

Case No. 15,534.

UNITED STATES v. KING.

{1 Cranch, C. C. 444.}<sup>1</sup>

Circuit Court, District of Columbia.

Nov. Term, 1807.

HIGHWAY ROBBERY—WHAT ARE HIGHWAYS—INDICTMENT AND SENTENCE.

1. No road in Virginia is a highway within the statute which takes away the benefit of clergy in certain cases, unless it be a public road laid out according to law, no evidence of which can be received but the record.
2. Upon an indictment at common law, the court may pass sentence under a statute.

Indictment [against Thomas King, a negro slave] for highway robbery of John Graham, and taking from him his watch.

Upon the trial, Mr. Simms and Mr. Swann, for the prisoner, called for evidence of the place being a highway.

Mr. Jones, for the United States, offered to prove by parol evidence, that it has been long used as such, and to prove by the records of this court, that this court has appointed an overseer of the road. If there is a record of the opening of the road, it must be in Fairfax county, in Virginia, out of our jurisdiction. If there should be a fault in the laying out of the road, if the viewers or petitioners did not proceed exactly according to law, yet it would be a highway. Highway means only common way,—*communis strata*; a river is a highway. If an individual lays out a road

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through his own land, from town to town, as a highway, it is a highway. 1 Hawk. P. C. c. 76, § 1.

Mr. Swann and Mr. Simms, in reply. By the act of Virginia of November 27, 1789, § 1, p. 46, the benefit of clergy is taken away from robbery in or near about a highway. It must mean something more than a common way. It must mean a road on which a man has a right to travel, and the obstruction of which may be prosecuted as a nuisance. It cannot be a road opened only by private agreement. In 1 Hawk. P. C. p. 367, § 3, it is said that an old way cannot be altered nor a new way laid out without the king's license, nor are the inhabitants obliged to keep watch in the new way, nor to make amends for a robbery therein committed. All public roads must appear on record; no road is a highway but a public road laid out by authority of the county court. The indictment charges the robbery to be in the highway. That cannot be a highway which any individual can lawfully shut up.

THE COURT (DUCKETT, Circuit Judge, absent) decided that no road in Virginia can be said to be a highway within the meaning of the act, unless it be a public road laid out according to law, and that no evidence but the record can be allowed to prove it to be such a public highway.

Verdict, guilty of the robbery, but not in a highway.

THE COURT sentenced him to be burnt in the hand and whipped with one hundred stripes. This sentence was passed under the Virginia act of assembly of 17th December, 1792, p. 190, § 34.

<sup>1</sup> [Reported by Hon. William Cranch, Chief Judge.]