No. 26947

IN THE

Supreme Court of Illinois

NOVEMBER TERM, A. D. 1942

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel., The Board of Trustees of the University of Illinois, Norval D. Hodges and Sveinbjorn Johnson, Petitioners, vs. **GEORGE F. BARRETT, as Attorney General of Illinois, and ARTHUR C. LUEDER, as Auditor of Public Accounts of the State of Illinois,** Respondents.	**Original Mandamus**

BRIEF AND ARGUMENT FOR PETITIONERS

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Petitioners Desire Oral Argument.

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STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

Nature of Action.

This is an original mandamus proceeding, leave to file the petition being granted by this Court at the September Term, A. D. 1942. The petition seeks to compel George F. Barrett, as Attorney General of Illinois, to countermand and rescind certain orders to the Auditor of Public Accounts, President of the University of Illinois and President of the Board of Trustees of the University of Illinois, directing that no payments or compensation be made to relators Johnson and Hodges as University Counsel and Assistant University Counsel, respectively. It also seeks

to compel Barrett, as Attorney General, to withdraw and dismiss a certain motion filed by him in the Circuit Court of Cook County wherein he sought to have the answer of the University stricken from the records in that case. (Pet., pp. 44, 45) In addition the petition prays for a writ directed against the Auditor of Public Accounts to issue and deliver certain salary warrants to the State Treasurer, payable to relators Johnson and Hodges and the University Retirement System of Illinois, which warrants were duly certified for payment by the President and Secretary of the Board of Trustees of the University of Illinois according to law. (Pet., p. 45)

Pleadings.

The pleadings consist of a petition and an answer. Pursuant to a motion made by petitioners to treat the answer as a demurrer or a motion to strike in the nature thereof because it raised questions of law and tendered no issue of fact upon which the right of the petitioners to the writ prayed for depended, this Court, with respondents consenting, entered an order that the answer be treated as a demurrer, or motion to strike in the nature thereof and at the same time ordered the issues closed. Inasmuch as the question then became one of the sufficiency of the petition, its allegations, material to the issue here, are treated under the heading of "Admitted Facts."

Admitted Facts.

While we believe that it is not possible to obtain a complete and correct picture of the University and its organization, indispensable to a correct understanding of the issues in this case, without recourse to the petition, we, nevertheless, tender the following summary of the facts admitted:

1. That petitioner Johnson has been an employee on the staff of the University of Illinois as professor of law on permanent tenure since 1926, in which year, while a member of the Supreme Court of North Dakota, he was appointed by the Petitioner the Board of Trustees of the University of Illinois, hereinafter referred to as the Board; and during this period he has also held and performed the duties of the position of Legal Counsel or University Counsel on the staff of the University of Illinois, hereinafter referred to as the University (Pet., pp. 11, 12);

2. That the Attorney General, from time to time during the years 1941 and 1942, indicated to members of the Board that he desired to name a counsel for that petitioner, but this petitioner informally and without a record vote, at a regular meeting on April 22, 1942, indicated that it was not inclined to remove petitioner Johnson from the staff of the University; and that on the same date the Attorney General wrote petitioner Johnson a letter advising the addressee that said respondent, on April 22, 1942, accepted the resignation of petitioner Johnson as an Assistant Attorney General and as University Counsel (Pet., p. 19);

3. The University, in common with other schools, colleges and universities in this region, is a member of an accrediting agency, as a result of which transfers by its students and graduates to other institutions of learning are facilitated; and that one of the requirements of maintaining the accredited status is a certain degree of freedom in the Board to make final decisions concerning the management and operation of the University and an absence of undue influence from interested outside sources; and that success on the part of outsiders in bringing about the removal of staff members endangers the accredited status of

the University and puts in jeopardy alike the interests of students and citizens of the State (Pet., pp. 7-9);

4. On May 7, 1942, the respondent Barrett, then Attorney General of Illinois, informed respondent Lueder, then Auditor of Public Accounts of Illinois, that on April 22, 1942, he had accepted the resignation of petitioner Johnson "as an Assistant Attorney General and so-called University Counsel for the University of Illinois," and on May 7, 1942 that of petitioner Hodges "as Assistant to the University Counsel"; and on the same date respondent Barrett issued an order to respondent Lueder that "no payments * * * *shall be made* subsequent to the dates above-mentioned" to either of petitioners Hodges or Johnson (Pet., p. 21). On the same day he wrote identical letters to the President of the University and the President of the Board of Trustees (Pet., pp. 19, 20).

5. That at the time when these orders and directives were written, relators Hodges and Johnson were employees of the University of Illinois, that petitioner Hodges had been an employee on the staff of the University since 1937, and that relator Johnson had been such an employee continuously since 1926; and that petitioner Johnson never was an Assistant Attorney General of this State either by appointment from respondent Barrett or from any of his predecessors in the office of Attorney General (Pet., p. 22), never was on the payroll of any Attorney General as an Assistant or otherwise, never tendered any person at any time a resignation from such a position or from that of University Counsel, and that petitioner Hodges never tendered a resignation as Assistant University Counsel to respondent Barrett or to any other person whatever (Pet., pp. 21, 22);

6. That on May 29, 1942, respondent Lueder wrote the Comptroller of the University and informed him

that salary warrants in favor of petitioners Hodges and Johnson were being held by him "upon the *request* of the Attorney General" and would not be delivered until such time as the respondent Barrett "advised otherwise," and stated that respondent Lueder, as Auditor of Public Accounts, "had no alternative but to comply with his (Attorney's General) *wishes*" in this behalf (Pet., pp. 23, 24);

7. That on August 13, 1942, the Chief Clerk in the office of the Auditor of Public Accounts informed the Chief Accountant of the University that vouchers payable to petitioner Johnson "will be held in this office until we are *notified* to do otherwise by the Attorney General"; and on August 19, 1942, petitioner Johnson was advised by the Chief Clerk aforesaid that the same rule would be applied in the case of vouchers drawn in favor of petitioner Hodges (Pet., pp. 26, 27);

8. That the Board, as of June 30, 1941, held and administered in trust as trustee loan funds aggregating approximately $359,000; that on the same date and in the same capacity it held and administered endowment and trust funds for other purposes approximating $1,378,000; and that all such funds are held and administered, and for many years have been held and administered, by the Board in trust and as trustee for the furtherance of educational objects and purposes, for the benefit of its students and of the people of the State, in connection with and in furtherance of the operation of the University; that the student loan funds represent gifts from many individuals in trust to be administered by the Board for the benefit of students who are in need in order to obtain an education; that the unusual character of the risk, the fact that loans are unsecured and are often unavoidably for long terms, that sometimes co-signers

die either without an estate or before the loans become due and payable, in circumstances making recourse against them impracticable, that the borrowing students are not economically established and sometimes do not arrive at financial responsibility until many years after they graduate, all combine to make necessary special attention and effort to protect the principal of the funds and at an expense which an ordinary loan business of the same size would normally not need to incur; that such an employee must be and is carefully selected by the Board strictly on the score of suitable personal qualifications and experience; that it would endanger the proper and efficient execution of important fiduciary duties assumed by the Board under deeds of trust made by generous donors for the benefit of students and of education in general, if an outside official could successfully remove such an employee (Pet., pp. 5, 9, 10, 11);

9. That relator Hodges is a member of the bar of the Supreme Court and of the inferior courts of this State, and was employed under a written contract with the Board for the academic year 1941-42, beginning September 1, 1941 and ending August 31, 1942, under the title of Student Loan Assistant in the Bursar's Division of the Business Office, at a salary of $2100 per year, and as Assistant University Counsel at a salary of $900 per year, making a total compensation of $3,000; that the sum of $2100 is paid the said relator from the income of student loan funds, hereinbefore in paragraph 9 described, and the item of $900 of said total compensation is payable from appropriations to the University made from the General Revenue Fund of the State, or from other State funds; that the duties of said relator are to service student loans, to supervise and assist in the collection and adjustment of loans made to students

from the student loan funds, and to perform such other duties as the University may assign him from time to time; that the University Counsel is, under the rules of the Board, ultimately responsible for the collection of these student loans, especially after the ordinary routine stages have passed and the loans have become delinquent; the task of collecting these loans and of maintaining the trust funds intact requires tact, patience, firmness, a fine sense of balance between the duty to protect the funds and an equitable regard for the lot of a borrower trying to establish himself, a thorough familiarity with the history of each loan and of each individual borrower, as well as of conditions within the University; that it is necessary to contact personally, at least once a year, approximately 500 persons scattered throughout the State, and, in many cases, outside the State (Pet., pp. 9, 10);

10. That the duties of petitioner Johnson, a member of the bar of this State, as an employee of the Board, are as follows: to teach in the College of Law of the University and to perform such other duties as may be assigned him, hereinafter more fully described; the duties of the relator Johnson as Professor of Law consist in teaching such courses in the College of Law of the University as may be assigned to him, among which have been Trial Practice, Evidence, Criminal Procedure, Private and Municipal Corporations, and Corporate Reorganization and Finance, being available for consultation by students in said College and in supervising the preparation of law review notes by selected students in the courses which he is teaching; his duties accruing under the title of University Counsel during the academic year 1941-42 and during previous years are and were as follows: he prepares and checks legislative bills which may

affect the University—work which the Attorney General has held is not within his official duty; in his capacity as University Counsel he is a member of the administrative staff, responsible to the President of the University and through him to the Board; the President counsels with him upon problems of mixed law and fact which constantly arise within the University and have to do with details of University administration, such as discipline of students and staff members, the interrelationships between colleges and departments and the interrelation and correlation of rules and regulations for the internal government of the institution; he was and is, as heretofore stated in paragraph 9, responsible for the collection of student loans after they have become delinquent, and he also performs other duties more fully described in the petition; that said relator also serves as secretary of the Committee on Patents of the University, which inquires into patentable discoveries made by staff members and makes recommendations to the President of the University and the Board in relation thereto; he has at times appeared for the Board in the courts, including the Supreme Court of this State (Pet., pp. 12, 13, 17, 29-36, 41-42);

11. That the primary and essential status of the Professor of Law who holds the title of University Counsel is professorial; such was the interpretation of the Board in the only instance in which the question arose, namely, when the predecessor of relator Johnson retired, who was retired as a Professor of Law with the retirement compensation appertaining to that status (Pet., p. 9);

12. That the Board could require relator Johnson to perform under the sole title of Professor of Law all the duties he now performs or has performed since 1926, which could be classified as belonging under the

title University Counsel or Legal Counsel; and that relator Hodges did, prior to the time when he was given the title of Assistant University Counsel, perform under the title of Student Loan Assistant substantially the same duties which he has performed since the Board gave him the former title (Pet., p. 18);

13. That for the more convenient and economical administration of the University in its various and constantly growing departments, the Board has for many years adopted the practice of giving more than one title to the same staff member on account of services performed in more than one field, department or college of the University, and often exacts from its staff members, who have the rank of professors, associate professors, assistant professors, associates, instructors or assistants, various and sundry duties, other than those of a strictly professorial character, which are administrative in nature, or which are deemed helpful to the President of the University and the Board in dealing with technical questions involved or implicit in the numerous and complicated University problems which almost daily demand solution; such duties have, in many instances, nothing to do with teaching or research as commonly understood in the educational world, and staff members perform such duties as are assigned them by the Board and sometimes are paid both from state and federal funds (Pet., pp. 14, 15, 18);

14. That in constituting and using these important administrative aids in the complex operations of the University, and in marshalling the skilled resources of the institution in the manner alleged in the petition (Part IV, 15-18) the Board selects and makes use of staff members specially qualified and trained in specific fields; it would be a costly detriment, of

major proportions, to the general interests of the University and to the people of the State, unprecedented in approved educational theory or practice, if any outside officials could coerce the Board into an abandonment of this policy in any department or field of knowledge of University administration (Pet., p. 18);

15. That relator Johnson was appointed Professor of Law on indefinite tenure with compensation fixed on an annual basis, effective September 1, 1926; pursuant to a policy, adopted approximately twenty years before that date, the Board also gave him the title of Legal Counsel, which title was in 1931 changed to University Counsel; that the late Judge O. A. Harker, formerly Professor of Law and Dean of the College of Law of the University, and a member of the Appellate Court of this State, had held the position of Professor of Law and Legal Counsel during substantially all the time since 1906; during the period from 1906 to 1942, the position held by the late Judge Harker and his successor, relator Johnson, by appointment from the Board, has been variously described in the internal budget of the University as Professor of Law and Legal Counsel or as Professor of Law and University Counsel, the latter being the present title; this was likewise the title of the position held by this relator during the academic year 1941-42, and specifically during the months of April, May, June, July and August of the year 1942; that sometimes, during the period since 1906, the total compensation to the incumbent of the position of Professor of Law and Legal Counsel, or University Counsel, has been in the internal budget of the University, apportioned between the duties of Professor of Law and the duties described under the title Legal Counsel or University Counsel, and sometimes not (Pet., pp. 15-16);

16. The relator Johnson was duly designated University Counsel and his indefinite tenure as Professor of Law reaffirmed under a contract with the Board for the academic year which began September 1, 1941 and ended August 31, 1942, under the title of Professor of Law and University Counsel, without any division or apportionment of compensation between the duties of Professor of Law and those accruing under the title of University Counsel; that during the academic year 1941-42 the Business Office of the University, in accordance with procedures established by itself, has certified payroll vouchers covering the position held by this relator to the Auditor of Public Accounts under the following description:

Sveinbjorn Johnson, Professor and
Counsel, $723.75;

of the monthly salary of said relator, $26.25 is certified on the payroll voucher to be paid to the University Retirement System of Illinois for the benefit of said relator when he retires from active service (Pet., pp. 11-12);

17. That no incumbent of the office of Attorney General prior to the assumption of the duties thereof by respondent Barrett, as far as the records of the Board show, and certainly not during the period since 1926 and prior to January 1, 1941, ever made an issue concerning the legal power of the Board to utilize the special training of staff members, or the legal training of a Professor of Law in the manner alleged in the petition, under the title of Professor of Law and Legal Counsel or University Counsel; that predecessors of the respondent Barrett in the office of Attorney General have recognized and accepted this practice of the Board, and have, on request and as a courtesy, given legal advice to the University and assisted it,

when requested by the Board, in and out of the courts of this State, as well as in the Federal courts (Pet., pp. 37-41);

18. That since 1867, the date when the University was chartered, it has acted through various legal counsel of its own selection, who were paid out of the general funds of the University appropriated to it by the General Assembly of Illinois with knowledge of this practice, in that official reports of such disbursements were made to the Governor of Illinois and delivered to each member of the General Assembly during its session; the names of the cases in which the University has appeared here by its own counsel appear in the petition by name and citation as well as the names of its counsel in each case (Pet., pp. 41, 42), including one case in which the Attorney General appeared against the University (Pet., p. 42);

19. That not only has the University appeared through its own counsel as aforesaid, but since 1906, the date of the creation by the Board of the position of Professor of Law and Legal Counsel, changed in 1931 to Professor of Law and University Counsel, the salary for said position by such title has appeared annually in the internal budget of the Board as reported to the Governor, copies of which official report are delivered to each member of the General Assembly during the legislative session, and appropriations by the General Assembly for the ensuing biennium are based and were made upon these budgets and official reports, the last instance being 1941 (Pet., pp. 42-43);

20. That respondent Barrett, contrary to the official action of the Board, assumed to act and appear for the University in a case in the Circuit Court of Cook County and sought to have the answer filed in said cause by relator Johnson and the appearance of

Johnson stricken after the return date and without proffering an answer of his own in behalf of the University, notwithstanding relator Johnson had been directed by the University to appear and answer in behalf of the defendants therein (Pet., pp. 27-36);

21. That the withholding of the compensation of petitioners Hodges and Johnson, under their contracts with the Board, by respondents was done without notice to them or an opportunity to be heard as to their rights under such contracts, and without opportunity to the Board to be heard upon its rights under such contracts as an employer (Pet., pp. 43-44).

Petitioners' Theory of the Case.

That the University is a public corporation of the same class or kind as a municipal corporation, with certain extensive powers, among which are the power to sue and be sued, to plead and be impleaded. The duties and functions of the Attorney General at common law and under the statutes as counsel for the Crown or the People were adverse to all charter bodies, both public and private, against whom it was his duty to move, in pursuance of the power of visitation which was lodged in the King or the People. The University is a legal entity separate and distinct from the State. It is not a Board, Commission or Department of the State Government but a creature of the legislature having a legal personality all its own. It has the power to employ its own counsel, as a necessary incident to its corporate life, implicit in the power to sue and be sued, plead and be impleaded.

POINTS AND AUTHORITIES.

I.

The sole issue in the case is one of law, namely, whether the facts well pleaded in the petition are sufficient to entitle petitioners to the writ for which they pray.

(a) Where an answer is treated as a demurrer, the sole question is whether petition upon its face shows that the relator is entitled to a peremptory writ as prayed.

People v. *Mount Morris,* 145 Ill. 427, 430, 431.
People v. *Salamon,* 46 Ill. 333, 336.
People v. *Miner,* 46 Ill. 385.

(b) In original mandamus, parties must elect to raise issues of law or issues of fact, and cannot submit a cause on issues of law, and upon a decision against them frame issues of fact.

People v. *Wells,* 255 Ill. 450, 455.
People v. *Palmer,* 336 Ill. 563, 571.

(c) Factual matters set up affirmatively in a demurrer make it a speaking demurrer, and such factual matters are surplusage and should be disregarded.

Kadyk v. *Abbott,* 266 Ill. App. 537, 543, and cases cited.
Jennings v. *County of Peoria,* 196 Ill. App. 195, 198.
Wood v. *Papendick,* 268 Ill. 383, 385.

II.

Original jurisdiction should be exercised for the reason that the facts alleged in the petition and admitted by the demurrer affect the rights, interests and franchises of the people and the performance of high official duties affecting the public at large, and also incidentally concern private rights inseparable therefrom.

(a) The rights, interests and franchises of the people and the performance of high official duties affecting the public at large are directly involved, as well as private rights inseparable therefrom.

People v. *City of Chicago,* 193 Ill. 507, 522.
People v. *Nelson,* 344 Ill. 46.
People v. *Harding,* 333 Ill. 384.
People v. *Palmer,* 363 Ill. 499.
People v. *Lowe,* 340 Ill. 51.
People v. *Russell,* 294 Ill. 283.
People v. *Lueders,* 287 Ill. 107.
People v. *Sullivan,* 339 Ill. 146.
People v. *Fisher,* 303 Ill. 430.
People v. *Williams,* 255 Ill. 450.
People v. *Hoffman,* 322 Ill. 174.
Attorney General v. *Blossom,* 1 Wis. 283.

(b) Conducting a University is of public not primarily of private concern.

Young v. *Regents of the State University,* 83 Kan. 245, 247.
Luhrs v. *City of Phoenix* (Ariz., 1938), 83 Pac. (2d) 285.
Trustees v. *Champaign County,* 76 Ill. 184, 187.

III.

The acts of respondents are arbitrary, unauthorized and unlawful and constitute a denial of due process to petitioners.

(a) The contract rights of petitioners have been invaded, the business of the University interfered with, its charter powers assailed, and liberty of employment denied petitioners Hodges and Johnson—all without notice or an opportunity to be heard under the protection of the general laws which govern all citizens.

Garfield v. *Goldsby*, 211 U. S. 249, 262.
Allgeyer v. *Louisiana*, 165 U. S. 578, 489.
Meyer v. *Nebraska*, 262 U. S. 390, 400.
Pierce v. *Society of Sisters*, 268 U. S. 510, 536.
Jones v. *Vermont Asbestos Corp.* (Vt., 1936), 182 Atl. 291, 297.
Nelson v. *Garland* (Pa. Super., 1936), 187 Atl. 316, 320.
New Orleans v. *N. O. Water Works Co.*, 142 U. S. 79, 91.
Kent's Comm., III, 275.
Jones v. *Securities Commission*, 298 U. S. 1, 24.
Truax v. *Corrigan*, 257 U. S. 312, 322.
Ex Parte Virginia, 100 U. S. 341, 346, 347.
Home Tel. and Tel. Co. v. *Los Angeles*, 227 U. S. 278, 286, 287.
People v. *Strassheim*, 242 Ill. 359, 366.
Dacus v. *Johnston*, 180 S. C. 329, 185 S. E. 491.
Trustees v. *Shaffer*, 63 Ill. 243, 245.

(b) If the Attorney General desired to test the validity of the acts of the University in the premises in calling upon petitioners Hodges and Johnson for the performance of the duties described, he should have proceeded in a lawful manner by quo warranto, or by information in equity.

People v. *Board of Education,* 101 Ill. 308, 312, 313.

People v. *Wilmette,* 375 Ill. 420, 424.

People v. *Ingersoll,* 58 N. Y. 1.

In re Great Eastern Ry. Co., 11 Ch. Div. 449.

Hunt v. *Chicago Horse and Dummy Ry. Co.,* 121 Ill. 638, 642.

IV.

The university is a public corporation of the same kind or class as municipal corporations; it is not a commission, board or department of either the executive or judicial department of the state government, but a creature of the legislature with such powers as the legislature confers upon it.

Smith-Hurd R. S., 1941, C. 127, Sec. 1-63a, 22, ff.

Spaulding v. *People,* 172 Ill. 40, 49, 50.

Statutes of 13 Eliz., C. 29.

Ayliffe, State of Oxford, II, 240, 197, 198, *passim.*

Charter of Oxford, Henry VIII, 1523.

Laws of Illinois, 1867, pp. 123-129.

Nevins, Illinois, 1-41.

7 U. S. C. A., Sec. 301, ff.

James, Origin of the Land Grant College Act, 63, 73, 82.

Charters and Laws of American Universities, Chambers, Appendix.

Illinois College, Rammelkamp, 23-38.

V.

Public corporations, such as cities and villages, school districts, townships, counties, the Universities of Oxford and Cambridge, have from time immemorial and under the common law exercised the right to employ their own counsel. This rule is one of necessity because instead of representing them, the Attorney General, as counsel for the Crown or the State, moved against them in the exercise of the right of visitation for violations of the law, non-user, or acts beyond their charter powers.

(a) The legal and historical fact is that the Attorney General of England never was at common law the legal representative of public corporations, other than the Crown; on the contrary he acted against them. The same is true of the Attorney General of Illinois.

1 Dillon, Municipal Corporations, (3d ed.), pp. 10, 11, 13, 14.

Opinions of the Attorney General, 1939, p. 253.

People v. *City of Chicago,* 256 Ill. 558, 564, 565.

People v. *Miner,* 2 Lans. (N. Y., 1868) 396.

Fairlie, Law Departments and Law Officers in American Governments, 36 Mich. L. Rev. 907 (1930).

Spalding v. *People,* 172 Ill. 40, 49-50.

(b) The Attorney General of England, on behalf of the Crown, acted against all chartered corporations, public and private, in the exercise of the power of visitation vested in the King, which is conclusive against the claim that at common law he was their counsel.

1 Blackstone Commentaries (1st ed.), 479, 480, 481.

Statutes of 13 Eliz., C. 29.

Patent Rolls, 28 Hen. III, m. 10 d., p. 438.
Ayliffe, State of Oxford, II, 262, cxxiii, cxxiv.
History and Antiquities of the University of Oxford, Parker, 204, par. VII.
Let. Pat. Henry VIII, Nov. 28, 36th year of his reign (1545).
Oxford Poor Rate, 120 Eng. Rep. 68, 76 (1867).
I Blackstone's Commentaries, 480-81.
Act of 9 Henry IV, C. 1.
Report of Oxford Commission, Evidence, 245.
2 Rashdall, 425, 433.
Williams, Laws of the Universities, 29-34.
Rex v. *Cambridge,* 2 Strange, 1157 (723).

(c) The visitorial power in the United States, with respect to business or public corporations, in general, is, simply put, the power to require them to give an accounting of their stewardship of the powers and privileges the State has conferred on the corporators, shareholders (through the filing of reports and in quo warranto actions) or inhabitants, to do business or exist on an incorporated basis; and that power is lodged in the people of the State and asserted through their law officer, the Attorney General, as to public agencies, domestic corporations, and those foreign bodies politic which the State has permitted to do business within its borders (Smith-Hurd R. S., 1941, C. 32, Secs. 157, 82, 83, 84, 85, 86, 91, 92, 95, 100). The position of the people and the Attorney General is, therefore, adverse to these corporate bodies, such as the University and all public and private corporate bodies who must, on their own responsibility, be prepared to meet whatever challenge the exercise of this inquisitorial power produces.

Smith-Hurd R. S., 1941, C. 32, Secs. 157, 82, 83, 84, 85, 86, 91, 92, 95, 100.
State v. *Milwaukee Chamber of Commerce,* 47 Wis. 670, 679, 3 N. W. 760.
IV Blackstone Commentaries (2nd ed.), 307-08.

III Blackstone's Commentaries (2nd ed.), 262, 263.
I Blackstone Commentaries (1st ed.), 485.
Statutes of Illinois, 1869, C. 25, pp. 107-08.
Smith-Hurd, R. S., 1941, C. 112, Sec. 9(a), (e), 10; C. 32, Sec. 157.

VI.

The university is a public corporation with extensive governmental and proprietary powers, such as the power "to sue and be sued, plead and be impleaded," acquire and transfer property, create trusts, issue bonds, and to formulate and carry out an extensive educational program with comprehensive disciplinary or police authority over both faculty and students. It is a legal entity separate and apart from the State. It has the right to employ its own counsel as an incident to its corporate life, and essential in the execution of powers expressly granted.

Illinois R. S., 1941, C. 144, Sec. 22, ff.
Saint v. *Allen,* 172 La. 350, 134 Sou. 246, 248, 252, 253.
Cooper v. *Delavan,* 61 Ill. 96 (1871).
Town v. *Thomas,* 82 Ill. 259 (1876).
Town v. *Patton,* 94 Ill. 65 (1879).
Town of Bruce v. *Dickey,* 116 Ill. 527, 533.
Culver v. *Village,* 220 Ill. App. 97 (1920).
Woods v. *Village of La Grange,* 287 Ill. App. 201, 208.
Statutes of Illinois, 1869, p. 755.
Laws of 1861, pp. 278, 220.
Laws of 1861, p. 218.
City of Birmingham v. *Wilkinson,* 239 Ala. 199, 194 So. 548.
Chrestman v. *Tompkins,* 5 S. W. (2d) 257 (Tex.).

So. Ind. Gas Co. v. *City,* 12 N. E. (2d) 122 (Ind.).
Clark v. *Smith,* 294 N. Y. S. 106.
Meeske v. *Bauman,* 122 Neb. 786, 241 N. W. 550 (1932).
Laws of Illinois, 1821, pp. 80-81.
Laws of Illinois, 1836-37, pp. 21, 59, 60, 246.
Laws of Illinois, 1867, p. 123.
Laws of Illinois, 1826, p. 88.
State Bank v. *Kain* (1823), 1 Breese, 75.
Ernst, etc. v. *State Bank* (1824), 1 Breese, 86.
State Bank v. *Buckmaster* (1826), 1 Breese, 176.
State Bank v. *Moreland* (1828), 1 Breese, 282.
State v. *Tensas Delta Land Co.,* 126 La. 59, 72.
People v. *Ingersoll, et al.,* 58 N. Y. 1, 2, 13, 17, 21.
People v. *Spalding,* 172 Ill. 40, 49, 50.
State v. *Southwestern Land and Timber Co.,* 93 Ark. 621, 126 S. W. 73.

VII.

Neither the common law nor the statutes of the judicial decisions of this State give any color or right to the Attorney General as the sole or exclusive legal counsel for the university.

Laws of 1867, Sec. 4, p. 47.
People v. *Ingersoll,* 58 N. Y. 1.
Canal Trustees v. *Havens,* 11 Ill. 554, decided (1850).
Constitution of 1848, Art. IV, Secs. 1, 14, 22, 23, 24; Art. II, Sec. 1 and 2.
Constitution of 1870, Art. V, Secs. 1, 3, 6, 20, 24; Schedule I, Sec. 1.
People v. *Kerner,* 362 Ill. 442.
People v. *Miner,* 2 Lans. 396 (1868).

Commonwealth v. *Margiotti,* 188 A. 524 (Penna., 1936).
Laws of Illinois, 1897, p. 74.
Roehm v. *Hertz,* 182 Ill. 154, 164.
Fergus v. *Russell,* 270 Ill. 304 (1915).
People v. *Chapman,* 370 Ill. 430, 435.
White v. *Seitz,* 342 Ill. 266, 270.
City of Geneseo v. *Ill. Northern Utilities Co.,* 378 Ill. 506, 519.
People v. *Kelly,* 379 Ill. 297, 302.
Smith-Hurd R. S., 1941, C. 14, Sec. 4, Par. 2.
Smith-Hurd R. S., 1915-16, C. 14, Sec. 4, Par. 2.

VIII.

The university was founded as a free educational institution, open to all; a decent public policy demands that it be free to determine its own defenses in suits brought against it, which it cannot be if it be denied the right to counsel of its own choosing—a fundamental right without which no person, natural or artificial, can be free.

Thomas v. *Board of Trustees,* 71 Ill. 310 (1874).
Sutton's Case, 10 Coke, 23a (1612).
Dowling, The Hedge Schools of Ireland, 1, *passim.*
Lecky, History of Ireland, *passim.*

IX.

Mandamus is the proper remedy.

(a) The conduct of the Attorney General being arbitrary and without premise in law; his duty to repair the damage is mandatory.

Garfield v. *Goldsby,* 211 U. S. 249, 261.

Bransfield Co. v. *Kingery,* 283 Ill. App. 405, 411.
38 C. J. 660, Sec. 200; 673, Sec. 220, Nn. 89, 90.
New Orleans, etc. v. *New Orleans,* 34 La. Ann. 4, 29.
Van Dyke v. *State,* 24 Ala. 81.
People v. *Fullenwider,* 329 Ill. 65, 70.
Levitt v. *Attorney General,* 111 Conn. 634, 151 Atl. 171, 174.
State v. *Berry,* 3 Minn. 190, 191.
San Mateo County v. *Cullihan,* 69 Cal. 647, 11 Pac. 386.
34 Am. Jurisprudence, 922, Sec. 145, N. 21.

(b) The Auditor has no discretion but must draw warrants upon the State Treasurer on vouchers duly certified according to law; the admitted facts suggest no justification for his refusal; and the Attorney General has no power to direct him to disregard mandatory statutes.

Illinois R. S., 1941, C. 127, Par. 146(8).
People v. *Stevenson,* 272 Ill. 215, 221.

ARGUMENT.

I.

The sole issue in the case is one of law, namely, whether the facts well pleaded in the petition are sufficient to entitle petitioners to the writ for which they pray.

The so-called answer of the respondents throughout assigns numerous legal grounds why the writ prayed for should not be awarded. Under the prevailing practice in original mandamus, which precludes parties from raising both issues of law and issues of fact (*People* v. *Wells,* 255 Ill. 450, 455; *People* v. *Palmer,* 356 Ill. 563, 571), petitioners moved this Court to treat respondents' answer as a demurrer or a motion to strike in the nature thereof and filed a printed motion with suggestions in support thereof. Respondents first filed objections to the motion and then served notice on petitioners that they would appear before Justice June C. Smith at Centralia, Illinois, October 3, 1942 and withdraw their objections to said motion. Both parties appeared by counsel at said time and place, and Justice Smith on said third day of October, 1942 entered an order granting leave to respondents to withdraw their objections to said motion and further ordered, on motion of counsel for petitioners, counsel for respondents being present and consenting, that the motion of petitioners to treat the answer of respondents as a demurrer or motion to strike in the nature thereof, be granted, which was then and there done and the answer accordingly so treated. At the same time the issues were declared to be closed, and

an order was entered with reference to the filing of briefs and that the cause stand for hearing at the November term, A. D. 1942, of this Court.

Therefore, the answer is a demurrer or motion to strike in the nature thereof, and, under the practice prevailing in this court, the sole question is the sufficiency of the petition to support the relief for which it prays. (*People* v. *Mount Morris,* 145 Ill. 427, 430, 431; *People* v. *Salamon,* 46 Ill. 333, 336; *People* v. *Miner,* 46 Ill. 385.) After treating the answer of respondents as a demurrer in the case of *People* v. *Town of Mount Morris, supra,* this Court said on page 431:

> "The question therefore is, Does the petition upon its face show that the relator is entitled to a peremptory writ as prayed?"

It is of course elementary that any factual matters set up affirmatively in a demurrer make the demurrer a speaking demurrer (*Kadyk* v. *Abbott,* 266 Ill. App. 537, 543 and cases cited; *Wood* v. *Papendick,* 268 Ill. 383, 385), and such factual matters so averred in a demurrer are surplusage and should be disregarded (*Jennings* v. *County of Peoria,* 196 Ill. App. 195, 198; *Wood* v. *Papendick,* 268 Ill. 383, 385).

II.

Original jurisdiction should be exercised for the reason that the facts alleged in the petition and admitted by the demurrer affect the rights, interests and franchises of the people and the performance of high official duties affecting the public at large, and also incidentally concern private rights inseparable therefrom.

Perhaps the leading case on this question is *People* v. *City of Chicago,* 193 Ill. 507, which clarified the law

on the subject. On page 522 of the opinion, the Court said:

> "That in conferring original jurisdiction by constitutional provision in such cases as *mandamus*, it was not contemplated that the Supreme Court would take jurisdiction of all *mandamus* cases which parties might think best to bring before it, but that such original jurisdiction was conferred that the court of highest authority in the State should have the power to protect the rights, interests and franchises of the State and the rights and interests of the whole people, to enforce the performance of high official duties affecting the public at large, and, in emergency (of which the court itself is to determine), to assume jurisdiction of cases affecting local public interests, or private rights, where there is no other adequate remedy and the exercise of such jurisdiction is necessary to prevent a failure of justice."

Pursuant to this rule, this Court has taken original jurisdiction in the following cases: on petition of the treasurer of this University to compel the Auditor of Public Accounts to register certain tax anticipation warrants so that the University Fund in the State Treasury would be sufficient to meet the ordinary and contingent expenses of the University (*People* v. *Nelson,* 344 Ill. 46); on the relation of purely private persons to compel the County Treasurer of Cook County to countersign and pay certain warrants drawn for the services of those persons as assessors of Cook County, denying the writ because the compensation represented by the warrants was in excess of law (*People* v. *Harding,* 333 Ill. 384); to compel the Director of Insurance to recognize the validity of policy liens of a life insurance company and to take such liens into consideration in valuing outstanding policies of the company (*People* v. *Palmer,* 363 Ill. 499); to compel the Director of Trade and Commerce

to issue a license to a foreign insurance company entitling it to do business in the State (*People* v. *Lowe,* 340 Ill. 51); to compel the Auditor of Public Accounts to issue a permit to organize a state bank (*People* v. *Russell,* 294 Ill. 283); to compel election commissioners to submit proposition of local option to the voters of the City of Chicago (*People* v. *Lueders,* 287 Ill. 107); to expunge an order of a trial judge setting aside a forfeiture notwithstanding the existence of another remedy (*People* v. *Sullivan,* 339 Ill. 146); to compel the Circuit Court of Cook County to expunge a void order releasing a convicted prisoner on *habeas corpus* (*People* v. *Fisher,* 303 Ill. 430), and a void order setting aside a judgment (*People* v. *Williams,* 255 Ill. 450); and to compel the Sheriff of Cook County to execute an order of commitment where judges and clerks of elections have been found guilty of contempt, notwithstanding a writ of *habeas corpus* issued by a trial court had discharged them from custody. (*People* v. *Hoffman,* 322 Ill. 174.)

While we are aware of the fact that no rigid rules can circumscribe this Court in the exercise of its prerogative right in mandamus, we respectfully submit that the admitted facts show a more impelling necessity that the relief prayed for be granted than was the case in any of the causes hereinbefore set forth. We submit, further, that the rights, interests and franchises of the State and the rights and interests of the whole people are in need of protection because the acts complained of in the petition directly affect the public at large and materially interfere with a public corporation of this state in its effort to perform duties of a public and general interest and concern imposed on it by the General Assembly. Thus in *Young* v. *Regents of the State University,* 83 Kan. 245, the Supreme Court of Kansas said (p. 247):

> "The State fosters higher education in order that it may improve the quality of its citizens. The purpose is to equip a limited number of young men and women who are able to attend college for the conduct of life in such a way that the civic life of the State as a whole may be quickened and elevated and improved by their presence and activities. The benefits thus conferred are official and general, and all the people of the state participate in them."

Any interference with the function of this agency in the State is a matter of the gravest public and general concern. The acts of the respondents make it impossible for the Board of Trustees to perform its contracts with staff members with consequences described in the petition (Pet., pp. 6, 8, 9).

The prerogative writ of mandamus is issued out of the Supreme Court because, in the government of a State, "other departments might need its intervention to protect them from usurpation," (*Attorney General* v. *Blossom,* 1 Wis. 283, quoted with approval in *People* v. *City,* 193 Ill. 507, 512; and see same Illinois case at p. 522). "The people of the State, or a large part of them, were directly interested" in what was done by the Attorney General and the Auditor of Public Accounts, and continue to be so interested. (*People* v. *City,* 193 Ill. 507, 520.) The activity in question—conducting a University—is one of public, not primarily of private concern. "Whether it (activity) is one or the other in such case depends upon whether the activity is carried on by the municipality as an agent of the State. If it is, it is of general or public concern." [*Luhrs* v. *City of Phoenix* (Ariz., 1938), 83 Pac. (2d) 285.] The University is an agency of the State. (*Trustees* v. *Champaign Co.,* 76 Ill. 184, 187.)

If respondents can with impunity commit the acts complained of in the petition, then such conduct constitutes a serious obstacle in the way of the Board of Trustees in performing its statutory duties, and, in fact, imperils the independence of the University and its status as a member of an important accrediting agency (Pet., pp. 7, 8) as well as being a serious threat, to the interests of students (Pet., p. 7) who attend the University and of their parents in the State who help support it by the payment of taxes (Pet., pp. 6, 8, 9).

III.

The acts of respondents are arbitrary, unauthorized and unlawful and constitute a denial of due process to petitioners.

(a) The contract rights of petitioners have been invaded, the business of the University interfered with, its charter powers assailed, and liberty of employment denied petitioners Hodges and Johnson—all without notice or an opportunity to be heard under the protection of the general laws which govern all citizens.

The Board of Trustees derives its powers from a charter granted by the General Assembly, evidenced by the Act of February 28, 1867. Illinois Revised Statutes, 1941, Chapter 144, Section 22, ff., to 57. This charter provides that the University

> "shall have perpetual succession, have power to contract and be contracted with, to sue and be sued, to plead and be impleaded, to acquire, hold and convey real and personal property; to have and use a common seal, and to alter the same at pleasure; to make and establish by-laws and to alter or repeal the same as they shall deem necessary for the management or government, in all its various departments and relations."

Pursuant thereto the Board entered into contracts with relators Johnson and Hodges as described in the petition (pp. 9, 12). The by-laws, also known as the statutes of the University, adopted by the University pursuant to express authorization empowering it to make by-laws, provide that no employee of the University shall be removed from his position without cause and then only after notice and an opportunity to be heard (Pet., p. 4). The University has admittedly exercised for many years, pursuant to charter provisions, the right to employ its own counsel, as the records of this court show (Pet., pp. 41, 42).

What has happened here? Notwithstanding that relators Hodges and Johnson were, at all times mentioned herein, employees of the Board under written contracts, pursuant to which payments for services were made monthly to each, and notwithstanding that the University for many years had utilized the services and special training of its professors in the manner described in the petition (pp. 12, 13, 14, 15, 16, 17), and notwithstanding that for many years the University was represented by its own counsel, all pursuant to its charter powers, and that all predecessors in office of respondent Barrett acquiesced in and recognized the practice (Pet., pp. 37, 38, 39, 40), respondent Barrett, by the stroke of his pen, without according to anyone notice or an opportunity to be heard, sought to destroy contracts which the Board had with its employees Hodges and Johnson, petitioners herein, and sought to and did deprive them of the liberty of employment by the expedient of an arbitrary order on the Auditor (Pet., p. 21) to withhold their compensation. Not only that, but without notice and without consultation with the President of the University or its executive committee or the Board, respondent Barrett sought to have the answer which

the University had filed in the cause referred to in said petition stricken from the files in said court and the University left in default with the attendant stigma which would attach to its reputation and standing as an educational institution because of the peculiar, extraordinary, and false allegations set forth in said petition relating to religious and racial prejudice (Pet., pp. 30, 32, 33, 34, 35, 36). And this notwithstanding the fact that the University since its creation has asserted and exercised without challenge the right to counsel of its own choosing! No better evidence of this fact can be found then the records of this court as set out in the petition, and the acts of the General Assembly herein set forth recognizing the practice and making appropriations incident thereto (Pet., pp. 41, 42, 43). Thereby, without notice of law, does respondent Barrett embarrass, harass and seek to prevent the University from prosecuting its lawful and sole business, namely, the education of youth, a distinctly fundamental enterprise.

"There is no place in our constitutional system for the exercise of arbitrary power," said Mr. Justice Day in *Garfield* v. *Goldsby,* 211 U. S. 249, 262, words which have been frequently quoted. (*Jones* v. *Securities Commission,* 298 U. S. 1, 24.) That the conduct of the respondents as set forth in the petition amounts to a denial of due process to these relators, we respectfully submit, is scarcely debatable. As to relators Hodges and Johnson, it deprives them of liberty guaranteed them by the XIV Amendment to the Constitution of the United States and the Bill of Rights of this State. Article II, Section 2. Relators here invoke the protection and guaranties of these constitutional provisions.

In *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589, 17 S. Ct. 428, 41 L. Ed. 832, in speaking of the liberty men-

tioned in the XIV Amendment the Supreme Court said that it

> "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all of his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

That high court invoked this rule in substantially similar language in favor of a teacher prohibited by statute from teaching German, his lawful calling, when it declared such a statute unconstitutional in *Meyer* v. *Nebraska,* 262 U. S. 390, 400, 43 S. Ct. 625, 67 L. Ed. 1042.

While the word "liberty" in the XIV Amendment applies only to natural, as distinguished from artificial persons (*Hague* v. *C. I. O.,* 307 U. S. 496), the word "property" in said amendment does apply to artificial persons such as corporations. Thus in *Pierce* v. *Society of Sisters,* 268 U. S. 510, 536, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A. L. R. 468, better known as the *Oregon school* case, the Supreme Court hald a statute of the State of Oregon unconstitutional because its tendency was to destroy the business of certain educational corporations, which the Supreme Court recognized as a lawful business and as property within the meaning of the amendment, saying:

> "Plaintiffs ask protection against arbitrary, unreasonable and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and

> immediate, within the rule approved in *Truax* v. *Raich, Truax* v. *Corrigan* and *Terrace* v. *Thompson, supra,* and many other cases where injunctions have issued to protect the business enterprises against interference with the freedom of patrons or customers." (Citing cases.)

An educational institution, created by legislative act and holding property in trust for educational or religious purposes, such as the University of Illinois, is entitled to the protection of the due process clause. (*Jones* v. *Vermont Asbestos Corp.* (Vermont, 1936), 182 Atl. 291, 297; *Nelson* v. *Garland* (Pa. Super., 1936), 187 Atl. 316, 320; *New Orleans* v. *N. O. Water Works Co.,* 142 U. S. 79, 91.

Speaking of municipal corporations, Chancellor Kent says:

> "They may be empowered to take or hold private property for municipal uses and such property is invested with the security of other private rights."

[Com., III, 275.]

The essentials of due process are well understood. They are notice, opportunity to be heard, an impartial tribunal, and an orderly course of procedure. (*Truax* v. *Corrigan,* 257 U. S. 312, 322.) In this case Chief Justice Taft laid down some of the requirements of due process, paraphrasing in part, but not improving upon the famous statement of Daniel Webster on the same subject:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general laws which govern society."

It is not a sufficient answer to say that the conduct here complained of is executive as distinguished from legislative conduct because it is well settled that the requirements of due process are as applicable to action by the executive branch of the government as they are to acts of the legislative branch. (*Ex Parte* Virginia, 100 U. S. 341, 346, 347; *Home Tel. and Tel. Co.* v. *Los Angeles,* 227 U. S. 278, 286, 287; *People* v. *Strassheim,* 242 Ill. 359, 366.) No better statement of the rule can be found than that of Chief Justice Cartwright of this court in the *Strassheim* case on page 366:

> "The term 'due process of law,' however, is not confined to judicial proceedings. It is the same as 'the law of the land,' and extends to every proceeding which may deprive a citizen of life, liberty, or property, whether the process be judicial or administrative or executive in its nature. The constitutional provision is designed to protect and preserve the rights of the citizen against arbitrary legislation as well as against arbitrary executive or judicial action. (2 Words and Phrases, 2230) Judge Cooley quotes as embodying more tersely and accurately the legal view of the principle than any other single sentence, the following from the opinion of Mr. Justice Johnson, of the Supreme Court of the United States, in *Bank of Columbia* v. *Oakley,* 4 Wheat. 235: 'As to the words from *magna charta* incorporated in the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' (Cooley's Const., Lim. 355.) Due process of law or the law of the land does not mean statutes passed by the legislature, but it means certain fundamental rights which our system of ju-

risprudence has always recognized, and extends to every governmental proceeding which may interfere with personal or property rights, whether the process be legislative, judicial, administrative or executive."

In *Garfield* v. *Goldsby,* 211 U. S. 249, a commission had found that Goldsby was an approved member of the Chickasaw Nation and entitled to be upon the Government roll. His name had been stricken from the roll without notice to him by Garfield's predecessor in office as Secretary of the Interior. Goldsby brought mandamus against Garfield as Secretary of the Interior to require him to erase certain marks and notations theretofore made by his predecessor in office upon the rolls striking Goldsby therefrom, and to restore him to enrollment as a member of the Nation. In affirming a judgment awarding the writ, Mr. Justice Day, speaking for the Supreme Court, said (p. 262):

"But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action * * *"

"The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded, is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court."

In *Dacus* v. *Johnston,* 180 So. Car. 329, 185 S. E. 491, Johnston, as the governor of South Carolina, suspended Dacus from his office of State Highway Commissioner without a hearing, claiming authority there-

for under certain provisions of a statute of the State. An original proceeding was brought by Dacus in the Supreme Court of South Carolina asking for an order that the suspension be declared to be a nullity and of no force and effect. In awarding the relief, the Supreme Court of South Carolina said:

> "If Section 1592 (the section under which the Governor claimed the right of suspension) is open to the construction given it by the Governor and upon which he has acted in the suspension of the petitioner, then it is in violation of Section 5, Article I of the Constitution of this State and of Section 1, Amendment XIV of the Constitution of the United States which declare that no citizen shall be deprived of life, liberty, or property without due process of law, nor shall any person be deprived of the equal protection of the law."

If the procedure adopted by the Attorney General in this case receives the approval of this Court, there is no limit to the extent to which that official may harass public corporations of this state, created by legislative enactment, which refuse to accept dictation from him or the degree to which individual employees of such public corporations may be oppressed by him through the simple device of ordering the Auditor not to issue warrants in their favor all without notice or an opportunity on the part of those public corporations or those employees to be heard upon the question of whether the Attorney General is acting legally or illegally. This Court, as the guardian of the constitutional rights of the persons of this State, natural or artificial, has ever been watchful against trespass upon these valued rights. Rather timely is the language of the Supreme Court of the United States in *Jones* v. *Securities Commission*, 298 U. S. 1, beginning on page 24:

> "Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict."

The Board itself could not have discharged petitioners Hodges and Johnson without cause, in view of their contracts. In *Trustees* v. *Shaffer,* 63 Ill. 243, this Court said on page 245:

> "Neither the superintendent nor the trustees had the power, at pleasure and without cause, to discharge the servants of the institution, when a special contract had been made. This would be the exercise of harsh arbitrary power. The trustees had no more right to violate a solemn contract than one of their servants."

We ask the Attorney General of Illinois: What principles of law or procedure gave him the legal power to do that which the Board could not do, namely, to bring about a breach of a lawful contract with an employee by executive fiat?

(b) If the Attorney General desired to test the validity of the acts of the University in the premises in calling upon petitioners Hodges and Johnson for the performance of the duties described, he should have proceeded in a lawful manner by quo warranto, or by information in equity.

The University claims the powers herein set forth, some of which are seemingly challenged, pursuant to its charter. It has admittedly exercised these powers, without question on the part of any predecessors in office of respondent Barrett and with the full knowledge and assent of the General Assembly of the State of Illinois since 1867, the year of its creation. If the Attorney General really believed that the University was exercising powers beyond the scope of its charter, the law provides him a remedy by *quo warranto,*

which is a constitutional procedure, and in which the rights of all parties are determined after notice and an opportunity to be heard. (*People* v. *Board of Education*, 101 Ill. 308, 312, 313.) A public or municipal corporation is a corporation within the meaning of the *quo warranto* statute. (*People* v. *Board of Education*, 101 Ill. 308, 312, 313; *People* v. *Wilmette*, 375 Ill. 420, 424.)

There was also open to the Attorney General the well known remedy of information in equity, which is substantially the chancery counterpart of information in *quo warranto*. It lies, among other things, to restrain public or private bodies from unauthorized action or the misuse of public funds. (*People* v. *Ingersoll*, 58 N. Y. 1; *In re* Great Eastern Ry. Co., 11 Ch. D. 449; *Hunt* v. *Chicago Horse and Dummy Ry. Co.*, 121 Ill. 638, 642.)

The Attorney General refused to follow the beaten path of orderly procedure, either at law or in equity, but, choosing the tortuous road of legal innovation, he issued a peremptory order to respondent Lueder, in complete disregard of the rights of the petitioners. It will not do to urge that these orders are but the gentle breeze of courtly counsel. They are couched in the language of the manifesto, breathing supreme power—using the "shall" of imperial and divine command.

IV.

The university is a public corporation of the same kind or class as municipal corporations; it is not a commission, board or department of either the executive or judicial department of the state government, but a creature of the legislature with such powers as the legislature confers upon it.

At this point it might not be amiss to trace as briefly as possible the position of the University in the State

government and the genesis of its charter. The University is not a part of the executive branch of the State government; and when, in 1917, the State government was reorganized, and the so-called Code Departments replaced the numerous boards, bureaus and commissions then existing, the University was left outside the scheme and its historical status was unaffected by the radical re-formation of State agencies which then took place.

An examination of Smith-Hurd Revised Statutes, 1941, Chapter 127, Sections 1-63a, shows a clear intent and purpose to keep the University outside the Code Departments and in no way subject to supervision by or control of them. The Department of Public Works prepares plans for buildings to be "erected by any Department" (Sec. 49, par. 11); the Department of Purchases and Construction in the matter of products for construction and maintenance of public buildings, serves only the Code Departments (Sec. 52-52c); the Department of Registration and Education controls the Normal Schools, but has nothing to do with the University (Secs. 58-63); and other departments are limited in a similar manner so as to exclude jurisdiction over the University of Illinois or its activities.

The Attorney General, under the Constitution, is a part of the executive branch of the state government. Historically, the University has not been within the scope of his power, or that of the executive except in so far as the governor may exert his influence as an *ex officio* member of the Board.

Referring now to the genesis of its charter, we find that the charters of our oldest and best known educational institutions follow the pattern of the charters of Oxford and Cambridge Universities. The essential provisions in the confirmatory statute of 13 Eliz., C. 29,

appear, sometimes in identical phrases, in the charters of Harvard, Yale and Illinois. A brief examination of these instruments convinces that the charter of the University of Illinois comes either directly from 13 Eliz., C. 29, or indirectly through the Harvard and Yale documents, or both.

Oxford and Cambridge. The Act of 13 Eliz., C. 29, confirming the "charters, liberties and privileges granted to either of them" (Oxford and Cambridge), in 1571, provided:

1. The name of "Chancellor, Masters and Scholars of the University of Oxford" or "of Cambridge."

2. The Universities of Oxford and Cambridge, respectively "shall be incorporated."

3. They shall "have a perpetual succession in fact, deed and name."

4. They may "implead and be impleaded, and sue and be sued * * * and also answer and defend themselves, under and by the name aforesaid."

5. The University "shall have a common seal to serve for their necessary causes."

6. The University of Oxford had the power, from time immemorial, which power was confirmed by act of Parliament, "to make by-laws for the better ordering and government of the University and the scholars therein." (Ayliffe, State of Oxford, II, 240.)

7. The Universities of Oxford and Cambridge were given the power to accept gifts and endowments. [13 Eliz., C. 29; Ayliffe, State of Oxford, II, 197 (Act of Eliz.,) 204, *passim.*]

Harvard. The act establishing the Overseers of Harvard College was passed on September 8, 1642. On May 31, 1650, the formal charter of the University was enacted, making it a corporation. We find the following provisions:

1. The College "shall be called by the name of President and Fellows of Harvard College"; in 13 Eliz., C. 29, the legal name of Oxford was declared to be "the Chancellor, Masters and Scholars of Oxford University."

2. The College is made a "body politic and corporate."

3. It "shall have perpetual succession."

4. It "may sue and plead, or be sued and impleaded, by the name aforesaid." The phrase "by the name aforesaid" is a literal copy from 13 Eliz., C. 29, Ayliffe, *op cit.*, II, 198.

5. The governing body may "make and appoint a common seal for the use of the said corporation."

6. The governing body may "make * * * such orders and by-laws, for the better ordering and carrying on of the work of the College."

7. Power to accept gifts was given the College. (Charters and Laws of American Universities, Chambers, Appendix.)

Yale. The charter of Yale University was granted in 1745 by the general court of Connecticut. It provided:

1. The name of the College was "the President and Fellows of Yale College."

2. It shall be a "body corporate and politic."

3. "By the same name they and their successors shall and may have perpetual succession."

4. They shall "be persons in the law capable to plead and be impleaded, defend and be defended, and answer and be answered unto."

5. They "shall have a common seal to serve and use for all causes, matters and affairs of them and of their successors." The charter of Oxford, as shown above,

provides that "they shall have a common seal to serve for their necessary causes."

6. They have power "to make, ordain and establish all such wholesome and reasonable laws, rules and ordinances, not repugnant to the laws of England nor the laws of this colony, as they shall think fit and proper * * *"

7. Power to accept grants was given the College. (Charters and Laws of American Universities, Chambers, Appendix.)

University of Illinois. The parallels between the charter powers of Oxford and Cambridge and those of the University of Illinois under the charter of 1867 are too striking to be coincidental. The charter of 1867 provides:

1. The Trustees "shall be * * * styled 'The Board of Trustees of the Illinois Industrial University; and by that name and style shall * * *"

2. They shall be a "body corporate and politic."

3. The governing body "by that name and style shall have perpetual succession."

4. The governing body "shall have * * * power * * * to sue and be sued, to plead and be impleaded, to acquire, hold and convey real and personal property."

5. The University "shall * * * have and use a common seal."

6. The governing body was given the power "to make and establish by-laws * * * for the management or government * * * of the Illinois Industrial University."

7. The Illinois Industrial University was given the power to "accept the endowments of voluntary professorships or departments in the University, from any person or persons or corporations who may offer the same." (Laws of Illinois, 1867, pp. 123-29.)

The proponents of the bill for founding the University of Illinois, introduced in 1865, when it failed to pass, and reintroduced in 1867, at which time it did pass, were certain members of an agricultural group in this State, led by Jonathan B. Turner, a graduate of Yale and for many years associated with Illinois College at Jacksonville. Turner was the leader, and according to the history of the movement leading to its adoption, the one individual most directly responsible for the preparation and enactment of the Land-Grant College Act, which was approved July 2, 1862. (7 U. S. C. A., Sec. 301, ff.) He was a man of great abilities and wide learning, thoroughly familiar with the history of education and of the great universities of Europe and the United States. (Nevins, Illinois, 1-41.) J. B. Turner came to Illinois in 1833, his brother Asa, also a Yale graduate and one of the founders of Illinois College, having come several years earlier. In 1851, at a convention of farmers held in Granville, Illinois, on November 18, he offered a Plan for a University, and a resolution was then adopted urging the establishment of "University, in the State of Illinois * * * to meet these felt wants of each and all industrial classes of our State." (James, Origin of the Land Grant College Act, 63.) The plan outlined by Mr. J. B. Turner included suitable buildings, instruction in the sciences, with "no species of knowledge * * * excluded," with a classical department, if deemed expedient experimentation in agriculture, and professors whose "connection with the institution should be rendered so fixed and stable, as to enable them to carry through such designs as they may form." (*Op. cit.*, 73.) He thought it should be governed by a board named by the governor, consisting of five "of the most able and discreet men of the State," who could add twelve to their own number and thus perpetuate the governing body; he thought

each trustee should be removable should he "pervert his trust to any selfish, local, political * * * end"; and he should receive, he said of any man in the public service who departed from this ideal "of the greatest of all interests ever committed to a free state—the interest of properly and worthily educating all the sons of her soil * * * the mark set on Cain." (*Op. cit.*, 82.) It is evident that Turner was determined that the new University should be independent of ordinary politics and politicians, and is best evidenced by the extreme provision he suggested on this point:

> "I answer, without hesitation and without fear, that this whole interest should, from the first, be placed directly in the hands of the people, and the whole people, without any mediators or advisers, legislative or ecclesiastical, save only their own appointed agents, * * *"

In the statement quoted lies the irrefutable proof that Professor Turner had before him the charters of the English Universities when he outlined his conception of a state university, because they had received charters from English Kings giving them the power of self-perpetuation.

The close connection of the Turner brothers with the founding of the University and the drafting of its charter is further evidenced by the fact that the agreement for the establishment of the Illinois Association, which later became Illinois College, in 1829 was drawn on a plan virtually identical with that outlined by Turner to the farmers at Granville in 1851. (Illinois College, Rammelkamp, 23-28.)

It was no accident that the bill which became the charter of the University of Illinois, in essential outline and in much of its phrasing, followed closely the charters of the Universities of Oxford and Cambridge. These standard words and phrases, common to all

these instruments, as indeed they were to the charters of this type of corporation in Illinois of this period, had a well known and understood meaning in the history and the common law of England, and must, in the light of accepted rules of interpretation of statutes, be presumed to have been used in the same sense.

This historical background of the corporate nature of the University finds judicial expression in the decisions of this Court. In 1896 one Spaulding, the Treasurer of the University, misappropriated some of its securities. He was indicted under a statute of this State making it a felony for any officer of a *municipal corporation* of this State to appropriate funds to his own use. The indictment charged that the University was a *municipal corporation,* that Spaulding was an officer thereof, and that he converted its property to his own use. The trial court instructed the jury that the University was a municipal corporation, and Spaulding was found guilty. On appeal it was urged that the instruction given to the jury was erroneous in that the University was not a municipal corporation within this penal statute. It is elemental that penal statutes are strictly construed against the State and liberally construed in favor of the defendant. It was conceded on appeal that the University was a public corporation. The claim was that it was not a municipal corporation. The matter was discussed quite fully in the opinion and numerous authorities cited. (*Spalding* v. *People,* 172 Ill. 40.) In affirming the conviction and holding inconsequential the claimed distinction between a public corporation, such as the University, and a municipal corporation, such as a city, the court said (pp. 49, 50):

> "Strictly speaking, the University of Illinois is not a municipal corporation, but it is a public corporation * * * Cities and villages are strictly

municipal corporations, while counties, and townships, are often spoken of by the authorities as *quasi* municipal corporations. In line with what was said in *Misch* v. *Russell, supra,* the *general characteristic of all these corporations, including the University, is the one which makes them of the same kind or class, that of their public character.*" (Italics ours.)

Therefore, it is clear that the University is not a commission, board or department of either the executive or judicial department of the State government, but, like a city or village, an incorporated instrumentality—a separate and distinct legal person—created by the General Assembly for the more efficacious performance of certain public functions and duties of statewide significance. It is governed by a board of wide discretionary power.

V.

Public corporations, such as cities and villages, school districts, townships, counties, the Universities of Oxford and Cambridge, have from time immemorial and under the common law exercised the right to employ their own counsel. This rule is one of necessity because instead of representing them, the Attorney General, as counsel for the Crown or the State, moved against them in the exercise of the right of visitation for violations of the law, nonuser, or acts beyond their charter powers.

(a) The legal and historical fact is that the Attorney General of England never was at common law the legal representative of public corporations, other than the Crown; on the contrary he acted against them. The same is true of the Attorney General of Illinois.

At the time of the Conquest (1066) towns and boroughs of England "were not incorporated, did not constitute bodies politic; and * * * were regarded by

their feudal masters as possessed of no political and but few civil rights." [I Dillon, Mun. Corp., 10-11, Sec. 8 (3rd ed.)] The interests of the Crown were then, as later, hostile and antagonistic to these public or quasi-public bodies.

Far from representing the municipal or public bodies or corporations of England—towns, cities, boroughs—the King moved against them in *quo warranto* when he wished to extinguish their charters and subdue them more fully. In the reigns of Charles II and James II, eighty-one *quo warranto* proceedings were "brought against municipal corporations." (1 Dillon, *supra,* 13, note 3.) When William and Mary came to power a bill was passed to restore the rights of municipalities whose charters had been surrendered in the reigns of Charles II and James II. (1 Dillon, *supra,* 14.) As counsel for the Crown, the Attorney General did not act for but against them.

In Opinions of the Attorney General of Illinois, 1939, at page 253, we find an opinion addressed to the City Clerk of Spring Valley, in which the Attorney General expresses this traditional view of the limited powers of the Attorney General in respect of municipal or public corporations. He says:

> "As you may know, I am authorized by law to give advice to State's attorneys, State officers, boards and commissions on official matters only, and am not authorized to give advice to other officials or private persons. As a matter of courtesy, however, I wish to advise * * *"

It would be an unprecedented and extraordinary pretension of power if the Attorney General should appear in the Circuit Court of Cook County, claiming the right to represent the City of Chicago in a suit brought against the City and seeking to strike the

answer and appearance of the City filed through its own corporation counsel. Yet, if he has the power claimed as to a public corporation like the University which, as this court has said (*Spalding* v. *People,* 172 Ill. 40, 49-50) is "of the same kind or class" as municipal corporations, by virtue of his common law powers, historically and legally he has just as strong a claim to a right to represent cities and villages.

Far from representing municipalities in Illinois, the Attorney General has in fact moved against them on behalf of the people of the State for violations of the penal law. Thus, in *People* v. *City of Chicago,* 256 Ill. 558, information was filed by the Attorney General against the City of Chicago for violation of the Women's Ten Hour Law, as amended in 1911. The trial court found the city guilty of this criminal act. The city appeared through its corporation counsel, and the people by the Attorney General and the State's Attorney of Cook County. The city argued that a municipal corporation could not be prosecuted criminally, but this Court, in affirming the conviction, cited many cases holding that a municipal corporation could be prosecuted criminally and that the city was as much bound by the provisions of the women's ten-hour law as any other corporation or individual (pp. 564, 565). By the same token, the University of Illinois is subject to criminal prosecution for violation of applicable penal statutes. It is rather obvious that the Attorney General could not represent both parties. The case cited clearly indicates the adversity of interest between the Attorney General as counsel for the people of the State and the public corporations like the University or a city, created by the General Assembly.

Th functions of the Attorney General at common law never extended to representation of governmental

corporations, other than the Crown. His powers have nowhere been more fully or accurately set forth than in *People* v. *Miner,* 2 Lans. (N. Y.) 396 (1868), a case always cited in all well considered opinions on this point, and there is no hint that this official was the legal adviser of public corporations in England. He never was, as has been pointed out, the legal adviser of counties or towns; he is not a member of the Cabinet; government departments have their own law advisers, including barristers in private practice who are named King's counsel. [Fairlie, Law Departments and Law Officers in American Government, 36 Mich. L. Rev. 907 (1930).]

(b) The Attorney General of England, on behalf of the Crown, acted against all chartered corporations, public and private, in the exercise of the power of visitation vested in the King, which is conclusive against the claim that at common law he was their counsel.

What was—and is, in so far as still practiced—the essential object of visitation? Let Blackstone answer first, since we are dealing with a claim to power sought to be vindicated by an appeal to common law principles. The right of visitation in the case of lay or civil corporations was exercised for the purpose of ascertaining whether they were "conforming to the end or design, whatever it may be, for which they were created by their founder." [1 Blackstone Com. (1st ed.), 479-80.] The founder of all corporations, public and private, "in the strict and original sense is the King alone" and "in general, being the sole founder of all civil corporations, the right of visitation results, according to the rule laid down, to the King." (*Ibid,* 480-81.) What this amounts to in modern legal parlance is simply that the King—in Illinois the people—moves against all corporations, public and private,

when they violate their charter privileges—cease to live up to the "design * * * for which they were created." Modern visitation takes the form of *quo warranto,* injunction, information in chancery and *mandamus,* depending upon the relief sought.

How was visitation accomplished? Again Blackstone furnishes a clear answer:

> "The King being thus constituted by law the visitor of all civil corporations, the law also appointed the place wherein he shall exercise this jurisdiction: which is the court of the King's bench; where, and where only, all misbehaviors of this kind of corporations are enquired into and redressed and all their controversies decided, and this is what I understand to be the meaning of our laws when they say that these civil corporations are not liable to any visitation: that is, the law having by immemorial usage appointed them to be visited and inspected by the King, their founder, in his majesty's court of the King's bench, according to the rules of common law, they ought not to be visited elsewhere or by any other authority."

(*Ibid.,* 481.)

In England, the visitorial power over public bodies or corporations is in the King (*Ibid.,* 480). This was so after the kingship began to grow in power. A glimpse into the legal past of England affords abundant illustrations of the complete falsity, alike from the standpoint of historical fact and legal concept, of the claim that because the Attorney General of Illinois has inherited the powers of the Attorney General of England, he is therefore the sole legal counsel of a public corporation like the University of Illinois. No better illustration of the indestructible genius of freedom as the guardian spirit of great schools can be found in Anglo-Saxon history than the Universities

of Oxford and Cambridge. Ambitious monarchs or designing ministers might for a time reduce them to subservient roles, only to see them rise triumphant and expand in constantly widening areas of respect and power as the relentless finger of experienced wisdom pointed to the wasting blight of royal or ministerial intervention. As we have pointed out, it is no mere coincidence that the University of Illinois is created and endowed with powers in the very words with which the English Parliament in 1571, in the 13th year of Elizabeth, Chapter 29, ratified and confirmed the ancient charters of these famed institutions of learning, providing that each "shall be incorporated," and empowering each to "implead and be impleaded, and sue and be sued" as corporations enjoying extended privileges of self-government and freedom from every sort of capricious interference.

It is recorded that in 1243 Henry III sought the advice and help of Oxford masters learned in the law. That is to say, the position of Oxford, its colleges and its masters was fully established at this early date. The Attorney General, as the law officer of the Crown, developed in his own direction without encroaching on the charter privileges of these corporations. (Patent Rolls, 28 Hen. III, m. 10 d., p. 438.)

In 13 Elizabeth 29, "Act concerning the several corporations of the Universities of Oxford and Cambridge; and the confirmation of the charters, liberties, privileges granted to either of them," we find the following statement:

> "Be it further enacted, by the authority of this present Parliament that the Right Honorable, Robert, Earl of Leicester, now Chancellor of the said University of Oxford, and his successors forever and the Masters and Scholars of the same University for the time being, shall be incor-

porated, and have perpetual succession in fact, deed and name, by the name of * * * may severally plead and be impleaded, and sue and be sued for all manner of causes * * * and also answer and defend themselves under and by the name aforesaid in the same causes * * * in any courts and places within the Queen's Higheness dominions whatsoever they may be."

In a certificate required by James I, the seventh year of his reign, the Vice Chancellor of Oxford certified among other thing that Oxford University is *corpus politicum et corporatum, consistens ex Cancellario, Magistris et Scholaribus eiusdem Universitatis*—body politic and corporate, consisting of the Chancellor, Masters and Scholars of the same University." It thus appears that the phrase, "body politic and corporate," had become established in the law on the date in question (1610). (Ayliffe, State of Oxford, II, cxxiii, cxxiv.)

In the History and Antiquities of the University of Cambridge, by Parker, 204, Paragraph VII, is a brief reference to a grant by Henry VIII, pursuant to which the Chancellor, etc., of Cambridge *sint unum corpus nomine et re: et quod per idem nomen possint prosequi et clamare,* etc.—shall be a body corporate and politic in name and fact, and under that name shall have the power to pursue (sue) and summon, etc. (Let. Pat., Westminster, Nov. 28, in the 36th year—1545—of his reign.)

The Universities of Oxford and Cambridge have been incorporated bodies for centuries, probably first under ecclesiastical grants, later under royal charters, and eventually, as now, by Act of Parliament. They have long ceased to be in fact or in law private or proprietary corporations. They have become in the opinion of the English people, of the English Parlia-

ment and of the highest courts of England, great national, public, educational corporations. They have, it must be conceded, to a greater extent realized the ideals of their founders than has the University of Illinois to date succeeded in achieving the objective of the statesmen who set it up in 1867. But these same institutions of learning have behind them centuries of development, made possible through an enlightened policy of freedom accorded them almost without exception, even by the most arbitrary and ambitious of monarchs, and of course in recent centuries by Parliament itself.

Lord Coleridge, in the case of Oxford Poor Rate, 120 Eng. Rep. 68, 76 (1857), speaking of the University of Oxford, said:

> "* * * the University of Oxford, without attempting an exact or complete definition of it, may at least be said to be a national institution created for a great national purpose, the advancement, namely, of religion and learning through the nation. We are bound judicially so to regard it; for the Legislature, in Public Acts of Parliament, so deals with its title and property, its discipline and government, as to declare it holds the one and must be compelled, if necessary, to regulate the other, not merely with a view to any private interests of the corporation or corporators, but so as best to advance the interests of the public in the two respects we have named, of learning and of religion."

Instead of acting for these Universities, the Attorney General of England moved against them on behalf of the King in the exercise of the right of visitation. The question as to who had this right of visitation of the Universities, whether the Archbishop or the King, has frequently been discussed in English history and, indeed, sometimes became a matter of legal

dispute. In these controversies the Universities, and specifically the University of Oxford, although a national institution, were represented by their own legal counsel, whereas the Attorney General appeared in behalf of the King. One illustration is given by Ayliffe, when Sir John Banks, Attorney General, made the argument against the contention of the University and in behalf of the King. (Ayliffe, State of Oxford, II, 262.) Blackstone, in common with other authorities, as noted before in this brief, accorded the right of visitation to the Crown (I Com., 480-1).

Originally, the Bishop of Lincoln visited the University of Oxford, while the Bishop of Ely claimed the same right as to Cambridge. Later (about 1281) the Archbishop of Canterbury asserted the right in defiance of the claims of the bishops. Over the protest of the Universities, Richard II held in favor of the Archbishop by letters patent in 1397, indirectly confirmed by Parliament in 1407 by 9 Henry IV, C. 1, and in 1411 by 13 Henry IV, C. 1. By statute, 25 Henry VIII, C. 21, and 1 Eliz., C. 1, the right of visitation of the University of Oxford, Selden being Crown. In 1647 an ordinance was passed for the visitation of the University of Oxford, Selden being one of the commissioners. Charles II named visitors in 1660; Cambridge was visited in 1570 by commissioners named by Queen Elizabeth. James II visited the Universities.

It thus appears that the right of visitation—a right in law hostile to the corporation visited—during a period in English history when the powers of the Attorney General had crystallized into the pattern now well known and understood, was in the Crown and, as instanced by Ayliffe, when there was resistance in some form from the Universities the Attorney Gen-

eral acted for the Crown and against these corporations. (Report of Oxford Commission, Evidence, 245; 2 Rashdall, 425, 433; Williams, Law of the Universities, 29-34.) *Rex* v. *Cambridge University,* 2 Strange, 1157 (1723), was a mandamus proceeding because the University had made no return to a visitor.

(c) The visitorial power in the United States, with respect to business or public corporations, in general, is, simply put, the power to require them to give an accounting of their stewardship of the powers and privileges the State has conferred on the corporators, shareholders (through the filing of reports and in quo warranto actions) or inhabitants, to do business or exist on an incorporated basis; and that power is lodged in the people of the State and asserted through their law officer, the Attorney General, as to public agencies, domestic corporations, and those foreign bodies politic which the State has permitted to do business within its borders (Smith-Hurd R. S., 1941, C. 32, Secs. 157, 82, 83, 84, 85, 86, 91, 92, 95, 100). The position of the people and the Attorney General is, therefore, adverse to these corporate bodies, such as the University and all public and private corporate bodies who must, on their own responsibility, be prepared to meet whatever challenge the exercise of this inquisitorial power produces.

Accounting by corporations of their stewardship is exacted by direct proceedings in *quo warranto,* mandamus or injunction. "Every corporation of the State, whether public or private, civil or municipal, is subject to this superintending control although in its exercise different rules may be applied to different classes of corporations." (*State* v. *Milwaukee Chamber of Commerce,* 47 Wis. 670, 679, 3 N. W. 760.)

The Mode in Which Corporate Excesses Are Checked. The procedure at common law for checking corporate excesses or ending corporate existence, where the body politic, whether public or private, violated the limitations of its charter, is easily found

out by those who happen to be as interested in the orderly processes of the common law, of which Blackstone often speaks, as they are in assuming large and sweeping powers.

Quo warranto was originally a criminal prosecution at the instance of the Crown and by the King's attorney general against "such as had usurped or intruded into any office or franchise. The modern information tends to the same purpose as the ancient writ, being generally made use of to try the civil rights of such franchises; though it is commenced in the same manner as other informations are, by leave of the court, or at the will of the attorney general." (IV Blackstone Com., (2nd Ed.) 307-8.) It "is in the nature of a writ of right for the King, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right. It lies also in case of non-user or long neglect of a franchise, or misuser or abuse of it * * * This was originally returnable before the King's justices at Westminster, * * * and must now be presented and determined before (them)." (III Blackstone Com., (2nd Ed.) 262-63.) This was followed by the method of prosecution "by information filed in the court of the King's bench by the Attorney General, in the nature of a writ of *quo warranto,*" and was used for substantially the same purposes as the earlier writ of *quo warranto.*

The right of a corporation to exist or exercise corporate franchises or privileges was determined in a *quo warranto* proceeding, inquiring "by what warrant the members now exercise their corporate powers." This proceeding was used "in the reigns of King Charles and King James the second, particularly in seizing the charter of the city of London." (I Blackstone Com., (1st Ed.) 485.) It was expressly recog-

nized by act of 1845 (Statutes of Illinois, 1869, C. 25, P. 107-8), where the Attorney General was directed to proceed by *quo warranto* against incorporated academies which violated their charter powers. Such is the present rule in Illinois. (Smith-Hurd R. S., 1941, C. 112, Secs. 9(a), (e) and 10, *Quo Warranto.*)

Information in chancery is an available remedy in Illinois in a proper case. The new Business Corporation Act has added the remedy of information in equity in certain cases. (Smith-Hurd R. S., 1941, C. 32, Sec. 157, 82 ff.)

To what does this lead? It leads to the inevitable conclusion—fatal to the position taken by the respondents that the Attorney General is counsel for the University under the Constitution by virtue of his common law powers—that the King, when he asserted his visitorial powers, acted through his Attorney General against the Universities of Oxford and Cambridge, which bodies, as well as all other corporate bodies, whether public or private, necessarily appointed their own counsel in pursuance of the express power to "sue and be sued," or by necessary implication arising from their corporate character. Furthermore, such a proceeding by the Attorney General as counsel for the Crown was in *quo warranto* and put in issue, in a *direct* as distinguished from a *collateral* proceeding, as is here attempted, the question of corporate power or the legal propriety of corporate conduct. The pretender to imperial powers, whoever he may be, cannot, under our constitutional system, have the power and the glory without the incidental burdens—one of which was and still is an orderly procedure in asserting them "according to the rules of the common law." If the Attorney General, in the instant case, really thought that the University exceeded or abused its charter powers in calling upon

one of its legally trained employees for services in part of a legal nature, the plain principles of the common law as well as of modern constitutional procedure, like white stones, marked the correct path for him to travel. On the contrary, he chose to follow the course of unregulated power and by an imperial flourish to strike down contracts and practices, as old as the common law itself, without an opportunity to those interested to be heard in their support. This is not what Blackstone meant when he said that the right of visitation must be asserted by the King in accordance with the great and salutary principles of the common law.

We ask the respondents:

1. What case or illustration can you cite from English history, legal or general, where the Attorney General claimed or exercised the right to exclusive representation of English public corporations comparable to our municipal corporations, or to the University of Illinois?

2. What principle, or principles, of the common law required that a national corporation like Oxford University, or a public corporation, like the City of Oxford, stand defenseless and undefended by legal counsel while the Attorney General, acting in behalf of the Crown, moved against them either for the purpose of restraining alleged corporate excesses, or for the eventual destruction of the corporation itself?

VI.

The university is a public corporation with extensive governmental and proprietary powers, such as the power "to sue and be sued, plead and be impleaded," acquire and transfer property, create trusts, issue bonds, and to formulate and carry out an extensive educational program with comprehensive disciplinary or police authority over both faculty and students. It is a legal entity separate and apart from the State. It has the right to employ its own counsel as an incident to its corporate life, and essential in the execution of powers expressly granted.

Under the statute of its creation in 1867 (Ill. R. S., 1941, C. 144, Sec. 22, ff.) it is provided that the University

> "shall have perpetual succession, have power to contract and be contracted with, to sue and be sued, to plead and be impleaded, to acquire, hold and convey real and personal property; to have and use a common seal, and to alter the same at pleasure; to make and establish by-laws and to alter or repeal the same as they shall deem necessary for the management or government, in all its various departments and relations."

Observe that these are broad, sweeping, comprehensive powers. Can it be said that a corporation, public or private, granted powers of this character, is denied the right to employ its own counsel? Under statutes giving a town the power to "provide for the institution, defense or disposition of suits at law or in equity," which is in substance the power "to sue or be sued, to plead and be impleaded," the power to employ counsel is clearly implied. (*Cooper* v. *Delavan,* 61 Ill. 96 (1871); *Town* v. *Thomas,* 82 Ill. 259 (1876); *Town* v. *Patton,* 94 Ill. 65 (1879); *Town of Bruce* v. *Dickey,* 116 Ill. 527, 533; *Culver* v. *Village,*

220 Ill. App. 97 (1920); *Woods* v. *Village of La Grange,* 287 Ill. App. 201, 208.) In the latter case the Appellate Court of the First District said, page 208: "A municipal corporation which may sue and be sued * * * may employ an attorney to conduct such business unless restrained by its charter * * *"

The statutes in force in 1869 (Statutes of Illinois, 1869, p. 755; Act of February 20, 1861, Laws of 1861, pp. 278, 220) under which the cases of *Cooper* v. *Delavan, supra,* was decided (*Town* v. *Patton* and *Town* v. *Thomas* were seemingly decided under the same act) gave the town the power to sue and made it liable to suit (Sec. 1, Laws of 1861, p. 218), but nowhere was the right to employ counsel expressly quoted. In numerous cases outside Illinois, however, the power to employ an attorney to appear in behalf of the town has been implied as an incident to the power to sue. Indeed, any other conclusion would be utterly absurd —leaving the corporation the subject of an attack in the courts but without power to defend itself. (*City of Birmingham* v. *Wilkinson,* 239 Ala. 199, 194 So. 548; *Chrestman* v. *Tompkins,* 5 S. W. (2d) 257 (Tex.); *So. Ind. Gas Co.* v. *City,* 12 N. E. (2d) 122; *Clark* v. *Smith,* 294 N. Y. S. 106.)

In *City* v. *Birmingham,* 239 Ala. 199, the Court said at page 551 (S. W.): "* * * admittedly the authority of a city to employ legal counsel is incident to the power to sue and be sued." In *Southern Ind. Gas. Co.* v. *City,* 12 N. E. (2d) 122, the right to employ counsel is here said to be "one of the incidental powers necessary to the execution of a granted power." In *Clark* v. *Smith,* 294 N. Y. S. 106, the Court said:

> "It has long been the settled law of this state, and in other jurisdictions, that a municipal corporation has implied power to employ counsel to

render services in matters of proper corporate interest, including the prosecution and defense of suits * * *"

In *Meeske* v. *Bauman,* 122 Neb. 786, 241 N. W. 550 (1932), the Court said:

"The power of the city to employ counsel, implied as it necessarily is from the legislative grant to sue and defend, is not wholly taken away by statutory provisions creating the office of city attorney, prescribing the duties of that officer and restricting the payment of city funds to regular city employees and officers."

This rule was laid down despite a statute which provided, as the Court says, that the city attorney "shall on behalf of the city, prosecute or defend *all* actions in which it is a party." (Italics are ours.) There is no such constitutional or statutory provision in Illinois, but if there were, it still would not deny the Board the right to employ counsel of its own.

The act establishing the State Bank of Illinois was approved in February 1821. It created "a body corporate and politic" with power "to sue and be sued, plead and be impleaded * * *" (Laws of Illinois, 1821, pp. 80-81.) The Illinois Industrial University, now the University of Illinois, was created and empowered to act in identical phrases. (Laws of Illinois, 1867, p. 123.) The Bank was later made "the fiscal agent of the State." (Laws of Illinois, 1836-37, p. 21.)

This language indubitably gave the Bank the power to arrange for its own counsel, when it was a plaintiff or defendant in court. The officers of the Bank were later given the power, in their discretion, to call on the Attorney General and the circuit attorneys to prosecute any suits the Bank might institute, and, under the statute, it thereupon became his duty so to do—*but only when required to do so by the Bank's*

officers. (Laws of 1826, p. 88.) On February 7, 1835, an act took effect giving the Auditor and Treasurer authority and making it their duty to settle the accounts "of the several attorneys," *inter alia,* for the Bank, allow them their reasonable charges and contingent expenses, and if there was anything due the Bank from them for moneys they collected, it was made the duty of the Treasurer to direct the Attorney General, or proper State's attorney, "to commence suit against all such delinquents without delay." (Laws of 1835, pp. 59, 60.) During the biennium 1832-34 the Auditor paid W. B. Scates $50.00 "for legal services in three cases against Jos. M. Duncan, late Cashier" (of the Bank). (Laws of Illinois, 1835, Auditor's Report, p. 246.) The claims were of course claims of the Bank against Duncan. The reports of the Supreme Court of this State show that the Bank was often represented by counsel of its own selection—counsel other than the Attorney General—under the grant of power to sue and liability to suit. [See *State Bank* v. *Kain* (1823), *Ernst, etc.* v. *State Bank* (1824), *State Bank* v. *Buckmaster* (1826), and *State Bank* v. *Moreland* (1828), reported in 1 Breese, 75, 86, 176 and 282, respectively.]

The authorities, then, clearly support the proposition that unless statutes otherwise provide, a public corporation having the power to acquire, hold and transfer property, to make rules for the government of the agencies under its control, to create trusts and issue bonds, and which is liable to suit, has the implied power to employ counsel in connection with its corporate activities, and the Attorney General is not the exclusive legal adviser to such an entity.

As a matter of fact, all the cases clearly recognize that the principle of corporate entity is here of controlling importance. They recognize that such a body

is a legal entity separate and apart from the State. Precisely in point here is the case of *Saint* v. *Allen,* 172 La. 350, 134 So. 246. In that case the Louisiana Highway Commission was incorporated by an Act of the General Assembly of Louisiana providing that "the commission shall be a body corporate and as such may sue and be sued, plead and be impleaded, in any court of justice." Other sections of the same Act provided that every contract for highway improvement, under the Act, must be made in the name of the State of Louisiana, be signed by the State Engineer and the other contracting party, and approved by the Commission, and that no such contract shall be entered into, nor shall any such work be authorized to create a liability on the part of the State in excess of the funds available for expenditures under the terms of the Act. Another section provided that the cost of all highway and bridge construction, under the Act, shall be paid out of the general highway fund, although local aid may be received. Another section provided that the State, acting through the Commission, may acquire by purchase, lease or donation, and may operate gravel beds, shell or rock deposits, and the like.

Section 55 of Article 7 of the Constitution of Louisiana provided that there shall be a Department of Justice consisting of an Attorney General, elected every four years at the general State election. Section 56 provided that:

> "The Attorney General * * * shall be learned in the law * * * shall attend to, and have charge of all legal matters in which the State has an interest, or to which the State is a party, with power and authority to institute and prosecute or to intervene in any and all suits or proceedings, civil or criminal, as they may deem neces-

> sary for the assertion or protection of the rights and interests of the State * * * shall exercise supervision over several District Attorneys throughout the State and perform all other duties imposed by law."

The Highway Commission employed its own counsel and the Attorney General brought an injunction suit to restrain the practice, claiming that he was the sole legal supervisor of the Commission and that if there be any statute in Louisiana authorizing the Commission to employ its own counsel, said statute was unconstitutional. In denying this contention of the Attorney General and referring to the constitutional provision defining his duty and power, the Supreme Court of Louisiana said on page 248:

> "Under this provision it is the duty of the Attorney General and his assistants to prosecute and defend all suits or other legal proceedings to which the state is a party, and to have charge of all legal matters in which the state, as a distinct entity, apart from other entities or corporate agencies it may create, has an interest. It was not intended that the word, 'interest,' used in this section, should be received or interpreted in its broadest sense, in connection with the interests, possessed by the state. Such an interpretation would make the accomplishment of the duties of the Attorney General and his assistants, next to impossible, if not impossible. Therefore, so far as relates to the Constitution, that instrument, with reference to the duties of the Attorney General and his assistants, has confined, by implication, the duties, there demanded to be rendered, to those interests, possessed by the state, as a distinct entity, and has left it to the Legislature to impose such other duties upon those officials as it may deem proper to do from time to time.
>
> "If the Louisiana highway commission is a distinct legal entity from the state, then there would

seem to be no reason, so far as relates to the Constitution, why the Attorney General and his assistants should be deemed to be the attorneys for the commission, and why other arrangements could not be made, under legislative authority, for the selection of attorneys by the commission.

"The commission, in our opinion, is a distinct legal entity from the state. Section 3 of Act No. 95 of 1921 (Ex. Sess.) makes it a body corporate, with power as such to sue and be sued. It is an agency of the state, and not the state itself, created for the purpose of executing certain duties, devolving primarily upon the state. In a general sense, in its relations to the state, it is not dissimilar to levee districts, which are bodies corporate, created for the purpose of constructing and maintaining levees, which are duties, devolving primarily upon the state. It was held in *State* v. *Standard Oil Co.*, 164 La. 334, 357, 113 So. 867, and in *State* v. *Tensas Delta Land Co.*, 126 La. 59, 52 So. 216, that a levee district, though the creature and an agency of the state, had, as long as it was permitted to exist, a separate existence from the state, and that the state could not sue on causes of action accruing to the district. Nor, in a general sense, is the commission dissimilar, in its relations to the state, to the board of commissioners of the port of New Orleans, concerning which it was held that the board, as a body corporate, had a separate existence from the state, and, though an agency thereof, did not enjoy the immunity from the prescription, *liberandi causa,* enjoyed by the sovereign. *Board of Commissioners of Port of New Orleans* v. *Toyo Kisen Kaisha,* 163 La. 865, 113 So. 127. These cases are pertinent here for the purpose of showing that the Louisiana highway commission is a separate legal entity from the state.

"However, it may be said that the ruling, as to the separate existence of the commission, is not well taken here, because the act, creating it,

provides that all contracts for highway improvement shall be made in the name of the state, and that the state, acting through the commission, may acquire gravel beds, and the like, by purchase, lease or donation, and that the state provides the commission with funds with which to discharge the purposes of its creation. Sections 16, 23, 34, Act No. 95 of 1921 (Ex. Sess.). These facts, however, are insufficient to make the commission and the state one and the same. They merely show that the commission is an agency of the state. It does not even follow that, because contracts for highway improvements must be entered into in the name of the state, suits on such contracts should be brought by the state or against it, for the commission, as a body corporate, is given express power to sue and be sued, which shows that such suits (which might be reasonably expected to constitute the greater part of the litigation in which the commission might become involved) should be instituted by the commission, and not by the state.

"Our conclusions therefore are that the Constitution, in defining the duties of the Attorney General and his assistants, confines those duties by implication, to the state, as a distinct entity from its corporate agencies, and to the duties imposed upon those officials by law, and that the Louisiana highway commission is one of those agencies, and hence the duties and powers of the Attorney General and his assistants do not, by virtue of the Constitution, save as some of those duties may be prescribed by statute, attach to the commission."

The Court concluded that the "Commission had the implied power to employ counsel under Sec. 3 of Act No. 95, 1921 (Ex. Sess.), arising out of the power to sue and be sued."

Two of the justices dissented, filing separate opinions. The opinion of one of them, Justice Odom, is quite enlightening. He said on page 252:

"There can be no dissent from the proposition that, as a matter of law, it is not only the prerogative but the duty of the Attorney General, who is made the head of the department of justice, to act as counsel for and represent the state in all matters wherein the state is interested or is a party 'as a distinct entity.'

"Now, in so far as the majority opinion so holds, I unreservedly concur. But in order to reach the conclusion announced, it is held that the highway commission, 'is a distinct legal entity from the state.' From that holding I respectfully, but most emphatically, dissent."

He then pointed out that while the commission was a legal entity, it was not "a distinct legal entity from the state," saying on page 253:

"The state has power to create, and has in many instances created, corporations to act for it with such unlimited and far-reaching powers that they may be said to be separate legal entities from the state. But the Louisiana highway commission is not one of them. It is a state agency with most limited and restricted powers. It has no general powers. It can perform no governmental functions like a levee board or commission. It does not act in its own name and capacity except in purely incidental matters. It does not and *cannot contract in its corporate name and capacity.* The act creating it specifically provides 'that every contract for highway improvement under the provisions of this Act shall be made in the name of the State of Louisiana.' Such contracts are not even signed by the commission, but by the highway engineer and approved by the commission. The commission does not acquire gravel beds, etc., for the construction of roads, but the state itself may acquire such 'acting through the Commission.' The state may acquire rights of way by purchase, provided the owner of the land and the commis-

sion 'representing the state,' not itself, can agree upon the price, and, when the land necessary for the rights of way must be acquired by the state through expropriation proceedings, the commission is authorized to 'bring such proceedings in the name of the state.' And in case these rights of way are acquired by the state through purchase or expropriation 'by the Commission acting for the state,' the price is paid out of the general highway fund.

"It is thus clear that the highway commission is the agent of the state in the most limited sense. In no sense, I think, can it be said that it is a separate and distinct entity from the state."

The dissenting opinion of Justice Odom in fact supports petitioners. The powers of the University of Illinois are vastly more sweeping in their scope than were the powers of the Commission in the Louisiana case. The University is a corporate entity whose governing body is endowed with perpetual succession; it has power to enter into contracts, to sue, to acquire and manage property and to build buildings, virtually unlimited save by the constitutional provisions which operate upon all corporate and public bodies; it may contract with and obtain grants and loans from the United States (Smith-Hurd R. S., 1941, C. 144, Secs. 64-67); it may make rules and enact statutes for the government of the institution; it may create trusts, enter into trust agreements with trustees having the power to issue bonds; it may execute documents such as leases and those creating liens; it may borrow money and issue its own bonds to refinance certain obligations; and it may assess fees against students to provide the funds with which to discharge obligations incurred in order to provide facilities and equipment for the use and convenience of students. (Smith-Hurd R. S., 1941, C. 144, Secs. 64-78.) Indeed, the

University, in common with comparable state institutions in the United States, has increasingly assumed the aspect of a municipal corporation with extensive governmental and proprietary powers, for, among other matters, a portion of the police power of the state has been granted to it and is exercised over students when disciplinary measures are enforced against them, under the rules and statutes of the University. The powers of the University are far more comprehensive than were the powers of the Commission in *Saint* v. *Allen,* 172 La. 350.

A suit against the University of Illinois is not a suit against the State, it is a suit against the University of Illinois, a body politic and corporate. The State is not the real party in interest in any legal or actual sense; the real party in interest is the person sued, namely, the University of Illinois.

Such Corporate Agencies Are Independent. The reason for the rule that a corporate State agency should be independent in the selection of its own counsel is implicit in the grounds assigned for the well established doctrine that such an agency, rather than the State as a corporate entity, has the exclusive right to enforce legal causes of action accruing in respect of property to which it has title. In *State* v. *Tensas Delta Land Co.,* 126 La. 59, at page 72, 52 So. 216, the Court said:

> "The argument that the said board is nothing more than a mere agency or instrumentality of the State, and that therefore the State may sue in every case where the said board might sue, contains a manifest *non sequitur*. Every city, town, and parish of the State is a mere agency or instrumentality of the State; but no one would venture to say that the Attorney General could ignore the existence of these corporations and enforce, in the name of the State, any cause of

action which any of them might have. The legislative control over corporations of the character of this levee board is much more complete than over municipal corporations proper and parishes —it made them, and can at any time abolish them, so long as the obligations of their contracts are not thereby impaired—but these corporations have their existence and exercise their functions by and under the Constitution and statutes of the State, and so long as these established laws remain in force it is they which must regulate the property and other rights of said corporations and their modes of action, and the disposition of their property, and their rights to sue and to be sued. If one of these corporations has a right of action, the proper functionary to enforce same is the governing body of the corporation, and not the Attorney General, or the State."

That the Attorney General or the State itself has no legal power to step in front of a corporate entity such as the Board of Trustees, either in the pretended exercise of constitutional powers or of authority given by general laws, and assert rights, political or property, which the legislature has conferred upon it, has long since been settled by the highest authority. From this premise it follows that the corporate body which owns the right of action to the exclusion of the State as a corporate entity, has the full power to take the appropriate steps to vindicate its right in a court of law, including the power to select its own counsel, unless some clear and unequivocal statutory or constitutional provision otherwise provides. There is none such in Illinois.

In no case has the doctrine under consideration been more fully or ably expounded than in the famous case of *People* v. *Ingersoll, et als.*, 58 N. Y. 1. On both sides in this *cause celebre* were some of the most distinguished leaders of the bar of the Empire State. Among

these eminent counsel were Charles O'Conor, Samuel J. Tilden, W. H. Peckham, Elihu Root, David Dudley Field, and William Fullerton. Among the members of the court were Allen, who wrote the prevailing opinion, Folger, Andrews and Peckham who concurred, all jurists of the first rank.

This action involved William M. Tweed, and others. The plaintiff was the people of the State of New York, and the claim was that defendants had tortiously received money belonging to New York County. The following propositions were laid down by the Court:

1. One who tortiously obtains money of another can be charged as involuntary trustee only at the instance of the true owner. The State has no such right, except in respect of funds "belonging to it as a corporate entity" (Syl., p. 1; p. 17, per Allen, J.).

2. When the right of property is unlawfully obtained and the "right of action therefor exists in a public corporation, a concurrent right of action at law does not exist in the State, except when given by statute. The right of action is exclusive in the corporation" (Syl. p. 2).

3. Property held by municipal corporations "is invested with the security of private or individual rights" (Syl. p. 2).

4. "The title to and ownership of the money sought to be recovered must determine the right of action, and if the money did not belong to the State, but did belong to some other body having capacity to sue, this action cannot be maintained." (P. 13, per Allen, J.).

5. "When grants, whether of rights or of power, are conferred by the legislature they are held absolutely, and to be enjoyed and exercised independently, subject only to the general laws of the State, the terms

and conditions annexed to the grant, until withdrawn or modified by the legislature." (P. 21, per Allen, J.).

6. "The (above rule) does not exempt such property from legislative control, and, in that respect, property rights stand upon the same footing as other corporate rights, whether political or civil. Property owned by a city, county or other municipal or local government, is held by it as a public corporation, and subject to the law-making power, and the governing body, by whatever name called and known, are merely trustees for the public who are the *cestui qui* trust of the corporation." From Denio, J. in *Darlington* v. *Mayor,* quoted by Allen, J., on page 21.

The Court of Appeals of New York in that case, although adopting the doctrine that the Attorney General of New York carried with him as an incident of his office all the common law powers of the Attorney General of England, held that he did not have the right to bring the proceeding in the name of the People of the State of New York on a cause of action which was vested in New York County, notwithstanding the fact that the funds involved were public funds, clearly recognizing the County of New York as a separate and distinct legal entity from the State of New York. It is to be recalled that the University is a corporation of the same kind and class as a municipal corporation. (*People* v. *Spalding,* 172 Ill. 40, 49, 50.)

The same conclusion was reached in *State* v. *Southwestern Land and Timber Co.,* 93 Ark. 621, 126 S. W. 73 (1910), where the Court refused to permit the State, acting through the prosecuting attorney, to assert a right of action in a body politic and corporate with power to sue in its own name.

In that case the Supreme Court of Arkansas held that the State, on the relation of its prosecuting attor-

ney, had no right to prosecute a suit to recover lands, title to which was in a levee district, as an agency of the State, where such levee district was "a body politic and corporate with power to sue."

From this we respectfully submit it uncontrovertibly follows that the University as a separate and distinct legal entity apart from the State, has the power to prosecute and defend its own suits and to employ its own counsel as an incident to its corporate life, and without which the power is illusory.

VII.

Neither the common law nor the statutes of the judicial decisions of this State give any color or right to the Attorney General as the sole or exclusive legal counsel for the university.

In Section V of this brief was pointed out that due to the nature of the University as a public corporation, to represent it as its sole legal adviser was beyond the duty or power of the Attorney General at common law. We now call attention to certain legal and constitutional history in Illinois. From 1848, when a new Constitution was adopted, to 1867, there was no Attorney General in Illinois. The circuit attorneys did all the law work in which the State as a distinct entity was concerned. On February 27, 1867, an act was approved providing for an Attorney General—to be elected in 1868. This act made it his duty to give legal advice to the "governor and other executive officers of the State," and "to institute and prosecute all actions, suits and complaints in favor of or for the use of the State which may become necessary in the administration or execution of the laws of the State; also to defend all actions, suits and complaints in favor of or for the use of the State which may be-

come necessary in the administration or execution of the laws of the State; also to defend all actions, suits and complaints in which the State is interested, which may be commenced or prosecuted in the State or United States courts." (Laws of 1867, Sec. 4, p. 47.) It will be observed that the act of 1874 makes no material change in this section.

No intimation is made that he is the legal adviser of the University or of the Canal Commissioners, public corporations both of which had been created by legislative act before there was a functioning Attorney General in Illinois. When the University was created, there was no Attorney General to act for it and no legal adviser available to it, except one of its own choice. Both these acts were in effect when the Constitution of 1870 was ratified. Upon the principle of *People* v. *Ingersoll,* 58 N. Y. 1, and other authorities, discussed in Section VI of this brief, these statutes did not impliedly give him the power to act as exclusive legal counsel for independent entities like the University or the Canal Commissioners, with power to sue in their own names, and the right to their own counsel. Actual practice followed this legal theory, and correctly so. (*Canal Trustees* v. *Havens,* 11 Ill. 554, decided in 1850.)

The Act of 1867, as stated, makes it the duty of the newly created Attorney General to "advise the Governor and other executive officers of the State * * *" The University never was a part of the Executive. Under the Constitution of 1848, the "executive power of the State shall be vested in a governor" (Art. IV, Sec. 1); and the Constitution of 1870 vests the Supreme executive power * * * in the governor" (Art. V, Sec. 6). The Constitution of 1848, as did that of 1818, conventionally separates the state government into three departments, exclusive, legislative and judicial

(Art. II, Secs. 1 and 2), but does not expressly, as does the Constitution of 1870 (Art. V, Sec. 1), specify what officials constitute the executive department. There can be no doubt, however, that the lieutenant governor, the auditor, the secretary of state and the state treasurer, all created in the Constitution of 1848 (Art. IV, Secs. 14, 23, 22 and 24, respectively) were executive officers and with the governor constituted the executive department of the state government.

When the Constitution of 1870 went into effect, with the Attorney General for the first time in the history of Illinois a constitutional officer and a member of the executive branch of the state government (Art. V, Secs. 3 and 20), the University had the power to name its own counsel to defend or prosecute cases in the courts, unless that instrument by necessary implication, through an irreconcilable inconsistency between its terms and existing statutes (Schedule I, Sec. 1), repealed the clear implication of Section 1 of the act creating the University, approved February 27, 1867, which gave the Board of Trustees of the University the power to sue and made it subject to suit. It has become hornbook law in Illinois that repeals by implication are in disfavor. (*People* v. *Kerner*, 362 Ill. 442.)

The University never was a part of the Executive branch of the state government; indeed, it has long since become the settled law of this State that the University is an agency of the General Assembly.

We respectfully submit that upon no tenable premise can it be said that the Attorney General has the power, under the law of this State, to act as sole counsel for the University in and out of court.

The case of *People* v. *Minor*, 2 Lans. 396 (1868) is significant. The opinion is carefully considered; nu-

merous cases, English and American, are examined and analyzed; and the common law powers of the Attorney General are described in such detail that in no other case found has the statement been expanded or criticized as too limited, whereas the statement of his powers as there set forth has been accepted as correct in recent decisions, notably in *Commonwealth* v. *Margiotti,* 188 A. 524 (Penna., 1936).

In this case the Attorney General of New York injected himself by information in chancery into a situation in the town of Augusta and undertook in the name of the people to enjoin the commissioners of the town from performing certain acts in relation to financing operations. He appears to have taken the position that they were acting either illegally or in excess of their powers. The Court held that neither the common law nor the statutory powers of the Attorney General justified this "intermeddling" as the Court put it, in the affairs of this public corporation. In short, the Court found no authority in the common law powers of this official for his claim of power, but held that the vindication of the corporate interest, whatever it might be in the circumstances, must be left to "those immediately concerned." The Court, further, said:

> "I am utterly opposed to the adoption of a rule that will permit a state officer to intermeddle in the affairs of every corporation."

Furthermore, it should not be overlooked that up until now in the history of this State, the power of the University to act by and through its own counsel has not been questioned. The State and the General Assembly have consistently regarded employment of counsel by the University as not forbidden by the Constitution. In 1897 it made an appropriation of $5,000 to the University for the expense of legal counsel

employed in connection with the defalcations of the University's treasurer (Laws of 1897, p. 74); and at each session since 1875 the General Assembly has made appropriations to the University with presumptive knowledge that a portion thereof would be used to pay the compensation of the University's counsel, for this practice has been officially reported to the Governor and the General Assembly throughout the years (Pet., pp. 41, 42, 43). It thus appears that this convenient arrangement and the interpretation as to the independent status of the University implied in it, so far as this question is concerned, has been approved by the contemporaneous construction of the State Government—governors (Pet., p. 42), attorneys general (Pet., p. 37), and legislators (Pet., p. 43). In *Roehm* v. *Hertz,* 182 Ill. 154, this Court said (p. 164):

> "It is a principle of construction of a constitution, that it is proper to take into consideration the uniform, continued and contemporaneous construction given by the Legislature and General Assembly, recognized as to its meaning or intention, and such contemporaneous construction affords a strong presumption that it rightly interprets the meaning and intention."

The case of *Fergus* v. *Russell,* 270 Ill. 304 (1915), discusses, generally, the powers of the Attorney General. That case involved the executive branch of the State Government and has no application to the facts of the case now before the Court. "A judicial opinion, like a judgment," says Mr. Justice Stone with sparkling accuracy, in *People* v. *Chapman,* 370 Ill. 430, at page 435 (1939), "must be read as applicable only to the facts involved and is an authority only for what is actually decided." (See also, *White* v. *Seitz,* 342 Ill. 266, 270; *City of Geneseo* v. *Ill. Northern Utilities Co.,* 378 Ill. 506, 519; *People* v. *Kelly,* 379 Ill. 297, 302.) What was "actually decided" in *Fergus* v. *Russell?*

Respecting the function and power of the Attorney General, the sole question before the Court was whether an appropriation to the Insurance Superintendent of $4,000 for "legal services" and of $2,000 "for traveling expense of attorneys, court costs *in re* prosecutions of violations of the insurance laws," and certain other appropriations, were violative of or an infringement upon the constitutional powers and duties of the Attorney General. The Court disapproved these items on the ground urged, but sustained other challenged items "for expenses of prosecutions of violations of the insurance laws," for "prosecutions" and for "investigating and prosecuting illegal sale of narcotic drugs."

The only question, therefore, was whether the General Assembly could legally appropriate money to an unincorporated branch of the *executive department* of the state government "for legal services," notwithstanding the state *had an official*—an Attorney General—whose clear statutory ~~suit~~ duty it was then and still is "to institute and prosecute all actions and proceedings in favor of or for the use of the state, which may be necessary in the execution of the duty of any state officer." (Act approved March 26, 1874, Sec. 4, par. 2; Smith-Hurd R. S., 1941, Chap. 14, Sec. 4, par. 2; and Smith-Hurd R. S., 1915-16, Chap. 14, Sec. 4, par. 2.)

The Insurance Superintendent was a "state officer"; the position was created by law, and the incumbent was appointed by the governor for a fixed term—four years. Act approved June 20, 1893, Sec. 2. The State Constitution defines an office as "a public position created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed term, with a successor elected or appointed." Const., Art. V, Sec. 24. It is, therefore, clear that

under the statutes in force when the act was passed which was before this Court in *Fergus* v. *Russell,* it was the statutory duty of the Attorney General to act for or represent this State officer. There is nothing in *Fergus* v. *Russell* to support the Attorney General's claim here.

VIII.

The university was founded as a free educational institution, open to all; a decent public policy demands that it be free to determine its own defenses in suits brought against it, which it cannot be if it be denied the right to counsel of its own choosing—a fundamental right without which no person, natural or artificial, can be free.

The plan on which the University is organized (Pet., pp. 3, 4, 5, 6, 15, 16, 17, 18) is admittedly in conformity with generally accepted theory and practice in educational administration, ancient and modern. The University of Illinois, being an educational institution, the theory and practice of its organization, administration and control should not differ in essentials from those approved and recognized in the cases of private institutions of learning comparable to it. No institution of learning in the entire history of the Anglo-Saxon people has maintained its standing or prestige for any length of time after any one of the three categories of freedom, namely, freedom to determine its own policies, prosecute its own suits and interpose its own defenses by its own counsel, have been denied it. The enviable renown of the Universities of Oxford and Cambridge is attributable chiefly to the fact that they have been for centuries free from executive intrusion. Indeed, without such freedom, no University ever achieved greatness. The Bardic schools of Ireland, famed for their classical learning

through the European continent and sought by scholars from almost every part of the world, maintained their greatness only as long as they were left free from arbitrary interference by the executive. Antedating St. Patrick, flourishing after his advent, it became the inglorious destiny of Cromwell to administer the *coup de grace* to them. (The Hedge Schools of Ireland, Dowling, *passim;* Lecky, History of Ireland, *passim.*) We repeat again that it is no mere coincidence that the charter of the University of Illinois contains language in many respects identical with that of the charters of the Universities of Oxford and Cambridge, such as "to sue and be sued, plead and be impleaded," words of well known and technical legal meaning, importing the utmost liberty of action, as ancient as the law itself.

The power granted is an illusory power without the attendant right of counsel in the premises. Revealing is the fact that when the University in 1867 was given the power to "sue and be sued, plead and be impleaded," there was no constitutional office of Attorney General and no State Official charged with the duty of defending it! Concerning the claim of the present Attorney General that he is the exclusive legal adviser of the University, it appears to us to be of controlling importance *that in 1867 when the University was created and given the power to sue and subjected to liability to suits there was no public officer in the State whose duty it was to defend it, and it would be left defenseless unless it had the power to name its own counsel.* Revealing also is the fact that in the first suit brought in this court against this University it was represented by counsel of its own choosing! (*Thomas* v. *Board of Trustees,* 71 Ill. 310 (1874).) Do not these incontrovertible facts conclusively reveal the public policy of Illinois that the University shall have

the right to its own counsel as an incident to its corporate life, "*tacite* annexed," to use the words of Chief Justice Coke, uttered in 1612 in Sutton's Case, 10 Coke, 23a? Such is clearly the rule laid down in the cases cited in Sections V and VI of this brief.

It is of course the duty of the Attorney General of Illinois to move *against* the University in case complaint be made concerning any trust it is administering. If he be the sole legal adviser of the Board, there arises here a most extraordinary conflict of duty—a conflict the logic of the common law never countenanced!

IX.

Mandamus is the proper remedy.

(a) The conduct of the Attorney General being arbitrary and without premise in law, his duty to repair the damage is mandatory.

The law appears to be rather well settled that where a State or Federal board or officer acts in excess of jurisdiction or without authority, mandamus is the proper remedy to review and correct such action. (*Garfield* v. *Goldsby,* 211 U. S. 249, 261; *Bransfield Co.* v. *Kingery,* 283 Ill. App. 405, 411 (3), opinion by Fulton, J.; 38 C. J. 660, Sec. 200.) We have heretofore referred to the first case, being the case in which the Supreme Court of the United States awarded a mandamus to correct arbitrary and unauthorized conduct on the part of the Secretary of the Interior. In the second case referred to, the Third District Appellate Court of this State reviewed and corrected by mandamus the unauthorized assumption of authority by the Director of the Department of Public Works and Buildings of this State in refusing to approve certain

highway paving contracts theretofore awarded to petitioner, Mr. Justice Fulton saying (p. 411):

> "We believe that mandamus will not lie to control the exercise of a discretion where there is room for an honest difference of opinion but that it will like to prevent a clear abuse of discretion or to control a discretion exercised contrary to an applicable rule of law. Where there has been unlawful denial of a clear duty on the part of a public official, the citizens to whom such right or duty is owing may secure its performance by the writ of mandamus."

In the case at bar the conduct of the Attorney General in ordering the Board to desist performance of its contracts with relators Hodges and Johnson and in ordering the Auditor of Public Accounts to withhold their compensation pursuant to such contracts (wholly unsolicited by either) and his conduct in intruding himself into the proceeding in the Circuit Court of Cook County and pretending to represent the defendants named therein when he had never consulted or advised with them, can scarcely be labeled even as an abuse of discretion. It is a pure usurpation of power not granted the Attorney General of this State. He has no power given him by the Constitution or the statutes of this State to order the Board of Trustees of the University to do anything; neither has he the power to so order the Auditor of Public Accounts or any other State or constitutional officer. Obviously he has no power to dictate to an agency of the General Assembly or by intervention endeavor to assume the power. (*New Orleans, etc.* v. *New Orleans,* 34 La. Ann. 4, 29; *Van Dyke* v. *State,* 24 Ala. 81.) Imagine the reaction of the General Assembly were he to appear before one of its committees appointed and empowered to perform certain functions desired by the Legislature, investigatory or otherwise, and

claim to be the exclusive and sole counsel for such committee! That the University of Illinois is an agency of the General Assembly and exclusively under its control charged with the performance of functions delegated to it by the General Assembly and of the highest importance to the people of this State is settled law in this court; and the General Assembly has delegated control over this institution to no executive officer or body in this State other than the Board of Trustees which it has created.

That an Attorney General is not immune from mandamus is well settled. (*People* v. *Fullenwider,* 329 Ill. 65, 70; *Levitt* v. *Attorney General,* 111 Conn. 634, 151 Atl. 171, 174; *State* v. *Berry,* 3 Minn. 190, 191; *San Mateo County* v. *Cullihan,* 69 Cal. 647, 11 Pac. 386; 34 Am. Jur. 922, Sec. 145, N. 21; 38 C. J., 673, Sec. 220, N. 89, 90.)

(b) The Auditor has no discretion but must draw warrants upon the State Treasurer on vouchers duly certified according to law; the admitted facts suggest no justification for his refusal; and the Attorney General has no power to direct him to disregard mandatory statutes.

The statutes provide that the Auditor of Public Accounts "shall draw his warrant on the State Treasurer for the payment of the same upon the presentation of itemized vouchers, issued, certified and approved by the President and Secretary of the Board of Trustees of the University of Illinois, with the corporate seal of the University attached thereto." [Ill. Rev. Stat., 1941, C. 127, Par. 146 (8).] The vouchers for which the Auditor refused to issue and deliver his warrants on the State Treasurer were admittedly drawn and certified in accordance with this statute and other applicable laws of this State (Pet., p. 25). The Auditor has no discretion under the

statute. His duty is ministerial and mandatory; indeed, his only reason for refusing to issue and deliver the warrants is an instruction from another official whose "wishes" or "request" he feels he must humor (Pet., pp. 23, 24, 25). It is apparent that the Auditor has no discretion in the matter, as the decisions of this Court are replete with cases where writs of mandamus have issued against the Auditor in analogous circumstances. (*People* v. *Stevenson,* 272 Ill. 215, 221.)

CONCLUSION.

Since 1867, the year of its creation, the University has been free from executive intrusion. Aided and encouraged by the General Assembly of Illinois, whose creature it is, it has risen to a preeminent and enviable position in the national and international field of education. For the academic year 1941-42 it was the third largest university in the United States in point of enrollment, representing virtually every state in the Union and major country in the world. Its alumni participate in every field of human endeavor. The services of its faculty have been and are constantly sought by the governments of the states, the nation and of foreign countries, conclusive proof of its accredited status essential to its existence and imperilled by the acts of the respondents as related in the petition (pp. 7, 8, 9). It has throughout its history been accorded a freedom of operation comparable to similar institutions of rank and renown. Men and women have labored long and sacrificed greatly that their sons and daughters might find the economic security and cultural repose incident to a free and untrammeled

education in a country where these are deemed the *sina qua non* of an abundant life.

This is no ordinary lawsuit. The answer to the basic question before this Court will be a beacon to guide all governmental agencies and public servants in their relations with free schools, or it will become a precedent sanctioning interference and intrusion in the control of education, condemned with cold finality alike by the voice of experience and of general policy. It is not only Illinois and its great University which are in danger and have been forced by overpowering necessity to flee to this Court, even as to the very horns of the altar for protection. The decision in this cause will find its way into every series of leading cases; it will be analyzed and discussed in all the journals of law and education throughout the land; and men and women concerned with the preservation of free schools and free education will read it, and, as we confidently hope, bless this Court for staying a movement which history shows has always been a forerunner of abridgement of liberty of thought and expression.

For the reasons indicated, we respectfully submit that the petition be granted and the writ ordered as prayed for therein (Pet., pp. 44, 45).

Respectfully submitted,

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