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THE GREAT SEAL AND TREATY-MAKING IN THE BRITISH COMMONWEALTH

Sovereigns of England, at least from the time of Edward the Confessor, have regularly signified their Royal assent to public documents by affixing to them impressions of their Great Seals. The Great Seal has thus through the centuries become the emblem of sovereignty used on certain occasions when the will of the sovereign is to be expressed in a written instrument. The earliest known example of the use of a seal by an English King is in a charter by which Offa, King of Mercia, confirmed a grant of land in Sussex in 790. This and other early examples of the use of a seal which remain today are sufficient evidence that the use of seals for important documents was not unknown even in Anglo-Saxon times. From the reign of Edward the Confessor, commencing in 1042, to the present day all treaties (and all royal charters, grants, etc.) executed by the sovereigns of England have been sealed with a regular succession of Great Seals.¹

¹See ALFRED BENJAMIN WYON, *THE GREAT SEALS OF ENGLAND*, London, 1887, pp. xiii, 1-2; and SIR HENRY C. MAXWELL-LYTE, *HISTORICAL NOTES ON THE USE OF THE GREAT SEAL OF ENGLAND*, London, 1926, p. 301. The former presents reproductions of the Great Seals of England from the earliest period to the reign of Victoria. These seals are arranged in regular succession and are illustrated with interesting and valuable descriptive and historical notes. The latter work describes in great detail the system of issuing various types of instruments under the Great Seal from the thirteenth century to the present time. The present study of the use of the Great Seal in treaty-making, it should be carefully observed, applies only to treaties between heads of states to which His Majesty is a high contracting party in respect of some member or members of the Commonwealth. It does not apply to the various instruments between governments, in the conclusion of which the Great Seal is not employed. Full powers and instruments of ratification for treaties formerly concluded between the British Empire, as a high contracting party, and foreign states were sealed with the Great Seal. The term "treaty", it should also be observed, is here used in the generic sense. His Majesty may conclude, in respect of one member or several members of the Commonwealth a "treaty", a "convention", an "agreement", etc., all of which instruments are intended to be included in the general term "treaty".

The Great Seal, used for both United Kingdom and Dominion treaties, has long been symbolic of Imperial supremacy in treaty-making as well as in other matters. Formerly it was known as the Great Seal of the United Kingdom;² but with the evolution of Dominion status after the war and with the establishment of Ireland as a Dominion, this description of the Great Seal was regarded as no longer appropriate. In order, therefore, to take into account the new position of the Dominions and, at the same time, to attempt to soothe the ruffled feelings in certain quarters of the Empire, the "Great Seal of the United Kingdom" was replaced by the "Great Seal of the realm".³ Thus in treaty making the Great Seal became in name as much an Irish Free State or Union of South Africa Great Seal as it was a United Kingdom Great Seal. Even after it had ceased, by this change in style, to be a purely United Kingdom Great Seal and had become the Great Seal of the Realm, certain writers on Constitutional Law maintained that it still remained the symbol of Imperial authority over the Dominions in treaty-making and that its continued use in connection with all United Kingdom and Dominion treaties rendered impossible any breach in the diplomatic unity of the Commonwealth.

In order to understand the basis of this argument and the importance of the Great Seal in treaty-making, it is necessary

² Prior to 1707 the Great Seal was the Great Seal of England. With the union of England and Scotland, it became the Great Seal of Great Britain. After the legislative union of Great Britain with Ireland in 1801 the Great Seal was known as the Great Seal of the United Kingdom. It remained the Great Seal of the United Kingdom until 1922, since which date it has been known as the Great Seal of the Realm. There is nothing on the Great Seal to indicate these changes. Indeed the words "Great Seal" do not even appear on the Great Seal, and have never appeared except during Cromwell's time. The first seal of the Commonwealth, in use from February 8, 1649, to March 26, 1651, has on one side the inscription, "The Great Seal of England, 1648," and on the other, "In the First Year of Freedom by God's Blessing Restored." See WYON, *op. cit.*, pp. 90-91 and Plate XXX. Nor is there an Act of Parliament in 1922 changing the name of the Great Seal. It is for the King to determine what his Great Seal shall be, and it would not be proper for Parliament to say what his Great Seal is. The transition from the Great Seal of the United Kingdom to the Great Seal of the Realm occurs, therefore, merely by a casual reference to it in an Act of Parliament. Thereafter all documents were altered so as to refer to the Great Seal in the new style. For information of these and other points I am indebted to The Hon. A. E. A. Napier, Deputy Clerk and Assistant Secretary to The Lord Chancellor.

³ Actually the Seal remained the same, but the name was altered in official reference to the Great Seal. The Act of Succession of 1708 (6 Anne, c. 41, sec. 9) provided that the Great Seal in use at the time of the demise of the Sovereign shall continue in use as the Great Seal of the successor until such successor shall give order to the contrary. It is customary for a new seal to be made at the beginning of each reign, the old one being destroyed or, latterly, defaced. The Great Seal of King George V, however, continued in use through the reign of Edward VIII and into the reign of George VI.

to remember the purpose which the Great Seal serves—namely, to authenticate the King's signature—and also the procedure by which it is affixed to official documents. The King's signature to a document may be authenticated in two ways: either by the affixing of the Signet or by the affixing of the Great Seal. The appearance of one of these seals is essential to the validity of the King's signature. Without the seal the signature is incomplete.⁴ Each Secretary of State in the United Kingdom is entrusted with a facsimile of the Signet as one of his seals of office.⁵ The Signet is used on warrants, signed by His Majesty and countersigned usually by the Secretary of State for Foreign Affairs, authorizing the affixing of the Great Seal to full powers and instruments of ratification. The Great Seal, however, is used on the full powers and the instruments of ratification themselves and also on certain other documents, (such as instruments to create peers, appoint judges, grant charters, etc.) which it is desired to invest with the highest degree of importance. For centuries it has been in the keeping of the Lord Chancellor as Keeper of the Great Seal, and there are no facsimiles of it.

The authority of the Lord Chancellor as Keeper of the Great Seal, although embodied in statute only since 1562, dates from still earlier times. "An Act, declaring the Authority of the Lord Keeper of the Great Seal and the Lord Chancellor of England to be one" was passed in 1562 and is still in force.⁶ While the Lord Chancellor is now the chief judicial officer of

⁴ W. Ivor Jennings maintains that, despite repeated assertions to the contrary, it is doubtful whether the use of the Great Seal is required by law. *THE CANADIAN BAR REVIEW*, Vol. XV, No. 6, Special Constitutional Number, June, 1937, p. 458. See, however, the Act for an Union of the two Kingdoms of England and Scotland, 1706 (5 Anne, c. 8, Art. 24), which provides that "the Great Seal of the united Kingdom be used for sealing Writs to elect and summon the Parliament of *Great Britain*, and for sealing all Treaties with foreign Princes and States, and all Publick Acts, Instruments and Orders of State, which concern the whole united Kingdom, and in all other matters relating to *England*, as the Great Seal of *England* is now used"

⁵ Each Secretary of State has a lesser Signet and a Greater Signet. Usage determines which of these shall be used upon various documents. It is the lesser Signet which appears on Warrants for affixing the Great Seal to full powers and instruments of ratification.

⁶ *Public General Statutes*, 5 Elizabeth c. 18. The Act is as follows:

"Where some Question hath of late risen, whether like Place, Authority, Preheminence, Jurisdiction and Power doth belong, and of Right ought to belong, to the Office of the Lord Keeper of the Great Seal of *England* for the Time being, as of Right doth and ought to belong to the Office of the Lord Chancellor of *England* for the Time being, or not:

"For Declaration whereof and in avoiding such Question hereafter, be it enacted and declared by the Queen our Sovereign Lady, the Lords Spiritual and Temporal, and the Commons, in this present Parliament

the United Kingdom and also serves as Speaker of the House of Lords, his functions in these two capacities are merely adjuncts to the ancient position as keeper of the Great Seal. The Lord Chancellor receives the Great Seal from the King personally and is thereby admitted to his high office, which he continues to hold until he has surrendered the Great Seal to the King.⁷

The Crown Office Act, 1877,⁸ provided for the creation of a Wafer Great Seal and a Wafer Privy Seal⁹ which, when attached to or embossed on any documents required to be or usually authenticated by or passed under the Great Seal, should confer on that document the same validity in all respects as if the document had been authenticated by or passed under the Great Seal or the Privy Seal. A Committee of the Privy Council (composed of the Lord Chancellor, the Lord Privy Seal and one of the Principal Secretaries of State) were empowered under the Act to make, and when made to alter, the rules prescribing the documents to which the Wafer Great Seal and the Wafer

assembled, and by the Authority of the same, That the Common Law of this Realm is, and always was, and ought to be taken, that the Keeper of the Great Seal of *England* for the Time being hath always had, used and executed, and of Right ought to have, use and execute, and from henceforth may have, perceive, take, use and execute, as of Right belonging to the Office of the Keeper of the Great Seal of *England* for the Time being, the same and like Place, Authority, Preheminence, Jurisdiction, Execution of Laws, and all other Customs, Commodities and Advantages, as the Lord Chancellor of *England* for the Time being, lawfully used, had and ought to have, use and execute, as of Right belonging to the Office of the Lord Chancellor of *England* for the Time being, to all Intents, Constructions and Purposes, and as if the same Keeper of the Great Seal for the Time being were Lord Chancellor of *England*."

⁷ Blackstone attributes the origin of the office and name of chancellor to the time of the Roman Emperors. Originally it signified "a chief scribe or secretary", who was later "invested with several judicial powers and a general superintendency over the rest of the officers of the prince. . . . And when modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. But in all of them he seems to have had the supervision of all charters, letters, and such other public instruments of the crown, as were authenticated in the most solemn manner; and therefore, when seals came in use, he had always the custody of the king's great seal. So that the office of chancellor, or lord keeper (whose authority by statute 5 Eliz. c. 18, is declared to be exactly the same), is with us this day created by the mere delivery of the king's great seal into his custody: whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom; and superior in point of precedency to every temporal lord." SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Second Revised Edition by Thomas M. Cooley, Chicago, 1876, Book III, Ch. 4, p. 45.

⁸ An Act for making Provision with respect to the Preparation and Authentication of Commissions and other Documents issued from the Office of the Clerk to the Crown in Chancery, 40-41 Vict. c. 41, Sec. 4.

⁹ The Privy Seal has sometimes been styled the "small seal", the two terms being regarded as equivalent and interchangeable. See SIR HENRY C. MAXWELL-LYTE, *op. cit.*, p. 20.

Privy Seal were respectively to be attached. Under this authority the Committee drew up a list of documents for which the Wafer Great Seal and the Wafer Privy Seal should henceforth be substituted. This list did not include either full powers or instruments of ratifications. After the Great Seal Act of 1884,¹⁰ which simplified the procedure of passing of instruments under the Great Seal, it was no longer necessary that any instrument be passed under the Privy Seal. Acting further under the authority granted by the Crown Office Act of 1877, the Committee of the Privy Council on January 4th, 1917, added full powers for diplomatic representatives below the rank of ambassadors to the list of documents in connection with which the Wafer Great Seal should be substituted for the Wax Great Seal. On October 7th, 1919, full powers to ambassadors and to the Secretary of State for Foreign Affairs were added to this list. Instruments of ratification were added to the list on the same date. Full powers and instruments of ratification, therefore, no longer pass under the Wax Great Seal but instead pass under the Wafer Great Seal. The work of affixing the Wafer Great Seal is a much easier operation. It consists merely of sticking a glossy red wafer to the document and embossing the Wafer Great Seal upon it. The affixing of the Wax Great Seal involves lacing a cord or ribbon into the document and fixing both ends of the cord or ribbon in a molten wax disc which, with hardening, bears the imprint of the Great Seal.¹¹ The Great Seal, hanging from this cord or ribbon, is placed in a metal box for protection. The metal boxes enclosing seals attached to treaties were formerly made of solid silver. Documents bearing such a wax seal (*i.e.*, the wax disc approximately six inches in diameter and three-fourths of an inch in thickness and weighing about two pounds) are obviously very cumbersome and particularly so when these documents must, as today, be handled in considerable numbers and must often be carried to distant foreign capitals where full powers may be presented and instruments of ratification deposited or exchanged. Both the Wax Great Seal and the Wafer Great Seal are kept in a vault in the office of the Lord Chancellor at the House of Lords. The wafer Seal is much smaller than the wax Seal, and the matrix with which it is embossed has, of necessity, no reverse.

¹⁰ An Act to simplify the passing of Instruments under the Great Seal of the United Kingdom, July 28th, 1884, 47-48 Vict., c. 30, sec. 3.

¹¹ "Nowadays, a disc of wax, softened by immersion in hot water, is placed on each half of the matrix, which has been rubbed with soapy water. The impressions are made by turning the handle of the press; superfluous wax is removed with a knife; and the seal, as perfected, is hardened in cold water."—SIR HENRY C. MAXWELL-LYTE, *op. cit.*, p. 312.

Authority for affixing the Great Seal is given by a Royal Warrant under the King's Sign Manual and Signet and counter-signed by the Minister responsible for tendering the advice to which the document is to give effect.¹² In submitting to the King for his signature full powers and instruments of ratification on behalf of the Dominions and in countersigning the Warrant instructing the Lord Chancellor to cause the Great Seal to be affixed to these documents, the Secretary of State—it has been contended—acts not merely on Dominion instructions but also upon his own authority and under his responsibility to the Parliament at Westminster.

Before submitting an instrument of ratification of a Dominion treaty and a Warrant for sealing the instruments, for example, it is argued that the Secretary of State is responsible for seeing that the rules of the 1926 Conference have been fully observed and if they have not been observed in any case, he would be compelled to bring the issue before the rest of the Empire with a view to reconsideration. Hence it followed that the continued use of the Great Seal of the Realm in connection with Dominion treaties involved effective control by a United Kingdom Secretary of State over Dominion treaty-making. With the persistence of this argument, however fallacious and unsound, the Irish Free State commenced to urge a change of procedure.

At the 1930 Conference the use of the Great Seal in connection with the foreign affairs of the various Dominions was discussed at great length and with much seriousness. A special appeal was made at this conference for as little alteration as possible in the existing procedure and machinery which without doubt had historical associations very highly valued by many persons both in the United Kingdom and in the Dominions. In order to take into account the new status of the various Dominions it was proposed that certain adaptations be made in the procedure governing the use of the Great Seal in connection with the documents relating to a Dominion. It was suggested, in the first place, that it would be desirable for the appropriate Minister in each Dominion to be entrusted with a seal similar

¹² The Great Seal Act, 1884 (47 - 48 Vict. c. 30, sec. 2(1)) provides :—

“A warrant under Her Majesty's Royal Sign Manual, counter-signed by the Lord Chancellor, or by one of Her Majesty's Principal Secretaries of State, or by the Lord High Treasurer, or two of the Commissioners of Her Majesty's Treasury, shall be a necessary and sufficient authority for passing any instrument under the Great Seal of the United Kingdom according to the tenor of such warrant; Provided that any instrument which may now be passed under the Great Seal by the fiat or under the authority or directions of the Lord Chancellor or otherwise without passing any other office may continue to be passed as heretofore.”

to the Signet but bearing some suitable mark to identify it with the particular Dominion concerned, and, secondly, that it would be proper, in the case of Warrants authorizing the affixing of the Great Seal to documents relating to a Dominion, to indicate clearly on the face of the Warrant that responsibility for the advice tendered rested with the Ministers of the particular Dominion concerned.¹³ This would be secured in each instance by having the Warrant in question countersigned by the Dominion Minister and bearing the seal, similar to the Signet, entrusted to him under the first proposal. This procedure, it was declared, would leave no doubt as to the true constitutional position of the Dominions as autonomous communities within the British Commonwealth. Subject to these modifications it was suggested that the existing practice with regard to the affixing of the Great Seal should remain unaltered. These proposals, it may be observed, while representing somewhat of a compromise from the point of view of the United Kingdom, would nevertheless have left the British Commonwealth with a single royal Great Seal in the keeping of the Lord Chancellor in the United Kingdom. These suggestions, however, were not acceptable to all of the Dominions. The general view of the Irish Free State was that the manner in which the King's signature is confirmed is for each government concerned to decide. The Union of South Africa took a similar point of view and General Hertzog argued that there was no need for the procedure to be the same for all of the Dominions. It was suggested on behalf of Canada that, since the Commonwealth has a single Sovereign and owes allegiance to a common Crown, it might be well to consider the creation of a Commonwealth Seal and the retention of the Great Seal in the future as a purely United Kingdom Seal. It was urged, however, that some agreement should be reached which would allow the status quo to continue for a time. Yet no such agreement was possible because of the above views of the Irish Free State and the Union of South Africa. The eventual result of these discussions has been to leave some Dominions following one procedure and other Dominions another. Hitherto any decision on the question as to whether the Commonwealth had one king or seven had been carefully avoided at Imperial Conferences. It was now clearly recognized that these discussions between the Prime

¹³ The change in the form of the Warrant here suggested was actually introduced June 22nd, 1931, in connection with the ratification of the International Convention relative to the Protection of Literary and Artistic Works, in respect of Canada, U.K. Foreign Office Treaty Department, *Ratifications of Treaties*, (unpublished) 1931, No. 22.

Ministers and heads of delegations at the 1930 Conference had definitely thrown the bias on the side of the theory of the divisibility of the Crown—a result as strongly desired by some persons as opposed by others. The subject was postponed on the understanding that the whole question should be left open for further discussion between Governments as occasion arose and would be reviewed at the succeeding Imperial Conference. Action proceeded along the former line and, with respect to the two Dominions urging a change in the status quo at the 1930 Conference, had produced such results (the striking of separate royal Great Seals for these Dominions) that no further discussions along these lines were necessary at the Imperial Conference of 1937.

As early as the 1926 Conference, at least, the Irish Free State was well aware that the use of the Great Seal on full powers of Free State plenipotentiaries to negotiate treaties and on the instruments of ratification of such treaties, while necessitating the formal intervention of a United Kingdom Secretary of State, did not in fact involve any control by the Secretary of State. The Dominions Office had clearly asserted that this procedure implied no control over Dominion treaty-making by Great Britain. The Free State knew that the King was acting in these matters on the exclusive advice of its own Executive Council and that the Great Seal would be released as often as requested. In 1931, however, the Free State further pressed its claims put forward at the 1930 Conference for a change in procedure and declared that it should have a Great Seal of its own, kept in the Free State, and released on the authority of the Free State Ministers alone. The fact that the Secretary of State for Dominion Affairs in London was used as the channel of communication with His Majesty and also the fact that Free State full powers and instruments of ratification were sealed by the Great Seal of the Realm, it was claimed, had given rise to considerable confusion both in the minds of foreign governments and of eminent international lawyers “as to the precise constitutional status of the Irish Free State, and of its responsibility in international law for the transactions concluded”.¹⁴ In order to remove this confusion the Free State urged that the old channel of communication between the Dominion Governments and the King should be discontinued, that Dominion advice tendered to His Majesty

¹⁴ See Official Press Release of the Department of External Affairs, Irish Free State, reprinted in W. Y. ELLIOTT, *THE NEW BRITISH EMPIRE*, New York, 1932, Appendix VIII, p. 509.

should be communicated directly and not through the channel of any British Minister, and that the seal used by the King in Free State documents referred to should be a seal "struck, kept, and released by the Government of the Irish Free State, on whose advice the document was issued by the King".¹⁵

The Irish Free State was not without a legal argument to support its claim for a Great Seal of its own. In the Letters Patent passed under the Great Seal of the United Kingdom, constituting the Office of Governor-General of the Irish Free State, December 6th, 1922, there appears the following provision relating to the Great Seal :

II. There shall be a Great Seal of and for the said State which We do hereby authorize and empower Our said Governor-General to keep and use for sealing all things whatsoever that shall pass the said Great Seal. Provided that, until a Great Seal shall be provided the private seal of the Governor-General may be used as the Great Seal of the said State.

Identical provisions had been incorporated in the Letters Patent passed under the Great Seal of the United Kingdom constituting the office of Governor-General and Commander-in-Chief of the Commonwealth of Australia in 1900 and similar provisions have been included in the Letters Patent constituting the office of the Governor-General of Canada.¹⁶ Indeed, this is the usual provision in such documents. Yet these provisions had never been cited as authority for the striking of a separate royal Great Seal for these other Dominions to be used in the place of the Great Seal of the Realm on Dominion full powers and instruments of ratification.

The other Dominions, of course, had Great Seals of their own just as the Irish Free State already had a Great Seal of its own,¹⁷ used by the Governors-General for sealing all public documents in their respective Dominions. There was, however, only one *royal* Great Seal, and it was situated in the United Kingdom in the keeping of the Lord Chancellor and was released (for Dominion treaties) only upon a royal warrant under His Majesty's own Sign Manual and Signet and countersigned by one of His Majesty's Principal Secretaries of State in the United

¹⁵ *Ibid.*

¹⁶ In the Letters Patent passed under the Great Seal of the Realm in 1930 revoking the Letters Patent of 1905 and constituting the Office of Governor-General and Commander-in-Chief of the Dominion of Canada the following provision occurs: "II. And We do hereby authorize and empower Our Said Governor-General to keep and use the Great Seal of Our said Dominion for sealing all things whatsoever that shall pass under the said Great Seal." *Statutes of Canada, 1930, Second Session, p. XIX.*

¹⁷ See House of Lords *Debates*, March 23rd, 1927, p. 731.

Kingdom. No Dominion had ever construed the provisions of Letters Patent constituting the Office of its Governor-General, or the provisions of any other documents, as authority for the striking of a separate Dominion *royal* Great Seal.

Yet the Irish Free State pressed the view that the provisions quoted above constituted legal authority for the striking of a separate Free State Seal to replace completely the Great Seal of the Realm in connection with Free State documents. The Letters Patent, it was pointed out, provided for the use of *a* Great Seal and not *the* Great Seal. Hence, the Free State argued, they were not compelled by this provision to use the Great Seal of the Realm and might instead have a separate royal Great Seal of their own. The right of the Free State to its own royal Great Seal was accordingly granted though the legal argument was clearly not the determining factor. Thus in the early part of 1931 the Department of External Affairs of the Free State made the following announcement in one of its official press releases relative to the Great Seal and the channel of communication with the King :

The arrangement now made is that the Government of the Irish Free State will advise His Majesty direct, and that the channel of communication heretofore used, namely, the Secretary of State for the Dominions, will no longer be used. In addition, a seal will be struck in the Irish Free State to be used on all documents of the kind referred to issued by the King on the advice of the Government of the Irish Free State and on which the Great Seal of the Realm has been used heretofore.

The new Seal will be the property of the Irish Free State, and will be struck, kept, and controlled in the Irish Free State.

A Signet Seal will also be struck, and will be affixed by the Minister for External Affairs on all documents relating to the Irish Free State issued by His Majesty on the advice of the Government of the Irish Free State other than those on which the Great Seal of the Realm has heretofore been used. . . .¹⁸

On January 18, 1932, the King received the High Commissioner for the Irish Free State in order that he might receive at the King's hands on behalf of His Majesty's Government in the Irish Free State the new Great Seal of the Irish Free State. The Great Seal of the Free State is in the keeping of the Secretary of the Executive Council and is released on the authority of the Executive Council, acting on the motion of the Minister for External Affairs. It is used on all full powers and instruments of ratification issued in the name of the King. Despite the physical dimensions of the Great Seal (comparable

¹⁸ This press release is reprinted in W. Y. ELLIOTT, *loc. cit.*

to those of the Wax Great Seal of the Realm) the Free State has not as yet provided for the creation of a wafer Great Seal. The comparative infrequency of its use, however, renders a Wafer Great Seal the less necessary.

With the use of the separate royal Great Seal and with the institution of direct communication with the King all legal authority for His Majesty's action in issuing full powers and instruments of ratification ceased to be vested in His Majesty's Government in the United Kingdom and has henceforward rested solely in the Government of the Irish Free State. No longer, therefore, could it be maintained that the use of the Great Seal of the Realm and the necessary intervention of a British Secretary of State retained even the appearance of diplomatic unity throughout the British Commonwealth. Both of these were now abolished. Thus those who had cheerfully pointed to the Great Seal of the Realm as sufficient evidence of imperial unity in external affairs unwittingly and unwillingly became the fathers of a separate royal Great Seal for the Irish Free State. The striking of this Great Seal and its use in connection with the external affairs of the Free State have, perhaps more than any other single innovation, disposed of the conception of the former legal unity of the British Commonwealth in international relations.

The Union of South Africa followed the Free State in its demand for a separate royal Great Seal and a Signet of the Union to be kept in the Union by the Prime Minister as Keeper of the Seals and to be affixed by him to any instrument bearing the King's sign manual and the signature of one of his Ministers of State for the Union and required to pass the Great Seal or the Signet. On March 21, 1932, the representative of the Union received at the King's hands on behalf of His Majesty's Government in the Union the new Great Seal of the Union.¹⁹ Provision for the Union Great Seal and Signet is made in the Royal Executive Function and Seals Act, 1934, which is as follows :²⁰

BE IT ENACTED by the King's Most Excellent Majesty, the Senate and the House of Assembly of the Union of South Africa, as follows :—

¹⁹ See SIR ERNEST SATOW, *A GUIDE TO DIPLOMATIC PRACTICE*, Third Edition, 1932, p. 428.

²⁰ *Statutes of the Union of South Africa*, 1934, No. 70, p. 922 : An Act to provide for the King's Acts as Head of the Executive of the Union, the use of Royal Seals in connection therewith and the vesting of certain functions in Union Officials and bodies.

1. (1) There shall be a Royal Great Seal of the Union hereinafter referred to the Great Seal, which shall show on the obverse the effigy of the Sovereign, with his full titles as circumscription and on the reverse the coat of arms of the Union with supporters and the inscription "Unie-van Suid-Afrika" and "Union of South Africa."

(2) There shall be a Royal Signet (hereinafter referred to as the Signet) showing the reverse of the Great Seal with the Tudor Crown for crest and the King's full title in Latin on the outer rim and the words "Unie van Suid Afrika—Union of South Africa" on the outer rim. . . .

3. The Prime Minister of the Union or, in his absence, his deputy shall be the Keeper of the Great Seal and the Signet.

4. (1) The King's will and pleasure as Head of the Executive Government²¹ of the Union shall be expressed in writing under his sign manual, and every such instrument shall be countersigned by one of the King's Ministers for the Union.

(2) The King's sign manual shall furthermore be confirmed by the Great Seal on all royal proclamations and he may, by proclamation, prescribe from time to time which other public instruments bearing his sign manual shall pass either the Great Seal or the Signet.

(3) The Keeper of the Seals shall affix either the Great Seal or the Signet, as the case may be, to any instrument bearing the King's sign manual and the countersignature of one of His Majesty's Ministers of State for the Union and required to pass either the Great Seal or the Signet.

5. (1) The Governor-General-in-Council may by regulation provide for the making of wafer seals, representing the Great Seal, of such material as he may deem suitable and prescribe the size of the cast to be used for that purpose.

(2) The wafer seals made in pursuance of the provisions of subsection (1) shall be kept by the Keeper of the Great Seal and may be used by him for sealing instruments which are required to pass the Great Seal, and instruments to which such wafer seals have been affixed shall be deemed to be sufficiently sealed in terms of this Act.

The Royal Executive Functions and Seals Act thus dispensed with the use of the Great Seal of the Realm and the intervention of the British Secretary of State in connection with the external affairs of the Union, as they had been dispensed with in the external affairs of the Free State three years earlier. The Act, however, does not stop here. It goes much further and provides that in certain eventualities the signature of the King himself may be dispensed with. The paragraphs of the Act in which this provision is found is as follows :

6. (1) Whenever for any reason the King's signature to any instrument requiring the King's sign manual cannot be obtained or whenever the delay involved in obtaining the King's signature to any

²¹ See Act No. 69 of 1934, 4(1).

such instrument in the ordinary course would, in the opinion of the Governor-General-in-Council, either frustrate the object thereof, or unduly retard the despatch of public business, the Governor-General shall, subject to such instructions as may, from time to time, in that behalf, be given by the King on the advice of His Ministers of State for the Union, execute and sign such instruments on behalf of His Majesty and an instrument so executed and signed by the Governor-General and countersigned by one of the King's Ministers of the Union shall be of the same force and effect as an instrument signed by the King.

(2) The Governor-General's signature on such an instrument shall be confirmed by his Great Seal of the Union and a resolution of the Governor-General-in-Council shall be the necessary authority for affixing the same.

The authority here conferred upon the Governor-General to sign and execute instruments on behalf of His Majesty has been exercised in issuing full powers and instruments of ratification in cases where the delay necessarily involved in obtaining the King's signature to these instruments is regarded as unduly retarding the despatch of the conclusion and ratification of treaties in question. In such a case the King is notified by telegram that, for example, an international conference at which the Union of South Africa wishes to be represented is convening on a certain date, that time does not permit the submission of the full powers to His Majesty through the ordinary channel, and that it is proposed that the Governor-General sign the document on behalf of His Majesty. The King expresses his pleasure by return telegram. These steps to secure the formal approval of the King for the Governor-General to execute a treaty instrument on his behalf are said not to be required by the Royal Executive Functions and Seals Act, 1934, although in executing and signing these instruments the Governor-General acts subject to instructions given by the King on the advice of his Ministers in the Union. This procedure, however, is always followed in practice. A very interesting instance of this procedure occurred in connection with the representation of the Union of South Africa at the Montreux Capitulations Conference, 1937. In this case the full power was issued not by the Governor-General but by the Chief Justice of the Union of South Africa in his capacity as Officer Administering the Government of the Union of South Africa acting, in the absence of the Governor-General, on behalf of His Majesty the King. The signature of treaty documents by the Governor-General or by the Officer Administering the Government of the Union of South Africa—which is followed by the counter-

signature of one of the King's ministers in the Union and which is confirmed by the Great Seal of the Union—avoids a long delay in the preparation of instruments for concluding or ratifying a treaty. In the absence of this provision for the Governor-General to sign on behalf of His Majesty, the creation of the separate royal Great Seal for the Union instead of expediting the procedure of treaty-making in respect of the Union would actually have retarded it. This is true of documents (full powers and instruments of ratification) which are prepared in the Union, sent to London to be signed by His Majesty, and returned to the Union to be completed by the countersignature of the Prime Minister (who is Minister of External Affairs) or of some other minister in the Union. This procedure is obviously cumbersome but it is tolerable in connection with most treaties. Indeed this is still considered the usual procedure and is ordinarily followed if time permits. If, however, the conclusion of a treaty is regarded as urgent, the procedure outlined in section 6 of the Royal Executive Functions and Seals Act of 1934 is followed, and the full powers and instruments of ratification do not pass either under His Majesty's sign manual or under the Great Seal of the Realm.

The Union still possesses the great seal which it had before the creation of its royal Great Seal in 1934, and this great seal is still used by the Governor-General in sealing all public documents in the Union.²² Documents, including full powers and instruments of ratification in respect of the Union, which are signed by the King now pass under the royal Great Seal of the Union of South Africa instead of under the Great Seal of the Realm. In summary, the use of the Great Seal of the Realm has been completely dispensed with in the making of treaties by His Majesty in respect of the Union of South Africa and the Irish Free State.

The Dominions of Canada, Australia, and New Zealand still use the Great Seal of the Realm in connection with full powers, letters of credence and instruments of ratification and they still employ the Secretary of State for the Dominions as the official channel of communication with His Majesty with respect to these matters. Recently there has been some discussion of the possibility of Canada's acquiring a royal Great Seal of her own in order to dispense with the use of the Dominions Secretary as a channel of communication with His Majesty and thus to expedite the procedure of treaty-making.

²² W. P. M. KENNEDY AND H. J. SCHLOSBERG, *THE LAW AND THE CUSTOM OF THE SOUTH AFRICAN CONSTITUTION*, London, 1935, p. 102.

As a time-saving device the striking of a new Dominion royal Great Seal is of dubious advantage inasmuch as the necessary documents would in any case still pass under His Majesty's sign manual. The procedure which is employed today is merely to send a telegram to the Dominions Office requesting that His Majesty be humbly moved and advised to appoint a certain designated person as plenipotentiary in respect of Canada for certain purposes or to ratify a treaty in respect of Canada. These documents are prepared in the Foreign Office, are transmitted to His Majesty, and are passed under the Great Seal of the Realm. If the Dominion of Canada possessed a royal Great Seal of its own, the procedure of treaty making might very conceivably be more circuitous still, unless it were provided along with the creation of such a Great Seal that the Governor-General might sign full powers and instruments of ratification on behalf of His Majesty as is now done in the Union of South Africa, or unless the counter-signature and affixing of the seal occurred before the signature of the King, as is also sometimes done in the Union. An instrument of ratification to be exchanged in Paris, for example, would presumably be prepared in Ottawa, transmitted to London, passed under His Majesty's sign manual, returned to Ottawa where the Dominion royal Great Seal would be affixed, and once more sent across the Atlantic for exchange in Paris. Whatever the attitude of the Dominion of Canada may be, both Australia and New Zealand are satisfied with the existing procedure whereby their full powers and instruments of ratification are signed by His Majesty and passed under the Great Seal of the Realm, under the authority of a warrant counter-signed by the Secretary of State for the Dominions in the United Kingdom. These Dominions are impervious to the continued suggestion that this procedure implies a control by Downing Street over their treaty relations. They know, and they have received the repeated assurances of Downing Street itself, that the existing procedure of treaty making does not involve any subordination of the Dominions to the United Kingdom and that the Great Seal will be released as often as is asked by these Dominions. As the 1926 Imperial Conference proclaimed, in the historic words of Balfour, the Dominions are truly equal in status with the United Kingdom and are in no way subordinate to the United Kingdom in any aspect of their domestic or external affairs.

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