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## **The “Littlewood Treaty”: An Appraisal of Texts and Interpretations.**

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### **Introduction**

1. I have been asked by the Treaty of Waitangi Information Unit to review the historical literature relating to the Littlewood document, also known as the “Littlewood Treaty” – an English-language text of the Treaty of Waitangi which came to light in the early 1990s – with particular attention to two recently-published studies: Mr. Martin Doutré’s *The Littlewood Treaty: The True English Text of the Treaty of Waitangi Found* (Auckland: De Danaan Publishers, 2005), and Dr. Phil Parkinson’s *‘Preserved in the Archives of the Colony’: The English Drafts of the Treaty of Waitangi* (New Zealand Association for Comparative Law/ Revue Juridique Polynésienne Cahier, Special Monograph, 2006). I have been asked to provide an appraisal of the soundness of the research and analysis, to comment on the provenance of the Littlewood document and to discuss the implications of my conclusions.

2. I am a professional historian, and have worked as an historical researcher and consultant in Canada and New Zealand. I received B.A. and M.A. degrees in History from Brandon University and the University of Manitoba, respectively, during the 1970s, and a Doctorate in Canadian History from the University of Toronto in 1986. My specialist field was land legislation and European settlement in the Canadian West during the latter half of the Nineteenth century<sup>1</sup>. I have resided in New Zealand since 1982, and was employed on

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<sup>1</sup> “‘The Garden of Manitoba’: The Settlement and Agricultural Development of the Rock Lake District and the Municipality of Louise, 1878-1902”. PhD thesis, University of Toronto (History), 1986.

contract as Senior Historian with the Treaty Issues and International Law Team of the Crown Law Office from January of 1988 until May of 1993. During this time I was involved in various ways with most of the Treaty of Waitangi matters dealt with by the Treaty Issues Team, but was principally concerned with the provision of historical evidence for the Ngai Tahu, Taranaki Raupatu, Muriwhenua (Land), and Geothermal claims. I was employed on contract as Chief Historian and Director of Research by the Crown Forestry Rental Trust from May of 1993 until May of 1994. Since that time I have worked as an independent historical consultant, and have prepared numerous historical reports for Maori claimant groups<sup>2</sup> and for the Crown<sup>3</sup>, along with a study of the Maori Land Councils and Boards for the Waitangi Tribunal's *Rangahaua Whanui* research programme<sup>4</sup>. I am presently contracted to the Crown Law Office for the provision of historical research and advice for the Treaty Issues Team and the Office of Treaty Settlements.

3. In addition to the reports referred to above, I have prepared a number of studies relating to the late 1830s and early 1840s, several of which deal specifically with the Treaty of Waitangi and the annexation of New Zealand by the British Crown. These include (in chronological order):

- “Historical Report: The ‘Declaration of the Independence of New Zealand’ of 1835, and the Confederation of United Tribes, 1835-1840” (1993).<sup>5</sup>
- “The New Zealand Land Claims Act of 1840” (1993).<sup>6</sup>
- “‘Many a Slip ...’: The Proclamations of May 21, 1840” (1993).<sup>7</sup>

<sup>2</sup> Including “The Settlement of the Auckland Islands in the 1840s and 1850s: The Maungahuka Colony, the Enderby Colony and the Crown” (1994); “The Maori and New Zealand Trade prior to 1840” (1995), “‘When the Freshets reach the Sea’: Ngati Pahauwera and their Lands, 1851-1941” (1996); “‘The Most Valuable of the Rotorua Lands’: Alienation and Development in the Ngati Pikiao Blocks, 1881-1960” (1998), and (with P. McBurney) “Ngati Pikiao Lands ca. 1881-1960: Block Histories” (1998); and “‘Let the White Men Come Here’: The Alienation of Ngati Awa Lands in Queen Charlotte Sound, 1839-1856” (1999).

<sup>3</sup> Including “The Adoption of Perpetually-Renewable Leases for Maori Reserved Lands, 1887-1896” (1994). “The Origins of the Native Lands Acts and Native Land Court in New Zealand” (2000); “Ngati Whatua and the Crown – The First Quarter-Century” (2001); “Maori Lands and British Colonization 1840-1865 – A Preliminary Analysis” (2001); “Issues Relating to the Otakanini Block 1904-1908” (2001); “The Development of Crown Policy on the Purchase of Maori Lands, 1865-1910: A Preliminary Survey” (2004); and “The Crown and the Opening of the King Country, 1882-1885” (2006).

<sup>4</sup> “Maori Land Councils and Maori Land Boards: A Historical Overview, 1900 to 1952.” (Wellington: Waitangi Tribunal, 1996; Rangahaua Whanui National Theme Report ‘K’, “First Release”).

<sup>5</sup> This was prepared as a working paper for the Crown Law Office in 1993. An updated version was prepared in 1998 and released for general circulation.

<sup>6</sup> Presented in evidence (for the Crown) in the Muriwhenua Land inquiry. An updated version of this report was prepared in 2002.

<sup>7</sup> An updated version of this report was prepared in 2002.

- “The 1842 Charter and the Extension of New Zealand’s Boundaries to include the Chatham Islands” (1994).<sup>8</sup>
- “Instructions for Captain Hobson, 1839-1841” (2001).<sup>9</sup>
- “‘An Object of the First Importance’: Land Rights, Land Claims and Colonization in New Zealand, 1839-1852” (2004).<sup>10</sup>

In the course of research for these and other projects I have had the opportunity to examine and analyse much of the original documentation for the period 1839-1840, including materials relating to the drafting and signing of the Treaty.

4. It should be noted that I had a marginal involvement with the Littlewood document at the time of its first public appearance in 1992. When its text was made available, I recognised that it was very similar to the English text of the Treaty sent to the United States by the American Consul in the Bay of Islands, businessman James Reddy Clendon, in a despatch to Washington dated February 20<sup>th</sup>, 1840<sup>11</sup>. This similarity was pointed out to Dr. Claudia Orange, who was reported to be investigating the Littlewood document at this time, in a telephone conversation on September 16<sup>th</sup>, 1992, followed up by a letter on September 17<sup>th</sup>. In the latter I commented that this Clendon text was “virtually identical” to the Littlewood text “except for the last line” (which reads “Done at Waitangi on the Sixth day of February in the year of our Lord One Thousand Eight Hundred & Forty”, instead of the “Done at Waitangi on the 4th Feb. 1840” in the Littlewood document).

5. Soon afterwards I was asked by the Treaty Issues Team at the Crown Law Office to prepare a note on this subject. In a Memorandum dated Sept. 21<sup>st</sup>, 1993, I reviewed the evidence then available and concluded that

The briefest of inspections will show that this document is virtually identical in all respects to the Clendon translation, aside from the date in the last line. [¶] Assuming that J.R. Clendon was telling the truth about the origins of his English version of the Treaty (and there is no reason at present to suspect otherwise) one can only conclude that Mr. Littlewood somehow came into

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<sup>8</sup> Presented in evidence (for claimants) in the Chatham Islands inquiry.

<sup>9</sup> Presented in evidence (for the Crown) in the Kaipara Stage II and III inquiries, essentially as a supplement to my “Ngati Whatua and the Crown – The First Quarter-Century” (2001), which dealt *inter alia* with the Treaty and the founding of Auckland.

<sup>10</sup> Presented in evidence (for the Crown) in the Wairarapa inquiry.

<sup>11</sup> Auckland Institute and Museum Library Micro #51, Despatches from the U.S. Consul in the Bay of Islands and Auckland, 1839-1906: Roll 1 Vol. 1 May 27, 1839- Nov. 30, 1846. Parkinson, ‘Preserved’, p. 61 notes that Mr. Hank Driessen at Archives New Zealand made the same observation around this time.

possession of a mis-dated copy of this document. The substitution of “Done at Waitangi on the 4th Feb. 1840” (Littlewood), for “Done at Waitangi on the Sixth day of February in the year of our Lord One Thousand Eight Hundred & Forty” (Clendon), was in all probability due to a simple copying error. If someone was trying to create a document which would pass for the lost Williams draft of February 4th (or any other English draft pre-dating the Waitangi signing), they did a singularly inept job of it.<sup>12</sup>

(The last remark was prompted by speculation at the time that the Littlewood document might be some kind of modern forgery of the elusive final English draft<sup>13</sup>). Dr. Orange was not entirely satisfied with my proposition that the “4th Feb. 1840” date on the Littlewood document was likely to have been the result of a copying error, although she later observed in a note to the Minister of Internal Affairs that this explanation “*could* prove in the long run to be correct”<sup>14</sup>. After preparing the aforementioned Memorandum, I had no further involvement in the debate over the Littlewood document until the present, save for a discussion of the subject with Crown Counsel Helen Carrad in August of 2004, relative to an Official Information Request made to the Crown Law Office concerning this subject<sup>15</sup>.

### The “Littlewood Treaty”

6. It may be useful, as a starting point, to consider the Littlewood document itself, and what is known about its origins. Henry Littlewood was a solicitor who was present in the Bay of Islands and, later, Auckland during the late 1830s and the 1840s. Relatively little information is available about his movements or activities, but on present evidence it seems quite unlikely, despite the ‘family traditions’ referred to by Mr. Doutré, that the lawyer had any involvement with either the drafting of the Treaty or with the production of the document which now bears his name (although his presence at one or more of the meetings at which the Treaty was signed cannot be ruled out)<sup>16</sup>. The document itself is a single sheet of paper bearing an 1830s watermark – “W. Tucker 1833”<sup>17</sup> – with handwriting in ink on

<sup>12</sup> Memorandum of 21 Sept. 1993 from Dr. D.M. Loveridge to Jennifer Lake, Executive Crown Counsel. This is referred to by Parkinson, *Preserved*, at p. 62 n. 10, as “Archives New Zealand file 4/1/18” (presumably from an Internal Affairs record group).

<sup>13</sup> Contrary to Dr. Parkinson’s reading of it (p. 62), my comment about ineptitude related to the form of English text presented, rather than the quality of the translation. That is, it differs significantly from the various English texts which were produced in the course of drafting the Treaty before 4 Dec. 1840.

<sup>14</sup> See Parkinson, *Preserved*, p. 62 n.11, quoting from Dr. Orange’s letter of 5 Oct. 1992.

<sup>15</sup> A Mr. Sid Wilson had requested copies of “any and all documentation that either proves or indicates that the document that has come to be known as the ‘Littlewood Treaty’, is not in fact written by the hand of Busby, and that the date written by Busby’s hand on the same document, is incorrect”.

<sup>16</sup> See Doutré, *Littlewood Treaty*, pp. 18-19.

<sup>17</sup> Doutré, *Littlewood Treaty*, p. 9.

both sides, repaired in places with adhesive tape. It came to light among the papers of the Littlewood family in 1989, and is now held at Archives New Zealand in Wellington<sup>18</sup>. It bears an English version of the text of the Treaty of Waitangi, my own transcription of which is given in Appendix 1 below<sup>19</sup>.

7. As can be seen, this text ends with the statement, “Done at Waitangi on the 4th Feb 1840”. To the best of our knowledge, it was on February 4<sup>th</sup> that a final English text of the proposed Treaty was completed, this being transformed into a Maori text by the Rev. Henry Williams (assisted by his son Edward) in preparation for the meeting at Waitangi on the 5<sup>th</sup>. Williams’ Maori text, with a few minor alterations, was read out to the assembled chiefs on the 5<sup>th</sup>, and was the basis for the Treaty signed by many of them on February 6<sup>th</sup> and after<sup>20</sup>. This is the sequence of events laid out by Dr. Claudia Orange in her study *The Treaty of Waitangi*, which largely follows that given in Ruth Ross’s seminal 1972 article “Te Tiriti o Waitangi: Texts and Translations”<sup>21</sup>. Both Mr. Doutré and Dr. Parkinson accept this basic chronology, although the former disagrees with Dr. Orange’s suggestion that the February 4<sup>th</sup> English draft was completed on board the H.M.S. *Herald* — the frigate which had brought Captain Hobson to the Bay of Islands from Sydney, and which provided him with a base of operations during this period<sup>22</sup>.

8. Ms. Ross noted that the English text used by Henry Williams as the starting-point for the creation of the Maori text “Unfortunately ... does not appear to have survived”, and Dr. Orange could only agree that no trace of “the final English draft” could be found<sup>23</sup>. The date which appears on the Littlewood document immediately raised hopes that it might be the missing final English draft. Then, in 2000, Dr. Phil Parkinson positively identified the Littlewood document as being written in James Busby’s hand. This conclusion appears to

<sup>18</sup> Archives New Zealand NA series 6544. See Doutré, *Littlewood Treaty*, Ch. 1 for the history. The document itself is reproduced at pp. 6-7 (in greyscale) and at pp. 49-50 (in colour).

<sup>19</sup> I include my own transcription here because the versions given in Doutré, *Littlewood Treaty*, p. 8 and Parkinson, ‘*Preserved*’, Doc. 8 pp. 89-90, both contain errors and minor omissions. As far as capitalization and punctuation are concerned, there is a good deal of room for differences of opinion, and my interpretation (based on extensive experience deciphering handwriting from this period) differs from both of the aforementioned authors’.

<sup>20</sup> An English text was also read out at the meeting at Waitangi on Feb. 5<sup>th</sup>, but we do not know which version it was.

<sup>21</sup> Claudia Orange, *The Treaty of Waitangi* (1987) pp. 36-37; Ruth M. Ross, “Te Tiriti o Waitangi: Texts and Translations” (*New Zealand Journal of History* 6#2, Oct. 1972, pp. 129-157), particularly pp. 132-136. The same basic chronological structure, it may be noted, was adopted by T. Lindsay Buick in one of the first major specialist studies of this subject: *The Treaty of Waitangi: How New Zealand Became a British Colony* (New Plymouth: Thomas Avery and Sons Ltd., 1936 3rd ed., reprint Christchurch: Capper Press, 1976).

<sup>22</sup> See Doutré, *Littlewood Treaty*, pp. 57-61.

<sup>23</sup> Ross, “Texts and Translations” p. 133, and Orange, *Treaty of Waitangi*, p. 39.

be undisputed (and, for that matter, indisputable)<sup>24</sup>. James Busby was a New South Wales settler who was appointed “British Resident” in New Zealand in 1832, and took up his position in the Bay of Islands in 1833<sup>25</sup>. He was superseded by Captain Hobson as the senior British representative in New Zealand late in January of 1840, but assisted with the drafting of parts of the preliminary English texts of the Treaty of Waitangi on the 3<sup>rd</sup> and 4<sup>th</sup> of February. The possibility thus arises that the Littlewood document was Busby’s personal copy (or, perhaps, a copy of his original copy) of the final English draft handed over to Henry Williams. Further, we can be certain that the version of the English text used in the Littlewood document was in existence before February 20<sup>th</sup>, 1840. As noted above, an English text of the Treaty which was virtually identical to that given in the Littlewood document – save that the last line read “Done at Waitangi on the Sixth day of February in the year of our Lord One Thousand Eight Hundred & Forty” – was attached to a despatch bearing that date sent to the American government by J.R. Clendon<sup>26</sup>.

9. Appended to this English text, however, was a note by Clendon:

Memo: This Translation is from the Native Document and *not a Copy of the Official Document in English from which the Native one is made*, and although the words may be different from what they were in the Original I think the sense is much the same;– but on the return of Capt. Hobson from the Southward I shall apply officially to him for a Copy and translation of the Treaty for the purpose of sending it to the Government of the United States.

[signed] James R Clendon  
U.S. Consul.<sup>27</sup> [emphasis added]

In other words, according to Clendon himself the text used was simply a “back-translation” (to use Dr. Parkinson’s technical phrase) of the Maori text. If this description is correct, it would of course scuttle any idea that the English text given in the Littlewood document could be the lost final English draft, and would also lead one to conclude that the “4th Feb.”

<sup>24</sup> See Parkinson, ‘*Preserved*’, p. 62, and Doutré, *Littlewood Treaty*, pp. 51-52.

<sup>25</sup> Busby was an official of the New South Wales colonial government, and reported to the Governor in Sydney as well as (on occasion) to the Colonial Office in London. For a short biography see Claudia Orange’s entry on the *Dictionary of New Zealand Biography* website or in Vol. 1 of the published *Dictionary*. Two longer biographical works are Eric Ramsden’s, *Busby of Waitangi: H.M.’s Resident at New Zealand, 1833-40* (1942) and A.D.M. Busby’s *A History of the Busby Family* (1994, four volumes).

<sup>26</sup> The enclosures of Clendon’s Despatch No. 6 are reproduced (from a microfilm copy) in Doutré, *Littlewood Treaty*, pp. 78-81 (Parkinson, ‘*Preserved*’, Doc. 8 pp. 89-80 identifies the differences). Clendon sent a similar English translation of the Treaty, which also incorporates the date February 6th, to an American naval officer in April of 1840: see enclosure in Letter of April 3, 1840, from Clendon to Commodore Wilkes, which was enclosed by Wilkes with his Despatch No. 64 of April 5, 1840, to American Secretary of State (probably as the “Appendix C” referred to by Wilkes): Auckland University Library Micro #1262, Papers of Charles Wilkes 1837-1847, pp.163-168.

<sup>27</sup> See the reproduction in Doutré, *Littlewood Treaty*, p. 81. It seems to be assumed that this is in Clendon’s handwriting, but I cannot see a specific confirmation of this in Doutré or Parkinson.

date on the Littlewood variant of the document was the result of some kind of mistake. If Clendon's description was not correct, however – for whatever reason – the possibility would remain that the date was used intentionally, and that the Littlewood document is in fact a copy of the missing draft.

### Doutré's Arguments

10. In his book *The Littlewood Treaty* (2005) Martin Doutré attempts to make a case for the second possibility. He argues that the Littlewood document is dated “4th Feb. 1840” because it was written by Busby on that date (as a copy of the English draft supplied to Williams), at the home of and using writing paper supplied by J.R. Clendon. Clendon, he proposes, made a similar copy at the same time which provided the basis for the English text sent to the U.S. with his despatch of February 20th 1840. That the paper used for the Littlewood document came from stock held by Clendon seems fairly certain. Mr. Doutré points out that the paper on which Clendon wrote several of his dispatches and documents for the U.S. Government – including that dated February 20<sup>th</sup> – also bore the watermark “W. Tucker 1833”<sup>28</sup>, and notes that Hobson, J.S. Freeman (Hobson's secretary) and Busby apparently drew upon stocks of paper with different watermarks. He also proposes that much of the Treaty-drafting on the 3<sup>rd</sup> and 4<sup>th</sup> of February took place at J.R. Clendon's “spacious 8-room house ... at Okiato”<sup>29</sup> rather than, as Dr. Orange suggested, on board the frigate H.M.S. Herald<sup>30</sup>. “It is very doubtful”, he concludes,

that Clendon would have carried his personal stock of **W. Tucker 1833** paper to a venue outside of his own estate. The compelling evidence shows that the final drafting session was held at his home on the 4<sup>th</sup> of February 1840 and that at least two copies of the final draft were completed there on that date, including Clendon's own transcribed copy. [emphasis in original]

Mr. Doutré goes on to explain Clendon's statement that the English text sent with the Feb. 20<sup>th</sup> despatch was a “Translation ... from the Native Document and not a Copy of the Official Document in English from which the Native one is made ...” (see above) by arguing that

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<sup>28</sup> See Doutré, *Littlewood Treaty*, pp. 70-71, who provides an enlargement of the microfilm copy of one of the four items identified as bearing this watermark. He states only that the microfilm copies in question were seen at the Auckland University Library. Presumably the reel in question was that of “Despatches from the U.S. Consul in the Bay of Islands and Auckland, 1839-1906: Roll 1 Vol. 1 May 27, 1839- Nov. 30, 1846”. I have not myself used the University Library's copy, but Auckland Museum Institute and Library's is catalogued as reel Micro #51.

<sup>29</sup> Doutré, *Littlewood Treaty*, p.65.

<sup>30</sup> Orange, *Treaty of Waitangi*, p. 39, quoted at length by Doutré, *Littlewood Treaty*, p. 63.

We know that Clendon, on the 20<sup>th</sup> of February 1840, **did not have in his possession** anything that he could categorically state was the “**official**” **English text**. He had his own transcript (notes) of something he could reasonably guarantee was very close to the finalised draft wording, but the best he could do, at that moment in time, was to call it a ‘**translation**’ and a reasonably accurate portrayal of what the Maori text said. [emphasis in original] <sup>31</sup>

and,

As stated, Clendon could not, on the 20th of February, guarantee that his English transcript version was still 100% officially precise down to the last “**jot and tittle**”, sufficient for a gazette notice in an American newspaper, so called it a ‘translation’. Due to no English printed version becoming available on the 17th of February, when Maori **Tiriti o Waitangi** was printed for official distribution<sup>32</sup>, Clendon was obliged to write the temporary disclaimer to U. S. Secretary of State John Forsyth on the 20th of February .... [emphasis in original] <sup>33</sup>

There are a number of difficulties with this line of argument.

11. One concerns the central role allegedly played by James Clendon in the drafting of the Treaty. Mr. Doutré places a great deal of reliance on a single statement made in Ian Wards’ study, *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand 1832-1852* (1968)<sup>34</sup>. He quotes Wards’ remark that “A treaty, soon to be known as the Treaty of Waitangi, was prepared with the co-operation of Busby, J.R. Clendon, and two missionaries, H. Williams and A. Brown”<sup>35</sup>. Mr. Doutré notes that Wards “lists one of his sources as J. Rutherford, *The Treaty of Waitangi*”, but he evidently has not examined this work himself. Although Wards referred readers to Prof. Rutherford’s pamphlet *The Treaty of Waitangi and the Acquisition of British Sovereignty in New Zealand, 1840* (1947)<sup>36</sup> for more information about the signing of the Treaty, the work in question is principally a lego-historical examination of the question of when, exactly, the British Crown acquired sovereignty over New Zealand. It does not actually examine the Treaty-drafting and -signing process in any detail. In any case, though, as far as I can see Rutherford made no mention of J.R. Clendon, and certainly does not lead us to believe that he played any part in

<sup>31</sup> Doutré, *Littlewood Treaty*, p.77.

<sup>32</sup> Clendon sent a copy of this Maori text, printed at the Church Mission press in Paihia, with this despatch: see the reproduction in Doutré, *Littlewood Treaty*, p. 82.

<sup>33</sup> Doutré, *Littlewood Treaty*, p.87. I cannot imagine why the Americans would have published the Treaty as “a gazette notice” in one of their newspapers, and as far as I am aware the U.S. authorities never did so.

<sup>34</sup> Wellington: Historical Publications Branch, Department of Internal Affairs, 1968.

<sup>35</sup> Wards, *Shadow of the Land*, p. 42; Doutré, *Littlewood Treaty*, p.64.

<sup>36</sup> Auckland: Auckland University College, 1949 (A.U.C. Bulletin No.36, History Series No.3).

the drafting. Mr. Doutré himself notes that Wards was in error in ascribing such a role to the missionary A.N. Brown, which should perhaps have suggested that a degree of caution was advisable in relying on his reference to Clendon in *Shadow of the Land*<sup>37</sup>.

12. I am not myself aware of any contemporary source which indicates that Clendon played any part whatever in the drafting – although (by his own account at least) he encouraged Maori to sign the Treaty<sup>38</sup> – and Mr. Doutré has not reproduced any explicit statement by another participant or contemporary showing that the American consul was involved in the process on the 3<sup>rd</sup> and 4<sup>th</sup> of February. Indeed, one of the statements which Mr. Doutré quotes strongly suggests that this was not the case. When the Rev. Richard Taylor visited Clendon's house on the afternoon of the 4<sup>th</sup>, in time to 'take tea' with his host<sup>39</sup>, the missionary apparently did not encounter Hobson, Busby, Williams or any of the other known participants there, even though this was at almost the exact time ("about 4 o'clock p.m.", according to Williams<sup>40</sup>) when the final English draft of the Treaty was handed over to Williams by Hobson.

13. But even if we were to accept that Clendon *did* play an active role in the drafting, that the Feb. 4<sup>th</sup> final drafting meeting *was* held at his Okiato home, and that Clendon retained a personal copy of the final English draft given to Williams, we would be left with a major problem. That is, why did Clendon then go on to describe the English text sent to the U.S. with his Feb. 20<sup>th</sup> despatch as a "Translation ... from the Native Document and not a Copy of the Official Document in English from which the Native one is made"? This is a

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<sup>37</sup> Doutré, *Littlewood Treaty*, comments at p. 66, that Clendon was one of "The primary participants in the drafting of the 1835 Declaration of Independence ..." with Busby, Henry Williams and George Clarke. He cites no evidence for this statement, and I can only assume that it is based on the fact that Clendon was one of the four "English Witnesses" who signed that document. I am not aware of any evidence which suggests that Clendon had a hand in the preparation of the Declaration, which as far as we know was drafted by Busby and translated by Williams: see Loveridge, "Historical Report: The 'Declaration of the Independence of New Zealand' of 1835, and the Confederation of United Tribes, 1835-1840" (1993), Part III. Doutré also notes here that "With the proposed Treaty of Waitangi now emerging to supplant the 1835 legislation, it seems obligatory that Clendon would have been invited, by Busby, to participate in this new incentive". In the first place, the Declaration was not 'legislation' in any sense. Secondly, the Treaty was prepared under Hobson's direction and authority, not Busby's, and it is most unlikely that he would have considered it appropriate to invite a representative of a foreign power to be involved in the drafting process.

<sup>38</sup> See Doutré, *Littlewood Treaty*, p. 72, citing Wilkes. Incidentally, the Treaty sheets show that Clendon did not sign Te Tiriti as a witness on Feb. 6<sup>th</sup>: see Claudia Orange, *An Illustrated History of the Treaty of Waitangi* (Wellington: 1990), pp. 130-131.

<sup>39</sup> See Doutré, *Littlewood Treaty*, pp. 65-66, who himself concludes p. 66 that "this probably means afternoon tea".

<sup>40</sup> See Orange, *Treaty of Waitangi*, p. 39: Henry Williams later recorded that "On the 4<sup>th</sup> of February, about 4 o'clock p.m., Captain Hobson came to me with the Treaty of Waitangi in English, for me to translate into Maori ....".

very explicit statement and, one would think, quite unambiguous – and it must also be noted that Clendon stated in the despatch itself that “I have also forwarded a Copy of the Treaty entered into with the Chiefs, with a translation attached thereto”, and the English text referred to is clearly headed “Translation”<sup>41</sup>. He could hardly have done more to make the point that this was *not* the text which provided the basis for the Maori text of the Treaty, but rather was derived from the Maori text. If the English text which Clendon sent was, to his personal knowledge based on involvement in the drafting process, the one which Hobson gave to Williams on Feb. 4th, and which Williams transformed into the Maori text used on Feb. 5<sup>th</sup>, why did he not simply say so? Why, in other words, did he not tell the American Secretary of State how he had come into possession of the text, and instead make a statement which would have amounted to the exact opposite of the truth as he knew it?

14. All such difficulties disappear, however, if Clendon was *not* involved in the Treaty-drafting process, and if the English text which he sent to the U.S. with his Feb. 20<sup>th</sup> despatch *was* in fact a “back-translation” from the Maori text of the Treaty made at some point after February 6<sup>th</sup>. Given that the Littlewood document is in his handwriting, it seems more likely than not that Busby was the source of the translation (although other possibilities exist). If this was so, and if the last line of the version which he gave to Clendon read “Done at Waitangi on the 4th Feb. 1840”, we could conclude that Clendon recognised this to be a mistake and altered it to read “Done at Waitangi on the Sixth day of February in the year of our Lord One Thousand Eight Hundred & Forty”: as Parkinson points out, this was in accord with the Maori printed text which Clendon also enclosed in this despatch<sup>42</sup>. It should also be noted, in this regard, that “4th Feb.” is not a date which one would expect to find in the postscript of *any* draft version of the Treaty. The various English drafts were preliminary versions of a document which was meant to be signed by those Maori who decided to cede all their “rights and powers of sovereignty” to the British Crown, and the postscript was meant to record the date at which the process of signing was begun. On February 4<sup>th</sup> it was expected that the final, Maori version of the Treaty – as yet unwritten – would be presented to Maori on the 5<sup>th</sup>, and perhaps signed by them a day or two later. One would therefore not be overly surprised to see a draft with the date ‘February 5<sup>th</sup>’ in the postscript, but one with February 4<sup>th</sup> makes no sense at all: at no time was it intended that

<sup>41</sup> Doutré does not reproduce the despatch itself, which can be seen at Auckland Institute and Museum Library Micro #15 “Despatches from the U.S. Consul in the Bay of Islands and Auckland, 1839-1906: Roll 1 Vol. 1 May 27, 1839- Nov. 30, 1846”, Despatch No. 6 of 20 Feb. 1840.

<sup>42</sup> Parkinson, ‘*Preserved*’, p.90 n. 51, and Doutré, *Littlewood Treaty*, p. 82.

Maori would sign on that date. This contextual point reinforces the conclusion that Busby simply made a mistake when writing or copying out the document which somehow ended up with Mr. Littlewood.

15. As for the fact that the Littlewood document seems to have been written on Clendon's "W. Tucker 1833" paper, several plausible explanations may be suggested. One is that Busby at some point borrowed a few sheets of paper from his good friend James (there were, of course, no handy stationery stores at the Bay of Islands in 1840). Another is that Busby, while visiting Clendon after Feb. 17<sup>th</sup>, made a translation of the newly-printed Maori text in Clendon's possession, and then made a clean copy of this translation for himself while Clendon made one or more copies for his own use. Yet another is that Clendon made such a translation himself (or had one done by someone else), and Busby copied it while visiting<sup>43</sup>. I doubt very much if we will ever know the exact details, but much simpler explanations are possible than the rather convoluted one proffered by Mr. Doutré.

16. One final point which needs to be addressed concerns James Busby and his fellow Treaty-drafters. If Mr. Doutré is right, the English text which was translated into Maori by Williams differed in many respects from that which was put forward as the 'official' English text after February 6<sup>th</sup>, and Busby would not only have known this to be the case but presumably had a Feb. 4<sup>th</sup> text in his possession<sup>44</sup>. Now, over the next three decades the former British Resident made repeated references to the drafting, the text and the interpretation of the Treaty in books, letters, petitions, speeches and pamphlets, mostly as part of his dogged search for redress for his many grievances against the Crown in relation to pre-Treaty land claims<sup>45</sup>. Mr. Doutré himself cites one of these items – the 1861 pamphlet entitled "Remarks upon Sir William Martin's Pamphlet entitled 'The Taranaki Question', by Mr. Busby, formerly H.M. Resident in New Zealand"<sup>46</sup>, which has long been

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<sup>43</sup> Doutré, *Littlewood Treaty*, p. 77 asks why Clendon would have needed Busby to do a translation, when he himself "had been in the country longer than Busby and, undoubtedly, spoke Maori equally well or better". I am not aware of any evidence pertaining to Clendon's Maori-language abilities, but would note that he could well have spoken the language without being able to write it or translate written documents.

<sup>44</sup> It should be noted that Busby's papers (Auckland Institute and Museum Library MS46 F.#6, "Draft of the Articles of a Treaty with the Native Chiefs submitted to Capt. Hobson 3rd Feby. 1840") contain one of the early drafts of the Treaty, but there is nothing in this collection purporting to be a copy of the final English draft of Feb. 4<sup>th</sup>. Why he would not have retained the latter document, if it was ever in his possession, is another question which remains unanswered.

<sup>45</sup> For the best (indeed, virtually the only extended) discussion of this presently available see Eric Ramsden's, *Busby of Waitangi*.

<sup>46</sup> Doutré, *Littlewood Treaty*, p. 30, referring to the version published in AJHR 1861 E.-2 No.3 pp. 67-72.

an important source of information about the drafting process. But there are many more examples<sup>47</sup>.

17. I have had the opportunity to examine most of these materials at one time or another over the last fifteen years, and have never come across a statement by Busby that might be construed as a claim that the ‘official’ English text of the Treaty was not the one which should be treated as the authoritative version. (On the other hand, I would note that in one 1866 pamphlet he stated that “the term ‘pre-emption’ was used [in Article Two of the Treaty] in its technical sense – the sense in which it has been always used in relation to the aboriginal title to land, both in the British American Colonies and in the United States, and not in the literal sense of its etymology”<sup>48</sup>. The word ‘pre-emption’, however, does *not* appear in the Littlewood document’s version of Article Two). Busby, it must be said, was something of a pedant, who delighted in splitting legal and historical hairs and elaborating on his own views at length, and in presenting himself as one of the leading authorities on the Treaty. I personally find it almost impossible to believe that he would have been able to resist making such a claim if he knew it to be correct.

18. Similarly, one might also ask why Henry Williams made no reference to having used an English text which was different from the ‘official’ one in preparing the Maori text of the Treaty, if that was the case? – or, for that matter, why Clendon never mentioned this. Both Henry Williams and James Clendon, it should be noted, lived and worked in New Zealand until their deaths in 1867 and 1872, respectively, and the Treaty of Waitangi was always a live issue during the three decades following its appearance.

19. So too with Governor Hobson, who always treated the ‘Feb. 6<sup>th</sup>’ text as the official English version of the Treaty. He sent his first report of the signing of the Treaty, in the form of his Despatch No. 40/8 of 5 & 6 Feb. 1840, to Governor George Gipps in Sydney aboard the merchant ship *Samuel Winters*, which left the Bay of Islands on Feb. 8<sup>th</sup><sup>49</sup>.

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<sup>47</sup> The newspaper which Busby published in Auckland from 1861 to 1863, for example – *The Auckland* – contained numerous editorials commenting on the Treaty and the Crown’s right of pre-emption, many or all of which were probably written by Busby.

<sup>48</sup> James Busby, *Our Colonial Empire and the Case of New Zealand* (London: Williams and Norgate, [1866]), p. 95.

<sup>49</sup> See *Sydney Morning Herald*, 21 Feb. 1840, “New Zealand” for confirmation of the date of departure: “Saturday 8.-- At 1 p.m. a royal salute was fired by H.M.S. *Herald*, and despatches were forwarded by the *Samuel Winter*, then under weigh for Sydney” – and what would appear to be the first published personal account of the events of February 5<sup>th</sup> and 6<sup>th</sup>. The *Samuel Winter* was not, as Doutré, *Littlewood Treaty*, p. 66 indicates by giving it the “H.M.S.” prefix, a British naval ship or auxiliary.

Attached to this despatch was an English text of the Treaty which, Hobson stated in his report, he had read out loud at the Treaty meeting on Feb. 5<sup>th</sup><sup>50</sup>. The original is no longer in the records held by the State Archives of New South Wales<sup>51</sup>. However, the English text contained in the duplicate of this despatch which Hobson sent away on or shortly after Feb. 12<sup>th</sup> has survived. This document is located in the “Archival Estrays” now held by the Dixson Library in Sydney<sup>52</sup>, and bears the full ‘official’ Feb. 6<sup>th</sup> English text<sup>53</sup>. Gipps sent a copy of Hobson’s Despatch No. 40/8, including a copy of this English text, to England with his own Despatch No. 40/24 of 19 Feb. 1840<sup>54</sup>, where it provided the basis for the ‘Feb. 6<sup>th</sup>’ English version published in the Parliamentary Papers in July of 1840<sup>55</sup>. Hobson himself sent another Feb. 6<sup>th</sup> English text to London with his Despatch No. 40/1 of 16 & 17 Feb. 1840<sup>56</sup>.

20. I have spent a good deal of time over the last few years looking at official correspondence and documentation from the early 1840s concerning New Zealand land policy, but am not aware of any occasion when Hobson quoted or used any English text other than this one<sup>57</sup>. Why, if he knew that the Feb. 6<sup>th</sup> English text was not the one given to Williams for translation, would he deliberately have misinformed his superiors on this point? In my opinion, if some version of the Littlewood document had been used on February 4<sup>th</sup>, the new Lieutenant-Governor would have been quite happy to treat it as the official English text: it is difficult to think of any reason why he would not have done so. Hobson was closely involved at every stage of the drafting and presentation of the English

<sup>50</sup> See Parkinson, *‘Preserved’*, p. 45-46, who presents other evidence suggesting that this statement was correct.

<sup>51</sup> See State Archives of New South Wales, 4/2540 Colonial Secretary of N.S.W.: Letters Received – New Zealand 1840-1” (Archives New Zealand Micro-Z 2713). I have examined the originals of these files in Sydney and the microfilm copies are complete.

<sup>52</sup> Dixson Library (State Library of N.S.W.) DL N Ar 2, pp. 11-12. This bears the notations: “(Copy) – Original despatched by ‘Samuel Winter’ 8 February 1840”. The front page of the duplicate despatch has Hobson’s initials.

<sup>53</sup> I attach a transcript (Appendix 2) because this text has to date been overlooked. It is not referred to by Dr. Parkinson in his discussion.

<sup>54</sup> CO 209/6 pp.52b-54b.

<sup>55</sup> BPP 1840 (560) pp.11-12.

<sup>56</sup> See CO 209/7 pp. 38b-39b. This is the copy on which was inscribed Henry Williams’ affirmation that this text was “as Literal a translation of the Treaty of Waitangi as the Idiom of the Language will admit of”: see Parkinson, *‘Preserved’*, p. 31.

<sup>57</sup> To the best of my knowledge, none of the “Feb. 5<sup>th</sup>” English texts (see below) were initialled by Hobson – as several of the extant Feb. 6<sup>th</sup> English texts were. Two of these were attachments to duplicate despatches which were sent without being scrutinized by the Governor, and one was the copy given to Clendon by J.S. Freeman. See Parkinson, *‘Preserved’*, pp. 26-27.

text<sup>58</sup>, and it seems to me that the most plausible explanation for his adherence to the Feb. 6<sup>th</sup> version is that he believed it to be the one on which the Maori text of the Treaty was based.

### Parkinson's Arguments

21. Although it is the product of a research project which had been underway for several years, Dr. Parkinson's study of *The English Drafts of the Treaty of Waitangi* was published after the release of Mr. Doutré's book. He examines the documentary trail of the Treaty-drafting process, paying particular attention to the identification of the individuals who wrote the various drafts of the English text of the Treaty which have survived. He then examines the production of the Maori text of the Treaty, the various "back-translations" into English from the Maori text, and the several 'official' English texts which appeared in 1840. This is a scholarly work which makes a significant contribution to Treaty studies.

22. Perhaps the most interesting and original point in Dr. Parkinson's discussion is his proposal that the original English draft, that given to Williams on Feb. 4<sup>th</sup>, has not in fact been 'lost'. Ruth Ross, in her 1972 article on "Texts and Translations", was the first to point out in a systematic way that the several contemporary English texts of the Treaty now extant are not identical, and included versions which referred to the Treaty having been 'Done at Waitangi' on February 5<sup>th</sup>. Her analysis was based on "five English versions" which "Hobson forwarded ... to his superiors in Sydney or London", with supplementary reference to the sole signed English sheet of the Treaty<sup>59</sup>. Ross correctly observed, among other things, that

- two of these six texts have a Preamble which follows that in draft penned by J.S. Freeman;
- the same two have the date February 5<sup>th</sup> in their Postscripts; and
- one of these two omits the words "Estates, Forests, Fisheries" from the second article.

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<sup>58</sup> As a number of historians have noted, Busby's claims to have been the principal author of the final English draft must be viewed with a good deal of scepticism. My personal view is that they are more or less a complete fabrication.

<sup>59</sup> Ross, "Texts and Translations", pp. 134-135. The five versions in despatches are listed on p.134 n.31. The "Waikato-Manukau" text is mentioned for comparative purposes in n.36 of p.134, and is reproduced on pp. 156-157.

Prompted by the latter discovery, Ross speculated that this particular variant may have been used by Henry Williams in preparing the Maori text of the Treaty<sup>60</sup>. She did not, however, go any further in her appraisal of its possible significance, and in any case overlooked another English text bearing the Feb. 5<sup>th</sup> date. This (rather ironically perhaps) was one given to J.S. Clendon, which he passed on to the American Secretary of State on July 3<sup>rd</sup>, 1840 – describing it as “an official copy of the Translation of the Treaty with the Native Chiefs”<sup>61</sup>.

23. Dr. Parkinson proposes that these ‘Feb. 5<sup>th</sup>’ English texts, rather than being copying errors of some kind, actually incorporate the text of the final English draft, “although both the actual document sent to Henry Williams, as well as the official reference copy” have not survived. This identification, he continues,

has been based on forensic examination of the handwriting and the use of the principle of filiation, the derivation of one text from another by descent. The use of filiation has enabled the sequence of textual amendment to be established in considerable detail. The same method demonstrates that the so-called “official text” of the Treaty [dated Feb. 6<sup>th</sup>] is in fact identical to the final English draft, except for the date.<sup>62</sup>

Chapter 3 of *Preserved in the Archives of the Colony* charts the line of descent in detail, and I personally find it quite convincing. If he is correct, and the several ‘Feb. 5<sup>th</sup>’ English texts are indeed derived directly from the final English draft of Feb. 4<sup>th</sup>, a puzzling anomaly in the documentary history of the Treaty has finally been cleared up.

24. Dr Parkinson also devotes most of a separate chapter to the Littlewood document. His conclusions are quite unequivocal. This document, he states:

is not a draft of the Treaty nor is it a ‘copy’ of it. It is simply a translation of [the Maori text of] the Treaty .... The paper on which the Littlewood document is written has a watermark (W TUCKER | 1833) which is also found on other documents prepared by Clendon – including despatch number 6, first page – and it is possible, and even probable, that Busby wrote the translation during a visit to Clendon in the period 17-20 February ... using Clendon’s paper stock.<sup>63</sup>

<sup>60</sup> Ross, “Texts and Translations”, p.142: “The omission ... of any other words signifying forests and fisheries, from the Maori text almost certainly stems from the omission of forests and fisheries from the English draft given to the Williamses [sic] to translate. This, it is true, is supposition, but it is nonetheless firmly based, as one of the English versions forwarded by Hobson to the Secretary of State ... [omits this phrase]”.

<sup>61</sup> Despatch No.7 of July 3, 1840, from J.R. Clendon to J. Forsyth (U.S. Secretary of State); Auckland Institute and Museum Library Micro #51, “Despatches from the U.S. Consul in the Bay of Islands and Auckland, 1839-1906” Roll 1 Vol. 1 May 27, 1839- Nov. 30, 1846.). If Clendon’s words are to be taken literally, the enclosed English text is the actual document which he had received from Freeman.

<sup>62</sup> Parkinson, *Preserved*, p. 7.

<sup>63</sup> Parkinson, *Preserved*, pp. 62-63.

(Dr. Parkinson's transcription of the Littlewood document is entitled "Busby's back-translation of the [Maori text of the] Treaty of Waitangi, misdated 4 (ie 6) February 1840"<sup>64</sup>). It should be noted that his conclusion is based in part on an extensive examination of a number of back-translations, including the Littlewood document, which is incorporated into his examination of the way in which Henry Williams produced the Maori text of the Treaty<sup>65</sup>. I claim no expertise in translation (to or from Maori), but the technical presentation here is persuasive.

25. *'Preserved in the Archives of the Colony'* is not without its flaws. I would suggest that Dr. Parkinson has not given sufficient weight to the role played by Lord Normanby's instructions to Hobson, and by Governor George Gipps, in the process of Treaty-drafting, and in general to the ways in which the Crown's plans for dealing with European land claims, and for the future colonization of the Islands, affected Hobson's proceedings in 1840<sup>66</sup>. As far as Gipps is concerned, for example, there is a good case to be made that he provided Hobson with a rough outline of a Treaty before the latter left Sydney.

26. Hobson left Sydney on January 18<sup>th</sup>: the Treaty of Waitangi was signed on February 6<sup>th</sup>. As far as can be determined, he received no official correspondence from Gipps in the interim<sup>67</sup>, and there is nothing to indicate that Gipps received any official correspondence from Hobson between January 18<sup>th</sup> and February 18<sup>th</sup><sup>68</sup>. On January 14<sup>th</sup> Gipps issued a proclamation declaring that future private purchases of Maori lands would not be recognized by the Crown. Near the end of January, however, it became known in Sydney that extensive purchases of New Zealand lands were imminent. The *Sydney Morning Herald* reported on the 31<sup>st</sup> that

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<sup>64</sup> Parkinson, *'Preserved'*, p. 89.

<sup>65</sup> See Parkinson, *'Preserved'*, Ch. 5 pp. 45-52.

<sup>66</sup> See Loveridge, "The New Zealand Land Claims Act of 1840" (1993), and "An Object of the First Importance": Land Rights, Land Claims and Colonization in New Zealand, 1839-1852" (2004), for extended discussions of these aspects of the situation in 1839-40.

<sup>67</sup> State Archives of New South Wales NG/27 4/1651 "Letterbook: Despatches to Lieutenant Governor of New Zealand, Jan. 15, 1840- Nov. 15, 1841", shows that only one despatch was sent by Gipps to Hobson in the period up to February 28th. This contained supplementary instructions to do with foreign subjects in New Zealand. (See Confidential Despatch of 25 Jan., 1840; State Archives of New South Wales 4/1651 pp.3-4 and CO 209/6 pp.30b-31b – the CO 209 version is numbered #40/2; the State Archives version is not numbered). It is highly unlikely that the Jan. 25<sup>th</sup> despatch had reached Hobson before the end of the first week of February.

<sup>68</sup> Hobson sent away a package of despatches, including his Nos. 40/5 through /10, inclusive, to Gipps on February 8th aboard the merchant ship *Samuel Winter*; see State Archives of New South Wales 4/2540 Despatch #40/12 from Hobson to Gipps of 17 Feb., 1840. They included all of the despatches prepared since his arrival in New Zealand (see National Archives G 36/1a pp.10-12). Gipps reported the receipt of this material "yesterday" in his Despatch #40/24 of 19 February, 1840, to Russell; BPP 1840 (560) p.6 No.4.

By the late arrivals a number of New Zealand chiefs have come to town and are continually to be seen near a certain Attorney's office, where a large quantity of *Deeds* are preparing for their *Signatures*. Surely this ought not to be allowed, after the Queen's late proclamation.<sup>69</sup>

The following day the rival *Australian* confirmed this report<sup>70</sup>. The chiefs involved were from the South Island, and they had been brought to Sydney by a syndicate which planned to buy all of the land in the Island which was not already claimed by British subjects.

27. Gipps decided to intervene. Presumably he hoped to prevent developments which might create problems for Hobson. After a preliminary meeting with several of these chiefs around the end of January<sup>71</sup>, another was arranged for the 12<sup>th</sup> of February<sup>72</sup>. The Governor met with seven Maori chiefs from the South Island. He wanted them, as he later told Lord Russell, to sign

a declaration of willingness to receive Her Majesty as their sovereign, similar in effect to the declaration which Captain Hobson was then engaged in obtaining from the chiefs of the Northern Island.<sup>73</sup>

After explaining the terms, Gipps gave the chiefs a present of ten sovereigns apiece. They promised to return in two days to sign, but did not do so. According to one report,

The land sharks of Sydney, heard of the bargain; and prevented the Chiefs from calling on the Governor a second time, which he had appointed them to do. The said land sharks afterwards themselves bought the Island of the same Chiefs; paid for it *in their way*; and got the duped sellers to sign the conveyance. Thus inducing the chiefs to cheat the Queen of the sovereigns they had received. Ought not these men to be prosecuted for suborning the chiefs to commit a fraud?<sup>74</sup>

<sup>69</sup> *Sydney Morning Herald* Jan. 31, 1840 "Domestic Intelligence – New Zealand" (by "Correspondent").

<sup>70</sup> *Australian* 1 Feb., 1840 "Correspondent".

<sup>71</sup> See *Hobart Courier* Feb. 14, 1840, p. 3. "Interview of New Zealand Chiefs with the Governor" and editorial comment. The article is attributed to an unidentified Sydney newspaper predating February 2<sup>nd</sup>, and is said to be based on the account of the interpreter who assisted the Governor. I have not been able to locate the original article.

<sup>72</sup> The date given here for this meeting (the 12<sup>th</sup>) is based on the fact that the "Memorandum" (see below) was drafted in readiness for the 14<sup>th</sup> – two days later. According to Gipps' August 16<sup>th</sup> report (below) he was approached by one of the men who had brought the Maori to Sydney; Despatch #2 Separate of 16 August, 1840, from Gipps to Russell [BPP 1840 (311) p.63 No.29]. According to a newspaper report, "A respectable man called on a certain member of Council ... and informed him, that most, if not all, the chiefs of the middle island of New Zealand, were then in Sydney; and advised, that the Governor should treat with them for the purchase of the Island [sic]"; Gipps was approached and agreed to the meeting. See *Sydney Monitor* 20 April, 1840 "Land Sharking".

<sup>73</sup> Despatch #2 Separate of 16 August, 1840, from Gipps to Russell; BPP 1840 (311) p. 63 No. 29.

<sup>74</sup> *Sydney Monitor* 20 April, 1840 "Land Sharking".

Gipps himself later told a similar tale, informing Russell that he had been told by one of the chiefs' "mentors" that "they had been advised to sign no treaty"<sup>75</sup>. On February 15th a syndicate had contracted with the chiefs to purchase all of the previously-unsold portions of the South Island<sup>76</sup>.

28. After the February 12<sup>th</sup> meeting, Gipps had a treaty (or, as he entitled it, a "Memorandum") drawn up. The Dixson Library in Sydney holds three versions of this so-called 'Unsigned Treaty'. One is an original draft on paper, to which a set of notes about the New Zealand chiefs is appended. The second is the parchment sheet, bearing official seals, which was to be signed on the 14<sup>th</sup>. Both of these date the proposed agreement to "the fourteenth of February" in their texts, although the day is struck out in pencil on the second. The third version is a slightly revised copy of the second, again on paper, in which a space is left open for a date<sup>77</sup>. All these texts consist of a Preamble, three Articles and a Postscript. To make a long story short, there are marked similarities between this material and the initial drafts of the English text of the Treaty in J.S. Freeman's hand which are discussed by both Mr. Doutré and Dr. Parkinson (not to mention all other modern students of the subject) – in particular in the presence of an article in both the 'Unsigned Treaty' and the Freeman drafts which offered the signatories the status and rights of British subjects. It is difficult to believe that Hobson in New Zealand in early February, and Gipps in Sydney in mid-February, independently arriving at exactly the same format, formula and (to a significant extent) wording for a treaty with Maori. Lord Normanby's instructions obviously played a major role in shaping both of these draft treaties, but they alone cannot account for all of the parallels between the two documents.

29. Further study may, or may not support this proposition, but it serves to underline the fact there is still a good deal of useful work to be done on the origins of the Treaty signed at Waitangi on February 6<sup>th</sup> in 1840. In his book Mr. Doutré accuses historians and legislators of paying insufficient attention to this vital subject, and, to a certain extent, one must agree with him. Ruth Ross pioneered the serious examination of the drafting of the English text

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<sup>75</sup> Despatch #2 Separate of 16 August, 1840; see John Jones' note to the Governor of 14 February, 1840, to this effect which is reproduced in E. Sweetman, *The Unsigned New Zealand Treaty* (Melbourne: Arrow Printery, 1939), p.62.

<sup>76</sup> The text of the deed has been published under the title, *The Wentworth Indenture* (Christchurch: Nag's Head Press, 1979).

<sup>77</sup> Dixson Library, Public Library of N.S.W., DL N Ar/3 "Miscellaneous New South Wales Archival Estrays relating to New Zealand, 1830-1845", pp.79-84, unpaginated sheet, pp. 87-90. The second version is the one photographically reproduced in Sweetman, *Unsigned New Zealand Treaty*, between pp.64-65. It should be noted that the transcript given by Sweetman is imperfect.

and the creation of the Maori one, but (with the partial exception of Dr. Orange) no one followed in her footsteps with the original archival research required until Dr. Parkinson set to work. If the furore over the Littlewood document has done nothing else, it has underlined the need for a publication which provides accurate descriptions and transcripts (and preferably photographic reproductions like the excellent ones provided in *The Littlewood Treaty*) of all the relevant manuscripts and printed documents. Although large amounts of money have been spent on Treaty-related historical research in the last two decades, very little of it has been put into scholarly works of this nature, of lasting value. A thorough and systematic examination of Busby's involvement in the Treaty drafting process, and his subsequent writings about the Treaty, would also be most welcome.

### Conclusions

30. An examination of the Littlewood document and the historical evidence relating to it does not, in my opinion, provide any support for Mr. Doutré's proposition that this is the long-lost final English draft of the Treaty of Waitangi, or a copy of it. His argument relies heavily on assertions about the role played by J.S. Clendon in the drafting of the Treaty which do not appear to have much substance. His argument that the document is not a back-translation of the Maori text of the Treaty flies in the face of Clendon's own clear and unambiguous statement to the contrary, which Mr Doutré is unable to explain away. It is further undercut by Dr. Parkinson's forensic analysis of the text in question, which firmly concludes that it *is* indeed a back-translation. In the face of his expertise I think that the onus is now squarely on those who support Mr. Doutré's interpretation to demonstrate that this is not the case – to show that it is *not* a translation of a Maori text. Finally, Mr. Doutré has not provided satisfactory explanations for the lack of any evidence that Governor Hobson, James Busby, Henry Williams or James R. Clendon ever stated or implied that the 'official' English text dated Feb. 6<sup>th</sup>, 1840, was not the one which provided the basis for the Maori text. In my opinion their silence is best explained by their personal knowledge that the English text of the Treaty which provided the basis for the Maori one was essentially the same as the 'official' English version<sup>78</sup>. If Dr. Parkinson's proposal concerning the "Feb. 5<sup>th</sup>" English texts is correct – as is very likely the case – then there is no longer any need to go looking for a 'lost' English draft of the Treaty. It has indeed been 'preserved in the

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<sup>78</sup> As noted in ¶23 above, Parkinson, *Preserved*, p. 32 points out that the 'official' English text is basically just a re-dated version of the "Feb. 5" texts.

Archives of the colony' all along. One can only concur with Dr. Parkinson's conclusion that the Littlewood document "is of historical interest but is of no constitutional significance"<sup>79</sup>.

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<sup>79</sup> Parkinson, *Preserved*, pp. 62-63.

## Appendix 1: The Littlewood Document

[Source: Based on the colour reproduction of the original in Martin Doutré, *The Littlewood Treaty: The True English Text of the Treaty of Waitangi Found* (Auckland: De Danaan Publishers, 2005), pp. 49-50. Transcript by D.M. Loveridge, 2006]

Her Majesty Victoria Queen of England in her gracious consideration for the chiefs and People of New Zealand, and her desire to preserve to them their Land and to maintain peace and order amongst them, has been pleased to appoint an officer to treat with them for the cession of the sovereignty<sup>80</sup> of their country and of the islands adjacent to the Queen, seeing that many of her Majesty's subjects have already settled in the country and are constantly arriving: And that it is desirable for their protection as well as for the protection of the natives to establish a government amongst them.

Her majesty has accordingly been pleased to appoint me William Hobson a captain in the Royal Navy to be governor of such parts of New Zealand as may now or hereafter be ceded<sup>81</sup> to her Majesty And proposes to the chiefs of the Confederation of the United Tribes of New Zealand and the other chiefs to agree to the following articles –

### Article first

The chiefs of the Confederation of the United Tribes and the other chiefs who have not joined the confederation cede to the Queen of England for ever

[page break]

the entire sovereignty of their country.

### Article Second

The Queen of England confirms and guarantees to the chiefs & tribes and to all the people of New Zealand the possession of their lands, dwellings and all their property. But the chiefs of the Confederation and the other chiefs grant to the ['chiefs' struck out] Queen the exclusive right of purchasing such land as the proprietors thereof may be disposed to sell at such prices as shall be agreed upon between them and the person appointed by the Queen to purchase from them.

### Article Third

In return for the cession of the sovereignty to the Queen, the People of New Zealand shall be protected by the Queen of England, and the rights and privileges of British subjects will be granted to them. –

Signed, William Hobson  
Consul & Lieut. Governor

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<sup>80</sup> The word sovereignty is consistently misspelled 'sovereignty' throughout: see Doutré, *Littlewood Treaty*, p. 52.

<sup>81</sup> Spelled 'cedded' with the first 'c' struck out.

Now we the chiefs of the Confederation of the United tribes of New Zealand being assembled at Waitangi, And we the other chiefs of New Zealand having understood the meaning of these articles, accept of them and agree to them all

In witness whereof our names or marks are affixed. Done at Waitangi on the  
4th Feb 1840. —

## **Appendix 2: English Text of the Treaty of Waitangi sent to Sydney by Captain Hobson, as an attachment to the duplicate of his Despatch #40/8 of 5 & 6 Feb. 1840 to Governor George Gipps, ca. 12 Feb. 1840.**

*[Source: Dixson Library, State Library of New South Wales, Sydney DL N Ar/2 "New South Wales - Colonial Secretary. Despatches, mainly duplicates, received from Capt. Hobson Lt. Governor, then Governor of New Zealand" [Archives New Zealand MicroZ 2717. Transcript by D.M. Loveridge, 2006]*

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[Upper left-hand corner: "(Copy) – Enclosed Copy of Letter No. 40/8 dated 5 February 1840–"]

Her Majesty Queen Victoria, Queen of the United Kingdom of Great Britain and Ireland regarding with Her royal Favor the Native Chiefs and Tribes of New Zealand, and anxious to protect their Just rights and property and to secure to them the enjoyment of Peace and good Order, has deemed it necessary, in consequence of the great number of Her Majesty's subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress, to constitute and appoint a Functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands. Her Majesty therefore being desirous to establish a settled form of civil government with a view to avert the evil consequences which

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must result from the absence of the necessary Laws and institutions alike [sic] the Native population and to Her Subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy, Consul, and Lieutenant Governor of such parts of New Zealand as may be, or hereafter shall be, ceded to Her Majesty, to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

### Article the first

The Chiefs of the Confederation of the United Tribes of New Zealand and the Separate and independent Chiefs who have not become members of the Confederation, cede to Her Majesty the Queen of England, absolutely and without reservation all the rights and powers of sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to

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exercise or possess over their respective Territories as the Sole Sovereigns thereof.

Article the Second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand, and to the respective families and individuals thereof, the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties, which they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession. But the Chiefs of the United Tribes, and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such Lands as the Proprietors thereof may be disposed to alienate, and at such prices as may be agreed upon between the respective proprietors, and persons appointed by Her Majesty to treat with them in that behalf.

Article The Third

In consideration thereof Her Majesty

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The Queen of England extends to the Natives of New Zealand Her Royal Protection, and imparts to them all the Rights and privileges of British Subjects.

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Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi, and We the Separate and Independent Chiefs of New Zealand, claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof. In witness of which we have attached our Signatures or Marks at the places and dates respectively specified.

Done in Waitangi this sixth Day of February, in the year of our Lord one thousand eight hundred and forty.

[ends]