

## **PLEASE NOTE**

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### **The regulation of the writ of certiorari to review summary criminal convictions, 1690-1848<sup>1</sup>**

The writ of certiorari first issued to withdraw administrative orders in late 1634.<sup>2</sup> However, it was not until 1654 that the records of the court of King's Bench show a writ of certiorari having issued to remove a summary criminal conviction.<sup>3</sup> This writ was issued to withdraw a conviction under the 1391 and 1429 statutes against forcible entry.<sup>4</sup> In 1657<sup>5</sup> a certiorari was issued against Essex justices to withdraw the conviction of one John Reeve for deer hunting under the Deer Stealing Act, 1605.<sup>6</sup>

In the seventeenth century it was convictions under the codes of forcible entry, deer hunting (and other game offences)<sup>7</sup> and the firearms acts<sup>8</sup> which attracted most applications for the writ. But the number of instances in which certiorari was used to withdraw convictions was tiny.<sup>9</sup> In the 1670s there were only three such applications. Numbers began to rise towards the end of the seventeenth century to about one annually. By 1730 the number was about two per term.

Nonetheless, from the late seventeenth-century onwards the employment of certiorari against criminal convictions attracted parliamentary attention and judicially-instigated procedural regulation. This account of certiorari and summary criminal convictions is concerned with legislative and judicial responses to the remedy: those measures adopted by parliament and the King's Bench to regulate this particular use of the writ, and the policy concerns which underlay these measures.

#### **1. The certiorari-bond and the game laws**

Convictions under the game laws attracted by far the greatest number of writs of certiorari. By the legal theory which had become accepted in the late seventeenth-

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<sup>2</sup> *R v. Marlborough JJ* Mich. 1634 (market regulation order); *R v. London JJ*, Mich. 1634 (bastardy order). EG Henderson, *Foundations of English Administrative Law* (Harvard, 1963), pp. 98-99.

<sup>3</sup> *R v. Watkin*, Mich. 1654 (TNA:PRO, KB 145/16/1655).

<sup>4</sup> 15 R II (1391) and 8 H VI, c. 9 (1429).

<sup>5</sup> Trin. 1657 (KB 145/16/1657).

<sup>6</sup> 3 Jac I, c. 13.

<sup>7</sup> *R v. Essex Justices*, Hil 1675 (KB 21/18); *R v. Devon JJ*, Mich. 1678 (TNA:PRO, KB 21/19); *R v. Kent JJ*, Mich. 1686 (TNA:PRO, KB 21/23); *R v. Wilts JJ* (TNA, PRO 21/ 23); *R v. Northampton JJ*, Mich. 1687 (TNA: PRO, 21/23).

<sup>8</sup> *R v. Wilts JJ*, Mich. 1678 (TNA:PRO, KB 21/18)

<sup>9</sup> *R v. Kingsland JJ*, Hil.1669 (TNA, PRO, KB 21/16).

century,<sup>10</sup> the writ of certiorari effected a permanent withdrawal of proceedings from the convicting justices. This theory produced, in turn, two forms of significant inconvenience for the prosecution: (i) withdrawal by certiorari suspended justices' power to continue proceedings;<sup>11</sup> (ii) the permanent withdrawal of the conviction had the consequence that, even if the conviction was affirmed, the penalty could only be levied by process of execution from the King's Bench.<sup>12</sup> But the cost of a writ of levavi facias from the King's Bench was more expensive than a local warrant of distraint issued by the justices. The danger was that a defendant might use the writ of certiorari to evade uncollected fines by forcing the prosecutor to suffer two types of expense: the cost incurred in having the conviction affirmed; and, secondly-even where the conviction was affirmed-the cost of recovering the penalty by process from the King's Bench.<sup>13</sup>

A concern that persons convicted of criminal offences were obtaining certiorari to evade the execution of forfeitures under the deer stealing acts seems to have prompted the first measure designed to regulate the remedy, the Deer Stealing Act 1691.<sup>14</sup> The Deer Stealing Act 1691 (and subsequent game acts)<sup>15</sup> reciting that 'divers offenders duly convicted do commonly procure writs of certiorari to remove such convictions into superior court at Westminster in hopes thereby to discourage and weary out such persons' required defendants removing a deer stealing conviction to enter a bond in the sum of £50. That £50 penalty on that bond would become enforceable<sup>16</sup> if the defendant failed to pay the prosecutor's expenses within one month of the conviction being affirmed.<sup>17</sup> It is not clear whether the Act of 1691 did much to stop the use of the writ as a means of challenging convictions under the game laws. By the middle of the second decade of the eighteenth century several writs were being granted per year to withdraw game convictions- a higher rate of usage than ever before recorded.<sup>18</sup> In 1718 parliament identified drafting oversights in the 1691 Act as having failed to properly remedy abuses in game conviction-related certiorari. Firstly, the threat of the bond only became active where the proceedings had been affirmed. But the legislation did not require the defendant to actively prosecute the writ. This enabled an opportunistic defendant to delay liability to the penalty by withdrawing the conviction into the King's Bench, and, thereafter, remaining inactive. Second, even where the

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<sup>10</sup> *R v. Inhabitants of Ailesbury* (1701) Fort 309; 92 ER 865

<sup>11</sup> *R v. Inhabitants of Ailesbury* (1701) Fort 309; 92 ER 865: 'The inconvenience is a certiorari stops proceedings'; *R v. Speed* (1703) 1 Salk 379; 91 ER 330.

<sup>12</sup> *R v. Pullen & R v. Rogers* (1691) 1 Salk 369; 91 E.R. 321.

<sup>13</sup> The obligation to execute a criminal fine by levavi facias from the court of King's Bench was, at least as far as the deer hunting conviction was concerned, removed by the Deer Hunting Act of 1776 (16 Geo. III, c. 30), s. 20 of which provided that the affirmation of a conviction was to have the effect of a procedendo issued to the justices' court. The effect was that the justices could execute the fine locally by distress, and were relieved from the obligation of levying the fine by process from the King's Bench.

<sup>14</sup> 3 Wil and Mary c. 10.

<sup>15</sup> The provision was reproduced in the game acts of 1694 (4 Will and Mary c, 23) and 1706 (6 Anne, c. 16).

<sup>16</sup> The enforcement of a game conviction certiorari bond is the subject of *Nicholas v. Simpson* (1720) 1 Stra 297; 93 ER 531.

<sup>17</sup> *R v. Dore* (1738) Andr 352; 95 ER 431: conviction for deer stealing affirmed; defendant ordered to pay costs.

<sup>18</sup> *R v. Weston JJ* (Mich 1714); *R v. Suffolk JJ* (Hil 1715); *R v. Devon JJ*, *R v. Essex JJ*, (Easter, 1715); *R v. Middlesex JJ* (Hil 1716); *R v. Northampton JJ*, *R v. Essex JJ* (Easter 1716); *R v. Nottingham JJ*, *R v. Hereford JJ* (Hil. 1717).

conviction was affirmed, the defendant was only obliged to pay the prosecutor's 'costs and charges', but not the post-conviction fine (which would usually be much higher than the prosecutor's charges). These oversights were addressed in the Deer Stealing Act 1718.<sup>19</sup> The preamble to the 1718 measure explained Parliament's reasons for strengthening the certiorari bond:

party or parties convicted are only obliged to give security to the person or persons prosecuting, for the payment of their costs and damages; and there being no provision made for securing the forfeitures incurred for the offence ...although such convictions should be confirmed by the said courts, the said offenders have opportunity to conceal their effects, and withdraw their persons from punishment; and the justice intended by the said Act hath been evaded

The 1718 Deer Stealing Act provided that the bond would be activated if (i) the defendant did not prosecute the certiorari with effect; or (ii) the defendant did not pay the prosecutor's costs in defending the conviction; or (iii) where, if the fine was uncollected when the conviction was affirmed, the defendant did not pay the fine. But the strengthened bond only operated in the special case of deer stealing convictions. It did not apply to convictions under other game offences, and there was no requirement to enter into a bond of any sort where certiorari was sought to withdraw a conviction which was non game-related.

## 2. The model-form conviction

The second technique targeted the nature of the judicial review administered on certiorari: testing whether the narrative contained in the conviction returned to court complied with the formal rules regulating the appearance of a summary conviction. Review of summary convictions by certiorari operated speculatively, rather than on the basis of some established legal complaint. The conviction was drawn up after the writ of certiorari had issued. The form of the conviction was settled by counsel.<sup>20</sup> The conviction was, by contrast with the administrative orders of justices which were returned in English, drawn up in Latin,<sup>21</sup> and rendered into court hand. It was with this purely retrospective document that the defendant would attempt to find fault.

In the space of sixty years between 1650 and 1710 the justices' conviction had become highly elaborate. The earliest seventeenth-century conviction<sup>22</sup> merely set out the adjudication: the fact that it appeared 'unto the justice by the testimony of AB that CD was guilty of several offences in taking and killing fallow deer', and recited that the said defendants were legally convicted of the offence of killing deer.

By the 1680s the classical form of conviction had begun to take shape.<sup>23</sup> Unlike the earlier version which merely set out the adjudication, this form included two

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<sup>19</sup> 5 Geo. 1, c. 15.

<sup>20</sup> *R v. Findal*, Mich. 1717 'passed by Mr Marsh' (TNA:PRO, KB 33/13/10); *R v. Pelleye*, Hil 1724 'this conviction was settled by the present Lord Chief Baron' (TNA:PRO, KB 33/13/6); *R v. Mayo*, 1732 'passed by Mr Fortescue' (TNA:PRO, KB 33/13/6).

<sup>21</sup> However, convictions for offences under the excise laws were permitted to be returned in English: *Anon* (1703) 91 ER 138; 1 Salk 150. *R v. Llamas* (1695) 5 Mod. 12; 87 ER 485.

<sup>22</sup> See *R v. Essex JJ* (TNA: PRO, KB 145/16/1657).

<sup>23</sup> See J. Tremaine, *Placita coronæ: or pleas of the Crown, in matters criminal and civil...containing a large collection of modern precedents* (London, 1723), pp. 326-328.

preliminaries which were not found in the earlier version. The conviction began with a memorandum clause (perhaps in imitation of the form used by the King's Bench where it tried offences prosecuted by way of information) setting out the appearance of the informer: 'be it remembered that on the 3d day of September in the 32d day of the reign of the Lord Charles etc...[AB] gives the said justice of the peace to understand and be informed that one [CD] ...unlawfully did hunt a certain fallow deer.'<sup>24</sup>

Two significant additions to the conviction occurred in the last decade of the seventeenth century. The first concerned the contents of the witnesses' testimony. Up to the 1690s the conviction merely recited that the witnesses testified upon their oaths 'of and upon the premises.'<sup>25</sup> There was no recital of what exactly the witnesses testified to, or whether the witnesses' testimony corresponded to the criminal offence with which the defendant was charged. Convictions which set out precisely what the witnesses testified to, and that it corresponded to the actus reus of the offence, first appeared in the early 1690s.<sup>26</sup>

The mid-seventeenth-century conviction included nothing about the appearance or defence made by the defendant. The new form,<sup>27</sup> the first instances of which occur in 1706,<sup>28</sup> included a recital that (a) the defendant had been summoned to respond to the premises; (b) that he had been asked to say why he should not be convicted of the premises; and (c) the fact that the justices had 'heard and understood all that the defendant had in his defence.'

It was the verbosity and hazard of invalidation of the common law conviction which prompted the second device invented by Parliament in order to check the abuse of certiorari: the model-form conviction. The credit for this particular invention is due to Sir Joseph Jekyll, the Master of the Rolls and draftsman of the Spirit Duties Act of 1735.<sup>29</sup> The Spirit Duties Act of 1735, better known as the 'Gin Act'<sup>30</sup> (legislation aimed at incriminating unlicensed retailers of gin) had been vigorously promoted by Jekyll. In the early eighteenth century convictions under the Alehouses Act of 1627<sup>31</sup> were amongst the most heavily targeted by the writ of certiorari.<sup>32</sup> It may have been from a concern that the enforcement of the Gin Act 1735 would similarly be frustrated by endless certioraris that Jekyll drafted the first model-form conviction- a provision which substituted for the long common law form, a short, fool-proof statutory form. The objective was to neutralise the threat of certiorari by making the task of drawing

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<sup>24</sup> *R v. Dobson*, Hil. 1680; J. Tremain, *Pleas of the Crown*, p. 328.

<sup>25</sup> *R v. Drake* (1685) 2 Show. 489, 89 E.R. 1058; *R v. Pullen* (1691) 1 Salk. 369, 91 E.R. 321.

<sup>26</sup> *R v. Kennett*, Easter 1691 (deer stealing) (TNA: PRO, KB 11/15).

<sup>27</sup> See *R v. Gloucestershire JJ*, Mich. 1710 (conviction of Francis Probert for deer stealing), (TNA: PRO, KB 16/5/3).

<sup>28</sup> *R v. Randall* Hil. 1706 (deer stealing); (TNA: PRO, 33/13/6); *R v. Langford*, Easter 1707 (deer stealing); (TNA: PRO, KB 11/21).

<sup>29</sup> 9 Geo II, c. 23.

<sup>30</sup> P. Clarke, 'The Mother Gin controversy in the Early Eighteenth Century,' *Transactions of the Royal Historical Society* 38 (1988).

<sup>31</sup> 3 Car. I, c. 4.

<sup>32</sup> Eg: *R v. Baynford*, Mich. 1716 (TNA: PRO, KB 21/29); *R v. Forde*, Hil. 1722 (TNA: PRO, KB 21/31); *R v. Reader*, Mich. 1722 (TNA: PRO, KB 21/31); *R v. Joy*, Hil. 1729 (TNA: PRO, KB 21/33); *R v. Dowding*, Hil. 1730 (TNA: PRO, KB 21/33).

up the conviction a simple form-filling exercise rather than the technical operation requiring the assistance of an expert pleader which it had originally been.

After its first appearance in the Gin Act 1735 the statutory short-form became routine, a standard clause inserted in virtually all post-1740 statutes constituting summary criminal jurisdiction. The use of such clauses ensured that the operation of judicial review on certiorari was effectively cramped. The offences which had attracted the greatest number of writs of certiorari in the early eighteenth century, the Profane Oaths Act, 1694<sup>33</sup> and the Alehouses Act, 1627,<sup>34</sup> were replaced by enactments (the Profane Oaths Act 1745<sup>35</sup> and the Alehouses Act, 1753<sup>36</sup>) which provided for model-form convictions which eliminated the need to draw up a conviction in accordance with the elaborate common law form. The effect of the wholesale adoption of Jekyll's invention was that by the end of the century certiorari only operated within that residual category of older offences for which no model-form conviction had been prescribed.<sup>37</sup>

### 3. Prohibition of certiorari clauses

A third device, which made its first appearance in the Navy Act, 1714,<sup>38</sup> and became more regular after 1745, provided that for an absolute prohibition upon convictions being subject to any writ of certiorari; the typical formula enacted that 'no proceedings shall be liable to be removed by certiorari, or other form or process of law.'<sup>39</sup> This was a slightly less common technique than the model-form conviction. There was greater resistance to the complete restriction upon access to the writ effected by the no-certiorari clause. In 1731 Sir Samuel Sandys introduced into the Commons the Quarter Sessions Appeal Bill. This provided that appeals to Quarter Sessions were to be final and 'not removable by certiorari.' The measure was defeated in Parliament.<sup>40</sup> An entry in the parliamentary diary of Sir John Percival records how (after an earlier visit to the Cotton Library to inspect Magna Carta) he had attended the debate on the Quarter Sessions Bill: the motion 'whereby no appeal from [Quarter sessions] could go to the Courts at Westminster was, on a division, rejected 130-against 75. 'It was thought,' Percival recorded, 'that the judges' determination on such appeals would be more equitable than the judgment of justices of peace at present, that party reigns everywhere so much.'<sup>41</sup> In 1786 there was a protest when the Commons enacted William Mainwaring's Lottery Amendment Bill which included a provision taking away certiorari. An item in *The Times* complained that the measure 'takes away the restraining power invested in the judges of the court of King's Bench

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<sup>33</sup> 6 & 7 Will. & Mar. c. 11.

<sup>34</sup> 3 Cha. 1, c. 4.

<sup>35</sup> 19 Geo. 2, c. 21.

<sup>36</sup> 26 Geo. II, c. 31.

<sup>37</sup> See the text accompanying fn. 58 below.

<sup>38</sup> 1 Geo. 1, c. 25.

<sup>39</sup> Workmen's Combination Act, 1757 (29 Geo. II, c. 33); Obtaining Money by False Pretences Act, 1757 (30 Geo. II, c. 24); Making of Bread Act (31 Geo. II, c. 29); Stealing of Dogs Act, 1770 (10 Geo. III, c. 18); Bricks and Tiles Act 1770 (10 Geo. 3, c. 49); Frauds by Workmen Act, 1779 (17 Geo. 3, c. 56); Preservation of Fish in the River Severn (18 Geo. II, c. 33); Duty on Hawkers Act, 1789 (29 Geo. 3, c. 26).

<sup>40</sup> 21 *Commons' Journal*, p. 803 (17 Feb. 1731/2).

<sup>41</sup> *Diary of the First Viscount Percival 1730-1733* (HMC, London, 1920).

by the writ of certiorari<sup>42</sup> and the clause abolishing certiorari was one of the grounds on which the measure was defeated in the Lords.<sup>43</sup>

Until the third decade of the nineteenth century there was only one means of evading a no-certiorari clause: the Crown was not bound by such clauses and a defendant could evade the prohibition if he could persuade the Crown to apply for the writ. In *R v. Allen*<sup>44</sup> Sir Vicary Gibbs, said that ‘as Attorney General he had in several instances assisted defendants against whom a doubtful judgment had been given below, to have their case reconsidered, by applying for the certiorari on the part of the Crown; without which they would have been concluded.’ But the rule books of the King’s Bench indicate that the number of instances where the Crown applied to withdraw a conviction on behalf of a defendant was low.<sup>45</sup>

The second means of evasion was not-at least as far as summary convictions were concerned<sup>46</sup>- recognized until the second and third decades of the nineteenth century. It very slowly came to be recognised that where justices exercised summary criminal jurisdiction in a case where the law did not allow the exercise of such a jurisdiction-exercising jurisdiction over an offence where the law did not empower justices to try such offences- a clause prohibiting certiorari could not prevent judicial review, since, what was prevented from being removed by certiorari was a ‘conviction,’ and where jurisdiction was exceeded there was no conviction.<sup>47</sup>

But the application of this theory to criminal convictions (as opposed to administrative orders<sup>48</sup>) came very late in the history of the writ. The possibility of evading the no-certiorari clauses in enactments constituting criminal offences did not occur until about 1830. The records of the King’s Bench show only about three instances<sup>49</sup> where certiorari was used to evade the anti certiorari clauses contained in the Offences Against the Person Act, 1828 and the Malicious Injuries to Property Act, 1827.

#### 4. The grounding affidavit requirement

In *R. v. Eaton*<sup>50</sup> Buller J held that an applicant must, as a condition of obtaining certiorari, lay a ground by affidavit testifying as to some miscarriage of justice or breach of natural justice or fundamental jurisdictional breach. The effect of this was (i) to increase the expense of the application, and (ii) to reduce the circumstances in

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<sup>42</sup> *The Times* 6 & 7 July 1786.

<sup>43</sup> *Lords’ Journal*, p. 758 (7 July 1786).

<sup>44</sup> 15 East. 333; 104 ER 870.

<sup>45</sup> In *R v. City of Worcester* (Mich 1820) the defendant had been convicted for offences contrary to the Hawkers and Pedlars’ code. This was one of those offences where Parliament had enacted a strict prohibition on certiorari. However, the order book records the consent of the Crown to the issue of the writ.

<sup>46</sup> The inability of a no-certiorari clause to bar certiorari where justices, purporting to exercise administrative jurisdiction, had acted outside objective jurisdiction had been recognised since the mid-eighteenth century: *R v. Derbyshire JJ* (1759) 2 Ld Kenyon 299; 96 ER 1189.

<sup>47</sup> *Anonymous* (1830) 1 B & Ad 382; 109 ER 829.

<sup>48</sup> See fn 46 above.

<sup>49</sup> *Anonymous* (1830) 1 B & Ad 382, 109 ER 829; *R v. Hastie* East 1834 (TNA:PRO, KB 21/59); *R v. Thornton* 1837 (Offences Against the Person Act, 1828) (TNA:PRO, KB 21/60); *R v. Opon* Mich. 1840 (Malicious Injuries to Property Act, 1827) (TNA:PRO, KB 21/62).

<sup>50</sup> (1787) 2 TR 89; 100 ER 49.

which the writ could be granted. The remedy would only be available to a defendant who was prepared to swear that there had been some miscarriage of justice. It was no longer possible to have a conviction withdrawn on demand. Defendants who could not comply with the grounding affidavit requirement were now denied access to the writ. In *Eaton* Buller J overruled an objection by counsel for the defendant who protested that that it had always been the practice of the court to issue the writ as a matter of automatic entitlement. An examination of eighteenth century Crown-side affidavits confirms the understanding of the practice expressed by counsel for the defendant in *Eaton*. Prior to the late 1770s the only affidavit required was one which established that notice of the intention to apply for the writ had been given to the convicting justices. Until the late 1770s the writ had not been conditioned on the defendant's ability to swear that the convicting justice had committed some serious miscarriage, or breach of jurisdiction. The grounding affidavit requirement was relatively novel; it had the important constitutional significance that the writ was no longer available to a defendant purely on demand.

## 5. The certiorari recognisance

The invention of the certiorari recognisance requirement was, in part at least, inspired by the same concern that had prompted parliament to create the certiorari bond in the game laws: the capacity of the remedy to keep the enforcement of an uncollected post-conviction fine in suspension until the prosecution incurred the expense of having the conviction affirmed and then executed by process from the King's Bench.

The incentive to the abusive use of certiorari increased as the penalty was heavier. The certiorari recognisance had its background in the offence punishable with some of the heaviest penalties in the eighteenth-century summary criminal code, the Lottery Office Keepers Act 1782. The 1782 Act was aimed at the problems caused by the proliferation of private lottery operators, and illegal lottery insurance, and fines under the Act were heavy. It seems to have been an apprehension that certiorari might be used to evade these penalties –to buy time, and to deter the prosecution from collecting the penalty by putting it to the expense of contesting the writ- that underlay the creation of the rule requiring a recognisance in conviction-related certiorari.

In *R v. Jenkinson*<sup>51</sup> the defendant had attempted to remove a conviction under the 1782 Act. Mansfield CJ expressed concern at the 'mischiefs of granting certioraris for vexatious purposes.' In order to cancel the risk of defendants evading uncollected fines and the threat that 'all convictions...would be removed by certiorari,'<sup>52</sup> Mansfield CJ decreed that henceforth the defendant was subjected to the threat of penalties of £50 if he did not proceed 'without any wilful or affected delay,' or, if the conviction was affirmed, pay the costs and charges incurred by the prosecution in defending the conviction. There was no positive statutory basis to extract recognisances from defendants challenging convictions by certiorari. The Quarter Sessions Appeal Act, 1731<sup>53</sup> had enacted that no certiorari was to be allowed unless the party prosecuting the certiorari entered into a recognisance in the sum of fifty pounds with condition to prosecute 'with effect, without any wilful or affected delay, and to pay the party or parties, in whose favour and for whose benefit such judgment

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<sup>51</sup> (1785) 1 TR 85; 99 E.R. 985.

<sup>52</sup> Ibid.

<sup>53</sup> 5 Geo. II, c. 19.

or order was given or made, within one month after the said judgment or order shall be confirmed, their full costs and charges.’<sup>54</sup> But the Act of 1731 was concerned with regulating the use of certiorari against *administrative* orders. It did not apply to criminal convictions.<sup>55</sup> However, Mansfield CJ used the court’s discretionary power to refuse certiorari as the means of insterting a procedural rule equivalent to that in the 1731 Act. The King’s Bench had jurisdiction to deny certiorari on public policy grounds. It would, Mansfield CJ ruled, exercise that jurisdiction to withhold relief where an applicant who sought to withdraw a criminal conviction had not entered into recognisances equivalent to those in the Act of 1731.

The game acts of 1691 and 1693 had instituted a system of penalties instituted to regulate the conduct of defendants withdrawing convictions under the game acts. *Jenkinson’s* case effected a massive extension of the same regime: a battery of penalties now regulated the conduct of defendants using certiorari to attack convictions, not just under the game acts but throughout the entire of the summary criminal code. As a deterrence to the threat that ‘all convictions...would be removed by certiorari’<sup>56</sup> defendants ran the risk of paying the prosecutor’s costs if the certiorari failed (while they would not be entitled to costs from the Crown if the application succeeded).

### **Certiorari and criminal convictions, 1848**

By the beginning of the reign of Queen Victoria the writ of certiorari was issuing at the rate of about one per year.<sup>57</sup> Use of the remedy was back to its late seventeenth-century rate. Most of the offences processed through justices’ courts were screened from certiorari by model-form convictions, or provisions outlawing absolutely the use of certiorari by defendants. The offences which had been the object of the first writs of certiorari in the mid-seventeenth century (offences against the game laws and against the Forcible Entry Acts) were not protected by statutory model-form conviction or no-certiorari clauses, and an extensive historical continuity was maintained by the fact that convictions under these codes, and particularly the game laws, continued to be removed by certiorari into the late 1830s and 1840s.<sup>58</sup>

Sir John Jervis’s Summary Proceedings Act 1848 provided for a simple standard-form conviction, relieving all convictions from the hazard of the conviction developed by the King’s Bench between the late seventeenth and eighteenth centuries. The effect of

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<sup>54</sup> In fact, Mansfield CJ incorrectly cited the Laws Continuance Act 1738 (13 Geo. II, c. 18) as the basis for the power. While the 1738 Act dealt with aspects of certiorari practice it made no reference to recognisances on certiorari, and Mansfield CJ must have intended to refer to the Quarter Sessions Act of 1731.

<sup>55</sup> The Act only applied where certiorari was used to withdraw ‘judgment[s] or order[s],’ and not criminal convictions. Further evidence that it was the intention was that the Act would only apply to administrative orders is derived from the fact that the respondents are described as the parties ‘for whose benefit’ the ‘order or orders’ had been made – an unlikely reference to the prosecutor in a criminal proceeding.

<sup>56</sup> *R v. Jenkinson* (1785) 1 TR 85; 99 E.R. 985.

<sup>57</sup> In the year 1837/8 there are records of two conviction-related writs of certiorari (TNA:PRO, KB/61). There are no records of conviction-related certiorari for the year 1838/9. There are two conviction-related writs of certiorari recorded for the year 1839/40 (TNA: PRO, KB 21/62).

<sup>58</sup> *R v. Derbyshire JJ*, Hil. 1829, (TNA:PRO, KB 21/56); *R v. Sylvester*, Mich. 1829 (TNA:PRO, KB 21/56); *R v. Thoroughgood*, Mich. 1831 (TNA:PRO, KB 21/57); *R v. Stokes*, Easter 1831 (TNA:PRO, KB 21/57); *R v. Bayley*, Hil 1832 (TNA:PRO, KB 21/57); *R v. Dent* Hil, 1837 (TNA:PRO, KB 21/ 60).



the 1848 measure was famously described in a judgment of Lord Sumner in *R v. Nat Bell Liquors*,<sup>59</sup> a frequently quoted passage which provides the standard history<sup>60</sup> of the development of the writ. Jervis's 1848 Act had, according to Lord Sumner, the effect of shutting down the power to review convictions on certiorari:

When the Summary Jurisdiction Act provided, as the sufficient record of all summary convictions, a common form, which did not include any statement of the evidence for the conviction, it did not stint the jurisdiction of the Queen's Bench...What it did was to disarm its exercise. The effect was to...remove nearly all opportunity for [the] detection [of error]. The face of the record 'spoke' no longer: it was the inscrutable face of a sphinx.

But the identification of the 1848 Act as the cause of the reversal of the use of certiorari greatly exaggerates the effect of that reform. Sir John Jervis's Act of 1848 did not terminate a flourishing jurisdiction. The 1848 Act was more of a tidying up measure. The remedy had peaked in the reign of George II and thereafter had been in decline. Lord Sumner's account in *Nat Bell Liquors* also overlooked the fact that the jurisdiction had already been extensively 'disarmed': by no-certiorari clauses, by the penalties under the certiorari bond (in game convictions) and under the certiorari recognisance (which applied to all other offences), and by the grounding affidavit. It was not Sir John Jervis's Act of 1848 which 'silenced' the common law conviction. The process of extinguishing the common law conviction had begun- and was, by 1848, to a large extent complete- with the first appearance of the model-form conviction in Sir Joseph Jekyll's Gin Act of 1735.

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<sup>59</sup> [1922] 2 AC 160.

<sup>60</sup> W. Wade and C. Forsyth, *Administrative Law* (Oxford, 2004), at pp. 269-270.