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6 Q.B. 19.

THE ATTORNEY GENERAL *v.* JOHN HIGGINS and Others. *May* 30.

A testator, domiciled in England, having died in the province of York, his property within that province was sworn under 100,000*l.*, and the will having been proved, probate duty was paid on that amount. The testator's personal property actually in that province amounted to 93,221*l.*, in addition to which he was possessed of shares in railway Companies in Scotland, (such Companies being constituted under the Companies Clauses Consolidation (*Scotland*) Act, 1845), to the value of 5715*l.* In pursuance of the 19th and 20th sections of that Act the executors produced the probate with the proper declaration to the secretaries of the several railway Companies, and caused their own names to be inserted in the register of shareholders at the chief offices of the said Companies in Scotland; but, although more than six months had elapsed, did not exhibit an inventory properly stamped in the Commissary Court in Scotland, as required by the 48 Geo. 3, c. 149, s. 38. In an information for penalties for not exhibiting such inventory,—*Held*, that the duty imposed on executors by the 49 Geo. 3, c. 149, s. 38, to exhibit in the Court of Scotland an inventory properly stamped, is not affected by the 8 & 9 Vict. c. 17, s. 20, and that therefore the duty on such inventory was payable in Scotland in respect of the shares.

THIS was an information against the defendants who were executors of William Higgins deceased, for not exhibiting an inventory duly stamped, of certain shares in Railway Companies in Scotland, pursuant to the 48 G. 3, c. 139, s. 38.

Plea: The general issue.

A special verdict was found by consent, which stated that William Higgins, before and at the time of making his will, and thence until his death, resided and inhabited, and was domiciled at Broughton, within the province of York, and after the 31st of August, 1805, on the 1st day of January, 1850, within the province aforesaid, duly made his will signed by him &c. and attested &c. according to the form of the statute, and thereby appointed the said John Higgins and others executors, and gave to his executors all his personal estate and effects in the United Kingdom of Great Britain and Ireland: and that William Higgins afterwards, and after the passing of "The Companies Clauses Consolidation (*Scotland*) Act, 1845," on the 7th of December, 1853, within the province aforesaid, died without having in anywise altered or revoked his will: and that the will of William Higgins was a good and valid

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will and disposition, according to the laws and customs of Scotland, of all the said testator's personal and moveable estate and effects at the time of his death in that part of the United Kingdom: that John Higgins and others as executors, after the death of William Higgins, on the 12th of January, 1854, duly proved the will in the Prerogative Court of the province of York, and probate was then granted to John Higgins and others; and the said John Higgins and others thereupon then took upon themselves the burthen of the execution of the will as executors, and afterwards, and within six calendar months after obtaining probate, that is to say on the 1st of March, 1854, produced the probate to the several and respective secretaries of certain Railway Companies in Scotland, all which several Companies had been incorporated by Acts of Parliament, with which "the Companies Clauses Consolidation (*Scotland*) Act, 1845," was incorporated, and which were respectively called the Edinburgh and Glasgow Railway Company, &c., in all which said several Companies the said William Higgins deceased, before and at the time of his death, was entitled to and was the owner of certain shares of and in the respective capitals thereof: and at the same time produced to and left with the said several and respective secretaries a declaration in writing duly made in conformity with and in pursuance of the provisions of "the Companies Clauses Consolidation (*Scotland*) Act, 1845," and thereupon then, as executors, caused the said shares to be duly transferred and transmitted in the manner required by "the Companies Clauses Consolidation (*Scotland*) Act, 1845," in the registers of shareholders of the said several Railway Companies respectively, at the several chief offices of the said several Companies, situate and being respectively in Scotland, from the name of the said testator William Higgins into the names of them the

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said John Higgins and others, and thereby and not otherwise entered upon the possession and management of the said shares, the same being the only personal and moveable estate and effects in Scotland of the said testator. And that the period of six calendar months from the time of such transfer and transmission being made, and from the time of the said John Higgins and others assuming the possession and management of the said shares as such executors as aforesaid elapsed before the day of exhibiting the said information; and that the certificates of the proprietorship of the said shares, duly issued in pursuance of the said Acts of Parliament whereby the said Railway Companies had been incorporated, before and at the time of the death of William Higgins were within the province of York; and each of them, the said John Higgins and others, had during all the time aforesaid notice of the premises, but have not nor has either of them exhibited in Scotland a full and true inventory duly stamped, or any inventory of the said shares, but have, and each of them has, neglected and refused so to do. And that the said shares at the time of the death of William Higgins, and from thence continually until the transfer thereof as aforesaid, and during and until the expiration of six calendar months &c., were in the whole of a value exceeding 5000*l.* and under the value of 6000*l.*, that is to say, of the value of 5715*l.* 2*s.* 6*d.*, and that the stamp duty which would have been payable upon and in respect of the inventory of the said shares in Scotland, if such inventory ought by law to have been and had been exhibited by the said John Higgins and others as such executors, was and is the sum of 100*l.* That the said William Higgins at the time of his death was possessed of goods and chattels within each of the provinces of Canterbury and York in England; and that the said John Higgins and others after the death of

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the said William Higgins, and after the obtaining of probate as aforesaid, and before the expiration of six calendar months from the time of their assuming the possession and management of the said shares, took upon themselves the execution of the said will, and after probate had been so aforesaid granted by the Prerogative Court of York, probate of the said will was on the 27th of January, 1854, duly granted to them as such executors as aforesaid by the Prerogative Court of Canterbury, for and in respect of the goods and chattels of the testator being within the said last mentioned province. And that the goods and chattels of the testator in the province of Canterbury, and in respect whereof probate was so granted by the said Prerogative Court of Canterbury as aforesaid, were at the time of his death, and from thence until and at the time of the granting of the probate thereof as aforesaid of a value exceeding 35,000*l.*, and under the value of 40,000*l.*, that is to say, of the value of 39,790*l.* 1*s.* 11*d.*; and that the stamp duty payable in respect thereof, that is to say, the sum of 625*l.*, was duly paid to Her Majesty by the said John Higgins and others, as executors. And that the goods and chattels of the said testator in the province of York, and in respect whereof probate was so granted as aforesaid by the said Prerogative Court of York, were at the time of the death of the said testator and from thence until and at the time of the granting of the probate thereof as aforesaid, of a value exceeding 90,000*l.*, and under the value of 100,000*l.*, that is to say of the value of 93,221*l.* 3*s.* 5*d.*; And that the stamp duty payable in respect thereof, that is to say 1350*l.* was duly paid to Her Majesty by the said John Higgins and others, as executors. And the jurors further found, that if the said shares of the said testator in the said Railway Companies in Scotland actually had been, at the time of the death of the testator, or if those shares

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were to be considered as being goods and chattels of the said testator within the province of York, the value of those shares, added to the other goods and chattels of the said testator within the province of York, would have been under the value of 100,000*l.*, and that no more stamp duty would have been due or payable to Her Majesty in respect of the probate thereof than has actually been paid by the said John Higgins and others as such executors. But whether or not upon the whole matter &c., the said John Higgins and others ought to have exhibited such an inventory as aforesaid, and whether they do owe or are liable to pay to Her Majesty double the stamp duty which would have been payable upon such inventory, in manner and form as in the said information is alleged, the jurors are ignorant &c.; and if upon the whole matter it shall appear that the said John Higgins and others ought to have exhibited such inventory and do owe &c., the jurors say that the said John Higgins and others ought to have exhibited such inventory, and do owe &c. double the stamp duty which would have been payable thereupon, that is to say, the sum of 200*l.* as in the information alleged. But if upon the whole matter &c. the said John Higgins and others ought not to have exhibited such inventory, do not owe or are liable to pay double the stamp duty &c., then the jurors say that the said John Higgins and others ought not to have exhibited such inventory, and that they do not owe nor are liable to pay double the stamp duty &c.

The Attorney General (with whom was *Pigott*, Serjt., and *Beavan*), for the Crown.—The question turns upon whether the Crown can claim duty in respect of shares in certain public companies in Scotland which belonged to a testator who was domiciled, and whose will has been proved in England. The 8 & 9 Vict. c. 17, s. 19, provides, that if the interest in any share have become

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transmitted in consequence of the death, &c., of any shareholder, such transmission shall be authenticated by a declaration in writing as thereinafter mentioned, and such declaration shall be left with the secretary, and thereupon he shall enter the name of the person entitled under such transmission on the register of shareholders. By s. 20, "if such transmission have taken place by virtue of any testamentary instrument, or by intestacy, the probate of the will or the letters of administration, or an official extract therefrom obtained from any prerogative Court, if granted in England, or a testament testamentary, or testament dative (*a*), if expede in Scotland, or an official extract therefrom shall, together with such declaration, be produced to the secretary, and upon such production, in either of the cases aforesaid, the secretary shall make an entry of the declaration in the said register of transfers." It will be contended, that on the production of the probate of the will the secretary is bound to make the entry in the register of transfers, and that the title of the executors is thereby complete, and that they are enabled to dispose of the shares without taking any further steps. The effect, however, of the statute is merely this, that when a person possessed of shares in public companies in Scotland dies, if his will is proved in England, it is not necessary for the executors to prove the will again in Scotland. In Scotland wills must be confirmed. Before the passing of 4 Geo. 4, c. 97, this took place in commissary Courts which were relics of the old ecclesiastical Courts which existed before the Reformation. Since the passing of that Act confirmation takes place in the sheriffs' Courts. In England probate

(*a*) In Scotland an executor producing a will by which he is appointed executor, is called an executor testamentary, and the will a testament testamentary. Where there is no will appointing an executor, the Commissaries, on the application of persons interested, appoint an executor dative, and the instrument of appointment is the testament dative.

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is an exemplification of an act of Court. William the Third brought from Holland the device of raising a revenue by stamps, and probate duty was levied in England by affixing a stamp on the exemplification. In Scotland the will was simply confirmed without probate, and therefore there were no means of affixing a stamp. Probate duty was introduced into Scotland in 1804, by the 44 Geo. 3, c. 98. This Act was amended in 1808, and in order to adopt the practice of affixing a stamp, the statute required that a stamp should be affixed to the inventory. By the 48 Geo. 3, c. 149, s. 38, it is enacted, "that every person who, as executor, &c., shall intromit with or enter upon the possession or management of any personal or moveable estate or effects in Scotland of any person dying after the 10th day of October, 1808, shall, on or before disposing of or distributing any part of such estate or effects, or uplifting any debt due to the deceased, and at all events within six calendar months next after having assumed such possession or management, in whole or in part, and before any person shall be confirmed executor testamentary or dative, exhibit upon oath or solemn affirmation in the proper commissary Court in Scotland, a full and true inventory, duly stamped, &c., of all the personal estate, &c., distinguishing what shall be situated in Scotland, and what elsewhere, together with any testament, &c., which inventory, together with such testament or other writing, if any such there be, shall be recorded &c., and in case any person hereby required to exhibit any such inventory &c. shall neglect or refuse so to do &c., he shall be charged, &c., to the payment of double the amount of the stamp duty which would have been payable upon such inventory" (*a*). The 20th section of the 8 & 9 Vict. c. 17, does not relieve the executor from the duty of exhibiting the inventory in Scotland, for though he may use the probate

(*a*) The amount is now regulated by 55 Geo. 3, c. 184.

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to establish his title, as soon as he intromits with the shares he is bound to exhibit an inventory. For general purposes personal property has no locality, but it has a locality for the purposes of probate. If there is a provincial probate, that operates only on property within the jurisdiction of the Court which granted it. These railway shares were personal property in Scotland. They were not within the jurisdiction of the Court which granted probate in England. The legislature has relieved executors from the obligation of proving the will again in Scotland, but the executor in Scotland has another duty, he is bound to exhibit an inventory, which is a collateral act which the legislature has directed to be done for fiscal purposes. It may be argued that the probate duty paid in the province of York covers the value of these shares, but property locally situated in Scotland is not assessable to probate duty in England. The probate duty in England is payable only on property within the jurisdiction of the Courts granting such probate. If the executors have paid probate duty on property not in England, they will get it back; it must therefore be taken that the duty which was here paid was paid on property in England. The mode of obtaining confirmation by an executor appointed by will, is to produce before the sheriffs' Court the testament which contains the nomination, with a full inventory seen and confirmed, and the sheriff's authority is granted by decree of confirmation. Confirmation is necessary as an active title, *i. e.*, to enable the executor to receive and distribute the moveable estate: Bell's Principles of the Law of Scotland, ss. 1892, 1893. The 20th section of the 8 & 9 Vict. c. 17, makes it unnecessary for an executor to obtain confirmation in Scotland for the purpose of getting shares transferred into his own name. It saves an executor, who has proved a will here, from the expence of taking down the original will in the custody of an officer before the sheriff's Court, and enables

him to get a transfer of the shares without that expense, but it has no further effect.

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Manisty for the defendant.—It is admitted that before the passing of 8 & 9 Vict. c. 17, s. 20, confirmation would have been necessary. The object of the clause was to render less complicated the steps which the executors of testators, who died in England possessed of shares in Scottish companies, were obliged to take in order to entitle them to such shares. For that purpose it enables executors to acquire a title to the shares by acts done in this country. They may therefore pay probate duty here. The duty has in fact been paid in the province of York. Probate was taken in York for an amount under 100,000*l.*; it is found that the value of the testator's other property in the province of York was 93,231*l.*, and that the value of these shares was under 6000*l.* [*Pollock*, C. B.—If your view is right where should the duty be paid, in England, in Canterbury or York? *The Attorney General*—It is well settled that legacy duty is paid according to the domicile of the testator, and probate duty according to the situs of the property: *The Attorney General* v. *Dimond* (*a*), *The Attorney General* v. *Bouwens* (*b*), *In re Ewin* (*c*). *Pollock*, C. B.—The 8 & 9 Vict. c. 17, s. 20, enables the executor of a person entitled to shares in Scotland to prove that he is the person entitled to them in an English Court. Suppose a person possessed of such shares died leaving a small property in England, and his executor obtained probate here, he would be entitled, on production of that probate, to have his name put on the register of shareholders; but there is nothing to compel him to reveal that he had property in Railway Companies in Scotland, or to subject him to penalties if he did not pay probate duty here upon it.] The 20th section

(*a*) 1 C. & J. 356. (*b*) 4 M. & W. 171, per Ld. *Abinger*.
(*c*) 1 C. & J. 151.

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of 8 & 9 Vict. c. 17, makes the shares to which it applies property "for and in respect of which the probate is taken out" within the meaning of those words in the 55 Geo. 3, c. 184, schedule. [*Pollock*, C. B.—Where do you say that the property is locally situate?] By section 7 the shares were made personal property, but it is not said where. Probably they are personal estate where the certificates are, that is to say, in the province of York. It is much the same as if a man died in England having a bond given by a person in Scotland. In such case the bond would draw to it the debt which would be bonum notabile in England. [*Martin*, B.—Is there any authority for that position? *Pollock*, C. B.—The doctrine as to the locality of a bond only applies where the debtor resides in this country. Debts due from foreigners are not the subject of probate in this country.—*The Attorney General* referred to *The Attorney General* v. *Hope* (*a*), and *The Attorney General* v. *Bouwens* (*b*).] The *Attorney General* would scarcely give up the claim of the Crown to all debts due to persons here from people residing abroad. [*Pollock*, C. B.—That may be so if dividends on such debts are payable here.]

The Attorney General, in reply.—The chief offices of these railways are in Scotland, and therefore the shares in question are personal property in Scotland: *Smith* v. *Stafford* (*c*). That being so, the duty is payable in Scotland. The 20th section of the 8 & 9 Vict. c. 17, does not repeal the 48 Geo. 3, c. 149, s. 38. It merely puts the English probate in the place of the Scotch confirmation. But the duty is a matter independent of the confirmation. As soon as the executor intromits with the property, he must exhibit the inventory and pay the duty. Unless the 48 Geo. 3, c. 149, s. 38, is repealed by the 8 & 9 Vict. c. 17, s. 20, the duty remains payable.

(*a*) 1 C. M. & R. 530.
(*b*) 4 M. & W. 171. Per Lord *Abinger*, Ib. 192.
(*c*) 2 Wils. Ch. Ca. 166.

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The object of that section is, that the will may be proved in England, leaving the duty to be paid in Scotland as before. It is impossible for an executor to pay in England the probate duty on this property which is in law situate in Scotland. The two enactments are wholly parallel, and do not interfere with each other.

POLLOCK, C. B.—I am of opinion that the Crown is entitled to our judgment. The question turns upon what is the effect of the 20th section of the 8 & 9 Vict. c. 17. The Act is "an Act for consolidating certain provisions usually inserted in acts of parliament with respect to companies incorporated for carrying on undertakings of a public nature in Scotland;" and certainly it would be strange if in an Act of that description there was found a clause which changed the mode of administration of a certain class of property in Scotland. Mr. *Manisty* says that the effect of the 20th section is to make all property upon which this Act was intended to operate, *effects* in England, and that it becomes for the purpose of probate either property in England or property in Scotland, without any provision whatever to secure the rights of the Crown in respect of the public revenue. It is suggested that we are to perform a sort of ancillary part, as if we were members of the legislature, and are to supply all that may be necessary to give effect to this construction of the Act. But we cannot do so. We must treat this act of parliament as providing for that which is found in it and nothing more. It is intended to relieve persons who take out probate in England from the necessity of also proving the will in Scotland, if there is no other personal property in Scotland, except shares in such undertakings as the Act relates to. The proof may be either in Scotland or in England; and the question is, whether the party is not still bound, under the 38th section of the 48 Geo. 3, c. 149, to

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exhibit an inventory and give to the Crown the benefit of the stamp which is to be impressed upon it. I think that he is. In this case, if we put together the duty on the York probate and the duty on the Canterbury probate, there is enough to cover the whole of the Scotch property. But that might not have been the case. The probate duty is not made precisely a duty for every pound; but it proceeds by stages, like many other matters of revenue, as for instance the stamps upon bonds, bills of exchange, conveyances, and other instruments. Here it is said that the duty has been paid, because, if the parties were allowed to include it in the English probate, the York probate would cover it, since, adding the value of the shares to the York property, the whole would not have been more than 100,000*l.* If probate were taken out in the province of Canterbury for under 100,000*l.*, there being but 90,000*l.* and a few odd pounds in Canterbury, the executor would not be entitled to take out probate in York without paying the duty on personal property in the province of York, if it happened that the York property would be covered by the duty on the Canterbury probate. The same rule applies here. The property in Scotland must pay its duty there, the property in York must pay its duty in York, and the property in Canterbury must pay its duty in Canterbury. The duty, therefore, has not been paid here. The 8 & 9 Vict. c. 17, s. 20, was really intended to give facility to transfer the shares at the office where the shares are to be transferred, and it was not intended to have the slightest effect upon either the payment of the duty, or the exhibiting the inventory, or to touch the revenue in any way.

MARTIN, B.—At first I had considerable doubt about this case, but the argument of the *Attorney General* has perfectly satisfied me. Two points were made by Mr. *Manisty*; the first was that the shares were bona notabilia

here. I apprehend that he has entirely failed in that, and that they are not. It is clear that by the 19th section of the 8 & 9 Vict. c. 17, the evidence of title to these shares is the register of shareholders, and that being in Scotland this property is located in Scotland; and considering that this act of parliament was passed in the year 1845, which is eleven years after the decision of *The Attorney General* v. *Hope* (*a*), I have no doubt it was framed upon the basis that the law as there laid down was the acknowledged law. The probate does not affect personal property located out of England, and the probate duty does not attach upon such property. Then comes the question, what is the true construction of the 20th section of this act of parliament? A Scotch will of personalty is analogous to an English will of realty, over which a probate court has no jurisdiction. The will of itself confers the title on the devisee. The 20th section enacts, that upon the production of the testament testamentary, the secretary of the Company shall make an entry in the register of transfers, that the person who is entitled under that testament testamentary is the owner of these shares, and that the production of the probate of the will in England shall have the same effect. This section therefore does nothing more than dispense with the necessity of producing the original will, and render it sufficient to produce the English probate to the secretary of the Company; and the object was to prevent the trouble and inconvenience of taking the original will into Scotland where, if the testament testamentary was required to be produced, it would be incumbent to produce the will itself. Therefore it gave to the production of the English probate the same effect as to that of the testament testamentary. That being so, it seems perfectly obvious on looking at the 38th section of the

(*a*) 1 C. M. & R. 530.

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48 Geo. 3, c. 149, that the inventory on which the stamp is to be impressed is a wholly independent matter; and that if a person claiming under a Scotch will, or under a testament testamentary, produces it to the secretary of the railway Company immediately after the testator's death, it becomes obligatory upon him, within six months (and perhaps before, for probably the procuring the name of the executor to be put on the registry would be intermeddling or intromitting with the property in Scotland), to exhibit an inventory, and to pay the duty upon it. I think that this is the true construction of the acts of parliament, and that the 20th section of the 8 & 9 Vict. c. 17 puts persons who have obtained probate in England upon the same footing as executors acting on a testament testamentary in Scotland; and that the duty is payable in Scotland, and the inventory must be exhibited in the proper Commissary Court there.

WATSON, B.—I am of opinion, that the Crown is entitled to judgment. I confess I never had any doubt upon the point. By the 38th section of the 48 Geo. 3, c. 149, the inventory must be exhibited upon the intromitting with, or entering upon the possession or management of the estate or effects in Scotland, or at all events within six months after the executor taking upon himself the settlement or the management of the estate; and this information is for not filing an inventory within the six months. The special verdict finds that probate has been obtained in England, and probate duty paid here. The mode in which probate duty is collected in Scotland is, not by a probate granted in Scotland or any proceeding analogous to a probate, but an inventory is required to be filed, stating the amount of the property, upon which the duty is to be calculated and paid. Now, inasmuch as it would be necessary, in transferring the

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property after the death of the shareholder, to produce the will in Scotland and give other evidence to the railway Company, this enactment is made by the 20th section of 8 & 9 Vict. c. 17:—"The probate of the will, or the letters of administration, or an official extract therefrom, obtained from any Prerogative Court if granted in England, or a testament testamentary, or a testament dative if expede in Scotland, or an official extract thereof, shall together with such declaration be produced to the secretary; and upon such production in either of the cases aforesaid the secretary shall make an entry of the declaration in the said register of transfers." Now, supposing there had been no probate in England, in what mode would the transfer have taken place? The shares would have been transferred on the production in Scotland of the testament testamentary with the declaration. The section in question, in order to prevent the inconvenience of bringing a will from London to pass a few shares in Scotland, provides, that the probate when produced with the proper declaration, shall be the evidence upon which the transfer is to take place, and nothing more. By the acts of parliament regulating probate duty, it is simply payable upon the property situate within the province or diocese wherein the probate is granted. The power of the ordinary is not with respect to the person, but with respect to the goods—he does not grant probate with respect to the individual, but with respect to the goods within the diocese or province. The Act does not provide that these shares are to have their situs in Canterbury, although the railway is in Scotland; therefore, its meaning is simply this, if a testator has bona notabilia in England, and the executors obtain probate in England, that when produced shall be evidence to satisfy the secretary, and on which he is to make the transfer. It was not intended in any way to abrogate the force and effect of the

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act of parliament on which the Crown collects the duty in Scotland. Nay, more, if the testator had no property in England, and these shares in Scotland were all the property he possessed in the world, the ordinary would have had no jurisdiction. The intention was merely to facilitate the mode of transferring the shares in Scotland, and for that reason, I think that the right to have the inventory exhibited in Scotland still remains, and therefore the Crown is entitled to our judgment.

Judgment for the Crown.

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