

indictment arraigned, and confessed the Indictment, and prayed his Clergy, and thereupon was entered Curia advisare vult, the Court will consider; whereupon he demanded Judgment, whether the Plaintiff ought to maintain that Appeal he had brought? To which the Plaintiff demurred in Law. And in this Case three Points were adjudged by Sir Christopher Wray, Sir Thomas Gawdy, and the whole Court.

First, That the Matter of the Bar had been a good Bar of Appeal by the Common-Law, as well as if the Clergy had been allowed: For that the Defendant, upon his Confession of the Indictment, had prayed his Clergy, which the Court ought to have granted, and the deferring of the Court to be advised, ought not to prejudice the Party Defendant, albeit the Appeal was commenced before the Allowance of it.

The second Point adjudged was, That this Case was out of the Statute of 3 Hen. 7. for that the words of that Act are,

If it fortuné, that the same Felons and Murderers, and Accessories so arraigned, or any of them, to be acquitted, or the Principals of the said Felony, or any of them to be attainted, the Wife or next Heir of him so slain, &c. may have their Appeal of the same Death and Murder against the Person so acquitted, or against the said Principals so attainted, if they be alive, and that the Benefit of his Clergy thereof be not had.

And in this the Defendant Holcroft was neither acquitted nor attainted, but convicted by Confession, and the Benefit of the Clergy only prayed, as is aforesaid, so as the Statute being Penal concerning the Life of Man, and made in Restraint of the Common-Law, was not to be taken by Equity, but as Casus Omissus, a Case omitted, and left to the Common-Law.