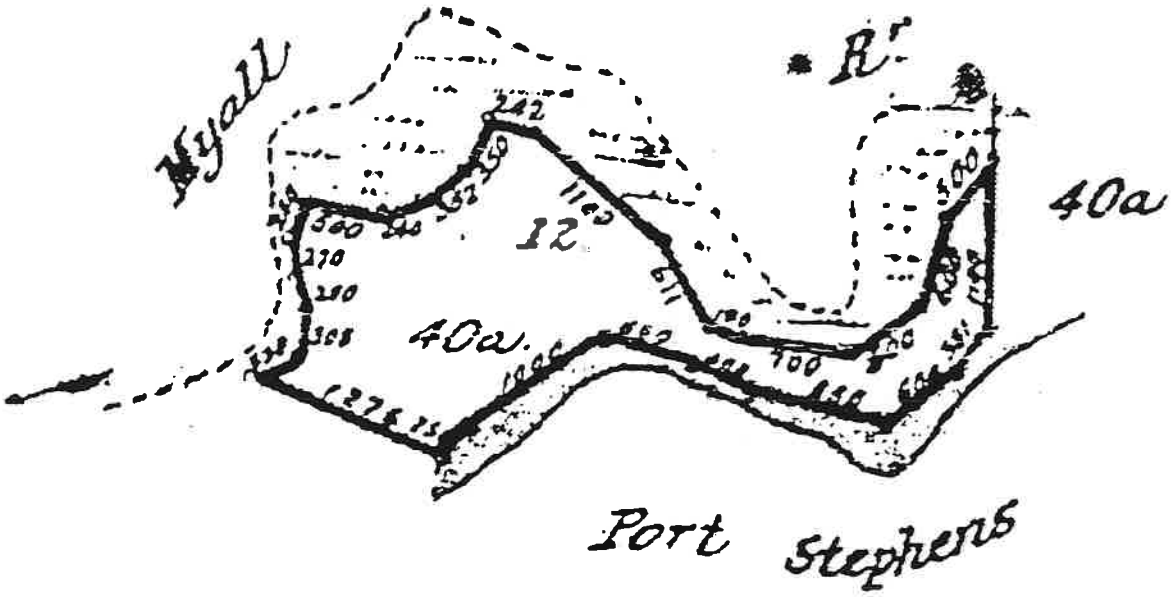
The land in question is Lot 1 in DP 739877. It is part of the land originally contained in the Land Grant Volume 681 Folio 145 originally granted to John Barnes on the 21 November 1883, having an area of 40 acres being Portion 12 in the Parish of Fens. Portion 12 was surveyed on the 10th April 1875 in Plan Number G517 - 1497. A point raised during the investigation of this case was the 8 year delay from when the survey was undertaken and when the Grant was issued. Section 12 of the Real Property Act 1862 required that every grant of land to be alienated required "every such grant in addition to proper words of description should contain a diagram of the land thereby granted"

The description of the land in the original grant is as follows:

> *"All that allotment or parcel of land in our said Colony containing by admeasurement forty acres be the same more or less situated in the county of Gloucester and Parish of Fens, Situated between Port Stephens and the Myall River Portion twelve COMMENCING on the foreshore of Port Stephens at the Southern end of the Western boundary line of C. McRae's forty acres and bounded thence on the East by part of that boundary line bearing North eleven chains on the North West North East again on the North West again on the North, and on the West by lines bearing South thirty two degrees forty minutes West five chains South nineteen degrees twenty minutes West six chains South*

fifty-two degrees West five chains North eighty-five degrees fifty minutes West seven chains North sixty eight degree's West one chain and ninety links North twenty eight degree's twenty five minutes West six chains eleven links North fifty one degree's thirty four minutes West two chains forty-two links South twenty two degrees one minute West three chains fifty links South fifty one degree's twenty three minutes West three chains fifty two links South seventy five degrees thirty minutes West two chains forty links North eighty one degrees five minutes West five chains South fourteen degrees ten minutes West two chains sixty links South eight degrees two minutes East two chain seventy links South twenty four degree's twenty nine minutes East two chains South three chains eight links and then South sixty eight degree's twenty eight minutes West three chains thirty links on the South West by a line bearing South sixty seven degrees fifty two minutes East twelve chains seventy-six links to the foreshore of Port Stephens and on the South East again on the South West and again on the South East by lines along that foreshore bearing North forty degrees ten minutes East two chains fifty links North fifty one degrees thirty four minutes East ten chains South seventy-four degrees nine minutes East six chains South sixty-three degrees thirty minutes East four chains South seventy-eight degrees thirty minutes East eight chains fifty links North fifty-three degrees thirty minutes East six chains and thence North thirty two degree's forty two minutes East three chains eighty-one links to the point of commencement as per plan in the margin hereof: with all Rights and Appurtenances whatsoever thereto belonging".

The Diagram in the title is shown below:



By contrast a copy of the plan of Portion 12 is shown in Figure 1. The main issue of the case was whether the northern boundaries were defined by the natural feature, that is, Mean High Water Mark (MHWM). If it was defined by the natural feature then it would benefit from any accretion provided that accretion satisfied the doctrine of accretion and erosion.

To answer this question the court was asked to determine the construction of the Crown Grant.

In deciding this question a number of relevant principals were used. These principals are;

1. At common law the doctrine of accretion or alluvion applies to land which borders the sea or a tidal river. The boundary is the high water mark unless the contrary appears from the Grant. *Gifford v Lord Yarborough* 5 Bingham 163; 130 ER 1023.

2. High water mark means the mean high water mark being the median tide between the spring and neap high tides; *Attorney General v Chambers* (1854) 4 DeG M & G 206;43 ER 486.

3. Torrens Title land is subject to the benefit of detriment of accretion or erosion *Verrall v Nott* (1939) 39 SR (NSW) 89 at 99.

4. The "foreshore" is technically the land between mean high water mark and mean low water mark. When a boundary is described as being the foreshore or running along the foreshore that would normally indicate mean high water mark as the boundary *Mellor v Walmesley* (1904) 2 Ch 525; *Government of Penang v Oon* (1972) AC 425 at 435.

5. If the boundary of land is a tidal stream or other tidal waters the fact that it is described in a grant by a metes and bounds description does not exclude the land from benefiting from accretion or losing from erosion. *Southern Centre of Theosophy Inc v State of South Australia* (1982) AC 706. A description is not sufficient to exclude the land from the benefit of accretion. If land is described by diagram or words as bounded or abutting tidal water (ie. MHWM) with a metes and bounds description which is not consistent with that fact then the boundary measurements generally give way to the physical boundary description. *Attorney General of Southern Nigeria v John Holt & Co (Liverpool) Ltd* (1915) AC 599 at 610; *Southern Centre of Theosophy* Inc p717. In general, abuttals will prevail over measurements. In all cases it remains a question of the construction of the grant.

Applying these general principals to this case, it was ruled the land in question is entitled to the benefits from accretion and the loses from erosion on the southern side. The southern boundary of the land in question shows surveyed lines parallel to the margin of Port Stephens which is shown by a solid line. Most importantly though the

description in the Crown Grant described the land as extending to the foreshore of Port Stephens and "by lines along that foreshore". Due to this description, the Judge confirmed that the southern boundary of the land was bound by the natural feature (MHWM) and would benefit or lose from accretion and erosion if the changes satisfied the doctrine of accretion and erosion.

The margin of the Myall River is shown by a dotted line in the survey of Portion 12. This dotted line appears to be north of "mangrove swamps" but no actual land is shown north of the metes and bounds lines. The question remaining is whether this land is entitled to be added to the adjoining title. To answer this question it was not possible to rely on the wording or the diagram in the Crown Grant alone. Much effort was spent highlighting supportive evidence from the adjoining survey plans and the survey directions which were current at the time.

Surveys in the area commenced with the survey of Porion 33 (G177 - 1497) in 1865. This was then followed by the survey of Portion 12 (G517 - 1497) in 1875. The next surveys in the area were performed by Surveyor E. Kenny in 1916. These surveys included the subdivision of portion 12 and a number of Special Leases of the adjoining Crown Land to the North of Portion 12. Copies of these plans are included in this paper.

The first plan inspected was that of Portion 12. Close attention was given to the diagram, and the information in the tables "Reference to Corners" and " Reference to Traverse". What appears on the plan to be the boundary lines are outlined in pink. Outside the pink, the boundaries "a-b", "c-d"and the margin of Port Stephens are outlined in black. The line which appears to be the line of the Myall River is a broken black line, with blue shading outside that broken line.

It is also pointed out that the diagram shown in the grant miscloses by 61 degrees and 85 links. The tracing however, closes to an accuracy of 1:14,000 and uses traverse legs 22 and 23. The title diagram does not use traverse legs 22 and 23 rather it uses 25 and 26 which were noted in red on the original plan and are missing from the tracing. The calculated area within the traverse legs using lines 25 & 26 is 42.4 acres (an area of 42.2 acres is achieved when using lines 22 & 23). This compares with the title description of 40 acres for the grant.

Field notes for the survey of Portion 12 where never lodged with the Department of Lands. Therefore, it was not possible to confirm any of the intentions of the survey in question. Part of the argument presented by the plaintiff relied on the line's 1 - 17 and 18 - 24 being a traverse used to locate the natural feature. They supported this by referring to the "Reference to Traverse" on the plan and claimed that it was indicative that the title was bound by the natural feature which was located from a traverse.

The Crown counteracted this claim by referring to the first survey in the area. This was the 40-acre grant to C. McRae, Portion 33. McRae's 40 acre grant was referred in the description of the Crown Grant to John Barnes (Portion 12). Portion 33 was surveyed in 1865 and appears to include all land from Port Stephens in the south to the Myall River in the North. Dashed blue traverse lines are shown adjacent to the natural

feature boundaries which are shown by solid black lines. This is confirmed by the wording in the Crown Grant (Volume 933 Folio 219) of Portion 33 describing the land as extending from "the high water mark of Port Stephen" in the south, "to the left bank of the Myall River on the north".

Using the information in the McRae's Grant which described the title extending from MHWM of Port Stephens to the left bank of the Myall River, it was evident that there was additional land north of the Portion 12 title description. Portion 12 shows a connection of 300 links north of corner "a" to presumably the corner on the left bank of the Myall River. This is confirmed by DP 953878, which is a subdivision of Portion 12 in 1916 by Surveyor E. Kenny. DP 953878 clearly shows the same 300 link connection north of corner "a" to "Peg ↑ fd at cor or H.W.M."

By comparing the plans of Portions 12 & 33 there may be some doubt that the title of Portion 12 extended to HWM. The western boundary of Portion 33 quotes a distance of 15 chains 6 links. Portion 12 (surveyed 10 years later) found the original markings from Portion 33 adjacent the Myall River and commenced surveying the title dimensions of 11 chains 300 links south of the left bank. Therefore, if Portion 12 extended to the HWM of Port Stephens the two surveys (Portions 12 & 33) disagreed by 106 links in the space of ten years. This may be explained by the MHWM boundary eroding quickly or there was never any intention to extend Portion 12 to the HWM boundary of Port Stephens.

There are other survey aspects that are important in this case. The survey of Portion 12 was made in 1875, presumably under the 1872 Surveyor's Instruction which were in force at the time of the survey. The 1872 Instructions superseded the 1864 instructions and both were closely examined during the hearing.

It was put that following 1872 regulations were significant for the case:

> "33. The boundaries should wherever practicable consist of creeks, ranges, or other natural features, but failing the existence of these in suitable positions, arbitrary lines may be adopted as boundaries, which should, unless a strong reason to the contra exist, be directed to the cardinal points."
>
> "37. In consequence of certain indefinite rights being conceded by the sale by the Crown of land having a frontage to swamps of fresh water, or lands liable to inundation otherwise than by tidal overflow, the margin of such swamps, etc., should not be made to form frontages for portions measured, but right lines should be adopted."
>
> "40. Offsets from traverse lines to fix the position of rivers, creeks, etc., should not exceed 150 links in surveys of country portions, nor 75 links in suburban portions. In cases where it is necessary to exceed the above limits, lines should be run and shewn on the plan."

"105. Traverse lines of survey are to be shown in blue lines, and the bearings or angles and lengths, are either to be introduced in blue on the lines, or stated in a tabular form on the plan, with reference by numbers to the lines."

"111. Lines of coasts, rivers, and creeks etc, are to be shown, where the position is determined with precision, by black lines, and where otherwise by broken black lines: both sides of rivers are to be shown, and an arrow inserted to show the direction in which the waters flow."

"113. The boundaries of swamps, forests, plains, lands liable to inundations, etc, are also to be represented, and the position and extent of any artificial improvements, such as buildings, fences, cultivation, etc, which may exist on or adjacent to lands being measured are to be clearly shown, and their character and approximate value stated in a note."

"120. Boundaries of portions and allotments should be shown by black lines whether dividing them from previous measurements, from unmeasured lands, or from roads, and the bearings or angles and length of all boundary lines should be clearly shown upon them."

These regulations differ very little from the 1864 regulations except that under the earlier regulations a traverse could be shown in blue or pink. While under the 1872 regulations, a traverse line was required to be shown by blue colour only.

After examining Portions 12 and 33 under the above regulations close attention was given to DP 953878 which subdivided Portion 12 in two parts, a 2-acre area to the east and another 8-acre area to the north west adjoining the traverse. This plan also shows a road 150 links wide between the land in question and special leases to the north which may indicate that there was land between the original grant and the river.

It was also raised that this was merely a "paper" road to comply with the requirements of section 89 of the Crown Lands Act 1884.

DP 953878 found pegs that where presumably placed by Portion 12 as it was the only Crown survey recorded in the area. The fact that pegs from Portion 12 lasted 41 years in an environment adjacent a wetland area is a sign that there must have been substantial marking at the time of survey. The "Reference to Corners" table on the plan of Portion 12 has the statement "and good pegs placed at each traverse station". The Crown claimed that this meant that the traverse of portion 12 was a traverse of the boundaries and marked all angles as boundary corners. All corner markings were required to be hardwood pegs 4" x 4" with a broad arrow on all pegs. If no special markings were placed then very few traverse pegs would be expected to last 41 years, especially if the traverse pegs were cut from local timber.

Certificate of Title Volume 2732 Folio 206 issued to Allen Taylor & Company Ltd for the 10 acres in DP 953878 shows a road to the north of the 8-acre parcel and would appear to indicate that the original high water mark was north of the original grant.

The Judge acknowledged that this was a difficult case, as there were facts that supported accretion and facts against it. Is the northern boundary determined by right lines or is it the mean high water mark? The Judge gave the following summary of both arguments.

There were a number of facts raised by the plaintiff saying that the northern boundary is the mean high water mark of the Myall River. These were:

a. That the land is described as being situated between Port Stephens and the Myall River.

b. That no useful land is shown on the plan between the marked boundary and the river.

c. That the statement on Plan of Portion 12 in the "Reference to Corners" table refers only to corners a, b, c & d although it does go on to say "and good pegs placed at each traverse station".

d. That the other lines are referred to as traverse lines being the lines running in general along Port Stephens and the mangroves on the Myall River. Traverses are not generally boundaries but points taken for the purpose of calculating bearings and offset areas.

e. That only the lines a-b and c-d are outlined or bounded in black outside the pink line whereas that is not the position with the northern or southern boundaries. There is some unresolved question about the traverse of lines 22 to 24.

f. That mangroves need to be under tidal influence to survive.

g. There is a traverse line description of the southern boundary which is described as running along the foreshore of Port Stephens. Good pegs at traverse points would not be located in an area often under water and were obviously placed above mean high water mark. If that is a traverse line, it is likely the northern line is also.

h. The provisions of section 17 of the Crown Lands Alienation Act 1861 as to form a frontage of portions.

To rebut the points raised by the plaintiff, the Crown pointed to the following facts:

a. It seems likely that there were broad arrow pegs placed at each traverse station. The evidence is that these are usually placed at boundary corners and not at traverse stations.

b. Reference to "Good pegs" appearing in the reference to corners table indicates that those pegs were intended to be boundary pegs.

c. Broad arrow pegs on the traverse have been located and used for actual

boundaries on a later subdivision under DP 953878.

d. McRae's grant encompasses land 300 links north of the subject land at its north east corner indicating that point "a" is not and was not the mean high water mark as McRae's grant extended to the dotted line indicating the river. It is described in Land Grant Volume 933 Folio 219 as bounded on the west by the eastern line of portion 12 of 40 acres "and its northerly continuation to the left bank of the Myall River".

e. The description of the subject boundary of the southern boundary refers to Port Stephens whereas the description of the northern side does not refer to the Myall River.

f. The northern boundary on the traverse line or metes and bounds description is accepted to be slightly south of the location of high water mark on the mangrove swamp.

g. What was thought to be the approximate high water mark is shown by the dotted line. It is clear that was not the boundary as it would have added about 10 acres to the grant.

h. The north and south lines are pink not blue.

There were many possibilities that could be decided upon. The Judge considered that "between" could not carry any weight. As noted before the Judge found this case a "most difficult matter". "It is for the Plaintiff to make the case. To do that it was necessary to establish that the true boundary was high water mark and not marked as shown on the plans - thus requiring the description to be set aside as an error it being accepted that the metes and bounds description was not at the time a true description of the swamp boundary. In other words it would need to be accepted that there needed to be no metes and bounds description of the boundary other than lines a-b and c-d." The Judge concluded this was not the case.

The Judge ruled that the southern boundary was defined by mean high water mark due to the reference "along the foreshore of Port Stephens". He also ruled that the northern boundary is a right line boundary due to the lack of any reference to the bank of the Myall River.

As the northern boundary is determined by right lines, the land does not benefit from any accretion that may occur.

This decision was given on the 13 December 1995 and has been appealed. Before conclusions are applied to other cases, reference must be made regarding the outcome of the appeal.

Figure 1. Portion 12

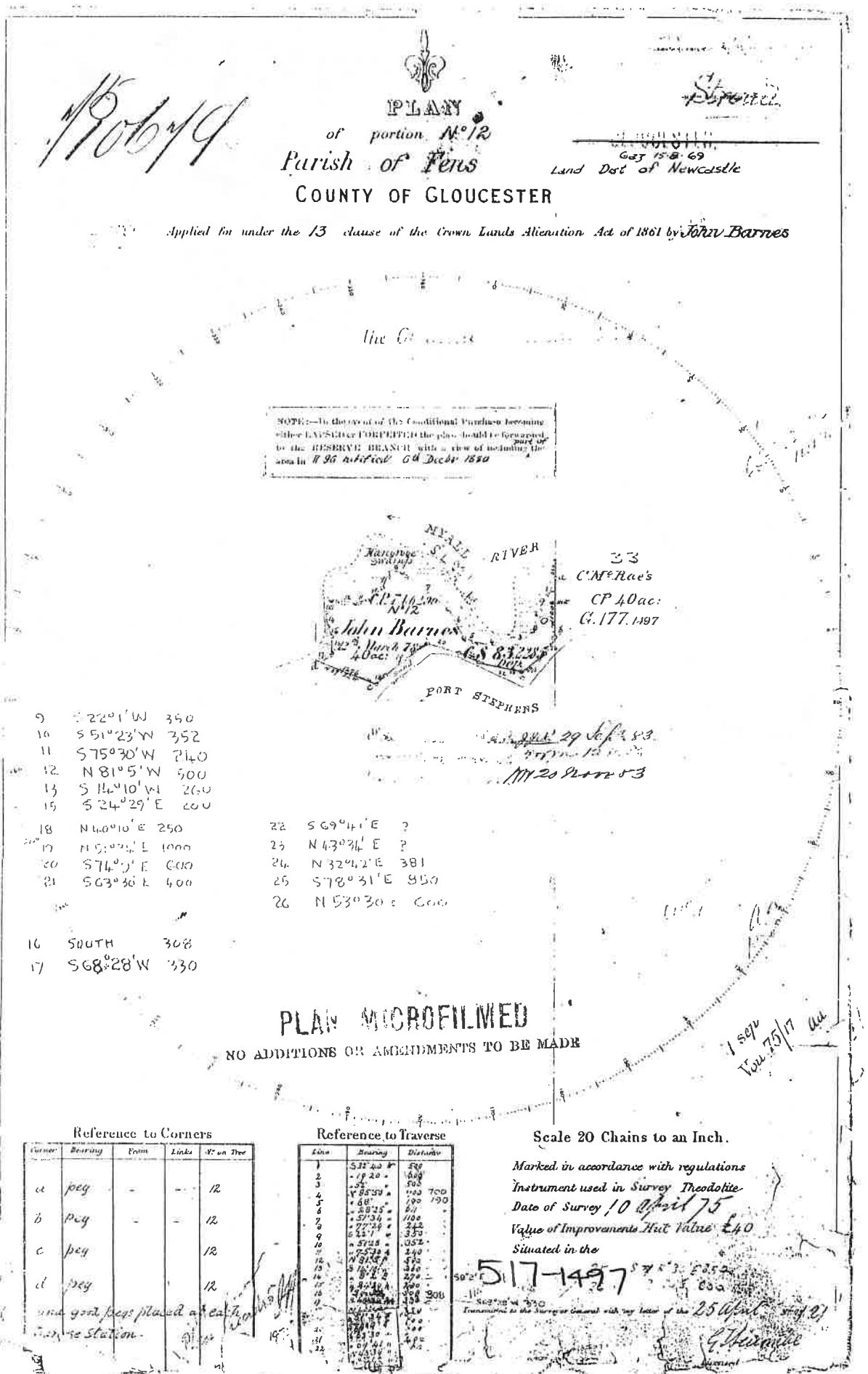


Figure 2. Portion 33

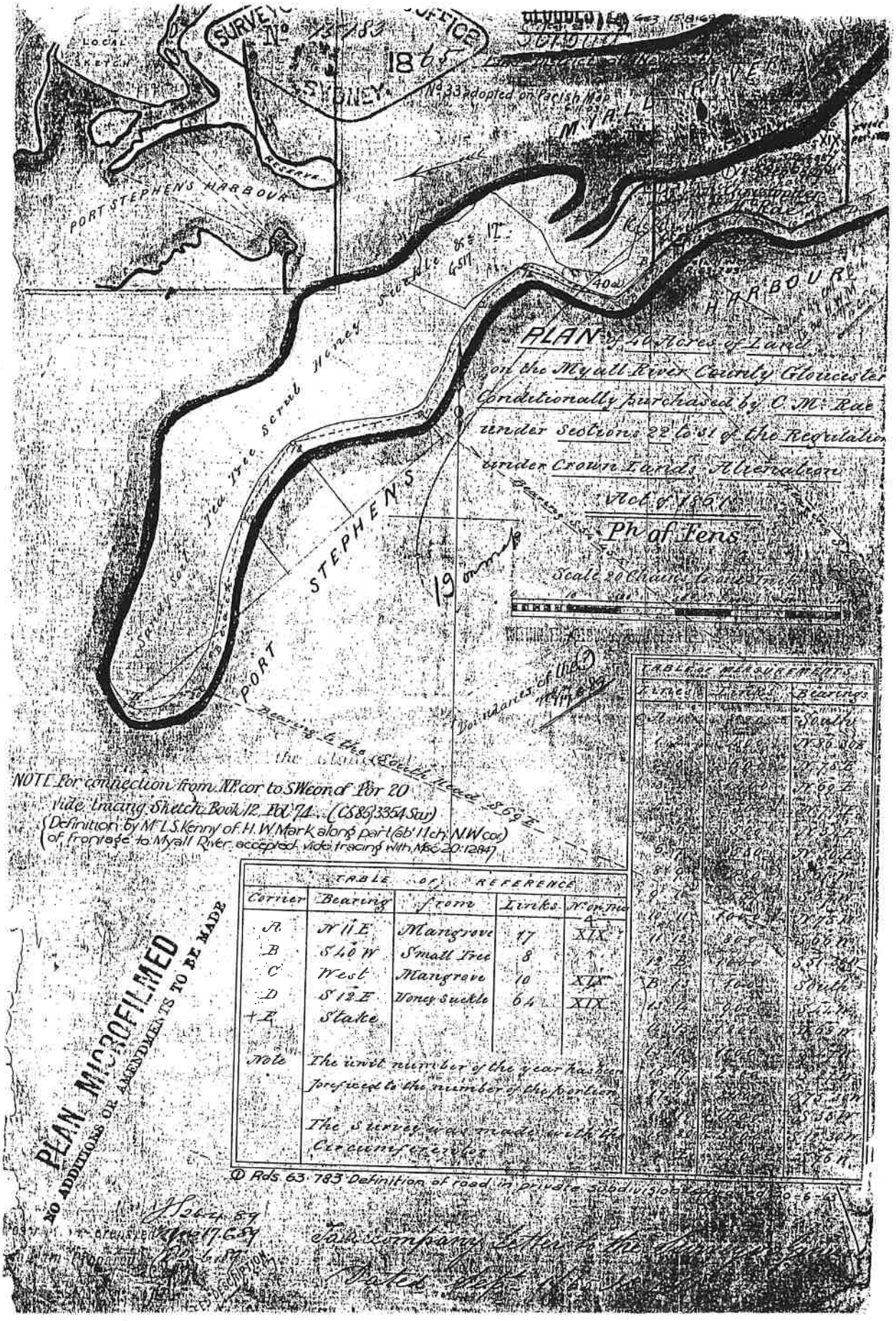


Figure 3. Part DP 953878

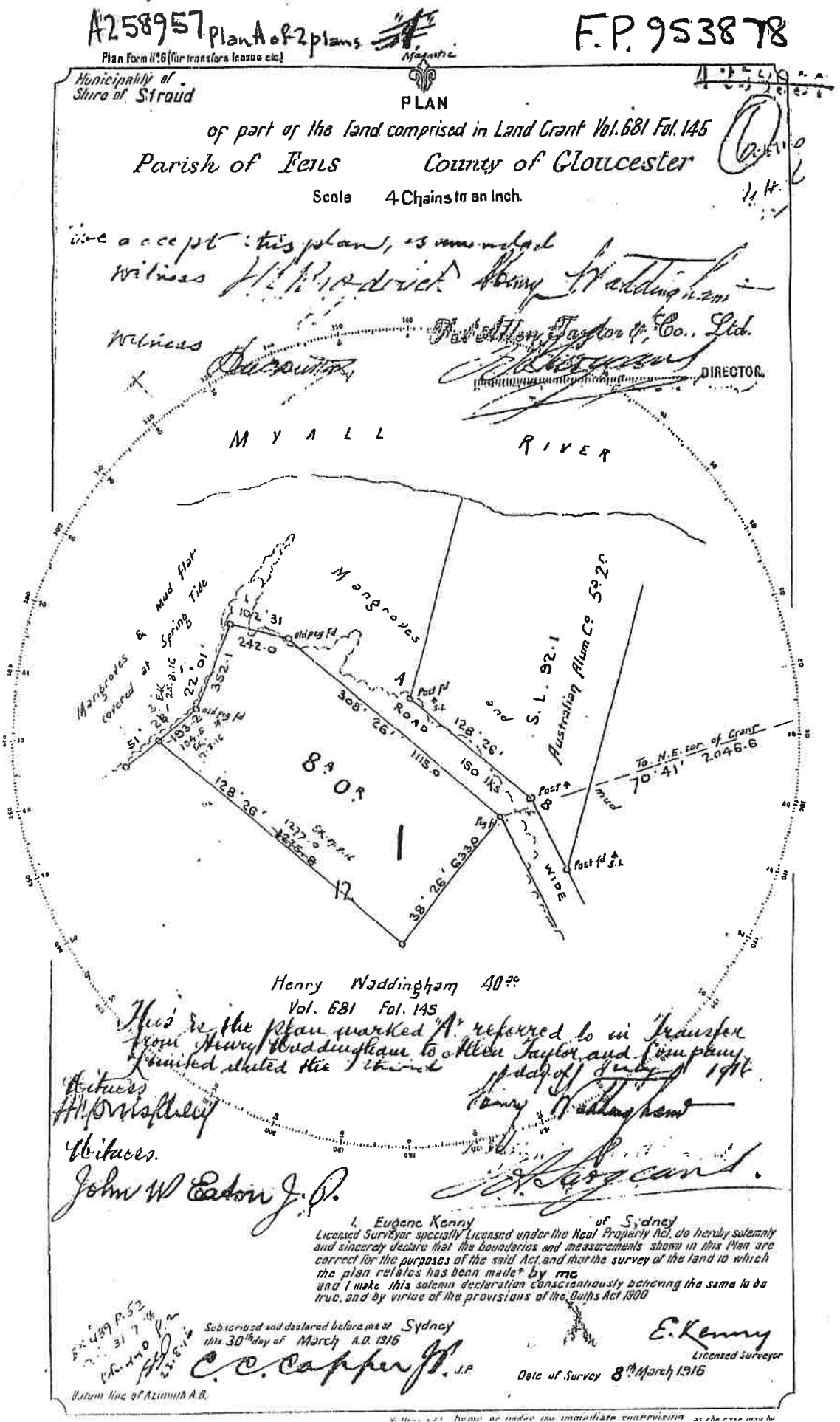
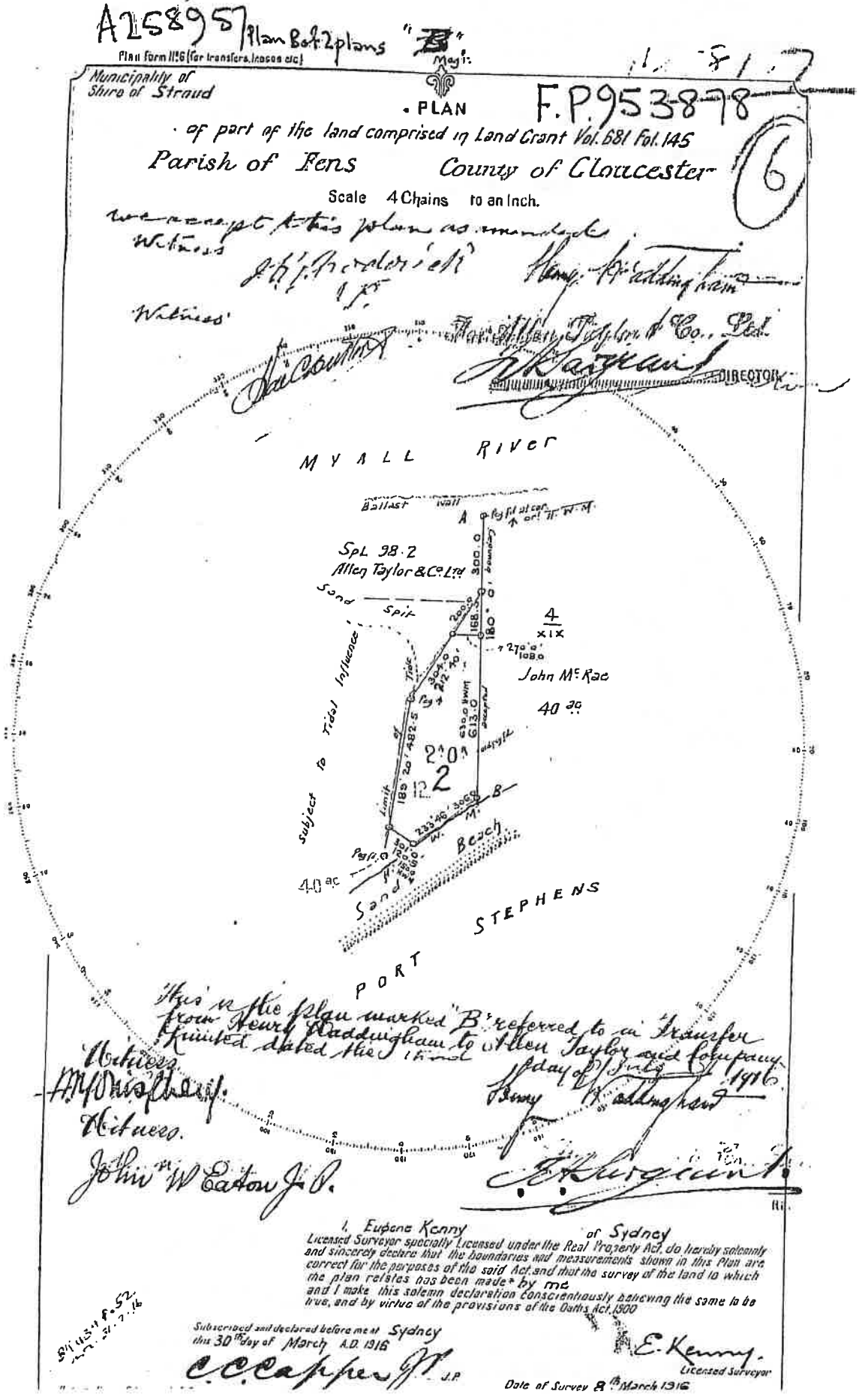



Figure 3. Part DP 953878 Continued