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to travel on the public streets.[39] Although these rights are not absolute and are subject to reasonable parking regulations, including parking meter zones, it has been held that to deny the right to load and unload passengers or freight without payment of a fee would be unreasonable.[40] Consequently, parking meter ordinances are often phrased to exclude such temporary stops,[41] and in other cases the court will imply an exception.[42] Probably adequate loading zones would be sufficient protection against this defect.

Conclusion

The struggle over the validity of parking meters has resulted in a substantial victory for the proponents of the ordinances.[43] Nevertheless, municipalities are somewhat limited as to particular uses of parking meters and their receipts. These limitations are not of a character which will restrict the municipality to a sphere of action too small to effectuate the regulatory purposes of the ordinances. On the other hand, the general public is protected from municipal abuse by the police regulation theory and its incidental restrictions. Lest it be thought that the courts have unduly sacrificed individual rights to pressure from municipal authorities, several courts have indicated they would not look with favor at "unreasonable" application of parking meter ordinances.[44] If the courts do not fulfill their obligation in this regard it is probable that the future limitations on the use of parking meters will be determined by the legislative process.

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Post Conviction Remedies in Illinois

In an effort to remove the procedural confusion in cases where persons convicted of crimes desire to question the constitutionality of their conviction, the Illinois Legislature, at the 1949 Session, passed an act entitled *Remedy for Convicts Claiming Denial of Constitutional Rights.*[1]

The need for such a procedure was strikingly indicated by the United States Supreme Court in *Loftus v. Illinois*[2] and the concurring opinion

39 Ex parte Duncan, 179 Okla. 355, 65 P. (2d) 1015 (1937); Harper v. City of Wichita Falls, 105 S.W. (2d) 743 (Tex. Civ. App. 1937).

40 In re Opinion of the Justices, 297 Mass. 559, 8 N.E. (2d) 179 (1937); Wonewoc v. Taubert, 203 Wis. 73, 233 N.W. 755 (1930).

41 Harper v. City of Wichita Falls, 105 S.W. (2d) 743 (Tex. Civ. App. 1937); Webster County Court v. Roman, 121 W.Va. 381, 3 S.E. (2d) 631 (1939).

42 Andrews v. City of Marion, 221 Ind. 422, 47 N.E. (2d) 968 (1943); Gilsey Building Inc. v. Village of Great Neck Plaza, 170 Misc. 945, 11 N.Y.S. (2d) 694 (1939).

43 It is significant that in De Aryan v. City of San Diego, 75 Cal. App. (2d) 292, 170 P. (2d) 482 (1946) no attack was made on the legality of the parking meter ordinance as a regulation, the suit being brought only on a theory of misuse of funds.

44 State v. McCarthy, 126 Fla. 433, 171 So. 314 (1936); Gilsey Building Inc. v. Village of Great Neck Plaza, 170 Misc. 945, 954, 11 N.Y.S. (2d) 694, 703 (1939) where the court said: "It seems unnecessary to add that if special circumstances present themselves in the improper or unreasonable enforcement of the ordinance in question, to the substantial injury of the plaintiff, it is not remediless."

1 The act, which was approved Aug. 4, 1949, is incorporated into the Illinois Criminal Code, Ill. Rev. Stat. (1949); *see:* Jenner, Ill. Post Conviction Hearing Act 9 Fed. Rules 347 (1949), c. 38, §§826-832.

2 334 U.S. 804 (1948).

of the late Justice Rutledge in *Marino v. Ragen*,[3] where he raised the question of whether there was any remedy whatsoever in Illinois to raise issues such as denial of counsel.[4] The procedural confusion in review of constitutional issues reached a new height when the Supreme Court in the *Loftus* case withheld decision until it could be advised by the Illinois Court what was the nature of the various Illinois methods of review and which one was proper to test allegedly void convictions.[5] In the subsequent opinion in the same case, *People v. Loftus*,[6] the Illinois Supreme Court set out what it considered the scope of the Illinois remedies: writ of error,[7] statutory coram nobis,[8] and habeas corpus.[9]

The *Loftus* opinion indicated that the writ of error is limited to testing the record made in the case by the trial court, which consists only of the indictment, arraignment, plea, trial and judgment. Since the writ of error does not contain a bill of exceptions unless this is submitted by the accused and certified by the trial court,[10] where the constitutional deprivation complained of, such as failure to appoint counsel, does not appear in the common law record, appeal by writ of error is impossible.[11]

Although a prisoner under confinement may seek review of his conviction by application for a writ of habeas corpus, the primary function of this writ is to review alleged lack of power of the court to enter the order questioned, and lack of jurisdiction over the defendant or over the subject matter.[12] Another factor which makes review by habeas corpus

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3 332 U.S. 561, 564 (1947); also *see* "Open Letter to the Attorney General of Illinois" by Dean Wilbur G. Katz, 15 U. of Chi. L. Rev. 251 (1948).

4 With regard to the constitutional right to counsel, *see* Comment (1948) 39 J. Crim. L. & Criminology 342.

5 This was due to conflicting statements by the Attorney General of Illinois and holdings by the Illinois court as to the use of habeas corpus for reviewing an alleged denial of constitutional right. People ex rel. Thompson v. Neirstheimer, 395 Ill. 572, 71 N.E. (2d) 343 (1947) held it was not the proper remedy. However before the Supreme Court in Loftus v. Illinois, 334 U.S. 804 (1948) the Attorney General argued, on the basis of dicta in People v. Shoffner, 400 Ill. 337, 79 N.E. (2d) 200 (1948) and People v. Wilson, 399 Ill. 437, 78 N.E. (2d) 512 (1948), that habeas corpus was the proper remedy. This was contrary to his argument in White v. Ragen, 324 U.S. 760 (1945), but consistent with his claims in Marino v. Ragen, 332 U.S. 561 (1947). In its second opinion in People v. Loftus, 400 Ill. 432, 81 N.E. (2d) 495 (1948) the Illinois court held that habeas corpus was the proper means of testing an allegedly void conviction.

6 400 Ill. 432, 81 N.E. (2d) 495 (1948).

7 Ill. Rev. Stat. (1949) c. 38, §§769-780½.

8 Ill. Rev. Stat. (1949) c. 110 §196.

9 Ill. Rev. Stat. (1949) c. 65, §§1-36.

10 Illinois Supreme Court Rules of Practice and Procedure, Rules 36 and 70A, Ill. Rev. Stat. (1949) c. 110, §§259.36, 259.70A. People v. Shoffner, 400 Ill. 337, 79 N.E. (2d) 200 (1948); People v. Berry, 399 Ill. 17, 76 N.E. (2d) 433 (1947); People v. Bolds, 398 Ill. 626, 76 N.E. (2d) 456 (1947); People v. Nelson, 398 Ill. 623, 76 N.E. (2d) 441 (1947).

11 Since the common law record imports verity, in the absence of any proof to the contrary by another matter of record, it is presumed that the court fully discharged all of its duties toward the defendant. People v. Shoffner, 400 Ill. 337, 79 N.E. (2d) 200 (1948); People v. Owens, 397 Ill. 166, 73 N.E. (2d) 274 (1947); People v. Fuhs, 390 Ill. 67, 60 N.E. (2d) 205 (1946); People v. Pacora, 358 Ill. 448, 193 N.E. 477 (1935). Thus, as frequently is the case, when the record contains no indication of the alleged deprivation of constitutional right, writ of error is not the appropriate remedy.

12 People ex rel. Thompson v. Neirstheimer, 395 Ill. 572, 71 N.E. (2d) 343 (1947); People ex rel. Barrett v. Bradley, 381 Ill. 169, 62 N.E. (2d) 788 (1945); People ex rel. Courtney v. Sullivan, 363 Ill. 34, 1 N.E. (2d) 306 (1936). It also has been held to include anything which happened subsequently to render the judgment void.

unsatisfactory is the fact that an order denying or quashing the writ is never res judicata. Therefore, since a judgment denying the prisoner his freedom is not final, the Illinois Supreme Court cannot review a trial court's decision.[13] On the other hand, of course, when a writ of habeas corpus is denied in the Illinois courts, the petitioner can apply for certiorari from the United States Supreme Court if a federal question is involved.[14]

The writ of error coram nobis is the statutory form of the former common law process by which a court could correct errors of fact occurring in the trial court, which facts, if known to the court, would have resulted in a different judgment. For example, the fact that the trial judge would be assumed to know whether the accused had been deprived of his right to counsel would preclude the use of the statutory coram nobis as a remedy in such a case. Likewise, a failure to inform an accused who submits a plea of guilty, that the penalty for the crime of accessory to murder carries the same penalty as the crime of murder has also been held to be an error of law for which coram nobis would not lie as the proper means of review.[15]

In addition to these various limitations, two additional factors have made review of alleged deprivations of constitutional rights extremely difficult. First is the virtual impossibility of obtaining a writ of habeas corpus from the Federal courts due to the exhaustion of remedies rule, which cannot be satisfied without numerous appeals in state courts that are subject to dismissal on procedural grounds. Although the Supreme Court in *Wade v. Mayo*[16] held that exhaustion of only one state remedy was necessary to obtain Federal habeas corpus, the new Judicial Code,[17] rejecting *Wade v. Mayo,* enacted only the complete exhaustion of remedies rule as announced in *Ex Parte Hawk.*[18] The second problem has been presented by the inconsistencies of the court holdings and state claims as to the proper remedies to be pursued. As a result an Illinois prisoner would have had to make from seven to twelve attempts to seek

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People ex rel. Courtney v. Thompson, 358 Ill. 81, 192 N.E. 696 (1934); People ex rel. Hoyne v. Windes, 283 Ill. 251, 119 N.E. 297 (1918).

13 People ex rel. Maglori v. Simmons, 284 Ill. 28, 119 N.E. 940 (1918); People ex rel. Magee v. McNally, 221 Ill. 66, 77 N.E. 544 (1906).

14 Since no higher Illinois court can review the denial of the writ, such a decision is by the highest court in the state in which a decision can be had and thus is reviewable by the United States Supreme Court, Marino v. Ragen, 332 U.S. 561 (1947).

15 People v. Sprague, 371 Ill. 627, 21 N.E. (2d) 763 (1939). For a discussion of writ of error coram nobis and habeas corpus as methods of collateral relief from convictions in violation of due process in Illinois, *see* Comment (1947) 38 J. Crim. L. & Criminology 139; reprinted as Comment (1947) 42 Ill. L. Rev. 329; Note (1947) 15 U. of Chi. L. Rev. 107, 119, 123.

16 334 U.S. 672 (1948).

17 Pub. L. No. 773, 80th Cong., 2d Sess. (June 25, 1948) §2254 which provides that "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." Young v. Ragen, 337 U.S. 235 (1949).

18 321 U.S. 114 (1943).

review in wending his way through the procedural maze before arriving in Federal court.[19]

It was important that a new remedy inquiring into alleged constitutional deprivations at the trial have none of the limitations previously discussed. An effort was made, therefore, to comply with the statement of the United States Supreme Court in *Carter v. Illinois*[20] that "A State must give one who is deprived of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface" and to that end it is essential that "questions of fundamental justice protected by the Due Process Clause may be raised, to use the lawyers' language, *de hors* the record."[21] By providing a speedy and certain remedy in the state courts the present Illinois procedure is designed to obviate the necessity of resorting to the Federal courts for an adjudication of alleged denials of Federal constitutional rights. In the last three terms of the United States Supreme Court 49% of the pauper cases seeking post-conviction relief originated in the Illinois prisons,[22] and in the 1946 term the Illinois cases amounted to over 60% of those in this category.[23]

The 1949 Illinois post-conviction remedy act neither supercedes the existing methods of review nor is it affected by the availability or unavailability of them. It provides an additional means of obtaining review, but is limited to the assertion of a substantial denial of federal or state constitutional rights in the proceedings which resulted in the petitioner's conviction. There is some question as to the advisability of providing this new remedy without in some way limiting its use so as to make it the exclusive means of asserting such a denial or deprivation. For instance, if, after a utilization of the various former remedies, this new procedure still remains available, additional confusion and overload of judicial facilities will have resulted without achieving any worthwhile improvement in criminal review procedure. On the other hand, since the new remedy does not have the technical limitations of writ of error, statutory coram nobis, or habeas corpus, it could very well be made the exclusive means of testing allegations of deprivation of constitutional rights.

The New Post-Conviction Hearing Law

The scope of the act is set forth in Section 1 which permits the filing of a petition for a hearing by any person imprisoned in the penitentiary who asserts that in the prosecution which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both.[24] Since venue of the

19 Note (1947) 15 U. of Chi. L. Rev. 107, 120.

20 329 U.S. 173 (1946).

21 *Id.* at 175.

22 Address by Honorable Fred M. Vinson, Chief Justice of the United States, before the American Bar Association, Sept. 7, 1949, St. Louis, Mo.

23 Justice Rutledge concurring in Marino v. Ragen, 332 U.S. 561, 563 (1947).

24 By virtue of the provisions of §1 of the Illinois State Penitentiary Act of 1933, Ill. Rev. Stat. (1949) c. 108, §105, specifically incorporating the institutions at Joliet, Chester, and Pontiac into the Illinois Pentitentiary System, any person imprisoned therein would come within the scope of the new statute. However, People v. Sowrd, 295 Ill. App. 314, 14 N.E. (2d) 957 (1938), reversed on other grounds 370 Ill. 140, 18 N.E. (2d) 176 (1938), held that the 1933 Act did not make the State Reformatory for Women at Dwight a penitentiary.

proceeding is fixed as the court in which the original trial took place, some criticism has been voiced as to the advisability of having as the court hearing the petition the same one in which the alleged deprivation occurred. However, the same factor is present as regards a hearing of a motion for a new trial, where the judge is nevertheless considered to be sufficiently impartial to render an unbiased decision. One explanation for this provision is the desire and practical need to avoid the possibility of having the few trial courts sitting in the counties where the penitentiaries are located flooded with hearings on petitions under the new law. The opportunity for review by the state supreme court insures that the venue provision will not result in prejudice to the petitioner even though he is seeking to have the trial court review its own alleged error.

When one of the first petitions[25] was filed under the new act, the Chief Justice of the Criminal Court of Cook County ruled it unconstitutional as "an encroachment on the power of the Judiciary," citing *People ex rel. Stead v. Superior Court*,[26] which held that "when a judgment is affirmed by the Supreme Court, all questions raised by the assignments of error, and all questions that might have been so raised, are to be regarded as free from all error, and a final determination" and that "interference by Nisi Prius judges with execution of such judgment constitutes a wrongful infringement of the Appellate jurisdiction of said Court." Since the remedy in the new post-conviction hearing law is similar to statutory coram nobis under Section 72 of the Civil Practice Act,[27] which has been held to permit a trial court to set aside a conviction and grant a new trial after affirmance of the conviction on appeal, this ruling of the criminal court of Cook County seems untenable. Coram nobis, which is available in criminal as well as civil cases,[28] is not considered subject to the rule laid down in the *Stead* case because, as the Illinois Supreme Court said in *People v. Dabbs*, "the original finding of the court is not disputed or contested, but the bill proceeds on the theory that newly discovered facts would produce a different result."[29] The new Illinois post-conviction act has as its purpose the providing of an adequate remedy for adjudicating alleged deprivations of constitutional rights in criminal trials, and in such cases, many of which allege lack of counsel and other defects, not of record, the petitioner should not be foreclosed from a full and proper hearing on these issues, notwithstanding a prior appeal to the state supreme court from the conviction.

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25 People v. Dale (Criminal Court of Cook County 1949). In this case, Judge Lynch merely quoted from People v. Superior Court, 234 Ill. 186, 84 N.E. 875, 877 (1908) the language used in the text of this article, at note 25, *infra*, and held that this was an unconstitutional invasion of the judicial power under Ill. Const. Art. VI, §2. The argument made by the state's attorney was to the effect that this invaded the appellate power of the Illinois Supreme Court since it would force a nisi prius court to accept jurisdiction of a case which had already been reviewed by the higher tribunal. It is interesting to note that the question was not properly before Judge Lynch since the Dale case had not been appealed. At present this ruling is on appeal to the Illinois Supreme Court, Docket No. 31411.

26 234 Ill. 186, 84 N.E. 875, 877 (1908).

27 Ill. Rev. Stat. (1949) c. 110, §196.

28 Thompson v. People, 398 Ill. 366, 75 N.E. (2d) 767 (1947); People v. Touhy, 397 Ill. 19, 72 N.E. (2d) 827 (1947); People v. Crooks, 326 Ill. 266, 157 N.E. 218 (1927).

29 372 Ill. 160, 23 N.E. (2d) 343 (1939).

The ruling holding the new act unconstitutional is also subject to question in view of the fact that the particular case which was before the court had not been appealed to the State Supreme Court and therefore no question was presented as to the propriety of a trial court reviewing a decision of an appellate court. However, even if this objection to the new law should be upheld in an appropriate case, there is no sound basis for invalidating the entire act. It should be entirely proper for the trial court to have jurisdiction of a petition filed under the act for a collateral attack on a conviction alleging substantial denial of constitutional rights. This procedure again may be analogized to the motion for new trial which is provided for in the Illinois Criminal Code,[30] but which requires that exceptions be taken in the original trial in order to qualify for the new trial motion.

In addition to the filing of the post-conviction hearing petition with the clerk of the court a copy also is to be served upon the state's attorney by any of the methods of serving papers which are provided in Rule 7 of the Illinois Supreme Court.[31]

A five year limitation period is provided for filing the petition, which is comparable to the period provided for in statutory coram nobis.[32] The "five years after rendition of final judgment"[33] language was chosen for this limitation period in order to take advantage of the certainty as to the point of commencement of the running of the period, and the availability of a body of decided cases which interprets that language[34] and thus should avoid or at least reduce the litigation necessary to interpret the provision. The same is true with regard to the extension of time if "the petitioner alleges facts showing that the delay was not due to his culpable negligence,"[35] which provision is taken from Section 76 of the Civil Practice Act.[36] A three year limitation period as to judgments rendered prior to the enactment of the statute was regarded by the draftsmen as sufficient time for persons already imprisoned at the time of passage of the act, especially in view of the time extension which may be granted in so-called hardship cases.

Section 2 of the new act prescribes the contents of the petition with an attempt to reduce to a minimum requirements which may result in purely technical objections. This is desirable in view of the finality of the judgment rendered upon the petition. As an aid to petitioners acting without counsel and in an effort to reduce the burden of analyzing the petitions, no argument, citations or discussion of authorities are to be included. The basic requirements are the identification of the proceeding which resulted in the conviction, the date of rendition of the final judgment complained of, and a setting forth of the respects in

30 Ill. Rev. Stat. (1949) c. 38, §747 which is governed by the provision for new trial in civil cases, Ill. Rev. Stat. (1949) c. 110, §192, but which requires that exceptions be taken at the original trial in order to qualify for the new trial motion.

31 Ill. Rev. Stat (1949) c. 110, §259.7.

32 Ill. Rev. Stat. (1949) c. 110, §196.

33 Section 1 of the new act, Ill. Rev. Stat. (1949) c. 38, §826.

34 The statutory coram nobis limitation, that filing must be within five years of rendition of final judgment, has been held to apply to review of criminal as well as civil proceedings. People v. Touhy, 397 Ill. 19, 72 N.E. (2d) 827 (1947); People v. Rave, 392 Ill. 435, 65 N.E. (2d) 23 (1946); People v. Sprague, 371 Ill. 627, 21 N.E. (2d) 763 (1939).

35 Section 1 of the new act, Ill. Rev. Stat. (1949) c. 38, §826.

36 Ill. Rev. Stat. (1949) c. 110, §200 (limitation period for perfecting civil appeal); Roy v. City of Springfield, 282 Ill. App. 238 (1935).

which the petitioner's constitutional rights were violated. In addition, the petition should identify any previous proceedings that may have been taken to secure relief from the conviction.

The provision requiring the attaching of affidavits, records, or other evidence supporting the allegations, or a statement explaining why they are not attached, serves both to incorporate the substance of the existing requirements as to statutory coram nobis and to discourage indiscriminate and unfounded petitions.[37]

Section 3 is of particular importance from the standpoint of the prisoner filing the petition. It provides that "any claim of substantial denial of constitutional rights not raised in the original or amended petition is waived."[38] On the basis of Illinois cases which have reached the United States Supreme Court, this section is within the constitutional power of the legislature. As that Court held in *Parker v. Illinois*,[39] reaffirming a similar holding in *Central Union Co. v. Edwardsville*,[40] constitutional question which Illinois courts have held to be waived for failure to follow the Illinois procedure will not be heard in the Supreme Court. This would apply only to claims of denial of rights guaranteed by the Illinois Constitution, since the issue as to whether Federal rights have been waived by failure to follow state procedure can be determined only by the United States Supreme Court.[41] Even in cases of alleged deprivation of Federal rights the issue is whether the state practice gives the complaining party "a reasonable opportunity to have the issue as to the claimed right heard and determined"[42] by the state court. Both the *Edwardsville* and *Parker* cases involved litigants who had appealed to the Illinois Appellate Court when the Illinois practice requires that constitutional issues be appealed directly to the Illinois Supreme Court,[43] and a prior attempt to have them reviewed by the Appellate Court precludes subsequent review of these questions by the state supreme court. This practice was upheld by the United States Supreme Court in both cases. The waiver provision of the new law is not subject to what Justice Rutledge termed a "hypertechnical procedural nullification of constitutional rights."[44]

Since the purpose of the new act is to provide a quick and adequate review of alleged denials of constitutionally guaranteed rights, it is essential that once the petitioner has resorted to its remedy he should not be free to renew his claims in the future. The Illinois Supreme Court has upheld the operation of res judicata in criminal as well as civil

37 With regard to statutory coram nobis "the issue of fact may be made, and is generally made, by affidavits in support of the motion and by counter affidavits denying the facts set up in the motion and affidavits in support thereof, in which case the burden of proof is upon the party making the motion to prove his facts alleged by a preponderance of the evidence." This is true even when applied to the review of a criminal judgment, as with regard to review of criminal cases the proceeding is civil in nature. Thompson v. People, 398 Ill. 366, 75 N.E. (2d) 767 (1947); People v. Touhy, 397 Ill. 19, 72 N.E. (2d) 827 (1947); People v. Crooks, 326 Ill. 266, 157 N.E. 218 (1927).

38 Ill. Rev. Stat. (1949) c. 38, §828.

39 333 U.S. 571 (1948).

40 269 U.S. 190 (1925).

41 Parker v. Illinois, 333 U.S. 571 (1948); Central Union Co. v. Edwardsville, 269 U.S. 190 (1925); Davis v. O'Hara, 266 U.S. 314 (1924).

42 Central Union Co. v. Edwardsville, 269 U.S. 190, 194-195 (1925).

43 Ill. Rev. Stat. (1949) c. 110, §199.

44 Parker v. Illinois, 333 U.S. 571 (1948) dissenting opinion, 578-579, referring to his concurring opinion in Marino v. Ragen, 332 U.S. 561, 563 (1947).

cases and given it full effect by precluding the raising of all issues which might have been raised as well as those which were raised, once an appeal has been taken and the judgment below affirmed by the Supreme Court.[45]

Under the provisions of Section 4, if the petition alleges that the petitioner is unable to pay the costs of the proceeding, the court may order that he be permitted to proceed as a poor person. The provisions for advising the petitioner of his right to counsel and appointing counsel for him if the court is satisfied that he has no means of procuring counsel himself, are substantially the provisions of Rule 27A of the Illinois Supreme Court.[46]

Section 5 provides that the state shall file an answer or motion to dismiss the petition within thirty days after the filing and docketing of the petition. This requirement that the state set forth grounds of objection or defense was thought necessary to make a record to which the full force and effect of the principle of res judicata could be applied. The provision that no further pleadings shall be filed, except as the court may order on its own motion or on that of either of the parties, is modeled after the similar provision in Rule 7(a) of the Federal Rules of Civil Procedure.[47]

An important feature of Section 5 is the provision for discretionary withdrawal of the petition at any stage of the proceedings prior to the entry of judgment. Again the need for this provision results from the res judicata effect of a judgment under the act. Since in many cases the petitioners will be unrepresented by counsel in the first instance, it is necessary to give laymen, unskilled in the law, some protection against the absolute finality of the doctrine, the effect of which is difficult for them to comprehend. The discretionary feature permitting pleading over, amendment of pleadings, and extensions of time to file pleadings are similar to Rule 8 of the Illinois Supreme Court[48] and Section 46 of the Civil Practice Act.[49]

Section 6 is concerned with the type of hearing which is to be granted. The court may receive proof by affidavits, depositions, oral testimony, or other evidence. It is discretionary with the court as to whether the prisoner is to be brought before it for the hearing. This provision, plus the one covering the forms of proof which may be made, was thought necessary in order to prevent prisoners from obtaining a free trip from the penitentiary to the locale of their trial, merely by verifying a petition which is good on its face. Although it could be argued that the petitioner was entitled to a jury trial at the hearing, since it is regarded as a new suit, the procedural analogy to habeas corpus would seem to be a sufficient basis for denying this contention.

A finding in favor of the petitioner does not necessarily result in his discharge from custody as it merely entitles him to another arraignment and a retrial. Practically, however, such a finding would often result in a release from confinement due to the difficulty of re-creating the state's case some years after it had been prepared.

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45 People v. Thompson, 392 Ill. 589, 65 N.E. (2d) 362 (1946); People ex rel. Kerner v. Circuit Court, 369 Ill. 438, 17 N.E. (2d) 46 (1938); People ex rel. Stead v. Superior Court, 234 Ill. 186, 84 N.E. 875 (1908).

46 Ill. Rev. Stat. (1949) c. 110, §259.27A; with regard to right of counsel and Rule 27A, *see* Comment (1948) 39 J. Crim. L. & Criminology 342.

47 28 USCA following §723c (1941).

48 Ill. Rev. Stat. (1949) c. 110, §259.8.

49 Ill. Rev. Stat. (1949) c. 110, §170.

In accordance with the underlying purpose of making the proceedings under this act final, Section 7 provides that any final judgment entered on a petition filed under it may be reviewed by the Illinois Supreme Court on writ of error within six months from the entry of the judgment. The writ of error provision is in compliance with numerous Illinois decisions holding that where property rights or personal liberty is involved, independent of statutory or constitutional provisions the writ of error lies from the Supreme Court by force of the common law.[50] This is particularly true of proceedings which are purely statutory and unknown to the common law and where the statute does not expressly forbid the writ of error.[51]

Conclusion

The new act should be evaluated in terms of the faults in the former procedures. The goal of the committee which originally drafted the act as a rule of court, to be promulgated by the Illinois Supreme Court, was to afford an adequate state procedure for hearing claims of denial of federal and state constitutional rights. It was felt necessary to provide a speedy, comprehensive and certain state remedy for such abuses, to clear away the confusion which had arisen regarding the propriety of the various Illinois procedures.

The post-conviction hearing gives the petitioner adequate opportunity to present his claims without regard to what is contained in the record, so long as these claims can be substantiated. The speed with which review of the individual case may be had depends upon the speed with which the petition is filed. Procedural simplicity has been achieved by requiring only such information as is listed in the act and the affidavits, records or other evidence necessary to support the allegations of the petition. Sections 3 and 7 combine to give the new remedy the necessary finality in order to obtain appellate review by the Illinois Supreme Court, and the United States Supreme Court in appropriate cases.

Although the new law is a commendable one in many respects, since the remedy it provides does not depend upon the availability of the already existing methods of review, it would seem that a new procedure has been added to the already too numerous means of review and, from the standpoint of the volume of judicial business in this field, this is a greater detriment than benefit. The satisfactory operation of this new procedure, if it is to dispense with the technical difficulties of obtaining a final determination of the issues raised by the prisoner, depends upon its being the exclusive remedy for raising the claim of deprivation of constitutional rights. From the standpoint of law enforcement officials, unless provision is made for such finality, this is just another procedure available to prisoners desiring to present unfounded claims. The persons for whose benefit this new legislation was passed—prisoners who have been substantially denied rights guaranteed to them by the Federal and State constitutions—would not be harmed by an exclusive remedy provision, as the desired final adjudication of their claims may be had in a more expeditious manner. In the interests of judicial efficiency, the

50 People v. Cornelius, 332 Ill. App. 271, 74 N.E. (2d) 900 (1947); People v. Scott, 326 Ill. 327, 157 N.E. 247 (1927); State v. Ajster, 318 Ill. 230, 149 N.E. 297 (1925).

51 Superior Coal Co. v. O'Brien, 383 Ill. 394, 50 N.E. (2d) 453 (1943).