Aspects of the career of Alexander Berry, 1781-1873

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Chapter 14

'SHOALHAVEN INCUBUS'

The Rev. Dr John Dunmore Lang arrived at Numba on 10 December 1858 having been invited by the Rev. J.H. Garven to preach at the Presbyterian church the following Sunday morning and intending to deliver a political lecture in the building in the afternoon. As Lang had many years before been deposed by both the Synod of Australia and the Church of Scotland members of those institutions were forbidden to acknowledge him as a minister. Berry, visiting Coolangatta at the time, wrote to Garven that 'so indecorous a proceeding would make himself and his congregation a laughing stock to other Christian denominations'. Berry owned the church and Garven otherwise depended much on his support. Garven forwarded Berry's letter to Lang with a message that he could not use the church. The trustees of the denominational school gave Lang permission to use it for his political meeting until Berry pointed out that Denominational School Board regulations prohibited such meetings on school property. Lang was not a man to be denied with impunity and, despite later protestations of lack of personal motives, he had a long-held, deep hatred for Berry because of their earlier clashes. He penned two long letters published in the Illawarra Mercury under the heading 'The Shoalhaven Incubus', and repeated wholly or in part by two other newspapers. Lang held Berry up as

the exact type of those antediluvian oppressors of their fellow men, for whose enormous wickedness and oppression God was pleased not only to shorten the duration of human life, but to bring in a flood of waters to destroy the world of the ungodly. What I ask would become of the world if such heartless men, such

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1 J.D.Lang to Mrs Lang 11/12/1858, Lang Papers v4 (ML A2224), 611.
2 This point was to be put to Lang in a subsequent court case: Questions for Rev.Dr.Lang (ML A1 4/1).
3 SMH, 22 Feb. 1859, letter from Berry.
oppressors of the poor, as Mr. Berry were to live five or six hundred years, and to reduce whole generations of Shoalhaven serfs to miserable vassalage and degradation?

This 'fossil specimen of antediluvian humanity' had built up, through 'enormous grants' and 'extensive purchases of land', when Crown land was sold at a mere trifle by 'a reckless and unprincipled Government in the olden times', a principality of eighty to a hundred thousand acres of the finest land worth, at the lowest estimate, a million pounds sterling. The Colony had nothing else to compare with it. Such was the monomania concerning land of this old man with one foot in the grave that he 'regularly and systematically opposes every intending purchaser ... in the vicinity of his own overgrown estate, and buys the land at whatever price'. This was a melancholy spectacle for Berry was a widower of considerably upwards of eighty years of age, with neither chick nor child belonging to him - having only two bachelor brothers and two maiden sisters, of a similar primaeval antiquity.

He had no such generous feelings towards his fellow man as to give anyone else a chance in his neighbourhood and had created around him a 'vast solitude' in the Shoalhaven district. The reckless administrations of the past had not reserved land for any public purpose so the needs of the whole community had been placed at the mercy of this one man. Society, Lang lectured, 'has a right to expect that the possessor of property shall use it in some way or other to the general good, as well as for his own'. In this respect Berry was 'a grand offender against the laws of society'. He had done nothing to settle families or promote formation of towns and villages. He had subjected his tenantry to the most 'heartless exactions' and reduced all on his property to a 'miserable state of serfdom'. In earlier times many a miserable convict had been 'flogged within an inch of his life for the slightest offences'.

In the second letter Lang prescribed the remedy for this situation. It lay in the recent Municipalities Act which would allow all kinds of improvements to be financed by levying rates on large estates. These constituted
'surface diggings' where gold was to be extracted without effort.  

There were three distinct aspects to Lang's letters: the attack on Berry as a land monopolist, embellishment of this with defamatory matter, and incitement to use the Municipalities Act as a weapon against him. Some of his shafts hit home. Berry acknowledged to David: 'There is some truth in one part of the letter. There is no Heir to the Shoalhaven Estate. You & William ought immediately to get wives'. As this injunction was reiterated it seems that he clung to a forlorn hope that one of his brothers might yet beget an heir, although the younger turned fifty-eight in that year. He might have gone further in concession. He had himself constantly queried David's determination to buy more land, whatever the cost, when they lacked means to develop what they had. He acknowledged evil consequences for tenants in David's leasing policies. Only a few years earlier he had written to David: 'no other people in the Colony would keep the place as we do - we are neither acting for our own nor the public advantage'. Lang had by this time a long record of defamation and earlier in the decade twice served prison sentences for criminal libel. He showed his usual disregard for establishing the facts and presenting them fairly, grossly overstating Berry's land holding and especially its value, misrepresenting the manner of acquisition and ignoring Berry's contributions in recognition of the obligations of property. As the *Sydney Morning Herald* said, Lang's libels were vindictive and intended to do Berry as much harm as possible.

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5. Berry to David Berry 29/12/1858, BP.

6. Berry to David Berry 15/8/1854, BP.

7. *SMH*, 20 Aug. 1859, edl. See for an attack on this 'A Man' in *IM*, 1 Sep. 1859.
opinion of another commentator they perverted and confused because 'their tendency is to create prejudice and enmity, on grounds which are perfectly unreasonable and unjustifiable'.

According to Berry his inclination when shown a copy of the *Illawarra Mercury* was to ignore the letters. When the Rev. W.B.Clarke read the first letter he thought it 'abominable' and advised consulting James Norton. On Norton's advice Berry lodged a criminal information against Lang for false and malicious libel and instituted proceedings against the proprietors of the *Illawarra Mercury*, *Kiama Examiner* and *Sydney's Evening Mail*. Lang moved quickly to pledge to indemnify these proprietors against all consequences of civil action.

At committal proceedings against Lang on 12 January 1859 Berry directed attention particularly to a passage in the first letter which asserted that Berry would shortly lift up his eyes, which any student of the *Bible* would understand as a reference to Dives, the rich man who had lifted up his eyes from the torments of hell. Lang, who pleaded public interest, denied malice and accused Berry of vindictiveness in bringing the charge, was committed to stand trial and admitted to bail.

Berry's prosecution came when land reform was the great issue of the day. During 1859 the demand for easy access to land was increased by high unemployment in Sydney which resulted in rioting. The *Illawarra Mercury* thought

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8 *IM*, 3 Jan. 1859, letter from Illawarra.

9 Berry to David Berry 29/12/1858, Berry to William Carter 8/1865, BP; Berry to George Macleay 28/1/1859 (ML Ab69/1).

10 Berry to David Berry 10/1/1859, BP.

11 *IM*, 20 Jan. 1859.

12 *SMH*, 13 Jan. 1859.

the question of the 'gross and enormous excrescence of a corrupt and wicked system' which the Berry estate constituted could not have been submitted to public scrutiny at a better time.14

News of Berry's prosecution resulted in a public meeting in Sydney to obtain an expression of sympathy with Lang.15 It was claimed that the opinion of almost every unbiassed person on the south coast was that Lang had said 'nothing but what is true and deserved' and that there was no fear of his conviction.16 A Jamberoo correspondent wrote, in a paean of praise for Lang, that his letters were 'as generally and as fully believed, as that the sun shines in the Heavens'. Berry was referred to on all sides as the 'Leviathan'. It caused pain to see a man of 'his parsimonious and niggardly habits' bringing up 'a gentleman of Dr Lang's standing, usefulness, and worth'.17 A meeting was held at Terara to consider collecting evidence and money to assist Lang. As the land question was the only important issue for a coming election the idea was floated, and taken up elsewhere on the coast, of electing Lang should Dr Andrew Aldcorn, the sitting member, retire because of approaching blindness. This meeting resolved unanimously to turn the knife in Berry by requisitioning for a further meeting in his Numba court house to allow inhabitants an opportunity to give their opinions.18

Meetings to express sympathy with Lang and open subscription lists on his behalf were held at Wollongong,

14 IM, 17 Jan. 1859.
15 Ibid., 24 Jan. 1859.
16 Ibid., 17 Jan. 1859, edl.
17 Ibid., 24 Jan. 1859, letter from 'Scripta Epistola Arbiit' 18/1/1859.
18 Ibid., 27 & 31 Jan. 1859. This was not the first time that Lang had been supported by members of the Shoalhaven community generally opposed to Berry. See James Graham, for The Independent Shoalhaven Lang Testimonial, to Mrs Lang 2/11/1853, Lang Papers, v5 (ML A2225), 169.
Shellharbour, Ulladulla and Moruya. The general opinion was that Lang was a public benefactor - always struggling for the good of the ordinary man and that what he had written was true. Berry received at least two threatening letters.

The *Illawarra Mercury* said that Berry had long been a public man. It was the press's duty, whatever the consequences, to publish Lang's strictures on him. It was not in the nature of courts that they could vindicate character and Berry's proper course had been to write a letter in reply. It was for Berry to consider whether he can disprove, or whether he can with truth deny, the things asserted in Dr Lang's letters. If he can, why has he not done so? If he cannot, how can he pretend such things ought not be made public? There is the standing damage of that immense estate in the hands of one man, to the whole public of New South Wales - a damage which is public if it be a damage at all.

Alfred Lutwyche, Attorney General in the Cowper Government, took over the prosecutions of Lang and James Fussell, proprietor and editor of the *Evening Mail*, on the plea that criminal libel should be confined to cases likely to endanger public peace and should be conducted by the Crown. Because of Charles Cowper's political friendship with Lang Berry interpreted this as indicating an intention to try to assist Lang escape the proper consequences of his actions by 'running dead' on the prosecution. His application for permission to prosecute by his own counsel at his own expense was refused although this had hitherto been the practice in New South Wales. Berry then wished to throw up the prosecution that he might apply to the court for a criminal information but Lutwyche refused him permission to withdraw, subpoenaed him as a witness and threatened to apply for a bench warrant if he attempted to throw up the prosecution that he might apply to the court for a criminal information but Lutwyche refused him permission to withdraw, subpoenaed him as a witness and threatened to apply for a bench warrant if he attempted to do so.

19 *IM*, 7 & 10 Feb. 1859.


21 24 Jan. 1859, edl.
boycott the trial. Likewise Lutwyche refused Berry's application for a special jury, for service on which there was a higher property qualification than for a common jury. This was a crucial reverse. Lack of concern with the facts of the case demonstrated at the pro-Lang meetings justified Berry's doubt whether conviction of Lang could be secured from a common jury for anything. Chief Justice Stephen, who heard the case, considered that 'a more disgraceful libel never was published' but that 'with a Common jury, Berry had no chance of justice'.

Berry secured publication of the correspondence between him and the Government in the *Sydney Morning Herald* of 2 February 1859. This led to the matter being raised in both Houses of Parliament the following day where discussion reflected intense dislike for Lang on the part of conservative members and recognition on all sides of the political clout which his immense popularity 'out of doors' gave him. Lutwyche, who had recently been nominated to judicial office, came under attack for political bias.

The trial of Lang was set for 7 February. Robert Isaccs and Edward Wise, counsel for Berry, applied immediately to the Chief Justice for Berry to be allowed to conduct the prosecution through his own barristers and for empanelment of a special jury. Isaacs said that he would not impute any motive to the Attorney General for his action in this case but would be prepared to do so 'in another place'. However, he went on to suggest that Lutwyche had pursued a course of 'absolute hostility' towards Berry. The Chief Justice rejected both applications, saying that he had no power to interfere with

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the exercise of the Attorney General's discretion. Lutwyche remarked that he could see no reason to permit a rich man to 'avenge his sense of injury when a poor man attacked in the same way had not the means to prosecute at his own cost'. Isaacs responded that the allusion to rich and poor was 'merely cast out to prejudice Mr Berry in the eyes of those who considered it a crime to be rich'. The Attorney General, a political office-holder had revealed his political motive in a case of a political character affecting himself and the ministry of which he was a member. It was most dangerous that he should have the power 'of crushing a political foe or throwing his shield of protection around a political friend'. What had begun as the private prosecution by one individual of another had become overtly a political contest by the time Lang was arraigned.24

Lang was to claim that Attorney General Lutwyche 'certainly did his best for the public. There was no sacrifice of the case on his part'.25 This was nonsense. Berry was fully entitled to feel that his fear that Lutwyche would act to assist Lang's acquittal was borne out.26 Certainly Lutwyche told the jury that Lang had committed 'one of the grossest libels that had ever been committed', that 'a libel so false, scandalous, and malicious, he never read or heard of' and that Lang's language was 'unbecoming the pen of a Christian pastor'. But he called no witness other than Berry's solicitor to put the letters prosecuted on formally into evidence. He made no attempt to show the falsity of any of the content or to prove malice. Lang, defending himself, proceeded directly to address the jury for over two hours while Berry was forced to listen to himself being traduced by assertion

24 IM, 10 Feb. 1859, report of Queen v Lang.
25 Empire, 7 Nov. 1859, letter from Lang.
26 Appendix to Berry to Clerk of Executive Council 7/10/1861, BP.
as fact all the libels which Lutwyche had left unfuted.27
As Lang had not pleaded justification Lutwyche should have
objected to this whole line of argument but sat silent.
Berry had been warned by his advisers not to be provoked
into interjecting in response 'to any thing the Blackguard
said but often I could not Contain myself'.28 The Chief
Justice summed up in Berry's favour but after half an
hour's retirement the jury (described by Berry as 'all Low
rascals... I would not have hired any of them from their
appearance')29 returned a 'Not guilty' verdict. This was
'greeted with a most unusual demonstration of applause
from a crowded court'.30 Berry immediately
approached Lutwyche and asked whether he meant to try
Fussell after such a verdict. He had wanted to abandon
that prosecution also when it was taken out of his
hands.31 Lutwyche replied that he would try that matter
the following day. Berry said that such a trial would be 'a
mere mockery of Justice'. He repeated this observation to
Chief Justice Stephen who shrugged his shoulders.32 As
Berry went to leave the court the Chief Justice's associate
captured him and asked him to wait until a
demonstrating crowd of Lang's supporters dispersed. Berry
had never shirked confronting physical danger33 and was
then 'too indignant' to heed the request. He strode out
through the crowd.34

27 Berry to William Carter - /8/1865, BP.
28 Berry to David Berry 9/2/1859, BP.
29 Berry to David Berry 9/2/1859, BP.
30 SMH, 8 & 9 Feb. 1859 & IM, 14 Feb. 1859, reports of
Queen v Lang.
31 Berry to George Macleay 28/1/1859 (ML Ab 69/1).
32 Berry to David Berry 9/2/1859, BP.
33 There were frequent demonstrations of this during the
voyage of the City of Edinburgh, and in making himself
available to T.L.Mitchell to attempt a whipping.
34 Berry to David Berry -/9/1865, BP.
The trial of Fussell was equally farcical, the Crown calling only the printer to prove publication. Fussell, appearing for himself, addressed the jury saying that he had published for the public good, had never set eyes on Berry before the committal proceedings and had no ill-feeling towards him. The jury took only a quarter of an hour to acquit.

As expressions of opinion in pre-trial meetings indicated and the verdicts suggested the issue was seen to turn on the philosophical questions of whether Berry had more than his fair share of land and failed to meet alleged obligations of ownership rather than the legal question of whether he had been defamed. Fussell's counsel at his committal proceedings quoted an authority in support of his contention 'that it was an indictable offence against the public for a person to hold more land than could be held for its benefit'. Berry believed it 'absurd to pretend that any one has purchased too much land and therefore ought to be deprived of his rights'. By failing to go into particulars and lead evidence on the falseness of Lang's assertions the Crown in effect encouraged the juries to find on the basis of their philosophical prejudice.

The outcome of Lang's trial caused strong feeling. In south coast communities the clash between the two prominent Scots was 'the all absorbing matter of conversation' with opinion 'almost universally condemnatory of him who, from Coolangatta's top, is lord of nearly all he surveys'.

35 At the committal proceedings Fussell had been represented by a close associate of Lutwyche: Berry to George Macleay 28/1/1859 (ML Ab 69/1).

36 SMH, 10 Feb. 1859, court report Queen v Fussell.

37 Ibid., 20 Jan. 1859, court report Berry v Fussell.

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

39 IM, 31 Mar. 1859, letter from 'Ita Est'.
Lang's acquittal was cause of great satisfaction. The general opinion was that there had been no libel. Berry was naturally downcast at the escape of the man he dubbed the 'Reverend DD. Habakkuk Mucklewrath' and thought he might be forgiven for wishing that his pet eagle Albert, of voracious appetite, could take his supper 'some night out of DD. Lang's buttocks'.

The *Sydney Morning Herald*, a strong supporter of Berry throughout his battles with Lang, denounced the cleric and said that in acquitting him the jury failed to do its duty. In Parliament Berry's supporters secured tabling and printing of correspondence concerning the takeover of both cases but no return was made to an address for all depositions and other relevant papers. On the evening of the verdict in the Lang case Edward Wise brought in a Bill giving a complainant in a criminal libel case the right to prosecute at his own expense and by his own counsel and a lengthy debate focussed squarely on this case.

From anger at the partisan actions of the Government and desire to 'rebute the calumnies of a professional &
convicted Libeller' Berry wrote a long, rambling defence of himself in the form of a letter published as an advertisement in the *Sydney Morning Herald* of 22 February 1859. He claimed that he did this 'most reluctantly' and was later 'sometimes annoyed with myself for doing it'.

Berry explained that the only grants he had received were the primary grant of two thousand acres, as did Lang's own father, and a half share in ten thousand acres taken on onerous terms requiring considerable expenditure. In the opinions of Oxley and Field the Shoalhaven was worthless when he settled. The land was 'a dreary swamp', much of it useless until drained by a hundred miles of ditches. He and Wollstonecraft were compelled to be great and constant improvers. Clearing, fencing, draining and cedar-getting: all the hardest forms of work, had been done by contract not convict labour. By

unwearied perseverance and expense I have made the country what it is. Although I have been unable to effect half the improvements I originally contemplated, I have accomplished enough to expose myself to the envy and detraction of the malignant.

Lang's assertion about flogging convicts to within an inch of their lives would be indignantly refuted by hundreds of alleged victims still living. A 'very general feeling of satisfaction prevailed amongst the men' and many former assigned servants were still employed on the estate. Far from tenants being hardly dealt with all who were sober had succeeded and many had become landowners. Lang's ravings about the rights and duties of property 'might find an echo in the revolutionists of France, but will not, I trust, for the honour of England, find favour even with a chartist mob'. Berry's answer concerning the use which he had put his land was that

I have converted a dreary wilderness into a habitation

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48 Berry to C.B. Robinson 14/3/1859, BP.

49 See Berry to Commodore Loring RN 15/11/1859, BP for one of his former assigned servants stopping him in the street to commiserate with him on Lang's 'unmerited attack'.

that affords employment and shelter for upwards of 1700 colonists - that I was long the greatest agriculturist in the colony, and have often had twenty teams ploughing one field; that I continued my operations as long as agriculture paid its expenses - as long as labour was procurable. Latterly, I have been compelled to devote my capital almost exclusively to grazing, and at this moment every available acre on my estates is completely devoted to the grazing of cattle or the plough of the agriculturist; that I have long rented from the Government many sections of waste lands in order to depasture my sheep.

It was true that he had not promoted towns or villages. These too often draw people to evil courses. In concluding Berry lapsed from honesty by claiming to have no rancorous feelings towards Lang; 'notwithstanding the wantonness of the attack he has made upon my character - the inveteracy with which he would pursue me, even beyond the grave'.

As Lang's biographer has written, Berry's letter was 'a dignified, moderate and convincing answer to Lang's charges'. It may have done him some good with individuals whose minds were not set. The Rev. Alexander Black, a minister of Lang's Synod of New South Wales, told Lang;

with all deference, I scarcely think Mr Berry is so bad as he had been represented to you. His letter would lead us to a more favourable opinion.

Letters of support flowed in from many prominent citizens.

Following failure of the criminal prosecutions Berry immediately commenced civil proceedings against the publishers of the Illawarra Mercury and the Kiama Examiner. Because of this his enemies saw his newspaper defence as a fresh cause for complaint. The Illawarra Mercury protested at the Sydney Morning Herald's 'repeated tirade' against the verdicts in the Lang and Fussell cases.

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51 Black to Lang 18/3/1859, Lang Papers, v 11 (ML A2231), 95.
52 Hay, op.cit., 669.
53 N.D.Stenhouse to Lang 18/2/1859, Lang Papers, v 7 (ML A2227), 111-112; IM, 21 Feb. & 22 Aug. 1859.
and publishing Berry's advertisement, holding these acts contrary to ethical journalism and prejudicial to its defence in the civil action to come. It argued that Berry was morally bound to withdraw his action after committing 'a most serious outrage upon the fairness of legal proceedings by attempting to steal the opinion of a jury' through 'a most expensive advertisement, to which there can be no equal rejoinder because of its costliness.'54 This complaint was supported by the Armidale Express55 and, later, by Lang who said that having recourse to the press and the Supreme Court at the same time was evidence of 'gross impropriety' and 'extreme vindictiveness'.56

The action against John Garrett of the Illawarra Mercury came to trial before Mr Justice Dickinson and a special jury on 15 August 1859. Garrett pleaded not guilty; thereby not only abandoning the right to attempt justification but also, as a matter of law, precluding either party from raising the question of truth. Isaacs read from other issues of the Illawarra Mercury to demonstrate a general attitude of malice towards Berry. Dickinson told the jury that punitive damages should not be awarded but only to compensate Berry for such pain and annoyance as he might have suffered. After a brief retirement the jury returned a verdict for Berry with damages of £150.57 Berry's costs added £102 2s 11d to Garrett's loss.58 The following day another special jury heard Berry's case against Robert Barr of the Kiama Examiner on two counts of libel: the first relating to a long, abusive attack on Berry for allegedly refusing Lang use of the Numba church, the second to an extract from one

54 Ibid., 14 Mar. 1859, ed1.
55 9 April 1859.
56 Empire, 18 Dec. 1860, letter from Lang.
57 SMH, 16 Aug. 1859.
58 IM, 1 Sep. 1859.
of the 'Shoalhaven Incubus' letters. Berry was awarded £200 damages:59 enough to bankrupt Barr and bring about the demise of the newspaper.60

Garrett was anything but repentant in defeat, editorialising on 'Abuses in the Late Libel Cases'. He argued that Berry ought not to have brought the actions at all for he might have had all the vindication he desired in the newspaper's own columns, attacked the Sydney Morning Herald for 'wantonly and wrongfully' acting to deprive the defendant of the benefit of jurors with unprejudiced minds, and accused Isaacs of slander in his advocacy.61 This newspaper continued to attack Berry as a great accumulator of land and an incubus, who could not 'pursue such a course without violating the purposes of the Creator, and equally violating the claims of his fellow man'.62

Support for Lang and the editors came from all around New South Wales and beyond,63 as a Garrett and Barr Relief Fund spearheaded by Lang was opened in Sydney to raise money to pay the proprietors' damages and law costs. A meeting at Hyams's hotel, under the chairmanship of Lang's political associate Andrew Aldcorn resolved unanimously to open subscription lists and request that Lang attend a meeting there.64 Lang went down at the end of November while Berry was on a visit to Coolangatta. The Illawarra Mercury's Shoalhaven correspondent gleefully represented this as 'a regular "bearding the lion in his den"' and reported that the meeting at Ringland's Hotel was very numerously attended with many more unable to gain

59 SMH, 17 Aug. 1859.
62 Ibid., 1 Sep. 1859, edl, quoted, 12 June 1860.
63 See e.g. Ibid., 1 Sep. 1859.
64 Ibid., 12 Sep. 1859.
admittance. Lang was applauded throughout a very lengthy explanation of his 'Shoalhaven Incubus' libels. Berry, who sent a clerk to take notes, said that the meeting 'in a Low pot house on the River' was attended by '63 drunken Ragamuffins' and added maliciously that as Lang was accompanied by his son George, who had served time for embezzlement from the Bank of New South Wales, he hoped the banks had kept their strong boxes locked.

Berry was anathematised as a symbol. He was the Colony's greatest accumulator of freehold land and its most outspoken defender of an aristocratic ideology in eclipse. A meeting at Brisbane resolved to thank Lang for exposing the injurious system of land jobbing, which, if not remedied will entail upon this land a territorial aristocracy, and prevent the settlement of the people, unless by tenancy of land from owners, which is fraught with danger to the freedom of the colony, and the result of which must be the creation of a vassalage foreign to the welfare of our adopted country.

Those who turned up at meetings or wrote to the press were unconcerned about the truth or otherwise of the specifics of Lang's allegations and apparently unaware of Berry's rejoinder. Berry could not but have suffered severe prejudice from wild statements about his wealth. Lang had in his first 'Shoalhaven Incubus' letter put the value of the Berry estate at £lm 'at the lowest estimate' whereas at Berry's death fifteen years later it was, with Crows Nest, valued at less than half that. W.B.Hutchinson, who had worked at Shoalhaven twenty years earlier, told a meeting at Mudgee that even then Berry's land holding was generally computed at 625 square miles or more: over six times its ultimate actual extent. The Era newspaper trivialised Berry's drive for vindication, dismissing him as a wealthy

65 Ibid., 1 Dec. 1859.
66 Berry to W. Lithgow 28/11/1859 (ML Ab 69/2).
67 Moreton Bay Courier, 21 Sep. 1859.
68 IM, 15 Sep. 1859, reprinting from Mudgee newspaper.
old man 'desirous of achieving a temporary notoriety of some kind before finally and for ever sinking into oblivion'.

Despite the massive verbal support for Lang and the newspaper proprietors money forthcoming was insufficient to pay the damages and law costs and Lang was obliged to pay £98 8s 10d out of his own pocket, 'at a time too when I could very ill afford it'.

At a public meeting in Sydney in August 1859 Lang read from the 'Shoalhaven Incubus' letters. On this republication of the libels Berry sued him. In a long letter in the Empire of 7 November Lang complained that as Berry had chosen to meet him in the press that was enough. The 'millionaire' failed the test of the gentleman in not allowing the person challenged the choice of weapon and violated the maxim of English law against double jeopardy. It seemed that

when any person, possessed of extensive landed property and a numerous body of serfs, is elevated to the distinguished position of a Botany Bay peer, he can not only violate the laws of honour, the well understood conventionalities of society, and the maxims of British justice, with perfect impunity but can be guilty, without question and even with the approbation of his associates, of acts of the most merciless vindictiveness and the most beggarly meanness of mind.

Lang professed to have written the 'Shoalhaven Incubus' letters with a pure and patriotic purpose. There was not a syllable which he would alter. Writing of the letters was 'a great and important service to this colony, which will

69 Ibid., 1 Sep. 1859, reprinting extract from previous Saturday's Era.

70 Empire, 18 Dec. 1860, letter from Lang.

71 See Berry to David Berry 24/8/1859 & 2/9/1859, BP.

72 What Lang means by this complaint is not clear to me.
not speedily be forgotten'. 73

At the trial of Berry v Lang on 11 November a jury again found in Lang's favour and his supporters in the body of the court gave him three cheers. 74 Berry was aroused to indignation against everyone concerned. The trial was 'badly managed' by his counsel, the 'Jury were all Langonians and the summing up of the Judge [Dickinson] was disgraceful'. 75 Dickinson was angered by Berry's belief that he had been intimidated by Lang's public support but voted with the other judges on appeal to grant Berry's application for a new trial. Lang left the Colony on one of his periodic overseas visits and the action was dropped. 76 Lang's parting remark was that this case showed what 'prodigious risks' an honest man had to take if he departed from 'flunkeyism and mammon worship' to 'advocate the rights of the people'. 77

The Illawarra Mercury argued throughout that the only effective defence against defamation was a reputation proof against aspersion. Anyone who had been a legislator for thirty years 'certainly ought not so lack character that a letter in a newspaper should crush him'. Lang's statements, it said, could have done Berry no possible harm if he stood well with himself and the community. His prosecutions had 'done him more mischief than the letters could, had they been answered, or even let alone'. 78 This was fair comment. It is particularly likely that it will be best, if possible, to ignore a politically-motivated libel for judge and jury are prone to bring their own prejudices to a trial

73 Berry naively believed that this letter vilifying him would prejudice Lang's case at the impending trial: Berry to David Berry 9/11/1859, p.s., BP.

74 Berry to David Berry 11/11/1859 p.s., BP; SMH, 12 Nov. 1859.

75 Berry to David Berry 14/11/1859, BP.

76 Berry to William Carter -/8/1865, BP.

77 Empire, 21 Dec. 1860, letter from Lang.

78 IM, 17 Feb. 1859, edl.
of the issue. In all probability Berry would have been best served by following his initial impulse and doing nothing. On the other hand a man is entitled to defend his reputation with those who have not had the opportunity to assess his character or to know the facts of ancient events, especially if silence could be construed as confession. When Berry answered Lang's letters his enemies, including the Illawarra Mercury, either ignored his responses or treated them as irrelevant. When he prosecuted, his defamers avoided the issue of truth by not pleading justification. He was entitled to feel that the Government acted with partiality and that Lang escaped punishment for reasons unrelated to the merits of the case. Through wilful confusion by Berry's enemies of the prejudicial fact of his owning more land than he could utilise to the full and the legal issue of Lang's libellous misrepresentations Berry's prosecution of Lang, far from securing him justice, became the means for turning him from being merely a disliked local landed magnate into a symbol of monopolisation vilified and reviled Colony-wide. This greatly boosted the morale of Shoalhaven opponents who were led into audacious acts of aggression and turned him into a man who for the rest of his life felt himself unreasonably targeted for persecution.