Aspects of the career of Alexander Berry, 1781-1873

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Chapter 12

PROBLEMS CONCERNING LAND

For virtually all of his life in New South Wales Berry was struggling against Governments, the Survey department, neighbours or would-be-purchasers of Crown land to defend his land grants or purchases or to establish title to more land. On a number of occasions he said that land he fought over was intrinsically not worth the trouble and expense: that he was concerned to maintain respect for private property and the irreversibility of Crown alienation of land. These principles were fundamental to his world view but probably no one believed him because his self-interested motives were too obvious, especially in his attempt to cling to land fenced into the Crows Nest estate for which Wollstonecraft had no title and his retention for decades of Comerong Island in the face of decisions by a succession of governors and a secretary of State that he had no right to it. Berry appears on firmer ground in projection of himself as the particular victim not only of the notorious inefficiency of the Survey department but of the opposition of two of its heads. His battles over land were often fought out in the public spotlight. No other landowner received anything like as much publicity. By the later eighteen fifties when access to Crown land had become the great public issue Berry had become in the public mind the archetypal determined accumulator, by fair means or foul, of more land than he could use profitably. He had helped make himself the particular target of attacks by anti-monopolists and supporters of the yeoman ideal which are the subject of following chapters. Unfazed by the hostility of those he despised he pushed on as before. What follows reveals the man's quite remarkable tenacity, prospensity for delay until pushed to action and capacity for inconsistency and inventive, if not convincing, pleading in pursuit of the main chance.
Seemingly successful resolution of the problem of Elyard's grant was an outcome of Wollstonecraft's forcefulness. Following his death Berry's failure to press to a conclusion contributed much to continuing problems with Elyard and his sons. Berry wrote in 1863:

The father obtained credit under fraudulent pretences. William & Alfred have both acted like blackguards. Arthur is a drunken idiot and Samuel a sort of idiot. One of William Jr's 'blackguard' acts was to plead the statute of limitations to defeat Berry's long-delayed application for payment for goods supplied.

In accordance with the agreement Berry & Wollstonecraft took possession of Elyard's five hundred acre block in 1831. Immediate conveyance was impossible as title to Elyard's grant did not issue until 1841. Berry neglected to obtain any document binding Elyard to convey and no move was made to do this after title was obtained. William Elyard Jr alleged in justification of this in 1863 that Berry had reneged on an undertaking at the time of the agreement that Berry & Wollstonecraft would clear Crookhaven Creek of obstructions for the whole length that it bounded Elyard's grant.

In May and September 1840 William Elyard Jr advertised his 1,060 acres for sale making a feature of the water advantages of the property. Chief Justice Stephen later ruled that this amounted to specific recognition of Berry's title to the remaining five hundred acres of Elyard's grant and that if there had been any condition regarding Berry snagging the Creek this was the time to call for performance. He believed Berry against Elyard that Elyard had written promising to convey the five hundred acres.

In December 1844 Elyard mortgaged his land, again to the extent of 1,060 acres. Stephen thought Berry then entitled to believe that no question of clearing the Creek

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1 Berry to David Berry 2/12/1863, BP.
2 Berry to David Berry 17/1/1865, BP.
3 SMH, 16 Jan. 1865, report on Berry v Elyard - Appeal.
or his own right to the five hundred acres would ever be raised. However at the end of 1847 Elyard threatened an action for ejectment and it was probably about that time that his employees burnt down a boundary fence incorporating the five hundred acres in Berry's land. Berry responded to the threat by instituting an action for performance of the contract to convey and thought of complaining to the Government about burning of the fence. He forbore to proceed when told that such proceedings could cost Elyard his public service job.\(^4\) Two judges of the Court of Appeal held in 1865 that whatever Berry's motive in not prosecuting his action and letting the matter lie for many years he forfeited his remedy.

In 1863 when Elyard was the Colony's senior public servant he faced proceedings which would have put him into the Bankruptcy Court and cost him his career. He had a man take down the boundary fence re-erected many years earlier and mortgaged 560 acres of his own land and Berry's five hundred acres to enable him to compromise the action against him. The land was then assigned to a man named Harris. Berry considered that Elyard had acted fraudulently in mortgaging the five hundred acres and demanded immediate re-erection of the boundary fence. Because of his financial predicament Elyard could not back down. He began an action to secure Harris possession of the five hundred acres, which were occupied by Berry tenants. Berry moved to have his action begun in 1847 brought to court. Elyard then dropped his own action. Berry said that the Elyards had returned him evil for the good he had done them but only Elyard's dishonesty had caused him to bring the action originally or to proceed with it at this juncture. He expected the suit to ruin Elyard and was glad that his senior counsel, James Martin, currently Premier, would have a chance to see in court what sort of fellow the Principal Under Secretary was.

\(^4\) See Berry to David Berry 11/9/1848, BP: Berry was still expecting the matter to go to a hearing.
The case came on in the Supreme Court on 19 November 1863. Possibly because of Elyard's position it was not reported in the *Sydney Morning Herald*. Mr Justice Milford dismissed Berry's application and awarded costs against him, finding that he had been guilty of such laches that however he might suffer from his neglect he could not expect relief. Berry wrote several times after this decision that he cared little about the land in question. What concerned him were the costs, which exceeded its value. He took the matter to appeal, in December 1864. By a two-to-one majority the Court of Appeal confirmed Milford's judgment; but the judges were agreed that some defences set up by Elyard were false and Milford reversed himself to agree with his brother judges in denying Elyard costs for any part of the action. Berry wrote that this would save him three to four hundred pounds and was from a moral perspective 'very damaging to Elyard'. As Mr Justice Wise pointed out in his judgment dismissal of Berry's bill in equity in no way prejudiced any right to the land which he might have acquired through long possession. Berry sent word to the tenants to stay put.

Charles Cowper was currently Premier. Berry, 'naturally precluded from making any application in that quarter', sent a copy of the judgments to the Governor to bring Elyard's conduct under notice officially. Through solicitor Barker he had copies of the judgments printed for

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5 *SMH*, 16 Jan. 1865, Berry v Elyard; Berry to David Berry 2,7&10/9/1863, 4,5,10,20&28/11/1863, 2/12/1863, -/-/[1863], 21/3/1864, 11/6/1864, BP.

6 Berry to David Berry 11,18 & 22/6/1864, BP.

7 *SMH*, 14 & 15 Dec. 1864, report of hearing, 16 Jan. 1865, judgments; Berry to David Berry 16/1/1865, BP.

8 See below Chap 14 & 15 for the enmity between Berry and Cowper.

9 Berry to Governor Young 30/1/1865, copy, BP. This letter was merely 'Put by' in the Col. Sec's Department: CSIL, Register 1865, 65/503.
private circulation. William Elyard Jr died two months after the verdict was handed down and Berry noted, with apparent satisfaction, Dr James Mitchell's remark that the exposure occasioned by his suit seemed to have killed him.

Berry & Wollstonecraft and later Berry experienced seemingly endless problems with the Survey department.

For most of the eighteen twenties this department was in a chaotic state. Until 1822 there were only two men on its Sydney establishment. The department employed primitive work methods and fell so far into arrears that in the last two years of his term Governor Macquarie ordered only thirty-one grants and on his arrival Governor Brisbane found unexecuted promises to 340,000 acres. Any scrap of paper recording a promise to grant land was sufficient to support occupation. The situation improved after 1822 and by the end of 1827 the department had built up to a staff of fifteen surveyors, but it took many years to clear the backlog of work.

Publicly Berry and Wollstonecraft maintained friendly relations with Oxley, a fellow Exclusive moving in the same confined social circle. Privately they deplored his dilatoriness in processing their promises to grants. For decades after Oxley's death in 1828 Berry felt compelled to enter into the disorder and inefficiency of the Survey Department to explain why he was obliged to appeal for honouring of promises of grants which should have been

10 Berry to David Berry 7/2/1865, BP.
11 Berry to David Berry 20 & 22/3/1865, BP.
13 Berry to Wollstonecraft 7 & 12/10/1825, BP.
implemented during Oxley's incumbency.\textsuperscript{14}

The second cause of difficulty was the manifestly unsympathetic attitude of both Oxley and his successor T.L. Mitchell towards Berry & Wollstonecraft from the extent of their grants, transparent desire to exclude others and monopolise all the good land at Shoalhaven, and pushiness and persistence in seeking support from the department.

Early in October 1825 Berry learned that Governor Brisbane was planning to return to Britain. He had been unable to secure satisfaction from Oxley on any point and feared 'some humbug' from the fact that Wollstonecraft had not received deeds to Crows Nest although all other deeds forwarded to the Colonial Secretary's office for registration at the same time had been given to the grantees months earlier. Berry and Wollstonecraft felt sure of Brisbane's good will and were eager to have all matters relating to grants settled by him and not left for the incoming governor, a stranger more likely to be influenced by Oxley. An appeal to Brisbane for completion was defeated by Oxley's absence on an expedition.\textsuperscript{15}

After many fruitless applications for survey Berry & Wollstonecraft were forced to commence operations on the southern bank of the Shoalhaven within conjectural boundaries.\textsuperscript{16} As more than two-thirds of the land there was covered with water it proved impossible to measure and mark out grants in the usual manner. Oxley used surveyor McBrien's blank map of the coast, the river and Crookhaven Creek to make out descriptions and mark two grants on the map, leaving Berry and Wollstonecraft to determine their

\textsuperscript{14} See Berry Estate (ML A719 - A721), passim.

\textsuperscript{15} Berry to Wollstonecraft n.d. [circa mid 1824], 7 & 12/10/1825, Berry to Brisbane 10/10/1825, copy, BP.

\textsuperscript{16} Berry & Wollstonecraft to Col. Sec. 28/6/1828 28/5/121, CSIL, Berry and Wollstonecraft Papers re land 1826-39 (NSWA 4/1128.1).
boundaries from the descriptions and a starting point. They were mortified to find that a considerable portion of the land they had fenced and improved was outside their limits. To protect themselves from loss in or about April 1826 they obtained Oxley's verbal agreement, frequently reaffirmed, to allow location of the purchased promise of a grant to William Wetherman to encompass their improvements.

In August 1829 assistant surveyor Edward Knapp arrived at Shoalhaven to measure certain grants and to set boundaries. In measuring Elyard's grant Knapp worked from a tracing of McBrien's map, which proved to be inaccurate, instead of establishing independently the southern boundary of the Numba grant. The result was a considerable overlapping of Elyard's grant with Hume's, which Berry & Wollstonecraft had purchased. One of their assigned servants, a former surveyor, alerted Wollstonecraft to the encroachment. Berry in a public letter to Surveyor General Mitchell reported errors in Knapp's measurement and in a private letter urged the inadvisability of locating more land at Shoalhaven until the place was accurately surveyed. After 'a good deal of pertinacity' Wollstonecraft finally secured an interview with Mitchell on 1 February 1830 with the result that senior assistant

17 Berry to Gipps 14/2/1840 40/1890, Surveyor General to Col. Sec. 1/7/1841 41/6453, Berry Estate (ML A719), Nos 46 & 73.

18 Berry & Wollstonecraft to Col. Sec. 28/6/1828 28/5121, CSIL, Berry and Wollstonecraft Papers re land 1826-39.

19 Wollstonecraft to Berry 14,27 & 31/8/1829, BP; Deputy Surveyor General Perry to Col. Sec. 29/6/1840 40/6453, Surveyor General Mitchell to Col. Sec. 1/7/1841 41/6453, Berry Estate (ML A719), Nos 59 & 73.

20 Berry to Governor Belmore 16/5/1871, Berry Estate (ML A721), No. 193.

21 Berry to Wollstonecraft 19/1/1830, BP.
surveyor Robert Hoddle was assigned to re-measure.22

Berry recorded at the time his view that Hoddle's instructions regarding Numba were 'not sufficiently explicit'.23 He attended Hoddle in his surveying, liked Hoddle 'very much' and felt sure that he would 'survey the place to our satisfaction'.24 Berry claimed later that Hoddle remarked to him that Knapp had made a great encroachment and left him under the impression that the error had been corrected. Instead Hoddle merely reported that Knapp had surveyed correctly according to his instructions.25

Continued existence of the error came to notice in February 1840 when surveyor J.C.Burnett arrived to measure Crown land south of Berry's two thousand acre Upper Numba grant and, despite remonstrances from John Berry, cut off about three hundred acres of the grant. Solicitor James Norton ridiculed the idea of such interference with an old grant duly signed, sealed, registered and many years in his possession. Berry was in fighting mood. He had recently had to contend with a similar encroachment on Crows Nest from faulty surveying and it was public knowledge that a further instance had affected a Hunter River grant belonging to Richard Jones. Berry called upon Acting Surveyor General S.A.Perry to countermand his order to Burnett, asserted that such interference with an old grant reduced Her Majesty's New South Wales subjects to a worse position than Russian or Turkish serfs and indicated that he would, if necessary, go to court to defend his rights.26

22 Wollstonecraft to Berry 2/2/1830, BP.
23 Berry to Wollstonecraft 18/7/1830, BP. See also Mitchell to Col. Sec. 1/7/1841, Berry Estate (ML A719), No. 73.
24 Berry to Wollstonecraft 18 & 20/7/1830, BP.
25 Berry to Governor Belmore 16/5/1870, Berry Estate (ML A721), No. 193.
26 Berry to Deputy Surveyor General 12/2/1840, Berry Estate (ML A719), encl. to No 45; Berry to Governor Belmore 16/5/1871, Berry Estate (ML A721), No. 193.
When Perry did not return the prompt reply requested, Berry appealed to Governor Gipps, saying that the acres in question would not much enrich the Government nor ruin him, but

if the principle is once admitted that the Surveyor General has a power of interfering with old Grants then public Confidence in the Stability of Landed property must be at an end and a Hydra of Confusion Created.

Shortening of his boundary line was commenced many years previously when Hoddle located Hume's grant behind Berry's and Wollstonecraft's individual grants and overlapped them. There was no justification for Perry's action because his and Wollstonecraft's grants were then executed and Hume's still was not. The only fair way to resolve the matter, Berry argued, would be to correct Hoddle's mistake. As the land behind Hume's grant was unalienated this could be done without injury to any individual. He had not known his own boundaries at the time and having confidence in Hoddle did not suspect any encroachment. Hoddle could also be acquitted of suspecting this because he located Hume's grant in a place far too swampy to enable survey in the normal manner, requiring instead use of a series of traverses and triangles in opposite directions from which a variation of the compass alone might have occasioned a considerable discrepancy.27

This letter is quite destructive of Berry's case as he otherwise presented it. It contradicts his statements about discovery of an error in Knapp's survey and protest against his survey at the time. Berry's assurances that neither he nor Hoddle had any reason to suspect any mistake flatly contradicts his argument that Hoddle was sent to correct a mistake. One could only speculate on why he wrote a letter so completely at variance with what he put at other times. When the papers in the New South Wales archives were collected for a review of measurement of Berry & Wollstonecraft's land they included no formal record of a

27 Berry to Gipps 14/2/1840 40/1890, Berry Estate (ML A719), No. 46.
complaint about Knapp's measurement and Hoddle's visit was reported to be for the purpose of measuring the exchange between Berry & Wollstonecraft and William Elyard Sr. From these papers it appeared to reviewing officials that Berry's assertion that Hoddle was sent in response to complaints about Knapp's error was a fiction designed to cover failure to detect any error or make a timely protest. However, in September 1840 Berry was shown in the Surveyor General's office a chart which he had submitted pointing out Knapp's error prior to Hoddle going to Shoalhaven a copy of which chart had not been included in the collected papers.28

Early in March 1840 Berry questioned the competence of the Survey Department, saying that 'it appears that the Surveyor General does not know how to find my Southern boundary'. He asked that Governor Gipps order that it be established by measuring according to the description to put an end to 'an unseemly dispute highly discreditable to the Surveying Department' and to make the order imperative 'as I have seen a disposition in the Department to Evade even the Commands of His Excellency'.29 When Perry ducked the issue of accuracy by reporting deceptively that Burnett's survey was consistent with those of McBrien and Hoddle,30 Berry pressed for a chance to confront him before the Governor because the dispute involved 'a point of great public interest'.31

Berry conceded that he had only the choice of proving either Oxley or Hoddle wrong, for Oxley's description of

28 Berry to Col. Sec. 1/10/1840 40/9750, Berry Estate (ML A719), No. 67.
29 Berry to Col. Sec. 7/3/1840 40/2552, Berry Estate (ML A719), No. 50.
30 Deputy Surveyor General to Col. Sec. 27/3/1840 40/5196, Col. Sec. to Berry 4/4/1840 40/327, Berry Estate (ML A719), Nos 52 & 53.
31 Berry to Gipps 6/4/1840 40/6453, Berry Estate (ML A719), No. 54.
Wollstonecraft's grant amounted to a physical impossibility. Nevertheless he protested against the idea of rectification because Berry had acquiesced in his boundary for so long and a change would throw everything at Shoalhaven into the melting pot, opening the way to immeasurable claims because of deficiency while not one acre could be recovered by Government as an excess in measurement. Gipps ordered remeasuring of Wollstonecraft's and Hume's grants and Burnett reported an overlap. Berry was informed that one of his boundary lines had been marked considerably shorter than it should have been but as all the adjoining land had been alienated and he had acquiesced in existing boundaries for so many years it was no longer in the Governor's power to rectify the mistake. Moreover, it could not then have been done without exposing the Government to numberless demands for similar rectifications. It was 'of the first importance to the Security of Titles in this Colony, that boundaries when once established shall never afterwards be disturbed'.

Berry refused to accept this decision. He told his brother John that he had lost all confidence in the Survey Department and was 'determined not to yield an inch'. He argued that as the present case did not involve a mistake of either carelessness or ignorance reasons of general policy ought not to interfere with correction, especially as, contrary to Perry's report, Crown land was available adjoining unexecuted Hume's grant. He had learnt from ex-

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32 Deputy Surveyor General to Col. Sec. 13/4/1840 40/3777 and Gipps' minute 16/4/1840, Berry Estate (ML A719), No 56. See also Berry to John Berry [21/4/1840], BP.

33 Burnett to Surveyor General 10/6/1840, Berry Estate (ML A719), No 58.

34 Col. Sec. to Berry 27/7/1840 40/743, Berry Estate (ML A719), No 61.

35 Berry to John Berry [21/4/1840], BP.

36 Berry to Col. Sec. 1/10/1840 40/9750, Berry Estate (ML A719), No 67.
surveyor Knapp that the problem arose not out of erroneous surveying by Knapp but from a 'pitiful stratagem' on the part of Mitchell. Gipps's minutes convey impatience with Berry's persistence and annoyance at the vague accusation of impropriety against a difficult senior member of his administration. He noted that Mitchell had made a mistake in reporting a parcel of land, Burke's grant, available whereas in fact it was marked down as a Government reserve. This grant, purchased by Berry & Wollstonecraft, could stand on condition that 'Numba' and Hume's grant remained as they were. Hoddle had been sent to Shoalhaven nearly a decade earlier expressly to settle Berry's boundaries and Berry should have satisfied himself at the time of the correctness of Hoddle's survey. This conceded nothing to Berry, for the Government could hardly deprive him of Burke's grant on the strength of its own mistake. The proposition that a grantee should take responsibility for seeing that a public official employed for professional expertise carried out his duties honestly and competently was entirely unreasonable.

Berry wrote in response that he was

happy to find that His Excellency agrees with me in the abstract principle that it is of the first importance that established boundaries should 'never be disturbed'. It is for this principle that I have been contending all along.

He finally carried his point and secured reversal of Gipps's earlier uncompromising dismissal of his complaint by demonstrating to him from a map of Shoalhaven and a copy

37 Berry to Col. Sec. 1/10/1840 40/9750, Berry Estate (ML A719), No 67.

38 Berry to Col. Sec. 3/8/1840 40/8171, Berry Estate (ML A719), No 63.

39 Memo. by Gipps 8/7/[1840] 40/3671, CSIL, Letters received relating to Land 1826-1860 (NSWA 2/7800); Col. Sec. to Berry 26/9/1840 40/994, Berry Estate (ML A719), No 66.

40 Berry to Col. Sec. 28/4/1841 41/4387, Berry Estate (ML A 719), No 70.
of Mitchell's written instructions to Knapp that the problem arose out of those instructions. Gipps then ordered that Wollstonecraft's grant be measured according to the description, with a consequent re-measurement of Hume's grant for which a deed was issued in October 1842.

Strangely, given all the disputing over boundaries on the Numba side of the Shoalhaven, it was not until May 1841 that Berry became aware that Burnett's survey had fixed his eastern boundary more to the westward than the line worked out from McBrien's chart leaving his main drain, constructed at high cost, on Crown land.

Concurrently Berry was in contention with the survey department concerning boundaries on the North Shore.

A dispute arose in 1833 between Berry and Surveyor General Mitchell as a result of Mitchell locating a forty acre grant on what Berry believed was part of Crows Nest estate but Mitchell insisted was land improperly enclosed when Wollstonecraft carried his boundary fence ten chains too far. When Governor Bourke ordered a re-measuring of Crows Nest Berry applied for measurement at the same time.

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41 Berry to Governor Belmore 16/5/1871, Berry Estate (ML A721), No 193.
42 Memo. by Gipps: Mr Berry's Land at Shoal Haven 19/8/1841 41/6453, Col. Sec. to Berry 23/8/1841 41/773, Berry Estate (ML A719), Nos 74 & 75.
43 Surrender of Land at Shoalhaven by Alexander Berry - minutes, Berry Estate (ML A719), No 85.
44 Berry to John Berry 31/5/1841, BP.
45 Berry to Col. Sec. 27/6/1833 33/4285, Berry Estate (ML A719), No 17. Wollstonecraft had been informed of the error in his fence line and asked to rectify it and Berry knew this. Surveyor General to Wollstonecraft 21/8/1832 32/658, Norton Smith Papers, No 6 Alexander Berry Papers concerning partnership with Edward Wollstonecraft 1823-1832, 37; Berry to - 27/8/1832, (part of draft answer), BP.
46 Col. Sec. to Surveyor General 16/7/1833 33/661, Berry Estate (ML A719), No 18.
of a grant of sixty acres to James Henry. William Henry, father of the grantee, said that he had seen Oxley mark this grant on a chart in pencil as adjoining Crows Nest to the east of William Gore's Artarmon estate. Berry who had been in possession of this land for many years and had had work done on it, wrote that he had tried many times to get Oxley to locate the grant.  

Remeasurement of Crows Nest revealed that 180 acres had been allowed to compensate for sand and rocks so that the estate actually amounted to 680 acres and that the extension to the fence brought in another 111 acres. Mitchell advised that to allow such encroachments on Crown lands to pass unnoticed would result in shaking the validity of every record in the Colony. His department requested that Berry be ordered to pull down fencing enclosing land not part of the grant. Henry had never occupied land held on the strength of the promise to him or even notified the department of his selection of it. Moreover the grant promised to him had earlier been ruled by the Government as forfeited.

Berry persisted. Although there was no record of selection of Henry's grant the location was said to have been mentioned in connection with a sale of land. Bourke was prepared to accept this and Berry's occupation as virtual selection and to order measurement of the grant to Berry at the spot indicated. Mitchell overlooked the fact that in correspondence with Oxley Wollstonecraft expressed his wish to locate this grant at Shoalhaven. Bourke wrote that had he been aware of this it was probable that his

47 Berry to Col. Sec. 24/7/1833 33/4838, Berry Estate (ML A719), No 22.

48 Surveyor General to Col. Sec. 12/8/1833 33/5237, Perry for Surveyor-General to Col. Sec. 24/9/1833, Berry Estate (ML A719), Nos 22 & 27.

49 Col. Sec. to Berry 19/9/1833 33/1568, Berry Estate (ML A719), No. 25.

50 Surveyor General to Col. Sec. 16/11/1833 33/7605, Berry Estate (ML A719), No 33.
decision would have gone the other way. Mitchell, perhaps still hoping for reversal did not measure Henry's grant until told again in 1834 to do so and then the assistant surveyor assigned the task measured nearly ten acres short by overlapping with Crows Nest.

On 30 January 1840 Berry complained of an encroachment on Crows Nest by Archibald Mosman and asked that a line of road be laid out from St Leonards township northwards to obviate public use of one passing through Crows Nest which he had constructed for his own use. Gipps's reply gave him no joy. The boundaries of the Crows Nest grant were fully defined in the deeds and it was Berry's business to protect himself from encroachment. The road had been so long used by the public that it had to be considered a parish road.

Berry was defeated on the matter of the road but when forty acres were advertised to Mosman on 13 June 1840 he entered a caveat claiming that they overlapped Crows Nest and Henry's grant. It was found on re-survey that the north-east boundary of Crows Nest was longer than it should have been and took in 160 acres in excess. Henry's grant on the other hand measured ten acres short. As in the case of Numba Gipps asserted that it was the business of a grantee or purchaser to see that he had measured to him the full quantity of land. If, at Berry's instance, he was to have the mistakes rectified he must begin with Berry's land and rectify both mistakes. Berry would emerge a heavy loser.

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51 Minute by Bourke 18/12/[1834], Berry Estate (ML A719), No 30.

52 Surveyor General to Col. Sec. 29/3/1834 34/2154 & 10/9/1834 34/6680, Berry Estate (ML A719), Nos 36 & 38.

53 Mr Berry's Statement, 1851, Berry Estate (ML A720), encl. M to No 116.

54 Berry to Surveyor General 12/2/1840, Col. Sec. to Berry 19/2/1840 40/1091, Col. Sec. to Berry 7/4/1840 40/338, Berry Estate (ML A719), Nos 45, 47 and 55.

55 Berry to Col. Sec. 22/6/1840 40/6171, CSIL, Register 1840; Col. Sec. to Berry 4/8/1840, Berry Estate (ML A719), No 64.
There was implied indictment of the Survey department's competence in the curious and gratuitous remark of the Colonial Secretary to Berry:

Had you fenced in the Crows nest or even put up a fence on what you assume to be your North East Boundary the excess of 160 acres would probably never have been discovered and the Surveyor who measured Henry's land would have recognised your fence as your boundary.56

In his usual fashion Berry argued against the unfavourable ruling but Gipps confirmed it.57 Mosman had encroached both on Berry and on Crown land but the Governor allowed him to retain a strip of Crown land on condition that he remove from Berry's land and it was clearly understood by both parties that this would settle their dispute.58

These cases demonstrate Berry's determination in fighting for land. However, his tenacity in these matters pales by comparison with his forty-five year campaign to obtain land in fulfilment of nineteen promises of small grants which Wollstonecraft purchased with partnership funds at the beginning of the eighteen twenties.59 From 1837 to 1872 his claims were focussed on part of Comerong Island, formed when the peninsula between the Shoalhaven River and Crookhaven was cut off by digging the Numba canal.60 Regarding an application in December 1829 Berry wrote 'I can safely say that no refusal would either

56 Col. Sec. to Berry 9/3/1842 42/914, Berry Estate (ML A720), No 82.
57 Col. Sec. to Berry 19/4/1842 42/358, Berry Estate (ML A720), No 84.
58 Col. Sec. to Surveyor General 6/7/1842 42/317, Berry Estate (ML A720), No 86.
59 Berry to Governor Belmore 16/5/1871, Berry Estate (ML A721), No 193.
60 The bulk of the three volumes of official papers titled Berry Estate (ML A719-A721) concern this matter.
silence or content me'.

In time important contradictions and inconsistencies found their way into Berry's arguments. In particular from 1837 primary reliance was placed on a certificate from Oxley dated 10 June 1823 which Berry claimed recorded location of the small grants although it did not mention them. Berry's private papers show this to be a thoroughly dishonest submission. As late as March 1825 Berry reminded Wollstonecraft not to delay in arranging location of the small grants with Oxley as 'the delay of every day brings danger'. A letter from Wollstonecraft to Oxley asking for the grants to be placed on the south bank of the Shoalhaven was dated 4 September 1825. When Berry approached Oxley on the matter in May 1827 Oxley

bluntly told me that he could not mark down for us any of our small grants at Shoal Haven & that they were good for nothing and would never pass the great Seal, that many of the parties had left the country & it was necessary in every case that they should appear before the Land board.

This sufficiently explains why no further formal application for location was made until after Oxley's death. Failure to act in good time to site grants had subsequently to be explained either by alleging that Oxley had repeatedly turned aside requests to fix the grants by pleading pressure of work or, inconsistently, denied by reference to the certificate. Oxley's insistence on reserving Comerong to the Crown was represented as repudiation of location as recorded in his certificate from fear that giving Berry & Wollstonecraft the land on both sides of the canal would lead to their attempting to seal off the river by refusing passage to others. Berry in

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61 Berry to Wollstonecraft 28/12/1829, BP.
62 Berry to Wollstonecraft 2/3/1825, BP.
63 Text of letter reproduced in Memorial of Alexander Berry to Court of Claims [1870], Berry Estate (ML A721), No 187.
64 Berry to Wollstonecraft 14 & 20/5/1827, quoted, BP.
another untrue statement denied that this was ever their intention or desire. The partners did attempt to deny others passage until they lost a court case and were fined in 1828.

There can be no doubt that in the early stages of his dealings with government over Comerong Berry knew that he had no claim and that his arguments were spurious. There is nothing in his extant papers or those of his solicitor to indicate that he kept a record of the correspondence and certainly he lost sight of discrepancies in his various, often very lengthy, submissions which were apparent to officials with the papers before them. The implication of Berry's private correspondence is that over the decades of his campaign he became mesmerised by his own pleading and ended by believing that he had a just claim and was treated with rank injustice in being refused ownership.

In July 1829 Berry pointed out to the Government that there was an amount of unappropriated land adjoining the south-eastern corner of his grant which was both within the natural boundaries of Berry & Wollstonecraft's holdings and able to be approached only through their cultivated land. He asked that they be given this land in return for cancellation of various promises of small grants. He told Wollstonecraft that he made this application because approximation of the acreages of unappropriated land and total of the promises gave them a better chance of being allowed land for the promises. This application resulted in cancellation for various reasons of all the promises except for three recorded as having been selected else-

65 Berry to Minister for Lands 10/11/1871, Berry Estate (ML A721), No 198.
66 Monitor, 19 Mar. 1828, report of Bolt v Berry, Wollstonecraft & Wiley.
67 Berry to Col. Sec. 27/7/1829 29/5940, Berry Estate (ML A719), No 1.
68 Berry to Wollstonecraft 21/8/1829, BP.
where. In October 1833 Berry sought to retain excess land fenced into the Crows Nest estate by arguing that it represented some of the small grants. Governor Bourke upheld his predecessor's decision. In July 1837 when Berry was going through Wollstonecraft's papers he came across the document signed by Oxley in 1823 certifying that Berry & Wollstonecraft were in possession of about two thousand acres on the south side of the Shoalhaven River of which about 640 acres were on the east side of the canal. Berry entered a fresh application in reliance on this document although it made no mention of small grants and each partner had subsequently had his full two thousand acres measured west of the canal. Governor Gipps rejected Berry's appeal.

Early in October 1837, while the claim based on the certificate was under consideration, Berry directed his brother John to put cattle on Comerong. In November 1846 Commissioner of Crown Lands Mackay threatened prosecution if the cattle were not withdrawn. Berry had been trying to think up grounds on which to resurrect his claim so he told John to leave the cattle on the island and invite Mackay to prosecute, saying that Berry had a claim to the land which he would gladly submit to any competent court. Mackay took no action and Berry cattle were left in possession of

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69 Col. Sec. to Berry & Wollstonecraft 5/3/1830 30/355, Berry & Wollstonecraft to Col. Sec. 14/6/1830 30/4608 with enclosed lists, Surveyor General to Col. Sec. 24/8/1831 31/6630 & 16/11/1833 33/772, Berry to Col. Sec. 4/10/1833 33/6727 with enclosure, Berry Estate (ML A719), Nos 6, 7, 13, 33 & 28 respectively, Wollstonecraft to Berry 25/7/1830, BP.


71 Berry to Col. Sec. 12/7/1837 37/6419 and minutes, Actg. Surveyor General to Col. Sec. 11/10/1837 37/9609, Berry Estate (ML A719), Nos 40 & 41.

72 Berry to John Berry 27 & 30/11/1846, BP.
Comerong for another twenty-five years.

Late in 1850 three applications to purchase land on Comerong led to Berry asking Governor FitzRoy to allow his case to be examined by the Court of Claims. FitzRoy could find no grounds for reopening the matter. Berry, arguing in reply that his case had not been judged on its merits because Darling's original decision had been made in absence of Oxley's certificate, succeeded in having his claim referred to the Crown law officers for an opinion. Attorney General J.H. Plunkett and Solicitor General W.M. Manning, accepting Oxley's certificate, believed Berry entitled to a grant of 580 acres of Comerong. FitzRoy recommended to the Secretary of State that Berry be allowed the grant but the Duke of Newcastle could 'see no grounds which will render it justifiable in the Government to admit his claim'.

In his letter asking for reference to the law officers Berry had introduced what was henceforth a regular feature of his case for being allowed Comerong: that he had cut his canal on what he was fairly entitled to consider his own

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73 Thomas Dillon to Surveyor General 14/10/1850, Ellen Stanfield to Surveyor General 3/11/1850 and John H. Black to Surveyor General 26/11/1850, Berry Estate (ML A720), Nos 92, 94 and 95.

74 Berry to Col. Sec. 23/10/1850 50/10,125, Berry Estate (ML A720), No 93.

75 Col. Sec. to Berry 11/12/1850, based on Minute on Mr Alexander Berry's Land Claims 30/10/1850, Berry Estate (ML A720), Nos 97 and 93 respectively.

76 Berry to Col. Sec. 21/2/1851 51/1912, Col. Sec. to Surveyor General 4/3/1851 51/144, Col. Sec. to Berry 4/3/1851 51/1912, Berry Estate (ML A720), Nos 99, 100 & 101.

77 Plunkett and Manning to Col. Sec. 9/3/1852 52/2312, Berry Estate (ML A720), No 118.

78 Col. Sec. to Berry 18/3/1852 52/2512, Berry Estate (ML A720), No 119.

79 Newcastle to FitzRoy 21/1/1853, Berry Estate (ML A720), No 124.
land and had had the fruit of his enterprise and expenditure confiscated. Mentions of the canal were misleading. They were calculated to leave the impression that he was responsible for the canal as it then was rather than for the ditch for small boats which his men had actually dug. Berry reacted to Newcastle's refusal with a reply in which he concentrated on the canal, pleading to be allowed the land because 'I ought even now he remunerated for performing this Public work'.

Berry retained possession and was strongly inclined to resist ejection although conceding that he would very likely incur trouble and expense to no end other than to dramatise that 'I have been treated unjustly & rewarded for making the canal by confiscation'.

In February 1857 when five islands in the lower reaches of the Shoalhaven or Crookhaven were ordered to be put up for lease by auction Berry gave notice that he would resist disposal of land on Comerong and again requested submission of his case to the Court of Claims. For some reason not stated in the records the Lands Department considered that nothing was to be gained by such a reference, withdrew Comerong from the list of islands to be

80 Berry to Duke of Newcastle 19/10/1853, enclosed in FitzRoy to Newcastle 31/10/1853 No 153, Berry Estate (ML A720), No 128.

81 Newcastle to FitzRoy 7/6/1854 No 61, Col.Sec. to Berry 18/9/1854, Berry Estate (ML A720), Nos 133 & 134.

82 Berry to David Berry 25/9/1854, BP. Berry said much the same thing many years later to Judge Alfred McFarland who wrote in *Illawarra and Manaro*, Sydney 1872, 17, that 'those who are acquainted with all the facts know well, that the reproach is but too just'.

put up and allowed Berry's claim to lie over. Attempts by several men including G.U. Alley and Henry Moss, prominent amongst Berry's enemies, to raise the question of ownership early in 1858 resulted in Berry submitting Oxley's certificate to Minister of Lands John Robertson as proof of his ownership. Departmental minutes at this time reveal sympathy for the principle that anything uncertain should be interpreted in favour of the individual and acceptance that unquestionably there was doubt in this case. Berry claimed to have been in possession since 1823 and Crown law officers and Surveyor General George Barney were on record as considering Berry's claim valid. Applicants for land on Comerong were put off on the ground that as an island its land was not available for selection and Berry's claim again allowed to rest.

In January 1865, shortly after having in effect lost his ruinous court battle with Berry, William Elyard submitted a memorandum in which he argued that Berry was in possession of land to which he was not entitled, focussing on Comerong and non-deduction of the acreage of Crows Nest from Wollstonecraft's Numba grant. As Elyard was so obviously motivated by vindictiveness and so much heat had been generated by Government action to Berry's disadvantage in the 'Shoalhaven Incubus' and Shoalhaven Municipality affairs it is not surprising that no action was taken.

At the end of 1869 raising of the question of

85 G.U. Alley to Minister for Lands and Public Works 4/6/1858, Berry Estate (ML A721), No 170; Empire, 7 June 1862.
86 Berry to Robertson 10/6/1862, Berry Estate (ML A721), No 174.
87 Cover to Berry to Under Sec. Lands 29/8/1862, Berry Estate (ML A721), No 176.
selection on Comerong led to belated granting in January 1870 of Berry's request of 1857 to have his case referred to the Court of Claims. Ironically this move, resulting in Berry being deprived of Comerong, flowed from advice by the current Under Secretary for Lands who thought Berry's claim incontestable and noted that over the last thirteen years various governments 'while hesitating to admit have abstained from again negating the claim'.

Berry was taken by surprise. By this time he was reviled Colony-wide as a greedy accumulator of land and from the current Government he felt 'no reason to expect common Justice, but the Contrary'. He was made more despondent when as a result of constant pressure from Thomas Garrett in the Legislative Assembly the Government entered a caveat claiming Comerong as Crown property. Berry commented that he had received many wilful injuries at the hands of the Government and, in an expression of diffidence characteristic when facing a reverse, that Comerong seemed 'a poor place with many mangrove flats & creeks' so he hardly cared whether he was awarded it or not.

Berry described the Court of Claims hearing as 'a mockery'. He was refused permission to see the papers in the case, his solicitor William Barker was allowed to look over them only after the hearing had begun, and he was obliged to answer from memory, at the age of almost ninety, questions relating to conversations which took place.

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89 Henry O'Neill to Under Sec. Lands 13/12/1869 69/1500, Minutes 15/1/1870 & 27/1/1870, Berry Estate (ML A721), No 178.

90 Berry to David Berry 11/2/1870 & 16/2/1870 quoted, BP. Berry had much reason to suspect that the matter had been resurrected in order to dispossess him.


92 Berry to David Berry 3/6/1870, BP.
upwards of forty years earlier. Barker warned Berry to expect an unfavourable outcome. The Government was opposing the application and in Barker's opinion the president of the Court, Arthur Holroyd, had prejudged the case and was looking for plausible grounds to reject the claim. There is no need to impute partiality to understand the finding of the commissioners that Berry had 'failed to support his claim to the Island of Coomerong or any portion of it' and that Oxley's certificate referred to Berry's primary grant, not to the small land orders. To have any chance of success Berry needed to convince the commissioners that Surveyor General Oxley had through dilatoriness or inefficiency failed to record properly location of the small grants when asked to do so. In his favour were the notoriously muddled state of the Survey department at that period and opportunity to say without fear of contradiction anything about conversations with Oxley which would advance his cause. The Berry of 1870 was no longer the man who had made the early applications without real belief in his right to the land. He was then an ancient staring Eternity in the face, who reminisced with a warm glow on his paternalistic care of happy convicts in former times. While he had been quite capable of misrepresentation and special pleading, it is doubtful whether his religious belief would at any stage have allowed him to go the extent of outright perjury. Berry testified that he had not had any conversation with Oxley about locating the small grants at a particular spot, that Oxley had refused to mark any land east of the canal because he intended to make a reserve of it and that he had never himself marked out the portion of the island which he wanted.93 This was no doubt honest, and fatal to any chance of success. Berry considered the finding 'too bad' but 'of a piece with the other injustice

93 Memorial of Alexander Berry to Court of Claims n.d., Case No 1499 Court of Claims President and Mr Owen Mon. 13 June 1870, Report of the Commissioners of the Court of Claims 1/8/1870, Berry to Minister for Lands 10/11/1871, Berry Estate (ML A721), Nos 181,183,184 & 198; Berry to David Berry 6/7/1870, BP.
which has been exercised against me'. The Government was 'determined to cheat me if possible upon any flimsy Pretence'.

Berry briefly considered attempting to get up an agitation on the matter in Parliament but dismissed the idea because he had no intimacy with any Member of the Legislative Assembly and 'no doubt all of them would be hostile to me. They think I have too much land'. In a thirty-page memorial to Governor Belmore Berry argued speciously that the small grants were all that Oxley's certificate could refer to and, as a fall-back position, that he was entitled to 580 acres of Comerong or other adequate compensation for construction of the canal which had been benefiting the public for forty years. Barker thought that he had not made the best of his case in this memorial, reception of which can hardly have been improved by a very long accompanying letter alleging antagonism towards him on the part of T.L.Mitchell and the Survey department. The petition was rejected as containing nothing new. Berry next applied for and was granted reference of the matter to the Crown law officers for a report on whether he had established a just and equitable claim to land or compensation for unsatisfied

94 Berry to David Berry 19/8/1870, BP.
95 Berry to David Berry 26/4/1871, BP.
96 Berry to David Berry 17/4/1871, BP.
97 Alexander Berry, Memorial to Governor the Earl of Belmore 6/5/1871, Berry Estate (ML A721), No 192.
98 Berry to David Berry 3/5/1871, BP.
99 Berry to Belmore 16/5/1871, Berry Estate (ML A721), No 193.
100 Crown Solicitor to Under Sec. for Lands 15/5/1871, Memorandum from Crown Solicitor 30/8/1871 71/713, Berry Estate (ML A721), Nos 191 & 194; Under Sec. for Lands to Berry 15/9/1871, BP.
promises. Attorney General Edward Butler and Solicitor General J.G.Long Innes said that the recent hearing of the Court of Claims revealed that some substantial matters of fact appeared very different from what their predecessors had assumed in finding for Berry in 1852. Despite having agreed to accept the decision of the law officers as final Berry considered an appeal to the Supreme Court but desisted from consideration of costs and the fact that the case would come before his 'bitter enemy' Mr Justice Hargrave. He concluded that he had already incurred too much expense in fighting for Comerong and that it would be 'foolish at my time of life to bother myself any more about it'. The Government's conduct was 'infamous' but he at last accepted that he had to submit to 'as great an act of injustice as ever was perpetrated'. In 1837 Berry had written that 'even if my claim is not allowed - the expense and trouble will not be much & I can buy it' but having convinced himself in the intervening years of the rightness of his claim to ownership he refused in 1872 to countenance bidding.

In February 1830 when reporting on Berry's application for land on Comerong Surveyor General Mitchell had noted on the letter: 'I cannot observe without regret the gradual Augmentation of this already immense property in a manner so directly Contrary to the Instructions of Earl

101 Berry to Minister for Lands 10/11/1871, Berry Estate (ML A721), No 198.


103 Berry to David Berry 25/1/1872, BP.

104 William Barker to Minister for Lands 14/1/1873, copy, BP.

105 Berry to John Berry 6/10/1837, BP.

106 Berry to David Berry 8/6/1872, BP.
Bathurst'.\textsuperscript{107} Berry & Wollstonecraft were informed of this comment, considered by them 'gratuitous' and 'uncalled for'.\textsuperscript{108} Henceforth Berry viewed Mitchell as an enemy and treated the Surveyor General's various reports unfavourable to his purposes as products of malice. He became Mitchell's most trenchant critic over his long term of office.

Berry's initial impressions of Mitchell were unfavourable. In January 1830 he wrote that he thought him 'a poor creature' who had somehow attained an office above his expectations, the dignity of which he knew not how to sustain. Mitchell was one of the most vain, querulous, ill tempered men in existence. He is a tyrant to all the Surveyors under him & keeps them at the most awful distance. He calls them into his presence with a boatswains whistle & receives & dismisses them with more Hauteur than I have seen any other person treat their convict servants.

There were very few members of the public he would condescend to see 'and those few ever after view him with dislike or derision according to their respective tempers'. When he had admitted Berry he was always remarkably civil. On one occasion he was even 'so humble & condescending' as to accept an invitation to Crows Nest. Mitchell did not keep the appointment. He apologised for not doing so by requesting me to treat him as he deserved for dissappointing me by not inviting him any more - & I took the hint & never repeated the invitation.\textsuperscript{109}

As was their wont with heads of government departments relevant to their interests Berry and Wollstonecraft attempted none too subtly to create a climate for mutual exchange of favours by promising Mitchell a brace of working bullocks.\textsuperscript{110} This tactic failed with Mitchell and

\textsuperscript{107} Mitchell, minute on Col. Sec. to Surveyor General 25/2/1830, Berry Estate (ML A719), No 4.

\textsuperscript{108} Berry & Wollstonecraft to Col. Sec. 14/6/1830 30/4608, Berry Estate (ML A719), No 7.

\textsuperscript{109} Berry to Wollstonecraft 19/1/1830, BP.

\textsuperscript{110} Berry to Wollstonecraft 21/8/1829, BP.
may even have offended him.

When convinced that the Surveyor General was using his position and influence to counter his claims at every turn Berry acknowledged that he hated Mitchell. From 1838 to 1842 he retaliated with attacks on Mitchell and his department in the Legislative Council. In 1839 Berry believed that Mitchell was behind supposed encroachment on the Crows Nest estate - and 'if so woe betide him'. He asked William to measure several parcels of land at Shoalhaven in hope of finding short measurement. Although he could not hope to obtain any correction short measure would provide an opportunity 'of having a pull at Major Mitchell' and might help get redress for other injuries Mitchell had done him. David Berry was set to survey the back lines of Crows Nest estate in search of mistakes. Astronomer James Dunlop was consulted for information on magnetic variation in preparation for an attack Berry intended to make in the Legislative Council. Berry wrote to John: 'I hope Mitchell [then overseas] will arrive in time to be scourged. Although he is now a lieut.- Colonel & a Knight that shall not save him'. Berry believed that it was 'because I publicly gave out that I meant to impeach the head of the Surveying Department in the Council' that Gipps took action to have his boundaries checked.

At the onset of dispute over the boundaries of Wollstonecraft's Numba grant and Hume's grant early in 1840 Berry asserted in a letter to the Government that any simpleton could determine the boundaries of a grant by

111 Berry to John Berry n.d., BP.
113 Berry to John Berry n.d. [May 1839?], BP.
114 Berry to John Berry 30/5/1840, BP.
115 Berry to John Berry [21/4/1840], BP.
following the description. Gipps refused to receive this letter on the grounds that it contained such harsh and insulting remarks concerning the Surveyor General that he 'could not allow himself to be made the means for creating personal quarrels' by referring it to Mitchell. Berry was granted his request to be allowed to withdraw his letter and to submit another. He seemed surprised to find from an interview that the Governor wished to support his Surveyor General as far as possible.\textsuperscript{116}

During his correspondence with the Government in 1840 and 1841 concerning encroachments Berry accused Mitchell \textit{inter alia} of deliberate encroachment, making misstatements calculated to mislead, having recourse to a 'pitiful stratagem', seeking to evade the Governor's instructions and persisting in an egregious and monstrous error.\textsuperscript{117} On one occasion he wrote that he was tempted to believe that Mitchell only behaved towards him as he did because of his critical attitude towards the department in the legislature.\textsuperscript{118} Mitchell for his part said that Berry openly stated as the reason for these attacks and for refusal to give him credit for his other services that he had been the means of preventing Berry obtaining thousands of acres of land. The Surveyor General had been 'much amused' on looking through papers in his office to find that Berry 'had offered language equally gross to Mr. Oxley'.\textsuperscript{119} It was useless to try to convince Berry that his recommendations and actions of his officers were not based on malevolence but 'what Mr. Berry's lands at Shoalhaven

\textsuperscript{116} Berry to John Berry 8/4/1840, BP.

\textsuperscript{117} Extracts from the Official Correspondence of Alexander Berry Esq. M.C., enclosure A to Surveyor Gen. to Col. Sec. 1/7/1841 41/6453, Berry Estate (ML A719), No 73.

\textsuperscript{118} Berry to Col. Sec. 7/3/1840 40/2552, Berry Estate (ML A719), No 50.

\textsuperscript{119} Memo. Mitchell to John Thompson n.d., Encl. E. to Mitchell to Col. Sec. 1/7/1841, Berry Estate (ML A719), No 73.
are to him, my fair fame is to me' and he wanted vindication in the eyes of the Governor. Mitchell extracted expressions in Berry's correspondence which impugned his integrity and appealed against 'the injustice and impropriety of such expressions toward me, and the Department under my Charge!'. Berry was informed of the Governor's regret that anything of a personal nature between him and the Surveyor-General had been 'very unnecessarily' mixed up with his submission.

Berry's campaign peaked with a long, wide-ranging and learned review of the department's work in a debate on the Estimates on 27 July 1841. The nub of his argument was that gross inefficiency had originated in adoption by Oxley in Brisbane's time of a system of surveying by use of compass lines without any allowance for the earth being spherical in shape or corrections for magnetic variation in compass bearings over time or from place to place. The department had no register of variations, no two of its compasses gave identical directions, there was not even a standard foot measure against which to check survey chains. The description in a grant deed was 'mere fiction', for the supposedly fixed lines were in reality floating about. Corners were clipped off grants after deeds were issued because of incompatible boundaries with ill-measured adjacent grants and according to Mitchell's deputy none of the department's maps had been published because they were full of errors. Governor Gipps felt compelled to agree that numerous evils had arisen in the Survey department which it was beyond his and the Council's power to correct and while both he and Colonial Secretary Thomson defended the integrity of surveyors who had measured Berry's lands they could not deny that their work might have been

120 Surveyor General to Col. Sec. 1/7/1841, Berry Estate (ML A719), No 73.

121 Memorandum by Gipps: Mr Berry's Land Case at Shoal Haven 19/8/1841 41/6453, Col. Sec. to Berry 23/8/1841 41/773, Berry Estate (ML A719), Nos 74 & 75.
unscientific. A second long speech from Berry solely on his personal experience of surveying at Shoalhaven exhausted Gipps's patience. He shut Berry up by offering, or as some construed it threatening,\textsuperscript{122} to have all Berry's land at Shoalhaven re-measured, to give him what was specified in the deeds and to take the remainder of what he currently held.\textsuperscript{123}

Berry heard that officers of the department were 'much annoyed' by his remarks of 27 July 1841.\textsuperscript{124} Shortly afterwards the Governor ordered resolution of the dispute over Wollstonecraft's Numba grant by remeasurement. A day or two later Mitchell served notice on Berry that as reflections had been cast upon him in correspondence with the Governor Berry must make an unqualified apology, meet him in a duel, or expect to be horsewhipped. Berry answered that provided Mitchell would write to him saying that the mistake in measurement was neither intentional nor the result of bad feeling he would reply regretting expressions he had used while under that impression. As soon as he learned that Mitchell had rejected this offer he took a stout oak stick and set off in a state of some excitement towards the Surveyor General's office to provide Mitchell with an opportunity to attempt a horsewhipping. Berry claimed that his purpose was not to provoke Mitchell, 'merely to break his head if he shook his whip'. Mitchell, carrying a whip, passed Berry in the street but pretended not to see him. A reference to these events without use of names appeared in the next issue of the \textit{Sydney Morning Herald}. As no actual harm flowed from Mitchell's challenge Gipps appears to have decided not to notice it, although at one stage Lt-Colonel George Barney predicted unpleasant consequences for Mitchell and his deputy who had served as

\textsuperscript{122} George Underwood Alley to Minister for Lands and Public Works 4/6/1858, Berry Estate (ML A721), No 170.

\textsuperscript{123} \textit{Sydney Monitor}, 28 July 1841 & \textit{Australian}, 29 July 1841: LC 27/7/1841.

\textsuperscript{124} Berry to John Berry 8/8/1841, BP.
his chief's second.\textsuperscript{125}

To the end of his life Berry continued to allege in official correspondence and private letters to his brothers that the Surveyor General was an enemy who acted against him from malice whenever opportunity offered. Despite this relations between the two Scots were somewhat repaired in the last few years of Mitchell's life. Berry was one of those who voted in the Legislative Council in 1852 for Mitchell to be granted leave on full pay to proceed to England to promote his boomerang propeller. After Mitchell's return to Sydney in 1854 the two men chanced upon each other in the street and although they had not been on speaking terms for a long period Mitchell said to Berry: 'Those fellows at home would not allow me my salary although it was voted by the Council'. Berry answered: 'I am sorry for it Sir Thomas for I was one of those who voted for it'. Mitchell rejoined: 'That I know and I felt it very much'.\textsuperscript{126} When Mitchell died in October 1855 Berry attended his funeral.\textsuperscript{127} Given his feelings about the deceased this may appear hypocritical but it was in line with studied attempts to present himself as resisting Mitchell's alleged aggressions and injustices while staying free of malice himself.

Mitchell can be acquitted of having initially any particular hostility towards Berry and Wollstonecraft. Despite his many clashes with those who had to maintain working relationships with him Mitchell remained popular.


\textsuperscript{126} Berry to Governor Belmore 16/5/1871, Berry Estate (ML A721), No 193.

\textsuperscript{127} Empire, 10 Oct. 1855; Berry to C.B. Robinson 23/7/1856, BP.
with the public because of his persistent opposition to the monopolisation of land by large landowners and squatters to the detriment of small settlers. Berry was vindicated in his attacks on the methods and administration of the department under Mitchell by the severely condemnatory report of a Royal Commission in 1855.128

Berry had no liking for John Robertson’s Crown Lands Alienation Act of 1861 which introduced free selection for small holders. He saw it as playing the devil with the value of landed property and allowing selectors to injure or ruin squatters or, in some cases, themselves.129 Shoalhaven was particularly suitable for small-scale agricultural settlement. The *Illawarra Mercury* reported in April 1863 that the population had been greatly augmented by free selectors who were weekly taking possession of large quantities of land.130 As a landowner and holder of secure Crown leases Berry might have expected to be safe from annoyance by selectors, but that was not to be. Attempts were made in the early to mid eighteen sixties to select land on Coolangatta formerly designated as ‘unprofitable swamps’ on the ground that this land was in excess of the prescribed amount of the grant, and therefore still Crown land.131 Further attempts along the same lines were made in 1886 when David Berry was the proprietor and again in 1890–1891 against David’s executors. These later attempts were more serious in that their focus included Wollstonecraft’s Numba grant which it was asserted was clearly in excess quite apart from allowance for unprofit-

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129 Berry to David Berry 9/12/1868, BP. Berry then estimated that something in excess of twenty thousand acres of the Shoalhaven estate were not worth the selection price of a pound an acre.

130 *IM*, 28 April 1863.

able land because Crows Nest had not been deducted from the promised acreage. 132 There was a good deal of public sympathy for claimants. No other instance of an old grantee being challenged in this way came to notice although there were expressions of opinion that it was high time that old settlers in general disgorged 'the valuable property which they have inequitably appropriated'. 133 The Berry brothers and David's executors stoutly resisted raids by selectors both on the legal ground of the indefeasibility of title to land given by a deed of grant and on the equitable ground that areas such as swamps measured as excess had been given value only by the enterprise and expenditure of Berry & Wollstonecraft, a fact which claimants and their supporters were ignoring. All bids to select were bound to fail. In law the extent of a grant was determined by the description of the boundaries and not by the promised acreage. 134

This review reveals that Berry had need to keep a sharp look out in defence of his land grants or purchases and cause to feel himself beset by incompetents or men of ill-will in the Survey department. No one else in New South Wales suffered problems of encroachment to the extent that he did. The degree of consideration and forbearance with which Berry was treated by a succession of administrations seems to have owed much to vulnerability to attack of a department notorious for inefficiency and his willingness to use the Legislative Council as a forum for embarrassing

132 The references for these affairs are too numerous to cite here but are included in my account of the dispersal of the Berry estate and fortune to be deposited in the Berry Museum.

133 IM, 11 Mar. 1862. The radical politician E.W. O'Sullivan who acted as Parliamentary champion for the would-be selectors of 1890-1891 took the same line, focussing on Berry but arguing the general case: O'Sullivan, 'The Berry Estate Stolen Public Lands', newspaper clippings from unidentified source, Berry Estate, v 1 (NSWA 2/8638A), 159.

134 Crown Solicitor to Under Sec. for Lands 16/10/1891, office memo. re Attorney-General's advice, Berry Estate, v 1 (NSWA 2/8638A), 65, 83.
criticism. On the other hand Berry sought to cling to excess land at Crows Nest and pursued ownership of Comerong Island for decades when he knew that he had no good claim. If government appeared willing to cheat him the reverse was also true. It is not surprising his enemies, with their gaze fixed particularly on Comerong, saw all his efforts for retention or acquisition of land as evidence of avarice.