Aspects of the career of Alexander Berry, 1781-1873

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Chapter 15

MUNICIPALITIES

The Municipalities Act, 22 Vic. No.13, was passed in October 1858 for extension of local government in New South Wales. Fifty or more householders might petition for incorporation of a district. This would be granted unless a counter-petition containing a greater number of names was received within three months.

A section of the Shoalhaven population favoured an immediate application but, as in other parts of the Colony, there was also opposition from fear that rates would prove oppressively heavy and a high proportion of funds go to salarising officials.1 Shortly after passing of the Act Berry was told that a 'clandestine petition' had been drawn up for a municipality including a great deal of Berry land at Bomaderry and a quantity on the south bank of the Shoalhaven2 although the petition was actually for incorporation of the whole Shoalhaven district.3 Berry reacted quickly, calling a meeting of landowners to agree to a petition against incorporation,4 then sending around one of his overseers bearing a letter from himself to secure signatures. By mid December the greater part of the population had signed. Only six individuals approached had refused. Berry argued that roads could be made and repaired by voluntary contributions from landowners for half the cost of municipal salaries and pointed out that he had made and repaired all roads on his estate. Tenants and the

1 See IM, 1 Nov. 1858, edl: 'The Municipalities Act' and 9 Dec. 1858, edl: 'The Opposition to the Municipalities Act'.

2 Berry, Memorandum n.d. (marked 10-176), BP.

3 This is referred to in a number of sources, e.g. SMH, 20 June 1860: LC 19/6/1860, Charles Cowper.

4 J. Graham to Col. Sec. 7/6/1860 60/4064, CSIL, Shoalhaven Municipality (NSWA 4/737.1).
public had benefited without cost to themselves. At a small public meeting on 21 December to consider the desirability of a municipality Henry Moss conceded that its proponents were 'thoroughly disheartened' by knowledge that hundreds had signed Berry's petition.⁵

In the week following this meeting Lang's 'Shoalhaven Incubus' letters were published. Like Berry Lang believed the ideal form of society was one centred on agrarian villages and united by Calvinist Christian beliefs, but his would be a society of independent yeomen, not tenants in demeaning subjection to dominating landlords. Lang told his readers that

the Berry domain is the veritable Shoalhaven diggings, under the Municipal Corporations Act. And the best of it is, it is all 'surfacing', for any Municipality that chooses to pick up the loose gold of the mammoth monopolist ... And as to quartz-crushing ... which requires rather expensive machinery, there will be nothing of the kind needed at the Berry diggings, the only thing to be crushed there being a miserable earth-worm, which can be done by the simplest possible process, the mere vote of the Shoalhaven Municipality.

At 6d an acre on ninety thousand acres Berry would have to pay £2,250 per annum in rates or have land sold off. Lang described this amount as a 'mere nothing' to Berry,⁶ but even allowing for Lang's exaggeration of the acreage it is obvious from the state of affairs that such an assessment would have been disasterous for the Berrys.

The 'Shoalhaven Incubus' letters reactivated the municipality issue which was taken up with passion on both sides. One resident held that farmers of Shoalhaven had forfeited the right to complain of bad roads because they had signed the Berry petition from 'slavish fear' of the 'wrath and vengeance' of 'Alexander the Great, Czar of Coolangatta or of his substitute, King Log'.⁷ Another resident considered that it was Berry who was being

⁵ IM, 27 Dec. 1858; Berry to Alfred Elyard 19/12/1858, BP.
⁶ Ibid., 27 Dec. 1858, letter from Lang.
⁷ Ibid., 17 Feb. 1859, letter from 'No Serf'. 
subjected to a reign of terror, so that 'no man shall till his land, or hire and dismiss his servants, without being abused in print'. The weight of opinion shifted decisively after Lang published his letters. By mid March a petition signed by 103 householders of Nowra, Green Hills and Good Dog had been submitted praying a municipality incorporating much Berry land. Shortly afterwards the 'fam'd whipper-in of the great Incubus' was busily going round seeking signatures to a counter-petition submitted on 5 May 1859. There ensued a war of petition and counter-petition, charge and counter-charge concerning informality, irregularity and forgery of signatures, brought up at every stage of the on-going controversy.

Henry Moss, brother-in-law of the troublesome Michael Hyams, was both a central figure in the movement for a municipality and principal Shoalhaven contact of John Dunmore Lang, who made favourable mention of him in the first 'Shoalhaven Incubus' letter. Berry knew Moss was an ex-convict and sensed that his opponents' association with such a man was a prospective source of embarrassment as evidence of want of principle. He thought it scandalously hypocritical that Lang, a moralistic Christian minister who mouthed rigid adherence to the Westminster Confession

8 Ibid., 4 April 1859, letter from Shoalhaven Correspondent.
9 The original name of Cambewarra.
11 IM, 4 April 1859.
12 Berry to Col. Sec. 5/5/1859 59/1874, CSIL, Shoalhaven Municipality.
should descend to political conniving with a Jew. Berry added acidly that Moss's status as an ex-convict no doubt endeared him to Lang 'as being in the same category as his own son'. Knowledge of Moss's past offence increased Berry's sense of righteousness but he found times so changed that his opponents and the public at large were untroubled by it. The moral issue for them was not the youthful lapse of one supporter of local government but Berry's sins of land monopolisation and domination of the community.

On 8 April 1859 Berry wrote to Governor General Denison that the petition for a municipality resulted from a scheme concocted by Lang for extorting from him an enormous amount of taxation. Circumstances revealed that promoters of the petition were attempting to effect an object 'directly opposed to the real meaning and content of the law' and so were attempting fraud and injustice. He referred to the second 'Shoalhaven Incubus' letter and pointed out that those who got up the petition had drawn boundaries with all sorts of deflections to exclude inhabited parts of his lands, the householders of which would oppose incorporation, and to include uninhabited, mostly pastoral parts. North of the Shoalhaven their boundaries included not more than 153 people and excluded upwards of 460. Berry included copies of petitions signed by householders residing within the boundaries of the proposed municipality and its immediate vicinity to show...

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14 Berry to Sir Charles Nicholson 17/5/1862 (ML Ab69/4); Berry to David Berry 1/7/1862, Berry to W. Carter -/8/1865, quoted, BP.

15 This was always the attitude in evidence in IM, both editorially and from correspondents. See particularly 11 June 1861, letter from G. U. Alley for view that Moss was convicted only because barrister Robert Lowe bungled his defence.

16 One of Berry's enemies commented, Ibid., 18 May 1860: Very true, but I should like to know how a line passing across Mr Berry's estate could be drawn so as not to include a large portion of uninhabited land; and also whose fault it is that it is so?
that of those entitled to decide the issue there was a majority of nearly four to one against a municipality. He had no objection to Nowra people having their affairs managed by a municipality but was quite capable of managing his own without one. His establishment had long been a tributary appendage rather than part of New South Wales but he was unwilling to be a forced tributary also of the people of Nowra 'who have long been a great annoyance to me, as a source of drunkenness and dissipation'. Berry appealed 'with confidence' for protection from the intended injustice and seemed genuinely surprised that Denison merely forwarded the letter to the ministry. When he did not get a quick response he wrote in some agitation to Minister for Lands John Robertson and to Colonial Secretary Charles Cowper successively.

The Executive Council decided on 8 August 1859 to create a municipality. Despite his letters to the Governor General and ministers Berry was not informed. He gathered from public remarks by Lang on 19 August that there would be a municipality. He had solicitor Robert Johnson write first on 30 August for information then two days later for confirmation of what he had heard, to enter

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17 Berry to Denison 8/4/1859 59/1550, Petition of Householders of the Police District of Shoalhaven 59/1874, CSIL, Shoalhaven Municipality.

18 Berry to David Berry 7/9/1859, BP.

19 Berry to Minister for Lands and Public Works 19/4/1859 59/1546, CSIL, Shoalhaven Municipality; Berry to Col. Sec. 29/4/1859, copy, BP.

20 Minute of Executive Council, 8/8/1859, CSIL, Shoalhaven Municipality. The long delay in dealing with the petition for incorporation was explained as the result of a request by several leaders of the movement to defer action as they were negotiating with David Berry in hopes of getting agreement to incorporation of the whole district: SMH, 20 June 1860: LC 19/6/1860, Joseph Docker.

21 Berry to David Berry 29/8/1859, BP.

22 Johnson & Johnson to Col. Sec. 30/8/1859 59/3841, CSIL, Shoalhaven Municipality.
a protest if it was true and to ask to be heard by the Executive Council if the municipality had not already been created. The Executive Council asserted that it was 'now quite beyond their power to reopen the matter'. Given the strength of Berry's objections to the honesty and equity of the application, the extraordinary boundaries, the fact that Lang knew while he was kept in the dark and refusal to hear him although no proclamation had issued, added to the Government's intervention in the 'Shoalhaven Incubus' cases, it is understandable that Berry frequently complained that Premier Cowper had entered into a 'diabolical conspiracy' with Lang to put his property 'under the control of a pack of ruffians as bad as themselves'. The Government had no answer to Berry's complaint about being left in a state of suspense and members of a select committee of the Legislative Council were to find that he had been treated with rank and unaccountable discourtesy.

Berry came to believe that Cowper hated Lang but lent himself to Lang's purposes from fear. John Hirst likewise sees the Government as processing the application 'as if there were nothing unusual about it' because it judged that it could not afford to thwart the immensely popular clergyman, although in other cases Cowper was unwilling to link town and country municipally.


24 The wording here is from Berry to Hamilton Hume 25/6/1872, BP.

25 Unsigned memorandum headed 'Shoalhaven Municipality', 19/6/1860, CSIL, Shoalhaven Municipality, deals with Berry's complaint without confronting the essence of it.

26 SMH, 20 June 1860: LC 19/6/1860.

27 Berry to David Berry 22/5/1862, BP.

28 Hirst, op.cit., 260, 298 n40.
Berry's immediate reaction was to resist to the utmost his enemies' 'illegal and nefarious' proceedings. Large landed estates would not henceforth be a desirable investment in New South Wales because 'they excite Envy and malice, and nothing which the possessor of such properties can do will prevent it'. Berry ruled out any attempt to counter the evident intention to plunder by trying to form an estate municipality based on Numba. This would virtually place management of Berry land in the hands of their tenants and neither David nor William was the kind of man who could cope with them.

Berry received some support from an unlikely source. George Underwood Alley wrote to surveyor Parkinson on the injustice of the proposed north-eastern boundary line for the new municipality and told Premier Cowper that

The purpose of the individual who proposed a line so greatly at variance with the established rule of direct or due lines, was to enclose as much untenant ed land of Mr Berry as possible, to gratify personal feeling, if this course be permitted it will be inferred that you have sanctioned it because Mr Berry is opposed to your Government.

When the municipality of Shoalhaven was proclaimed on 21 September 1859 the boundaries had been altered a good deal from those petitioned for. The Government had extended them to include much more Berry land north of the

29 Berry to David Berry 2/9/1859, BP.
30 Berry to David Berry 6/9/1859, BP.
31 Berry to David Berry 7/9/1859, BP.
33 Alley to Col. Sec. 12/9/1859 59/4087, CSIL, Shoalhaven Municipality.
35 Berry to David Berry 26/9/1859, BP.
Shoalhaven with an increase also on the south side.\textsuperscript{36} A total of 21,560 acres of Berry land was included.\textsuperscript{37} This adverse alteration of the boundaries seemed to remove any doubt of the Government's active involvement in a scheme to injure Berry.

From proclamation of the municipality solicitor Johnson advised Berry to seek redress from the legislature because he believed that the proclamation gave legal cover to whatever was done regardless of its justice. He based this opinion on section 6 of the Municipalities Act\textsuperscript{38} which stated that

\begin{quote}
After the constitution of any municipality by any such proclamation, all previous proceedings hereinbefore required shall be deemed to have been duly taken; and no objection shall be allowed, on the ground of any defect or irregularity in such proceedings, or any non-compliance with the provisions of this Act.
\end{quote}

On the face of it this protected the Government in its unseemly conduct.

On the day the municipality was proclaimed petitions from Berry were presented in both Houses of Parliament praying each to adopt such measures as would ensure him justice.\textsuperscript{39} Henceforth Parliament was involved in the

\textsuperscript{36} See map showing the boundaries of the municipality as asked for by the petitioners and as granted by the Cowper Government, \textit{Nowra and Suburbs}, between 734 and 735. This map is far too large to include here or to have any clarity if reduced to fit these pages.

\textsuperscript{37} Report of the Select Committee appointed by the Municipal Council of Shoalhaven, on the Motion of Alderman Moss, to Consider and Report upon the gross misrepresentations in a Petition addressed by Alexander Berry Esq\textsuperscript{re} to the Governor-General dated 8\textsuperscript{th} April, on the establishment of the Shoalhaven Municipality, in Shoalhaven Municipality, encl. in J. Graham, Mayor to Col. Sec. 7/6/1860 60/4064, CSIL, Shoalhaven Municipality.

\textsuperscript{38} Johnson to Berry 16/1/1860, BP.

conflict with the Legislative Council reflecting the values of the old gentry and strongly supporting Berry while the Legislative Assembly took the popular side. A motion by Berry's friend Joseph Docker in the Council on 22 September for production of Berry's letter to the Governor General and all correspondence relating to it 'gave rise to a renewed and somewhat excited debate, in the course of which the conduct of the Ministry was seriously animadverted upon'.

The tenor of debate in the Assembly was less favourable to the great proprietor. John Garrett argued the case of the incorporators and secured an address for a return showing all land granted or sold at Shoalhaven. Lang cheekily supported printing of the petition, saying Berry had likened him to the devil and he wished to see 'whether he was compared to any other of the hon. and venerable member's friends'.

The Cowper ministry fell on 26 October 1859. At the beginning of January 1860 an appeal was made to William Forster, the new Premier, for review of Berry's memorial to Denison that the ministry might consider whether to take steps to relieve Berry of gross injustice in violation of the spirit as well as the letter of the Act. The reply was that as the municipality had been proclaimed the Government should take such steps as the municipal council requested. The Forster Government did not want to deal with even a blatant act of injustice when the votes were with those who applauded it.

In April and October 1860 and January 1861 the

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40 JLC, v V, pt 1, 1859-60, 17, 22 Sep. 1859; SMH, 23 Sep. 1859: LC 22/19/1859. For the return: Nowra and Suburbs.


42 Johnson & Johnson to Col. Sec. 5/1/1860 60/57, CSIL, Shoalhaven Municipality.

43 Principal Under Secretary to Johnson & Johnson 17/2/1860, CSIL, Shoalhaven Municipality.
Legislative Assembly appointed select committees to enquire into Berry's petition. For various reasons none of these committees functioned. This was fortunate for Berry because all were controlled by his opponents, to the extent that his principal enemies Lang and John Garrett found places despite pleas from a number of members to stand aside.44

On 19 April 1860 Docker obtained a select committee of the Legislative Council to report on the petition and all circumstances connected with formation of Shoalhaven Municipality.45 This committee of Berry's conservative friends was broadened a fortnight later by addition of Attorney General, J.F. Hargrave, a man persistently hostile to Berry.46 The committee gave the municipality every chance to present its case47 but it and its supporters demonstrated lack of regard for the Legislative Council. The Shoalhaven correspondent of the Illawarra Mercury dismissed the Upper House as a gilded mockery and predicted that it would soon debate 'a motion of sympathy with the great Alexander, for including his lands within the Municipality of Nowra'.48 The municipal council did not send witnesses and although it appointed a sub-committee to prepare a report on 'gross misrepresentations' in Berry's submission it demonstrated no sense of urgency, putting in its report only as the select committee was about to report49 and then in such a manner as to prevent its

45 JLC, v V, pt 1, 1859-60, 73, 19 April 1860.
46 Ibid., 78, 2 May 1860.
47 See for details SMH, 16 June 1865: LC 15/6/1865, Docker.
48 IM, 5 June 1860.
49 J.Graham, Mayor to Col. Sec. 7/6/1860 60/4064 encl. Report of the Select Committee appointed by the
The municipal council explained the wavy boundary lines by saying that Berry's known hostility to a municipality required exclusion of his tenants, who could not be expected to place themselves in antagonism to him. Otherwise it made no concessions to Berry's rights or predilections as owner of the land. Petitioners for the municipality, it said, had a 'higher view' than 'making Mr Berry the victim of taxation'. At no very distant date about twenty thousand acres of his vacant land suitable for agriculture or dairying must change hands, making way for settlement of a considerable population. Laying out of proper roads by a municipality was necessary for this. In pointing out that he had never taken money voted for the construction of roads Berry had forgotten to state that the reason was his desire to retain control over the course of roads. The assessment on his land within the municipality amounted to the paltry sum of £88 per year. Berry had paid only £7,529 13s for 15,426 acres of land within its boundaries, purchasing 10,362 of these acres in 1837 for £2,590 or 5s per acre. Sixty-five other owners of land in Good Dog Ward, north of the Shoalhaven, had paid £9,400 for 5,732 acres, or nearly £2,000 more for little above one third of his acreage. It would be unfair to frustrate the desire of so many purchasers for local government to satisfy a single individual 'who has already been so extensively benefitted at the public expense'. The committee rejected Berry's contention that his drained swamp land was fit only for pastoralism. The whole of it was of 'very superior quality' and most of it on the banks of a navigable river. For years past he had been receiving thirty to forty shillings an acre for it. Re-survey would result in land marked on maps of the estate as 'unprofit-

Municipal Council of Shoalhaven. For Berry's petition and this answer see Empire, 10 June 1862.

50 SMH, 16 June 1865: LC 15/6/1865, Docker.
51 IM, 18 May 1860.
able swamps' being found in excess of the grant and made available for housing as many as two hundred and fifty families. The municipality thus envisaged confiscation of part of the estate and used Berry's presumed impending death to deny him full control of his property. In arguments on costs and values no allowance whatever was made for Berry's pioneering work and his expenditure.

On 11 June 1860 Docker presented the report of his committee, endorsed by all members other than the Attorney General. It came down firmly on the side of Berry and was highly critical of the Government's refusal to consider his petition or allow him to put his case. Docker said that 'the details of this case were such as to call forth indignant feelings'. Deas Thomson believed Berry's assertions had been fully borne out. The boundaries of the municipality were 'most fantastical'. Miserable Nowra: a hamlet of a few slab huts, had been given control of an immense rural district. Berry's plea to be heard had been treated with contempt by the Government which acted as though it was above the Act. Both speakers spoke contemptuously of the municipal council. It was, said Docker, a 'burlesque' which 'boasted of aldermen who could not read, and a Mayor who could not write his name, nor complete an official document by his sign manual'. Charles Cowper, under pressure in a chamber where numbers were against him, undertook a spirited but unconvincing reply. Cowper denied any injustice to Berry and dismissed the report as what was to be expected from such a committee. Berry was an eccentric and morbidly selfish individual well known for complete opposition to all municipal institutions. The House adopted the report by fifteen votes.

52 JLC v V, pt 1, 1859-60, 103-104, 11 June 1860.
54 Report from the Select Committee on the Shoalhaven Municipality Petition, 11 June 1860.
to eight.\textsuperscript{55}

In his remarks Cowper directed attention to the fact that Robert Johnson was acting as solicitor for Berry in relation to Shoalhaven Municipality instead of his regular legal advisers Norton, Son and Barker. The implication was that the latter did not support Berry's stand. Berry never properly explained his change of solicitor but wrote in 1868 that when the Cowper Government began to oppress him James Norton the elder earnestly advised him to sell his property and leave New South Wales - but he was unwilling to submit to being 'HUNTED OUT OF THE COLONY'.\textsuperscript{56}

Resolutions passed by a meeting of ratepayers held at Nowra to consider the select committee's report were uniformly hostile to Berry and the report. This meeting wanted amendment of the Act for compulsory incorporation within a short period of all districts containing a set minimum population.\textsuperscript{57} The Shoalhaven correspondent of the \textit{Illawarra Mercury} dismissed as so monstrous that it would 'never be recognised by the representatives of the people' the proposition that a person possessing fifty or sixty thousand acres of the best land in the Colony, adjoining navigable streams, should be free from municipal control because the land was not populated. Taxation was the only means for forcing great landlords who had acquired nearly all the good land when it was given away 'for a mere nothing' to sell or rent for the common good.\textsuperscript{58} About this time Berry was seriously embarrassed by discovery that land within municipal boundaries long believed to be his and let out by David Berry was actually Crown land. On Moss's initiative the municipal council requested John Garrett MLA


\textsuperscript{56} Berry to the Governor and Executive Council 20/8/1868, Legislative Assembly, Municipalities. (Correspondence, etc., Respecting the Incorporation of Numba and of South Shoalhaven.), 23 Feb. 1869, 7.

\textsuperscript{57} \textit{IM}, 27 July 1860.

\textsuperscript{58} \textit{Ibid.}, 29 June 1860.
to secure a re-survey of all Berry's land in expectation that he would be found to be falsely laying claim to other land which would meet with ready sale and be 'at once redeemed from its present state of nature'.

As with the 'Shoalhaven Incubus' libels Berry's efforts to defend himself were proving counterproductive. His determination to resist an attack on the sanctity of private property in land was serving only to focus attention on the issue and strengthen denial of any absolute right to own and control land. Taxation was being openly advocated as necessary to ensure redistribution of ownership. Shoalhaven residents had to know that Berry was always eager to take more tenants than he could find. It was not mere access to land which his critics demanded.

Berry's inclination was to resist constitution of the municipality in the courts. Barrister Edward Wise was of opinion that irregularities in the application and violation of the letter and spirit of the Act by the ministry were fatal to the legal position of the municipality. In January 1860 Berry was advised to wait for an act of aggression, most probably issuing of an assessment for rates, and to sue the parties authorising it. A resort to the Supreme Court would either succeed in law or demonstrate that the grievous wrong done him could only be remedied by the legislature.

By mid June 1860 all rate assessments at Shoalhaven had been paid except those of the Berry brothers and two small settlers. Distress warrants were enforced around the end of September when forty or fifty horses were seized although sale of one proved sufficient to meet the levy.

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60 Robert Johnson to Berry 16/1/1860, BP.
61 IM, 15 June 1860.
This resulted in Berry commencing the action Berry v Graham and others: the 'Shoalhaven Municipality Case'. At the beginning of 1861 the Berry brothers were subjected to further distraint for non-payment of rates. In July 1861 Berry paid a rate assessment for £90 under protest to prevent his horses or cattle being injured as on the previous occasions and because the current mayor, Moss, was without responsibility or resources. It riled him that in crowing over his apparent surrender Lang's 'surface diggers' neglected to mention his protest.63

In February 1861 Henry Moss became mayor of Shoalhaven Municipality and ex-officio a magistrate. By statute the mayor of Sydney was given precedence on all magisterial benches sitting within the city bounds. Moss, like mayors of some other municipalities, claimed precedence on the basis of this enactment but met with resistance from a majority of the bench. The matter was referred to Attorney General Hargrave who ruled that a mayor had precedence at all meetings, magisterial or otherwise, within a municipality. The Illawarra Mercury exulted that this decision would prove 'a severe blow to the would-be Aristocrats of Shoalhaven' who recognised in ex-officio membership of the mayor the principle of elective magistracy and, forgetful of their own antecedents, presumed to scorn corduroy.64 For a time the magistrates stymied Moss by continuing to hear police cases outside the municipality at Numba where he had no entitlement to a seat.65 For Berry Moss's elevation to the mayoralty and to chairmanship of the Shoalhaven bench was evidence of degradation of the Colony. Where once convicts had been kept under wholesome restraint they now ruled. On his own

63 Berry to [David Berry?] 30/7/1861. He referred to an item in the Illawarra Express, 27 July 1861.
64 IM, 9 April 1861 & 4 Mar. 1862; SMH, 2 July 1862 : LA 1/7/1862.
65 IM, 7 June 1861.
testimony Moss had no regular employment or visible means of support.66

In mid 1861 the Cowper Government, which had done nothing to remove the injustices found by the Legislative Council select committee, began to use the Parish Roads Act, 4Wm IV No 11, as Berry saw it, in moves concocted by local 'surface diggers' to bleed him financially. On 5 July lines of road from Broughton Creek to Kangaroo Valley and from Bomaderry Creek to Mt Illaroo, the first stage of an intended road to Goulburn, were gazetted. Although these roads were laid out chiefly on lands of the Berry brothers the surveyor made no contact with them. Arguing that it was hardly rational to categorise these as parish roads Berry protested to the Governor in Council on his own behalf and that of his brothers. Another protest, embroidered by much emotive declamation about the malice of the Cowper Government, a prisoner of the mob, followed after three more roads passing through Berry properties for a total of twenty-three miles were gazetted on 17 September. Again no reference had been made to the Berrys. The Act was being perverted. These roads would pass through a mere cattle run and be of no use to the proprietors. If that from Broughton Creek to Bomaderry would serve any useful purpose it would be as part of a highway to the south.67

On 8 July Berry wrote to Governor Young, 'explaining the villainy of Cowper' in the matter of the municipality.68 Two days later the Private Secretary returned this letter with an expression of the Governor's regret that Berry should find the law press unequally upon him in this instance. Berry was stung to reply: 'it is not to unequal pressure of the Law, of which I complain, but it


67 Berry to Clerk of Executive Council 26/7/1861 (two letters) & 7/10/1861, copies, BP.

68 Berry to David Berry 12/7/1861, BP.
is the *Perversion* of the *Law*. He went on to traverse Moss's convict antecedents and central role in working out Lang's nefarious scheme and the manner in which the Cowper Government had embodied the municipality on the basis of a 'fraudulent' petition. At his request this letter, two further manuscripts and all official correspondence on the matter were forwarded to the Secretary of State for the Colonies with a plea for protection against the scheme of crushing him 'like a miserable earthworm'. 69 This was done on the advice of Sir Charles Nicholson as a basis for asking some member of the House of Commons to raise the matter in that chamber. 70 Sir John Young told Berry in conversation that he had been ill-used but that neither he nor the Secretary of State had any power to help him. Nevertheless Berry thought his appeal would 'produce a sensation'. Any colonial ministry disliked having a complaint against it to the Secretary of State. 71

Following submission of Berry's second protest concerning roads with a request that it also be forwarded to the Secretary of State construction of the roads was suspended. Within a week of receipt of the Duke of Newcastle's answer declining to intervene the roads were re-gazetted. Berry believed 'that they now think that they may oppress me with impunity and have determined to do so'. 72 In May 1862 he was writing despondently that he did not see 'where I am to get money to pay for making all the roads to be proclaimed in a few weeks'. 73

69 Berry to Young 13/9/1861 & 10/10/1861, F.Turville, Pte Sec. to Berry 14/9/1861 & 11/10/1861, Berry to Pte Sec. 10/10/1861, BP.

70 Berry to David Berry 21/3/1862, BP.

71 Berry to David Berry 18/10/1861, BP. In the event Nicholson did not carry out his promise to have the matter raised in the Commons: Berry to David Berry 21/3/1862, BP.

72 Governor Young to Berry 18/3/1862, Berry to David Berry 27/3/1862, quoted, BP; Berry to Sir Charles Nicholson 19/4/1862 (ML Ab 69/5).

73 Berry to David Berry 1/5/1862, BP.
When Berry sued Shoalhaven Municipal Council it
resolved to indemnify mayor James Graham against personal
loss, suspended works, took a bank overdraft to meet legal
costs, hired Sir William Manning QC and Peter Faucett as
counsel, and waited for a Sydney jury to decide whether it
'must fall at the bidding of one man merely because liberal
institutions are in advance of his antiquated notions'.74

Berry v Graham and another came to trial in August
1861 before Mr Justice Wise, who as a barrister had advised
Berry to commence the action. The municipality had made the
mistake of levying on the Messrs Berry but seizing and
selling only Alexander's property. Counsel for the
defendants agreed that council's conduct had been so
illegal, irrespective of the question of the legitimacy of
the municipality's creation, that they could not ask for a
verdict or judgment. Counsel for the parties agreed on a
verdict for Berry with damages of £68 and reference to the
Full Court of a special case to determine whether the
municipality had legal existence. A second action was
resolved by another arranged verdict for Berry with damages
of £76.75

Certain Shoalhaven gentlemen, considering the result
'a great victory over the Municipality', appointed a
deputation to present its compliments 'to the often
secretly maligned, but now openly and fulsomely lauded
manager of the estate'. The aldermen and their friends were
down in the dumps and showing 'lang wry faces'.76 After
greeting the verdicts with a querulous editorial77 the
*Illawarra Mercury* in a more considered opinion called on
the parties to show tolerance and forgiveness of wrong and
settle their differences without further resort to the

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74 *IM*, 25 June, 2 & 26 July 1861, quoted 26 July.

75 *IM*, 16 Aug. 1861, report Berry v Graham & anor., 13
Sep. 1861; *SMH*, 16 June 1865: LC 15/6/1865, Johnson.

76 *IM*, 10 Sep. 1861, letter from 'E'.

77 23 Aug. 1861.
courts. It was now prepared to say that

Mr Berry's position entitles him to expect a good deal of his own way, and a good deal he would get if he were not so determined to be offended when he is opposed. Nobody would be more popular, if he were not so terribly stiff and touchy.78

Further 'aggressions' left Berry in no mood to compromise.

The municipal council was without any funds and was advised not to attempt to enforce payment of rates until after its legality had been ruled on. It petitioned the Government for the Attorney General to take up and argue its case as the matters in contention 'bear entirely on the proceedings of the Executive under the Municipalities Act of 1858'.79 Attorney General Hargrave advised that it would be 'quite unconstitutional and open to great mischief' for the executive to interfere on the side of one private litigant and 'altogether improper' for the executive authority to appear 'to justify or explain any Act of Government'.80 The aldermen were left without aid to worry about how they would pay their law costs: a predicament which Berry felt to be entirely of their own making.81

The aldermen were certainly not inclined to back off. In a statement containing a reference to 'money power' they told their constituents:

It is a matter of regret with the Council that local improvements cannot be carried on. Owing to the obdurate obstinacy of Alexander Berry, Esq., - the only ratepayer holding large property within the Municipality - the public works are deferred and public business stands still, thereby clearly pointing out the source of obstruction.82

78 27 Aug. 1861.
80 Copy of opinion by John F. Hargrave, Attorney General ... 8/10/1861 61/4062, CSIL, Shoalhaven Municipality.
81 Berry to David Berry 18/10/1861, BP.
82 IM, 5 Nov. 1861.
The Berrys refused to supply the council with any information in respect of their property. It could not be ascertained what interest any one of them had in any portion of land or even its acreage. In order to deal with such obstruction and be in a position to act as soon as the legal issue was decided council revised its by-laws and submitted them to the Government for approval as a matter of urgency. The council in November 1861 assessed the rental value of Berry's unlet land at £3,478 per annum - although this was in excess of what the estate as a whole had ever returned, tenants were not on offer and anyone who rented land from him was derided as his 'serf'.

The issues in Berry v Graham were argued on 17 January 1862 before the Chief Justice and Mr Justice Wise. On 7 February they handed down a judgment which 'created a great sensation' by not only favouring Berry but calling into question the legality of a number of other municipalities. The judges cited case law in support of their finding that a proclamation of incorporation could not add land in excess of the area petitioned for. While no case law could be cited in support of the proposition that a town and rural area could not be united in one municipality on general principles of construction the language of the Act made it clear that towns and rural areas were to petition separately. Counsel for the municipality had placed much reliance on s6. The judges

83 Thomas Boyce, Town Clerk, Shoalhaven to Col. Sec. 19/11/1861 64/4935, with minutes by Attorney General 6/12/1861, CSIL, Municipalities 1860-74 Pt II (NSWA 4/795); Boyce to Col. Sec. 19/12/1861 61/5390, CSIL, Shoalhaven Municipality.

84 Berry to David Berry 29/11/1861, BP. At Berry's death his part of the unlet land - the bulk of it - was returned as yielding £1,470 per annum: Summary account of the real Estate Belonging to the late Alexander Berry Esqre on 17 September 1873, BP.

85 See, for example, petitions from the municipal councils of Wollongong and Shell Harbour, V&PLA, 1862, v V, 751, 757.
held that this was meant to cure minor irregularities but could not be taken to have an effect so sweeping as would place the executive above the statute and render unimpeachable every act done. In this case what was sought to be covered were incorporation of localities from which in effect no petition proceeded and union of a town and rural districts. These were not mere irregularities and not 'before' the issue of the proclamation but positive acts committed through the proclamation itself, which for that reason was rendered 'absolutely void'. Wise added as an individual reason for finding for Berry the defendants' submission to judgment without the taking of evidence in the second case before him the previous August.86

The victory of the 'obstuctive oligarch'87 aroused considerable discussion and uncertainty at Shoalhaven. Had the judges pronounced the municipality stillborn, dead or merely in a state of suspended animation pending a possible appeal? The aldermen, determined to fight on, asked the Government whether they were still a body corporate and empowered to approve estimates although not to enforce collection of rates? They were told they would be guilty of impropriety if they acted in a corporate capacity after the Supreme Court had refused to recognise the municipality as valid.88 A deputation was assured that the Government would meet their law costs.89 Although every penny raised in rates had been expended some ratepayers wanted their money refunded, including a few minded to 'go to law and ape Mr. Berry'.90

86 J. Gordon Legge, ed., A Selection of Supreme Court Cases in New South Wales from 1825 to 1862, Sydney 1896, 1493-1504; SMH, 8 Feb. 1862; Johnson & Johnson to Berry 8/2/1862, BP.

87 IM, 18 Feb. 1862, from a Shoalhaven correspondent.

88 Thomas Boyce, Town Clerk to Col. Sec. 3/3/1862 62/1180, with Attorney-General's minute 20/5/1862, CSIL, Shoalhaven Municipality.

89 IM, 4 Mar. 1862.

90 Ibid., 28 Feb. 1862.
On 19 February 1862 Berry sent a copy of the judgment to the Governor for forwarding to the Secretary of State as evidence that his complaint against the Cowper Government had not been made without good cause. On 3 March he submitted a copy of an hysterical letter which he had that morning sent to Chief Justice Stephen and asked that it also be forwarded.91

Berry's letter to Stephen was occasioned by his learning that since judgment Moss had appeared before Wise and on the strength of holding the office of mayor been sworn in as a magistrate and because he had 'every reason to believe' that Moss intended a fourth distraint on his property for rates and 'some reason' to believe that Attorney General Hargrave had sanctioned this. The effects the stress of the municipality affair had on Berry showed when he continued:

Under such circumstances, when the law is trampled on, it becomes necessary for every one, to revert to the first law of nature and to defend his property 'vi et armis'. This is the more necessary in my case, as Henry Moss (alias Moses) may be considered in the light of a pauper - indeed I have been informed, that there are already three executions against him at Shoalhaven to which the return has been 'Nulla Bona'.

Therefore I feel it imperative on myself to proceed forthwith to Shoalhaven to rescue my property from these ruffians who have been illegally constituted 'surface diggers' on my Estate by the Cowper Government and if I am able to capture any of these Marauders, I shall bring them to Sydney, for the purpose of bringing them before the Supreme Court. It would be worse than useless to appeal to the Magisterial Bench at Shoalhaven, as both Graham and Moses are Magistrates ....

Therefore I have no other alternative, and if bloodshed results from this proceeding, Mr. Cowper, will be answerable to God and Man for all the Consequences.92

Berry's letters to his friends about this time are likewise full of his determination to maintain the unequal struggle and outlast the efforts of the 'Robespierreen' Cowper Government - more corrupt if less sanguinary than its

91 Berry to Sir John Young 3/3/1862, copy, BP.
92 Berry to Sir Alfred Stephen 3/3/1862, copy, BP.
French predecessor - which had virtually outlawed him and was attempting to ruin him by the expense of defending himself. Berry recounted how John Robertson, Cowper's Minister for Lands, whom he had known since he was a boy, came into the Surveyor General's office while he was there making an enquiry. Robertson held out his hand which Berry refused saying, 'No Mr Robertson, we are not friends, you are one of the many who have returned me evil for good'. Robertson looked blank and walked out without a word.93

In the event Moss did take a seat on the Shoalhaven bench. Kenneth Mackenzie questioned his right to do so and Moss replied that things stayed as they were pending a decision on appeal to the Privy Council.94 The council issued rate assessment notices as a matter of form. Berry, concerned that it was acting to levy on him a fourth time, in increasing amounts each time and despite the judgment of the Supreme Court, repaired to the Equity division and in Berry v Moss obtained a perpetual injunction restraining the council from acting as a municipal body.95

Berry's solicitors took out executions against Graham and Moss as nominal defendants for the municipality. The Cowper Government thereupon paid out of the unforseen contingent fund, until voting of the money by Parliament, £1,222 9s 2d to cover damages and costs on both sides. Payment was made on condition that the council seek leave to appeal to the Privy Council and repay the money unless that tribunal also ruled the municipality to be illegal.96

Cowper justified preempting Parliament on the ground that

93 Berry to C.B. Robinson 19/4/1862, BP; Berry to Sir Charles Nicholson 19/4/1862, quoted, & 17/5/1862 (ML Ab 69/5 & 4 respectively). Robertson had migrated with his parents on the Royal George in 1821.

94 IM, 3 June 1862: proceedings Nowra Police Court 27/5/1862.

95 Berry to David Berry 31/5/1862; IM, 10 June 1862.

96 Berry to Sir Charles Nicholson 19/4/1862 (ML Ab 69/5); Berry to David Berry 28/4/1862, BP; Empire, 11 June 1862: LA 10/6/1862; SMH, 13 June 1862: LC 12/6/1862; IM, 31 July 1863, ed1.
the honour of the Government was to a certain extent involved for it could hardly see men who gave their time to local government made to suffer for what had been an executive blunder. There were objections in the Legislative Assembly against the payment as hasty, ill-advised and unconstitutional.\(^97\) James Martin later gave notice of a censure motion\(^98\) but the Government fell before it could be moved. Berry was worried that the expense of a Privy Council hearing would be 'ruinous'\(^99\) but did not take solicitor Johnson's advice to petition for his costs on the ground that as the Government had paid the expenses of the oppressors it could hardly scruple to pay those of the oppressed.\(^100\)

On 28 May 1862 Attorney General Hargrave introduced into the Legislative Council a 'Bill to remove Doubts arising under the Municipalities Act of 1858': a drastic piece of retrospective legislation by which anything done under the 1858 Act was to be deemed lawful, all rates ratified, all aldermen and every council indemnified notwithstanding any law, statute or judgment to the contrary.\(^101\) Berry had feared that the Cowper Government would bring in a Bill which would permit its adherents to 'play the devil'.\(^102\) When he saw its terms he fumed that it was so 'infamous' that its authors 'deserve to be damned not only in this world but the next'.\(^103\)


\(^98\) V&PLA, 1863-4, v I, 647, for 25 Nov. 1863.

\(^99\) Berry to David Berry 5/5/1862, BP.

\(^100\) Berry to David Berry 26/6/1862, BP.

\(^101\) JLC, v IX, pt I, 1862, 8, 28 May 1862; SMH, 20 May 1862: text of the Bill.

\(^102\) Berry to David Berry 22/5/1862, BP.

\(^103\) Berry to David Berry 31/5/1862, BP.
Encouraged by conservative friends in the Legislative Council Berry petitioned against the Bill. His counsel, James Martin QC, was permitted to address the House from the bar. John Smith, small farmer and strong Berry supporter, also petitioned alleging that the municipality had been 'conducted throughout in an arbitrary and unprincipled manner' causing him damage in excess of £100 through distress and sale of his property.

The *Sydney Morning Herald* denounced Hargrave's Bill as 'an example of oppression and misgovernment to which there are few parallels in the annals of law and administration'. If enacted the Government and its supporters would have power to violate every law and carry on a 'practical suppression' of the Supreme Court. The question was so associated with the name of Mr. Berry that, although now of high public importance, it is commonly regarded as his case, and with many sympathy or antipathy fastens upon the whole subject in proportion as he is the object of admiration or hatred - and we may observe that he commands the first sentiment as distinctly as the last.

From a district once considered of no value Berry had 'by persevering enterprise and immense outlay of capital' formed an estate perhaps equal to any in the British Empire which excited the envy of the multitude. It was astonishing that in old age he should be 'harrassed by a persecution which, for meanness and insolent injustice, has scarcely a parallel even under democratic Governments'. Those who regarded protection of private rights as one of the highest

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104 Berry to David Berry 31/5/1862, BP; *JLC*, v IX, pt I, 1862, 10-11, 4 & 5 June 1862; 747-749, *Municipalities Indemnity Bill (Petition from Mr. Alexr. Berry in Opposition to)*, 5 June 1862.

105 *JLC*, v IX, pt I, 1862, 13-14, 11 June 1862; *SMH & Empire*, 12 June 1862: LC 11/6/1862.

duties of government would rejoice that this oppression was
met by a man of strong will, capable of contending against
the combination seeking to injure him. This was the most
important duty a patriot could discharge.  

When Hargrave's Bill was debated in the Legislative
Council it met with strong and general condemnation as an
insult to the Supreme Court and to the legislature. No
member would second it. Deas Thomson called it 'a monstrous
piece of legislation' got up to cover a conspiracy to
defraud Berry. Sir William Manning, principal counsel for
the municipality, joined in the condemnation.  

In October 1861 Berry received an address from his
tenants expressing sympathy and congratulating him on his
victory in the Supreme Court. In a very sour comment the
Illawarra Mercury's correspondent insinuated that this was
a politic act of sycophancy by men conscious that their
leases would soon come up for renewal. Berry himself was
unimpressed: 'This pretended demonstration comes very late
- and only after I got a verdict against Graham - and is
now of little moment'. Subsequently a deputation invited
him to accept a testimonial dinner from the tenants. This
event took place at the Numba hotel in April 1863 with the
Berry brothers as guests of honour, H. G. Morton in the
chair and 310 people present, of whom about 250 were
tenants and some of the remainder Berry employees. A number
of Shoalhaven inhabitants not resident on the estate,
including some who supported Berry's political opponents,

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107 5 June 1862, edl.

108 JLC, v IX, pt I, 1862, 15, 12 June 1862; SMH & Empire,
13 June 1862: LC 12/6/1862.

109 IM, 13 Sep. 1861.

110 Berry to David Berry 18/10/1861, BP.

111 Berry to David Berry 23/2/1863, BP; Berry to Rev. G.
Walker 29/1/1868, in Letters from Alexander Berry,
Esq. to Rev. George Walker, D.D., (carbon typescript,
ML), 24.
chose to attend but a report implies that local member John Robertson declined an invitation. A German band was brought from Sydney, the editor of the Sydney Morning Herald sent his best reporter and three friends accompanied Berry from Sydney for the occasion. The toast to Berry's health was received with enthusiasm but the event as a whole 'passed off very quietly'.

Whatever his reservations arising from timing of the event Berry was naturally pleased to receive this public demonstration of respect from so numerous a body of the very people Lang and other traducers alleged he oppressed. An obituary notice said that Berry and his brothers were 'much gratified' by this mark of respect and 'have often since alluded to it with evident pleasure' but a Scottish report based on Berry's letters to a boyhood friend noted that he 'seems to have taken the popular applause quite philosophically'. Certainly Berry was suspicious of the motives of anyone not an intimate and despised mere numbers as the measure for anything in human affairs.

Although all court verdicts had been in Berry's favour his costs by December 1863 amounted to the better part of a thousand pounds. He had recently paid £150 costs in the injunction case Berry v Moss and was determined to recover from Moss and Graham. He believed they would not be able to find the money and that the Martin Government would not provide it. He was persuaded to proceed against all six ex-aldermen as a lesson to the lot and when property of the three from Good Dog ward was attached all six paid an equal


113 SMH, 6 Oct. 1873.

114 St Andrews Citizen, 21 Dec. 1889.

115 Berry to David Berry 7/12/1863, 18/12/1863 & 20/1/1864, BP.
share of the amount, swelled by expenses of recovery to £182 9s 8d. As the aldermen had not opposed Berry's injunction application it caused general surprise that costs could amount to anything substantial and a feeling amongst municipality supporters that the Government should pay. Lang was approached for political assistance. The ex-aldermen petitioned the Legislative Assembly praying relief. They were brought under added pressure when their own solicitors threatened to sue for unpaid expenses. Garrett presented another petition for relief and moved for sums to be placed on the Additional Estimates. Premier Martin pointed out that the petitioners had brought these costs on themselves by indicating their intention to pursue their course after losing three actions. Nevertheless he conceded that it was a hardship that they should have to pay and persuaded Garrett to withdraw his motion by saying that the Government would bring in legislation to revive the municipality. They could then be reimbursed from rates. This was far different from outright rejection of payment, ruinous to Graham, which Berry had expected.

In August 1864 the Martin Government did introduce an abortive District Council Bill. To Berry's dismay and disgust it would have given the vote to 'every bush ranger robber or murderer who pays one pound'.

In 1866 the ex-aldermen's supporters obtained a select

116 *IM*, 23 Dec. 1863 & 15 Jan. 1864; Part of a letter to J.D.Lang 22/1/1864 JAF 158/462, Lang Papers (NLA MS 3267), Series 1, Box 2.


120 Berry to David Berry 20 & 21/4/1864, BP.

121 Berry to David Berry 3/8/1864, BP.
committee of the Legislative Assembly with Cowper as chairman and Lang a member but no one identifiable as sympathetic to Berry. Predictably it reported that the petitioners had a 'strong claim' to indemnification. In August 1867 another Martin Government refused to implement the recommendation because the ex-aldermen had acted in defiance of a decision of the Supreme Court.

The nominal defendants in the Shoalhaven Municipality Case petitioned the Privy Council, out of time, for leave to appeal against the decision in general of the Supreme Court. The Privy Council gave leave only for the question of whether the municipality was duly constituted. They were to pay Berry's costs whatever the result and he was to retain damages and costs awarded in the Supreme Court. The Privy Council would not proceed without ample security for costs and it was not until 1864 that the New South Wales Government paid £1,000 into court. Argument was heard early in 1865 and judgment given on 26 May 1865.

In a verdict which pleased neither side the Judicial Committee upheld the decision of the Supreme Court, ruling the municipality illegal because it incorporated territory the owners of which had not sought to have it included, but reversed the finding that towns and rural areas could not be joined, saying that incorporation depended on a proclamation and no Governor and Executive Council was likely to sanction an unjust connection. Berry cried

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122 Legislative Assembly, Report from the Select Committee on Shoalhaven Municipality, 21 Dec. 1866.


125 Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Graham and Bindon v
'Shame upon the senseless Dotards. Govr Denison did sanction such a nefarious proceeding'. The Government and other supporters of the aldermen had been led by the appellants' English solicitor to expect a win.

Berry had long realised that he could achieve only a pyrrhic victory in the courts. Cowper would pass new legislation. By late 1864, when he considered David still not awake to the ruinous prospects of municipal institutions for the owner of such a property as theirs Berry professed to believe that he 'did very wrong' to resist oppression and 'ought to have succumbed & cut the Colony'. The struggle had been 'very expensive'. Berry calculated his unrecoverable disbursements at £1,040. Although the costs of his opponents for his equity action were paid from the public purse he recovered nothing from them.

As the Government had been so heavily involved it seemed to a majority of parliamentarians unjust to leave the aldermen to be ruined by their costs so sums of £1,000 for the Privy Council appeal and £1,722 9s 3d for the Supreme Court hearing in 1862 were voted on the Supplementary Estimates. Berry's supporters objected

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Berry, from New South Wales; delivered 26th May, 1865, in Pamphlets Collected by Mr. Justice E. Wise (ML A857), 427-433; Lagge, ed., A Selection of Supreme Court Cases, 1504-1510; IM, 18 Aug. 1865, text of judgment.

126 Berry to David Berry 25/8/1865, BP.
128 Berry to David Berry 20/4/1864, BP.
129 Berry to David Berry 29/11/1864, BP. See similarly Berry to David Berry 15/7/1863, BP.
130 Berry to David Berry 8/5/1865, BP; Berry to G. Walker 29/1/1868, Letters to Rev. George Walker, 23.
131 JLC, v XII, 1865, 122, 13 June 1865.
strongly to the public purse being drawn upon to rescue aldermen who had persisted in a course of action despite a series of adverse judgments and who asked for Government intervention only after a decisive loss. Several members of the Legislative Council spoke of a conspiracy between Lang, the Shoalhaven aldermen and the Cowper Government to oppress and mulct Berry.\(^{132}\) The *Sydney Morning Herald* thought that if 'the cost of abusing the law had fallen upon those who designed and executed the abuse it would have taught a wholesome lesson'.\(^{133}\) Berry considered payment of his persecutors' costs a shameful act.\(^{134}\) He was particularly incensed by Cowper's remark that

it was a singular fact that in this country those who had obtained large estates for little or nothing were generally the most obstinate obstructors to the improvement of the country, and the last to give support to those municipalities.\(^{135}\)

Cowper was determined to keep propagating the lie that he had obtained his land for 'little or nothing'.\(^{136}\)

Cowper and his parliamentary following had become locked in to the Shoalhaven Municipality affair by the popularity amongst their constituency of the anti-Berry line. As far back as October 1861 Robertson remarked to Augustus Morris, an MLA sympathetic to Berry, that the Government 'had been fairly taken in about the Municipality'. Early in 1865 Charles Cowper reportedly told H. G. Morton that the Shoalhaven Municipality affair was

\(^{132}\) *SMH*, 4 May 1865: LA 3/5/1865, 15 June 1865: LC 14/6/1865; *JLC*, v XII, 1865, 122, 13 June 1865.

\(^{133}\) *SMH*, 8 May 1865, edl.

\(^{134}\) Berry to David Berry 16/3/1864, quoted & 22/3/1865, BP.

\(^{135}\) *SMH*, 4 May 1865: LA 3/5/1865.

\(^{136}\) Berry to David Berry 4/5/1865, BP. Berry wrote what was, for him, a mild letter of correction but John Fairfax's son refused to accept it for publication other than in a severely mutilated form, and then only as an advertisement. Berry to Charles Cowper 5/5/1865, per *SMH*, Berry to David Berry 8/5/1865, BP.
ridiculous; that it was one of many scrapes Lang had got him into and he did not know how to get out of it.137

In November 1865 the Cowper Ministry brought in a new Municipalities Bill differing chiefly from the 1858 Act in giving aldermen more power. Shoalhaven was amongst places declared by the Bill to be duly constituted municipalities. Berry wrote to a number of members of Parliament asking them to vote against the measure, even addressing privately J. H. Plunkett who had become Cowper's Attorney General.138 Berry contended that the Bill, like the Act it was to replace, violated the great principle of taxation by representation, being designed 'to convert the Lacklanders into a taxing Machine to tax the Landholders and to spend the money at their discretion'. Cowper would argue that the people would be taxed by their own representatives, but 'such an assertion is an impudent and barefaced fallacy'. Under the Shoalhaven Municipality he had no vote and no influence and none of the assessments levied on his land were expended on it. He had made all roads on his estate and although for a period of years a sum was voted for the road from Kiama or Gerringong to the Shoalhaven crossing not a penny had ever been spent on that part which passed through his property. He wanted no government money, only 'to be let alone, and not oppressed'.139 The Bill died when the Cowper Government fell on 21 January 1867.

To a considerable extent Berry had been vindicated in his prophecies of problems from linking towns and rural

137 Berry to David Berry 18/10/1861 & 4/5/1865, BP.

138 Berry attributed drafting of the Bill to J.F.Hargrave: Berry to [Robert Isaacs] 9/11/1865, BP. He had remarked earlier that Hargrave was a 'great scoundrel' and an 'ignorant ass' and, prophetically, that he feared 'that these qualifications will be sufficient for the purpose of his being appointed a judge': Berry to David Berry 16/6/1865, BP.

139 Berry to Robert Johnson 6/11/1865, to [Robert Isaacs] 9/11/1865, to J.H.Plunkett 10/11/1865 and see also Berry to James Martin 12/2/1866, BP.
areas in municipalities and discontent over expenditure of rates.

In 1859 a Kiama Municipality was created, despite his opposition, which included all of David Berry's land and much of his own at Gerringong.\footnote{IM, late 1858 & 17 Jan. 1859; Berry to David Berry 8/4/1859 & 6/7/1863, BP.} Berry predicted that Gerringong people would come to rue asking for inclusion for they would be 'regularly robbed and plundered by the Kiama Butchers, Bakers & publicans' under 'a system of corruption, fraud and robbery'.\footnote{Berry to David Berry 7/11/1859, BP.} As early as December 1860 there was a meeting of sorts at Gerringong to consider grievances concerning the municipality.\footnote{IM, 6 Jan. 1860.} In 1862, following the Supreme Court decision in Berry v Graham, a large number of rural residents of Kiama Municipality petitioned Parliament against any alteration of the law to allow incorporation of rural districts with towns, alleging that in their case the 'great bulk' of rates raised in rural areas had been expended in the town to their 'manifest disadvantage'.\footnote{V&PLA, 1862, v I, 237, 23 July 1862, Incorporation of Municipalities. (District of Kiama)., (V&PLA, 1862, v V, 719).} In his letters to David, Berry professed a lack of sympathy for their tenants for they had made negroes or slaves of themselves. At the same time he considered spending fifteen per cent of revenue raised in Gerringong and Jamberoo on Kiama Ward 'a regular Swindle and Robbery'\footnote{Berry to David Berry 6/7/1863, BP.} and of borrowed public money to erect a monument over the grave of the late mayor as illegal.\footnote{Berry to David Berry 9/7/1863, BP.} He gave advice and assistance to those agitating for the disjoining of Gerringong.\footnote{Berry to David Berry 11, 12 & 14/12/1863, BP.}
Similarly at Shoalhaven there was by February 1861 a movement for separation of Good Dog Ward from Nowra ward on the ground that the interests of the wards were antagonistic and because of the inconvenience of having to cross the river to transact business. There was no local opposition to separation once the matter of Berry's law suits was resolved but insistence that meanwhile the wards remain united so that law costs would not fall entirely on Nowra ward. That there was still a propensity for aggression against the Berry estate was indicated by a petition for extension of Good Dog ward's current boundaries to the mouth of Broughton Creek: an extension which would take in about sixty of Berry's tenants at Bolong, not one of whom had signed the petition and fifty-three of whom signed a counter-petition. Berry offered to provide an iron cross as 'a Symbol of freedom and a badge of distinction' to all Good Dog residents who had opposed incorporation to distinguish them from Moss's and Hyams's white niggers who had supported it.

Berry's strategy was to use the respite provided by his legal challenges to get as much land tenanted as possible to shift the rate burden by the time unchallengeable local government legislation was enacted and then to form his own municipalities. From the desire of small settlers to own their farms and David Berry's persistence with unsuitable terms little headway was made.

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147 Petition from householders of municipality of Shoalhaven, Government Gazette, No. 165, 8 July 1861, Third supplement.


149 John Bindon to Col. Sec. 20/9/1861 61/3963, CSIL, Shoalhaven Municipality.


151 Berry to David Berry 6/7/1863, BP.

152 Berry to Hamilton Hume 25/6/1872, BP.
with leasing.\textsuperscript{153}

In May 1867 there were moves to petition for a new Shoalhaven Municipality under the 1858 Act. Berry suggested to his brother that they arrange applications for municipalities for tenanted Berry lands south of the Shoalhaven and on the north side west of Broughton Creek, leaving them to manage Coolangatta by themselves.\textsuperscript{154} By early July there were petitions for no fewer than five municipalities at Shoalhaven in place of the defunct one. The \textit{Empire} condemned the notion of a single landowner, even of a 'great principality', being allowed to form municipalities confined to his own land and tenants he had power to tame. Fragmentation brought on by this move was unfair to the district as a whole.\textsuperscript{155} Berry did not like the idea either. He considered the tenants a 'rather unmanageable set' and municipalities confined to them only the lesser of two evils.\textsuperscript{156}

Berry did not secure his municipalities without a fight and this time with help from his political friends. The petition for Berry's proposed municipality of Numba was signed by 91 householders but 162 signed a rival petition for a municipality of South Shoalhaven which would have incorporated all of the southern bank.\textsuperscript{157} According to Berry the 'outsiders' were united only in a desire to dip their hands into his pockets.\textsuperscript{158} The Martin Government approved the petition for Numba and disallowed that for

\begin{footnotes}
\item[153] Berry to David Berry 21/4/1864, BP.
\item[154] Berry to David Berry 29/5/1867 & 4/6/1867, BP.
\item[155] 7 Aug. 1867, repeated \textit{IM}, 13 Aug. 1867.
\item[156] Berry to David Berry 29/5/1867, BP.
\item[157] Petition for Incorporation of South Shoalhaven, Legislative Assembly, \textit{Municipalities (Correspondence, etc., Respecting the Incorporation of Numba and of South Shoalhaven)}, Return 23 Feb. 1869, 4-5, (\textit{V&PLA}, 1868-69, v III).
\item[158] Berry to David Berry 24/3/1868, BP.
\end{footnotes}
South Shoalhaven and proclaimed incorporation of Numba on 24 October 1868, four days after its resignation, over the countersignature of the Colonial Secretary, Berry's champion Joseph Docker.\textsuperscript{159} Alfred Elyard and James Aldcorn, appointed by petitioners for South Shoalhaven to remonstrate with the Government on the procedure and the decision, complained that it was

in the highest degree inexpedient to put our roads at the mercy of Mr. Berry's mayor, Mr. Berry's aldermen, Mr. Berry's rates, and, in fact, of Mr. Berry, as autocrat. We do not suppose a rate will ever be levied in his domains; and though we certainly cannot blame Mr. Berry for taking his own view of his interests we feel that public policy was against granting his petition to the exclusion of ours.\textsuperscript{160}

For Berry this complaint demonstrated the desire of Terara people to victimise him by extracting money to spend on their own properties.\textsuperscript{161} The Municipality of Bomaderry and Broughton Creek was gazetted on 26 October 1868.

Fragmentation of both old municipalities of Shoalhaven and Kiama\textsuperscript{162} bore out Berry's predictions that in incorporation of broad districts without real community of interest rural dwellers would find themselves taxed for the benefit of distant towns or remote localities. During 1869 a petition was submitted to the Government for resurrection of a municipality of Shoalhaven but it was defeated by a counter-petition got up by large landowners satisfied with the status quo.\textsuperscript{163} By securing estate municipalities Berry

\textsuperscript{159} Proclamation of the Municipal District of Numba, 24/10/1868, Municipalities, 12. Parliament had passed a new Municipalities Act in December 1867.

\textsuperscript{160} Elyard and Aldcorn to Col. Sec. 17/11/1868, Municipalities, 13-14.

\textsuperscript{161} Berry to David Berry 9/11/1868, see also letter 16/8/1869, BP.

\textsuperscript{162} On 24 April 1871 Kiama was split into three new municipalities. For the problems and process leading to this see the papers collected in CSIL, Broughton Vale Municipality 1871 (NSWA 4/787.1).

\textsuperscript{163} William A. Bayley, History of Shoalhaven, Nowra 1965, 87; Berry to David Berry 28/12/1871, BP.
was able to turn temporary triumph over the old Shoalhaven Municipality into continuing defeat of Moss, Hyams and other 'surface diggers'. Berry told Hamilton Hume that the two municipalities, the mayors and aldermen of which were all his tenants, had the advantage of allowing the tenants to make their own roads. However tenant support for his municipalities had to be purchased by the estate continuing to do much at Berry expense which would otherwise have fallen to local government. As his life approached its close Berry had secured a situation which he could live with, although it was philosophically offensive and marked by periodic annoyance at limitation of his freedom of action or what he saw as unreasonable or unwise aspirations or expectations. He had achieved as much in limiting the effects of local government as he could reasonably have hoped for.

For about eight years from 1858 Berry also fought schemes to bring Crows Nest estate under municipal incorporation. He considered himself a public-minded citizen deserving to be left in peace. The public was accommodated by use of two roads built at his expense. Although he made no use of the principal road running from Blues Point northward he was in the habit, as an act of neighbourliness, of contributing towards its repair and although he crossed the harbour in his own boat he had subscribed £1,000 in total to steam ferry companies establishing services to the North Shore.

During November 1858 Sir William Burton, who lived in the township of St Leonards, organised a committee to seek incorporation of the township and whole parish of Willoughby. Berry learnt of this when Burton solicited his support. He replied that he could see 'no reason why I should offer myself a voluntary victim'. A public

164 Berry to Hume 25/6/1872, BP.
165 Berry to Sir William Burton 10/11/1858, Legislative Assembly, Town and District of St. Leonards. (Correspondence respecting boundaries of.), Return 16
meeting carried the proposal to seek incorporation by only one vote but some hundreds of people, including two other Legislative Councillors, signed a counter-petition organised by Berry. Faced with such strong opposition proponents of incorporation accepted that their cause was hopeless.166

Berry had won a battle but not the war. John Dunmore Lang reminded him of the threat, writing in the second 'Shoalhaven Incubus' letter that Berry 'the doomed victim of Municipal taxation', was likely to be as much a marked man for taxation at the North Shore in this harbor as he is at Shoalhaven. Horror of horrors! They are talking of a Municipal Corporation at St. Leonard's also, where Mr Berry is lord of the manor, and doubtless as fair a mark for Municipal taxation as he is even at Shoalhaven.167

At the end of 1859 Burton and his supporters changed tack and sought incorporation of the town enlarged to take in Crows Nest estate but not the bulk of Willoughby. Berry submitted a counter-petition signed by sixty-five householders and landowners, observing that a principal object of the application was 'to render my estate...liable to be assessed ad libitum, and at their discretion, for... municipal purposes in which I had no interest'. It was part of 'as rabid a warfare of the lacklanders and their leaders against the landholders of the Colony as there was in France during the first Revolution'. The Robertson Government on 30 March 1860 proclaimed incorporation of St Leonards with only a trifling extension of boundaries to take in portions of Crows Nest alienated in small allotments and two adjacent areas where villas had been

June 1865, 4; Berry to C. Robinson 23/11/1858, BP.

166 Berry to C. Robinson 23/11/1858, Berry to Captain Mann 1/12/1858, Berry to Dr J. Mitchell 2/12/1858, BP; Berry to Col. Sec. 14/2/1860, Town and District of St. Leonards, 3.

167 IM, 27 Dec. 1858.
Colonial Secretary Cowper was reported to have said the Government would 'never hear the last of it' if Crows Nest were included. When denied Berry's estate the petitioners left the municipality inoperative. Berry felt that while the Shoalhaven Municipality Case remained unresolved his political opponents would not move lest their purpose of ruining him be made blatantly obvious but that a decision in that case adverse to him would be followed by incorporation of Crows Nest into St Leonards.

At the beginning of 1866 139 inhabitants of St Leonards petitioned for extension to include Crows Nest without the knowledge or consent of Berry or of any householder residing on the estate. A counter-petition was signed by every one of those householders. Berry wrote that this was the third time that the petitioners had attempted to prevail upon the Government, to grant them my farm, as an endowment .... If their petition was granted, it would amount to virtual confiscation of my property. Their avowed intention, is to employ the assessments on my property in making and repairing the streets of St Leonards, and to give employment to the draymen, who signed their petition, or perhaps to a certain class of jobbing contractors.

They were well aware that he had been under the ban of the Cowper Government and put to enormous expense in defending himself. They seemed to think him 'fair game for their rapacity'. As the signatories to Berry's counter-petition did not exceed the number for the petition the Municipality of St Leonards was proclaimed on 31 May 1867.

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168 Correspondence printed *Town and District of St. said Leonards*, 1-10.

169 Berry to C. Robinson 19/4/1862, BP.

170 Berry to David Berry 26/6/1865, BP.

171 Berry to James Martin, Premier 12/2/1866, BP. See also Berry to Joseph Docker 19/4/1866, *Public Men of Australia* (ML A68), 666-668; Berry to Col. Sec. 12/2/1866 66/1737 & 13/2/1866 66/1738, CSIL Register 1866.
with boundaries which took in Crows Nest.172

At first Berry reacted petulantly. Under the Act of 1858 councils had power to tax unoccupied buildings and Berry's store at Berry's Bay had stood unused for many years. Rather than pay rent for it to the 'quasi robbers' of a municipality he threatened to hoist a black flag over it, unroof it, paint the walls with coal tar and place a suitable inscription on it as a warning to strangers who might visit the harbour to beware of investing in property in New South Wales.173 Some months later he remarked calmly that as Crows Nest had been taken into St Leonards the whole estate would in time become part of the town.174

The 'Shoalhaven Incubus' and Shoalhaven Municipality affairs deeply scarred Berry's psyche. He conceived an absolute detestation of Charles Cowper whom he considered 'as great a rascal as Lang himself'175 but more culpable in that he acted in breach of the trust associated with high public office.176 He saw Cowper as 'utterly devoid of principle. His only attribute is low cunning'.177 In pursuit of popularity Cowper had entered into a conspiracy, closed the courts of justice to him and abused office by acting partially and misappropriating public funds to pay the legal costs of fellow-conspirators.178 So obsessed did Berry become with Cowper's vendetta that over the last

172 Supplement to New South Wales Government Gazette, 31 May 1867. The background to this decision is unclear. The collected papers on the matter are missing from the end location indicated in the CSIL Register.
173 Paper headed Case, 10/6/1867, BP.
175 Berry to David Berry 26/6/1865, BP.
176 Berry to William Lithgow 4/10/1859, BP.
177 Berry to David Berry 23/12/1864, BP.
178 Berry to Sir William Burton 22/2/1860, BP.
fifteen years of his life he was rarely able to mention any political issue, publicly or in private, without injecting Cowper and his iniquities into the discussion. As one commentator remarked, Cowper came to occupy much the same position in his thoughts as King Charles's head did for Dickens's character Mr Dick in *David Copperfield*.\(^\text{179}\) The obsession added to Berry's reputation for eccentricity and on occasion caused no little annoyance to friends.\(^\text{180}\) Berry also detested Lang, 'the dismissed & disloyal Clergyman',\(^\text{181}\) whom he referred to as 'Auld Nickie Ben' or the Chaplain to Satan. Lang at least was not abusing public office in pursuit of his malice and had long since lost credibility with 'respectable' sections of the community.\(^\text{182}\)

Berry's hatred of taxation and fear of municipal rates as the means whereby the poor and landless would force subdivision of large estates were characteristic of the Colony's 'old' gentry. Rating has been historically an important method for forcing subdivision. Berry differed from other old landowners in the extent of his land suited to small-scale farming and near water transport to the market of Sydney, his aggressively outspoken adherence to what poorer colonists considered an unjust social philosophy and in being a particular target of the immensely influential John Dunmore Lang. Berry did not succeed in preventing his subjection to local government

\(^{179}\) *DT*, 5 Oct. 1889, obit. for David Berry.

\(^{180}\) Berry to William Carter -/8/1865, BP, where Berry attempts to justify his attitude to this friend of forty years after causing him 'great annoyance'.

\(^{181}\) Berry to Sir William Burton 22/2/1860, BP.

\(^{182}\) Despite his growing political following Lang had little support amongst Presbyterians, many of whom saw him as an embarrassment to the Church. Interestingly Lang makes no mention of the 'Shoalhaven Incubus' letters or his clash with Berry in the 1875 edition of his *An Historical and Statistical Account of New South Wales*. 
but was neither ruined financially by it nor had his estates compulsorily broken up.

The Shoalhaven Municipality affair had a profound effect on local government in New South Wales for decades to come. Abuse of the Act of 1858 and vindictiveness towards Berry discredited the practice of linking town and country and brought acceptance on all sides of a need for separate provisions: the very thing which conservatives had asked for in 1858.\(^{183}\) Berry was vindicated in his arguments that it was premature to think of instituting a general system of local government and that country people were seldom interested in more than roads and bridges. The provision for forming local bodies only at the request of residents was retained from the 1858 Act in a new Municipalities Act of December 1867. Residents of much of the country chose to remain unincorporated into this century and to obtain roads from the Government. The capacity of local government to harm large property holders was weakened by relating voting power to value of land held, to the extent of up to four votes.\(^{184}\) Berry's plea that it is 'unjust' to raise rate revenue in one locality and expend it in another was very soon echoed and to this day remains a potent cause of dissatisfaction with local government.

\(^{183}\) SMH, 3 July 1863, 4 Dec. 1866; Hirst, \textit{op.cit.}, 261.