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The Hunt Institute for Botanical Documentation, a research division of Carnegie Mellon University, specializes in the history of botany and all aspects of plant science and serves the international scientific community through research and documentation. To this end, the Institute acquires and maintains authoritative collections of books, plant images, manuscripts, portraits and data files, and provides publications and other modes of information service. The Institute meets the reference needs of botanists, biologists, historians, conservationists, librarians, bibliographers and the public at large, especially those concerned with any aspect of the North American flora.

Hunt Institute was dedicated in 1961 as the Rachel McMasters Miller Hunt Botanical Library, an international center for bibliographical research and service in the interests of botany and horticulture, as well as a center for the study of all aspects of the history of the plant sciences. By 1971 the Library's activities had so diversified that the name was changed to Hunt Institute for Botanical Documentation. Growth in collections and research projects led to the establishment of four programmatic departments: Archives, Art, Bibliography and the Library.

ADVANCE



SHEETS

OPINIONS OF THE SUPREME JUDICIAL COURT

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ATTORNEY GENERAL *vs.* PRESIDENT AND FELLOWS OF HARVARD COLLEGE.

Suffolk. October 7, 1965.—January 31, 1966.

Present: SPALDING, WHITTEMORE, CUTTER, KIRK, & SPIEGEL, JJ.

Trust, Charitable trust. Charity. Harvard University. Arnold Arboretum. Equity Jurisdiction, Retention of jurisdiction. Equity Pleading and Practice, Decree, Suit to enforce charitable trust.

Reservation and report by Spalding, J., of a suit in equity in the Supreme Judicial Court for the county of Suffolk.

WHITTEMORE, J. This information in equity to enforce a trust, brought by the Attorney General at the relation of members of the Association for the Arnold Arboretum, Inc., challenges the acts of the defendant under a resolution of January 19, 1953, in removing to Cambridge, from the Arnold Arboretum premises in the Jamaica Plain district of Boston, the bulk of the library and herbarium of the Arboretum. The basic issue is whether this removal was a breach of the trust under which the Arnold Arboretum was established and developed. The facts are found in a master's report.

Interlocutory decrees were entered in the county court, denying the defendant's motions in respect of the master's report, overruling its exceptions thereto and confirming the

report. A reservation and report by the single justice¹ presents these decrees for review as well as the substance of the final decree appropriately to be entered. The master's report is well organized, clear, and complete, and we dispose of the case thereon.

The trust is set out in an Indenture dated March 29, 1872, by which the trustees under the will of James B. Arnold of New Bedford gave to the President and Fellows of Harvard College (the Corporation) a fund that, by the will, was to be "applied for the promotion of Agricultural or Horticultural improvements, or other Philosophical or Philanthropic purposes."

There were negotiations preliminary to the execution of the Indenture. George B. Emerson, one of James Arnold's trustees, in a letter to the acting president of Harvard, in March, 1869, had stated his desire "if possible, to have an arboretum — and for Harvard College"; also, if land could be found near the college, to establish the arboretum in Cambridge as an appendage to the Botanic Garden. Emerson and the two other trustees, John J. Dixwell and Francis E. Parker, had been closely associated with Harvard.

The 1872 Indenture required that the Corporation should accumulate income until the principal should be \$150,000 and until the Bussey land at West Roxbury (now Jamaica Plain) thereafter described should come into the full and free possession of the Corporation and that thereafter the Corporation should devote ninety-five per cent of "the said nett income in every year, to the establishment and support of an Arboretum,"² to be called the Arnold Arboretum, which shall contain, as far as is practicable, all the trees, shrubs and herbaceous plants, either indigenous or exotic which can be raised in the open air at the said West Roxbury, . . . and to the support of a Professor, to be called the Arnold Professor, who shall have the care and management of the

¹ With the approval of the parties, the single justice, Mr. Justice Spalding, sat with the full court for the decision of the case.

² An arboretum is defined in Webster's Third New International Dictionary as "a place where trees, shrubs, and herbaceous plants are cultivated for scientific and educational purposes."

said Arboretum, subject to the same control by the said President and Fellows to which the professors in the Bussey Institution are now subject, and who shall teach the knowledge of trees in the University which is in the charge of the said President and Fellows, and shall give such other instruction therein as may be naturally directly and usefully connected therewith." The Indenture further provides: "And as the entire fund, increased by the accumulations above named, under the best management and with the greatest economy, is barely sufficient to accomplish the proposed object, it is expressly provided that it shall not be diminished by supplementing any other object, however meritorious, or kindred in its nature. But the said President and Fellows shall be allowed to obtain from said Arboretum, free of cost, any trees, shrubs, and herbaceous plants, which, in the judgment of the Arnold Professor, can be spared from said Arboretum, without injury thereto; the same to be used for the ornament of the college grounds, at Cambridge or elsewhere." A following article provided that for "the purpose of ascertaining the said nett income, it is agreed that the fund shall be subject to no charge, except for actual expenses; and in the management of the said fund, it is to be charged only such a part of the actual expense of managing the property of the college, as the said fund bears to the entire property of the College."

The Corporation by the 1872 Indenture agreed to dedicate exclusively to the purposes of the Arboretum about 137 acres of the land in West Roxbury (now Jamaica Plain) devised to it by Benjamin Bussey for the purpose, as declared in his will, of establishing there as the Bussey Institution a course of instruction in practical agriculture and subservient and connected arts.

The Corporation in due course after 1872 and in the decades following established and maintained the Arnold Arboretum with its physical embodiment, as intended, on the Bussey land in Jamaica Plain, and with related activities centering in an administration building on the Arboretum grounds.

Charles Sprague Sargent was appointed Director of the Arnold Arboretum in 1873 and was elected Arnold Professor on June 30, 1879. He held these positions until his death in 1927. Oakes Ames and, after him, Elmer Drew Merrill followed Sargent as Arnold Professor, with the position vacant in 1927-1932, 1935-1936, and 1948-1954. Each of these Arnold Professors held other responsible positions in the administration of Harvard's botanical collections. Sargent in 1879 pointed out to the Corporation the need for both a library and a reference collection of plant specimens. The Corporation promptly, and thereafter from time to time, made appropriations from the trust income for these purposes. The library and herbarium were located in a dwelling house in Brookline until 1892 and thereafter, until the removal to Cambridge in 1954, in the administration building at Jamaica Plain.

Under the guidance of Professors Sargent, Ames, and Merrill, there had been accumulated by 1946 approximately 6,500 species in the living collection, 630,000 sheets of specimens in the herbarium, and 46,000 bound volumes and 14,000 pamphlets in the library. By 1944, or earlier, the administration building had become overcrowded and presented a serious fire hazard.

The Arboretum under Sargent "had more or less followed a 'policy of isolation.' " Professors Ames and Merrill, however, after 1927, departed from this policy by closer cooperation with other botanical departments. At the same time the scientific work of the Arboretum was broadened to include pathology, cytology, genetics, ecology, and other fields. As noted, the 1872 Indenture provided for the living collection to be raised at West Roxbury and the Arnold Professor to teach in the university and contained no other provision limiting the location of scientific work of the Arboretum. Members of the staff conducted explorations in North America, Europe, Africa, Australia, and Asia to bring back living plants and specimens. They used the biological laboratories and Gray Herbarium in Cambridge for research and office space and taught courses in the De-

partment of Biology at Cambridge. Research and experimental work were carried on at the Harvard Forest at Petersham and the Case Estates in Weston.³

The Arnold Arboretum, growing under able leadership, acquired many of the characteristics of an independent institution, and it came to be so regarded. It acquired high reputation and prestige. The Corporation received additional gifts and bequests as endowment funds for the purposes of the Arboretum. After 1927, the Corporation raised a fund of \$1,000,000 as the Charles Sprague Sargent Memorial to add to the endowment.⁴

On January 19, 1953, after nine years of investigation, the Corporation adopted a statement of policy that included approval of the removal of the library and herbarium to Cambridge. This was pursuant to a plan to merge the library and herbarium with those of the Gray Herbarium. The statement declared that the Bailey Report of 1945, discussed below, should not apply to the Arboretum, and acknowledged that the property and endowment held for the purposes of the Arboretum were held by the Corporation in trust, and that "in the administration of the trust it is to act with a view to the best interests of the Arboretum." The statement of policy concluded with the determination by the Corporation, as trustee of endowment funds held for the purposes of the Arboretum, "that it is in the best interests of the Arboretum and will promote the purposes of its endowment to remove to a central building in Cambridge [the new Harvard University Herbarium] the main body of the library and herbarium of the Arboretum related to research, and to retain at Jamaica Plain such books and specimens as may be required to provide there a working library and herbarium." The transferred books and speci-

³ The "Case Estates" comprised land in Weston which was transferred to the Corporation in 1942-1945, to be "used for the benefit of Arnold Arboretum at Harvard University."

⁴ The relators do not contend that the subsequent gifts were held for purposes other than those established by the Indenture of 1872. See *Cary Library v. Bliss*, 151 Mass. 364, 376-377; *Trustees of Andover Seminary v. Visitors*, 253 Mass. 256, 273.

mens were to be identified as a part of the Arboretum and remain under the care of the Arnold Professor. The Arnold Professor and the directors of the university library and the New York Botanical Garden were to determine the books and specimens to be retained at Jamaica Plain. A part of the expense of annual maintenance and operation of the central building was to be charged to the Arboretum endowment.

Scientific, administrative, and legal consideration of the removal to Cambridge began in 1944. In that year, Professor Irving Bailey, a member of the staff of the Arboretum, was requested by the Provost of the university to investigate "the total botanical situation" of the university. Professor Bailey submitted his report in 1945. It contained no consideration of the responsibilities of the Corporation as trustee under the 1872 Indenture. Emphasized were the isolation and wasteful duplication of the various botanical activities at Harvard.⁵ The proposed solution included the combination of all the botanical libraries and herbaria (as distinguished from the final action merging only those of the Arboretum and the Gray Herbarium and three other collections) in a central unit in Cambridge. Permeating the plan and its initial implementation was a concern for the overall needs of botany at Harvard.⁶

⁵ Botanical institutions administered by the Corporation in 1944 and having libraries and herbaria were the Gray Herbarium, the Farlow Library and Herbarium, the Arnold Arboretum, the Botanical Museum, the Atkins Garden in Cuba, and the Harvard Forest.

⁶ The master found that the Bailey report "aimed in important part at increasing Harvard's prestige and at enabling Harvard to assume leadership in the botanical field. . . . [The report] strongly emphasized that the accomplishment of the Plan's objective was dependent on the recommended unification of the botanic libraries and herbaria, including those of the Arboretum and the Gray Herbarium. Bailey believed . . . that 'the future of Harvard's Botany' depended on unification. . . . In referring to the Arboretum, in a consideration of the possibility of an abandonment of the living collections, the Report characterizes the Arboretum as 'the goose that lays the golden eggs.' It recommended against abandonment for this and other reasons and it did recommend the restoration and improvement of the demonstrational aspects of the grounds and living collections since it found these of significance to the general public. The recommendations of the Bailey Report affecting the Arnold Arboretum were not made primarily to further . . . [its] interests"

From November, 1949, until January 19, 1953, strong opposition by the Board of Overseers' Committee to Visit the Arnold Arboretum, joined in by a member of the Corporation, directed the attention of those involved to the fact that a transfer of the library and herbarium must accord with the purposes of the Arboretum endowment.

In the course of the developing controversy those opposed to the move asked of the Corporation that the doubts be resolved by a legal proceeding. That the proposals were questioned by responsible persons dedicated to the welfare of the university and to the Arnold Arboretum strongly suggested, we think, the wisdom of following that course. With the benefit of hindsight it is now abundantly plain that the interests of all concerned would have been greatly served by so doing. The master found that the Corporation was determined not to seek a judicial determination of the issues involved because it believed its position legally sound, was hesitant to incur the very large expense involved and believed that some of the claims were on a moral level, which a legal decision would not dispose of.

On October 2, 1952, a resolution was drafted by counsel to the Corporation that, with certain changes, was to be approved by the Corporation as the resolution of January 19, 1953. A revised draft of October 14, 1952,⁷ was approved by the Corporation in October. This draft resolution was, in substance, adopted by the Coordinating Committee on the Biological Sciences of the Board of Overseers and, on January 12, 1953, by the Overseers. The draft resolution was also submitted, in November, 1952, to representatives of the Visiting Committee, including counsel.

⁷ Three recitals that were in the October 2 draft were omitted from the revision of October 14. These were "(1) that a purpose of the resolution was to continue the identity of the Arboretum; (2) that 'without limit of time' (the words 'for the present' being substituted) the income of the Arboretum would be first applied to the support of the living collections, the Arnold Professor, and the library and herbarium, and only then to other activities; and (3) that the Arboretum should bear no part of the maintenance of the central botanical building to which the bulk of its library and herbarium were to be moved."

Counsel to the Visiting Committee responded on December 22, 1952, urging that the Corporation as trustee was obliged to act "with a view solely to the best interests of the Arboretum" and that there be no removal since serious doubts had been raised as to whether removal would be in the Arboretum's best interests.

The master (under the heading of "The Motive Underlying the Adoption of the Resolution of January 19, 1953") found, *inter alia*, as follows:

(1) The resolution was adopted by the Corporation in the belief that action under it would not constitute a breach of trust and would be consistent with its conception of its obligations as to the property held for the purposes of the Arnold Arboretum.

(2) The decision to move the main body of the library and herbarium was made "wholly or in major part" because of a belief that although such removal was consistent with the Corporation's obligation with respect to the Arboretum assets "such removal would promote the science of botany as a whole at Harvard (rather than the interests of particular botanical institutions)."

(3) "The Corporation acted in the bona fide belief that it was entitled, and indeed had a duty, to consider the interests of botany as a whole at Harvard and the standing of the University in the botanical field."

(4) "The conviction of the Corporation, reflected in its [earlier] approval of the Bailey Plan, that a transfer of libraries and herbaria to a new central building in Cambridge would promote the science of botany at Harvard from an overall standpoint (rather than from the standpoint of each component part), having been made after careful and serious deliberation, remained the controlling factor in the Corporation's final determination to bring about the transfer of the main portion of the library and herbarium moved from Jamaica Plain."

(5) The Corporation accepted as sound the view underlying the language of the report of the Coordinating Committee of the Board of Overseers in 1950 that the Arbore-

tum should be regarded as an instrument in the development of botany as a whole.*

(6) The Corporation believed that "if it were required to act solely in the interests of the Arnold Arboretum with respect to the removal . . . it would be impossible to operate the University since the Corporation felt that it had to consider a great many different interests that were involved in the removal as well as the effect of the action on the University as a whole."

(7) The Corporation refused to state in the January 19, 1953, resolution that it was acting solely in the interests of the Arboretum because it was aware that it was not so acting.

The master found as to the effect of the removal of the main portions of the library and the herbarium to Cambridge, as follows:

(1) The high reputation, prestige, and standing, which the Arnold Arboretum had enjoyed separate from that of the university, markedly declined. The books, other library items, and the specimens "are commonly looked upon as those of Harvard rather than as those of the Arboretum, and thus the prestige of the Arnold Arboretum's library and herbarium has in effect been transferred to Harvard University, and the Arboretum has come to be looked upon as an appendage to the Botanic 'Department' at Harvard."

* The Coordinating Committee's report stated: "The Coordinating Committee believe that the present controversy is rooted in two opposed and apparently antagonistic schools of thought regarding the position of the Arboretum, and that of the other botanical research institutions, in the educational and administrative structure of the University. The Arboretum can either be regarded as an independent institution, a Corporate entity, of which the President and Fellows happen to be trustees, or as an integral department of the University, separately endowed, it is true, but a tool to be used in the development of botany as a whole and in the overall interests of the University. The Coordinating Committee believe the second to be the proper concept." The master found that the Coordinating Committee's report stated with respect to the proposed transfer of the library and herbarium that the sole criterion was whether it would further the advancement of botanical knowledge without impairing the usefulness and vigor of horticultural activity in Jamaica Plain and that, if the move strengthened botany as a whole within the university, it would inevitably react to the welfare of the Arboretum; also that the report stated that the Committee did not believe that the proposed transfer would be harmful to the Arboretum.

(2) Unsatisfactory housing and working conditions in the administration building at Jamaica Plain have been remedied. The library and the herbarium are now well housed in a fireproof air conditioned building in Cambridge. All this could have been accomplished, however, without the removal to Cambridge.

(3) Segregation at Jamaica Plain of a library and herbarium devoted to horticulture "might have enabled more efficient work at Jamaica Plain in horticulture and in the use of the living collections," but this could have been accomplished without the removal of the bulk of the items to Cambridge. The evidence "does not warrant a conclusion that either the library or the herbarium at Jamaica Plain is reasonably adequate for horticultural or other work."

(4) The move has been of advantage to carrying on taxonomic research in Cambridge because of "the vast number of the books, pamphlets, periodicals and specimens of the Gray and Arnold . . . combined together in one building with other botanical facilities and scholarly contacts at hand or nearby." There is, however, a "marked disadvantage" to the carrying on of such research "arising from the separation of books and herbarium specimens from the living collections in Jamaica Plain, from the separation of the wild and cultivated specimen collections and from the division of the Arboretum staff resulting from the move."

(5) The work performed by persons paid from Arboretum funds in taxonomy, horticulture and other scientific fields has continued. They are performing competent scientific work. There is no evidence of either improvement or decline in the quality of work.

(6) The services of the Arnold Professor have not been shown to have been diverted from the care and management of the Arboretum.

(7) The books and specimens of the Arboretum now in the Harvard University Herbarium are under the control of the Arnold professor. Use is made of them, as before, but to a greater extent, by Harvard students and faculty and others engaged in research. Each separate library

item is identified as an Arnold Arboretum item, but not in the card catalogue. A book housed at Cambridge if lost or misplaced cannot be identified from the catalogue as having been an Arboretum book. Each herbarium sheet from the Arboretum is so marked but the herbarium cases are not marked and one must examine each sheet to determine ownership.

(8) Since the removal, persons paid with Arboretum funds have performed the same type of activities as such persons performed earlier. These activities have been carried on in Jamaica Plain, Cambridge and Weston. The evidence does not establish either improvement or impairment in such work.

(9) "The removal of the main part of the library and herbarium of the Arnold Arboretum and the coupling of it with the Gray Herbarium and its library at the Harvard University Herbarium created one of the greatest libraries and herbaria in the world and a world famous scientific station identified with Harvard. Notwithstanding the effect of the removal on the Arnold Arboretum, the removal was in the interests of botany as a whole both in intent and effect, and the return of the Arboretum portion of the library and herbarium to Jamaica Plain would be a retrograde step from the standpoint of botany. A witness called by the petitioner testified that he considered such a step would create 'a tremendous outcry from botanists throughout the country' and would be unthinkable."

The view that there has been a breach of trust is, we think, founded in the concept of an obligation to maintain the Arnold Arboretum as the particular institution that the combined efforts of the Corporation, professors, directors and staff in the use and application of the trust funds over the years had caused it to become.⁹ For reasons stated in

⁹ This view was manifest in the 1950 opinion of Mr. J. Wells Farley to the Visiting Committee of the Overseers: "[T]he Arboretum had the status in its own right of an institution" (defined, in the opinion, as an organization of people who have become affiliated for a common purpose and whose assets are used and expended for that purpose by its officers or agents and whose affairs are subject to the control of a unified management), even though not a

the following paragraphs we hold that such an obligation was not imposed by the 1872 Indenture.

The express intent of the 1872 Indenture is to benefit the public through the establishment and maintenance by Harvard University of an arboretum as described, and a professorship in the university as described. Certain other purposes are implicit. Obvious are the creation and maintenance of related libraries and herbaria and the conduct of directly related activities. This being a public charitable trust there are, we hold, other important implications to be found therein.

There is a dominant public interest that public charitable trusts in private educational hands be so managed under the particular trust provisions as to be of maximum usefulness, thus serving to the greatest possible extent the public as the ultimate beneficiary. In the light of this, in a gift to a university of trust funds to create a specific subdivision of scientific or cultural activity of the university (that is, broadly, a department¹⁰), there is, we think, an implied intention that the managers of the university shall determine in their best judgment what policies, in respect of that de-

corporate entity. The Farley opinion found nothing in recent events which would make it impossible to continue to carry out the purposes of the Arboretum as it had been conducted from 1872 to 1946 and pointed to the principle applicable in the case of charitable trusts that neither considerations of convenience nor differences of opinion as to the desirability of policies established by the creator or donor of the trust may properly override the terms of the instrument creating the trust. The opinion noted that the Indenture of 1872 did not in terms prohibit a transfer of the library and the herbarium from Jamaica Plain, but said that these and the other steps of the Bailey report (to which it was addressed) stood out "as steps toward the abolition of the Arboretum as such and therefore constitute a breach of the duty of the trustees to maintain it as an institution." The view that the Arboretum must be dealt with as a separate institution also underlay the opinion of Mr. Robert G. Dodge and Mr. Farley, dated March 1, 1952. That opinion referred to the Arboretum as "the beneficiary" and stated in a footnote: "In referring to the Arboretum as the beneficiary we do not overlook the fact that, strictly speaking, the Arboretum is the object of the trust and that the ultimate beneficiaries are the public, or those of the public who are in a position to benefit from or make use of or enjoy the Arboretum."

¹⁰ The Corporation's trust obligations are not changed by a reference to the Arboretum as a department. We use the term as descriptive of one of the many scientific and cultural activities managed by the Corporation but separate from other such activities to the extent that the Indenture, with its reasonable implications, indicates.

partment, within the express trust purposes, will give that department and the trust assets used therein their greatest usefulness. Certainly it is implied that to such end the managers may decide to correlate the activities of the department with the overall policies of related departments, provided all applicable restrictions are regarded, and the trust assets are used advantageously for the specific purposes of the trust.

These implications exist in respect of the trust under the 1872 Indenture. The advantages of having the Arboretum a part of the larger scientific and professional operation of Harvard University were, it appears, recognized by at least one of the donor trustees. See *Harvard College v. Attorney Gen.* 228 Mass. 396, 410. These implications are not negatived by the express requirement of the 1872 Indenture that the fund "not be diminished by supplementing any other object." The use of the fund and its income for the purposes of the Indenture is not diminished in any degree. The Indenture, in expressly providing that the Arboretum as there described have its physical embodiment in West Roxbury (Jamaica Plain), specified a physical separation from other parts of the university in Cambridge. As described in the Indenture the Arboretum was a place for the growing of "trees, shrubs, and herbaceous plants." The separation of this activity from Cambridge does not imply a requirement that the Arboretum be managed as though it were unrelated to an institution having other divisions with similar activities.

We agree with the relators that the Indenture did not give a fund to the Corporation to be used for general botanical purposes. Nevertheless, the Corporation, in the course of determining what management of the assets of the Arboretum would reasonably and appropriately serve the direct purposes of the Indenture, was entitled to give consideration to the effect of the move on other departments and botany as a whole at Harvard and the possible general advantages to result. Such consideration cannot mean, however, that those other ends are to be regarded as purposes

of the Indenture. Even in administering a private trust, the trustee may regard related matters. *Penniman v. Sanderson*, 13 Allen, 193, 205-206. The duty to consider the overall welfare of the university and the ultimate purposes of all its foundations of course did not disqualify the members of the Corporation in respect of the decision under the Indenture. Resolution of possibly divergent interests is inherent in the holding and management by a single institution of a number of public trusts for independent, related or overlapping purposes.

The members of the Corporation did not violate the "duty of loyalty" that required them to "administer the trust solely with a view to the accomplishment of the purposes of the trust and not with a view to promoting their own interests." Scott, *Trusts* (2d ed.) § 379, p. 2735. *Boston Safe Deposit & Trust Co. v. Lewis*, 317 Mass. 137, 140. They did not act adversely to the trust and, in taking into consideration the effect on botany as a whole, they were regardful of an end which, as we have held, was within the general implied purposes of the public trust so far as in support of the specific purposes. The members of the Corporation rightly declined to accept the view that they were required "to act solely in the interests of the Arnold arboretum." The implication of a determination to this effect would have been to exclude relevant and appropriate considerations.

The plain obligation of the members of the Corporation was to bring to bear the attention and judgment required of trustees in the performance of their trust duties on the issue of the effect of the move on the continued accomplishment of the express purposes of the trust and to act in a way that they believed in their good judgment would promote those purposes. We hold that the findings show that they did so act.

The subsidiary facts support the master's conclusions that the challenged move stemmed from the Bailey report and that the promotion of the science of botany at Harvard from an overall standpoint was the controlling factor.

This conclusion, however, does not in itself imply a finding that the members of the Corporation failed to give consideration to the effect of the move on the accomplishment of the trust purposes, or failed adequately to weigh evidence relevant thereto.

The members of the Corporation acted in the light of an opinion from their counsel. This advised that the transfer might lawfully be carried out "provided, (i) that the removal be justified as promoting the purposes of the Arboretum, (ii) that such books and specimens 'as are required to provide a working library and herbarium at Jamaica Plain should be retained there' and (iii) that any additional annual operating costs chargeable to the Arboretum be justified upon a determination by the Corporation of the extent to which the Arboretum purposes would be benefited by the move, having regard to all other proper demands on the income of its endowment." It advised as to administrative and research activities and other matters as to which there is no present issue. It also advised that the proposed removal was justified if the conditions stated in the opinion were met. It concluded with the observation that "there is persuasive evidence that the move will promote the purposes of the Arboretum."

The Corporation acted in the light also of a memorandum from President Conant of October 15, 1952, in which he argued at length in favor of the removal of the main part of the library and herbarium to Cambridge. He gave various reasons in support of the position "that the work of the Arnold Arboretum may be carried on more effectively" if the move were made. He pointed out also that the removal would "assist all those concerned with a knowledge of botany." Stress was laid on the aid to teaching the knowledge of trees in the university which would result from the presence of the library and herbarium in Cambridge. He characterized the Arnold Professor as a "part of the University." This memorandum reflected his final decision as to the removal.

At a meeting of the Corporation on January 5, 1953, there

was read a letter from Mr. Grenville Clark, one of the relators, and a former member of the Corporation, who had resigned in November, 1950, with enclosed memoranda prepared by Professor Lawrence, the head of the Hunt Botanical Library in Pittsburgh and director of the Bailey Hortorium, a botanical institution operated by Cornell University, and by Professor Slate, a professor at Cornell. The Corporation thereupon decided that, "at least as a matter of record," certain other outside scientists should be consulted. On January 17, 1953, a committee of President Conant and Messrs. Marbury and Kane conferred in New York with Mr. J. George Harrar, Director of Agriculture for the Rockefeller Foundation in Mexico, Professor Paul B. Sears, Professor of Conservation in charge of the Agricultural Conservation Department of Yale University, and Dr. David B. Keck, Head Curator of the New York Botanical Gardens. Each was consulted individually. President Conant showed them the resolution of the Board of Overseers of January 12, 1953, and read them the provisions of the 1872 Indenture. The three persons consulted replied affirmatively to the inquiry whether the move would be "the best way of carrying out the terms of the trust." Each agreed that the work of the Arnold Professor would be assisted by the move and that the Arnold Professor and his staff could work efficiently, partly in Cambridge and partly in Jamaica Plain. "Dr. Keck, at least, was asked whether, in his opinion . . . the move would be desirable from the standpoint of botany at Harvard University." He replied that in his opinion it would. Asked as to the effect on the Arboretum, he pointed out "what he considered to be the disadvantages of the move from the Arboretum's standpoint."

The master noted that the basis for choosing the consultants or who chose them does not appear and that the qualifications of Messrs. Harrar and Sears are not shown and expressed the view that "their titles as of the time of consultation give no basis for placing confidence in their judgment on the matters presented to them for opinion."

There is no suggestion in the findings that President Conant's opinion that the move would permit the work of the Arboretum to be carried on more effectively did not reflect his best judgment on adequate evidence or that it was untenable for one giving due regard to the nature of that work as required under the Indenture. We put aside for the moment the issue of the possible effect on prestige and reputation. Certain of the findings suggest that the reference to outside experts was perfunctory. We think it was adequate for its purpose. The aim of the members of the Corporation was, it appears, to let the record show that, accepting their premises, there was professional support outside the university for the decision. Contrary to the master's comment, we think that there is implicit in the titles of the consultants a suggestion of a background of experience and professional standing that would give a degree of substance to their opinion.

We do not overlook the master's findings that the decision to move was made because of a belief that it would "promote the science of botany as a whole at Harvard (rather than the interests of particular botanical institutions).⁵ We do not construe this as a finding that the Corporation disregarded the carrying out of the express purposes of the 1872 Indenture. It is coupled with the finding that the Corporation believed the removal to be consistent with the Corporation's obligations with respect to the Arboretum assets. It does not negative the declared views of the President and the Corporation that the move to benefit botany as a whole at Harvard would be "in the . . . best interests of the Arboretum and . . . promote the purposes of its endowment." The finding that the Corporation accepted the view of the Coordinating Committee that the Arboretum should be regarded as an instrument in the development of botany as a whole must be read with other findings that, in our view, show that the Corporation did not undertake to use the Arboretum as such an instrument except after finding, on an appropriate showing, that the course to be followed would advance the particular pur-

poses of the Arnold trust. To the extent, if any, that the master's report may be thought to suggest otherwise we draw different conclusions from the specific findings.

Implicit in the master's findings is the conclusion that if the Corporation had accepted "the best interests of the Arboretum" as an important criterion, its members, acting with due care and in good faith, must have decided against the move. A decline in the reputation, prestige, and standing of the Arnold Arboretum as a separate institution was, we think, reasonably foreseeable. But the purpose of the 1872 Indenture was not the maintenance of the prestige, reputation, and standing of the institution or department that might evolve over the years in connection with the use of the trust funds by the Corporation to build the Arboretum. Nor were these intangible attributes solely the fruits of the trust fund. They resulted in part from the association of the Arboretum in the group of related Harvard institutions and departments, the interplay between these departments, and the management of the Arboretum by the managers of the university. Whether the Corporation could rightly risk impairment of the prestige of the Arboretum regarded as a separate institution depended upon whether the steps taken, in reasonable likelihood, would impede or promote the stated purposes of the public trust, the funds of which had been used in the creation of that prestige.

There was ground for concluding that the net result would be to promote those purposes. The Arboretum would continue as a part of a group of botanical science departments that was expected to attain outstanding pre-eminence. The outcome that the master has found was foreseeable: the creation of "a world famous scientific station" with "one of the greatest libraries and herbaria in the world." The members of the Corporation could reasonably conclude that in the long run the accomplishment of all the specific scientific and teaching purposes of the Indenture of 1872 would be aided by the move and that outstanding scientists, scholars and students would be at

least as much attracted to association with the Arboretum as before, and, in reasonable likelihood, more so, and that their work on the whole would benefit.

Therefore, so far as transferring the prestige from the Arboretum to the university was a use of an asset of the Arnold trust fund, that transfer was, prospectively, a use of the asset for the accomplishment of specific public charitable purposes of the Indenture that established that fund and not a breach of trust. The prestige was not, in our view, a capital asset, which, once accrued, could not be expended.

To act in "the best interests of the Arboretum" means, in our view, to serve advantageously the stated purposes of the trust and not necessarily to maintain the separate reputation of the Arboretum. "[T]he trustee of a charitable trust owes duties but . . . not . . . to any person or persons in particular, although they are enforceable at the suit of a public officer for the benefit of the community." Scott, *Trusts* (2d ed.) § 348, p. 2552. See also § 379, p. 2735.

The prospective adverse effect on the move on the reputation, standing, and prestige of the Arboretum was, of course, highly important apart from its legal aspect. Such an institution, although a subdivision of university activity, develops a separate personality and generates the loyalty and support of teachers, staff, alumni, donors, and friends. These, we think, are the considerations that the members of the Corporation had in mind in concluding, as the master found they did, that moral issues were involved that could not be settled by a legal adjudication. These considerations — the effect of the move on the loyalty and interest of many persons close to the university and devoted to it and the Arboretum, as well as a due regard for their views — although properly of most serious concern to the Corporation, cannot affect our rulings. It is appropriate for us say, however, that the report, as we view it, shows that the members of the Corporation did not overlook them, but found them overbalanced by the other factors necessarily weighed by them. The report does not show or suggest

that the Corporation was acting to increase the prestige of Harvard University as an end in itself.

The findings of the effects of the move do not show that inadequate consideration was given to probable results or that bad judgment was exercised. There is an implication that the "marked disadvantage" in carrying on taxonomic research in Cambridge more than offsets the advantages therefrom. But the master was unable to find either improvement or decline in the continuing work of the Arboretum and it is of course too soon to judge the long run effects. Nothing in the report shows that those effects will not be of net benefit in the accomplishment of the specific trust purposes of the 1872 Indenture.

What we have said disposes of the contention that the move itself, so far as carried out as voted, was a breach of trust.¹¹ We disagree with the view of our dissenting colleagues that it is implicit in the Indenture that the place of such implied related activities as the library and herbarium, if established, be the place specified for the growing of the trees, shrubs and plants. The dominant consideration is that those things and only those things be done that will, in the good judgment of the Corporation, promote the express purposes of the Indenture. There is no implication that, to promote those purposes, the library and herbarium could not be maintained at Cambridge. This is tested, we suggest, by considering whether, if these facilities had been originally established and always heretofore maintained in Cambridge, it could now be contended that there had been a breach of trust.¹² In certain aspects, however, the implementation of the resolution of January 19, 1953, does not, or may not, conform to its terms.

The master's report states "the evidence does not war-

¹¹ It is unnecessary to deal separately with the contention of the relators that the allocation of Arnold trust money to the support of the Harvard University Herbarium was improper. This stems from the view that the move involved a breach of trust. The master has found that the bases of the allocation of the charges were reasonable.

¹² The construction we make would not, we think, as our colleagues suggest, have supported moving the Arboretum's library and herbarium to Harvard's Atkins Garden in Cuba.

rant a conclusion that either the library or the herbarium at Jamaica Plain is reasonably adequate for horticultural or other work." The resolution calls for the retention at Jamaica Plain of "such books and specimens as may be required to provide there a working library and herbarium." The implication from the master's observation and from the finding that the working library and herbarium were gathered by selecting duplicates of items taken to Cambridge may be that the intention of the Corporation's vote has not been met.

The resolution required that the books and specimens to be housed at Cambridge be appropriately identified. We hold that this includes identification of the books on the card catalogue and of the specimens on a catalogue, if any, or on some other form of general listing, if feasible. Also we think that appropriate identification calls for a sign or legend of substantial size on the outside of, or in, the foyer or a general room of the Harvard University Herbarium stating in some form of words that the books and specimens include those of the Arnold Arboretum.

The interlocutory decrees are affirmed.

The rescript shall provide that the county court retain jurisdiction of the cause and that the defendant shall file with the clerk within six months of rescript (a) a report to it by the Arnold Professor or other appropriate person that in the Corporation's judgment shows either that an adequate working library and herbarium exist at Jamaica Plain or recommends the steps to cause them to exist; (b) a report of its proposals or action to amplify the catalogue and general listing references; and (c) a report of its proposal or action in respect of a general designation on or within the Harvard University Herbarium.

A final decree affirming the validity of the Corporation's votes and acts as modified by the foregoing changes shall enter when it shall appear to the single justice that such changes, adequate to conform to this opinion, have been made or are assured.

So ordered.

The Chief Justice and Mr. Justice Reardon took no part in the consideration of this case. The Chief Justice was a member of the Harvard Board of Overseers from 1957 to 1963, and Mr. Justice Reardon became a member in 1961 and is still serving.

SPIEGEL, J. (dissenting) Mr. Justice Kirk and I agree with the majority that the "plain obligation of the members of the Corporation" was to use the trust assets "for the express purposes of the trust," but we do not agree that "the findings show that they did so act." Although the Corporation may have "believed the removal to be consistent with the Corporation's obligations," belief does not constitute compliance. The Corporation did not use the trust assets "within the express trust purposes." It palpably misinterpreted those purposes. The majority, it seems to us, have chosen to accept the Corporation's mistaken conception that the purpose of the trust is the establishment and support of an instrument "to be used in the development of Botany as a whole and in the over-all interests of the University."

The majority admit that the "express intent" of the Indenture is "to benefit the public through the establishment and maintenance by Harvard University of an arboretum as described, and a professorship in the university," but the majority say that "[c]ertain other purposes are implicit." One such purpose, they say, was "to create a specific subdivision of scientific or cultural activity of the university (that is, broadly, a department)." It is this holding, which apparently serves as a major premise upon which the reasoning of the opinion is based, that results, in our view, in an erroneous conclusion.

In writing this dissent we are constantly confronted with the "implications" which the majority create. The unadorned language of the "express trust" is brushed aside and the opinion rests on a fragile foundation of "implications."

We agree with the majority that "the Corporation's trust obligations are not changed by a reference to the

Arboretum as a department." The employment of this concept in administering the trust does not *change* the obligation; it *violates* it. The Indenture provides for the support of an Arboretum. It does not provide for the Arboretum to be one of the "parts" of the university or a "department" of the university or a "subdivision of scientific or cultural activity of the university."

If the purpose of the Indenture was to make the Arboretum just another of the many departments of Harvard, the Arboretum's library and herbarium could have been removed, for example, to the Harvard administered Atkins Garden in Cuba solely on the basis of a trustee's decision that such a move would give "that department and the trust assets used therein their greatest usefulness."

The majority state that the term "department" is merely "descriptive" of an activity "managed by the Corporation." A department is defined in Webster's Second New International Dictionary in the context of education as "[a] division *within* a college or school, giving instruction in a branch of the arts and sciences" (emphasis supplied). This may be descriptive of the Arboretum after the move, but it is not descriptive of the Arboretum envisioned by the Indenture.

In our judgment the Arboretum is not, as the majority say, a "subdivision of scientific or cultural activity of the university (that is, broadly, a department)." It is, as the footnote to the majority opinion states, "*a place* where trees, shrubs, and herbaceous plants are cultivated for scientific and educational purposes" (emphasis supplied). Under the terms of the Indenture, the "place" is in West Roxbury (now Jamaica Plain). A fund for "the establishment and support of an Arboretum" may be expended to enable persons to make proper use of the "place," such as by creating and maintaining related libraries and herbaria; but not for anything which does not advance the operations of that "place." It should be noted that when the Indenture was made the university was engaged in similar work at the Bussey Institution and the Botanic

Gardens. That the donor intended the Arboretum to have a separate and independent identity is shown by the specific provision that the funds "shall not be diminished by supplementing any other object, however meritorious, or kindred in its nature." Plants might be taken for the use of the college only if they could be spared without injury to the Arboretum. These provisions indicate to us that the intent of the donor was not to create a peripheral "appendage" to the botany department at Harvard but to create as a distinct entity a "place" for the cultivation and study of plants and shrubs.

In 1879 (seven years after the Indenture), the year in which the Arboretum was established, the first Arnold Professor stated that "without a herbarium of specimens . . . and without a library . . . it would be impossible either to carry on the current operations of the Arboretum or to make it what, in his judgment, it should be, a center of dendrological investigation and research." In 1924 he wrote "such an institution [as the Arboretum] must consist of three departments: First, the herbarium; second, the library; third, the collection of living trees and shrubs. . . . The value of this [latter] department is dependent on the first department or collection of dried plants, and this is dependent on the second department, the collection of books."

The majority state that "[t]here is no implication that, to promote those purposes [the express purposes of the Indenture], the library and herbarium could not be maintained at Cambridge." The express purposes of the trust require the trustee to find that the removal of the library and herbarium from the Arboretum to Cambridge would be in "support" of the Arboretum and not of the university. This the trustees did not do.

The majority argue that "[t]he separation of this activity [the growing of trees, shrubs and herbaceous plants] does not imply a requirement that the Arboretum be managed as though it were unrelated to an institution having other divisions with similar activities. "There is a

vast distinction between a related activity and a subordinate one. We find no implication in the Indenture that the Arboretum was to become a division and, therefore, a subordinate part of the university.

The purposes of the trust limit the power of the trustee. "The extent of the duties and powers of a trustee is determined . . . by the terms of the trust as the court may interpret them, and not as they may be interpreted by the trustee himself or by his attorney. . . . [The trustee] can, however, escape liability by submitting the matter to the court for instructions." Scott, *Trusts* (2d ed.) § 201, p. 1510.

We note with special interest that "a legal opinion entitled 'Report on the Questions Raised by the Bailey Plan,' prepared, at the request of the Visiting Committee, by Robert G. Dodge, Esquire, and the law firm of Herrick, Smith, Donald, Farley & Ketchum, of which J. Wells Farley, Esquire, was a member, was submitted to the Visiting Committee." This report contained the following conclusions: ". . . that carrying out the Bailey Plan would involve the Corporation in various breaches of trust arising from its administrative proposals and its alleged diversion of Arboretum income to purposes foreign to the purposes of the Arboretum trust, and that its effect would be to destroy the Arboretum as a separate identifiable institution; . . . that the proposed removal of the greater part of the library and herbarium to Cambridge was not in the interests of the Arboretum . . . and that, whether or not the Corporation and its counsel agreed with the Farley-Dodge conclusions, the Corporation should seek a judicial determination of the matter."

Thus it is certain, that at least after the receipt of the Farley-Dodge report, the Corporation knew that serious legal questions were raised concerning the purposes of the trust, and also knew that it could seek a judicial determination of the issues in controversy. Yet it choose not to follow such a course. On the other hand, the opponents of the Corporation's plan wanted to get a judicial decision

through the only channel of approach to the court, without avail. *Ames v. Attorney Gen.* 332 Mass. 246.

The failure to ask for a judicial determination when one was patently called for makes inapplicable to the Corporation's decision the principle of *Trustees of Andover Seminary v. Visitors*, 253 Mass. 256, 298, that "[t]he practical construction put upon a charitable foundation of doubtful meaning by those charged with its administration through many years is entitled to great weight in ascertaining its right construction." Instead, this principle directs our attention to the status of the Arboretum prior to the controversy.¹ As the majority admit, and as the master found, "[t]he Arnold Arboretum, growing under able leadership, acquired many of the characteristics of an independent institution, and it came to be so regarded." The master found "The Arboretum prior to the removal of the main portion of its library and herbarium to Cambridge had a reputation of its own as a botanical institution and this reputation was separate and distinct from the reputation of Harvard University or of the other botanical enterprises administered by Harvard."

The majority, at one point, admit that "the Indenture did not give a fund to the Corporation to be used for general botanical purposes." However, the majority appear to modify this holding by adding that "the Corporation, in the course of determining what management of the assets of the Arboretum would reasonably and appropriately serve the direct purposes of the Indenture, was entitled to give consideration to the effect of the move on other departments and botany as a whole at Harvard and the possible general advantages to result. Such consideration cannot mean, however, that those other ends are to be regarded as purposes of the Indenture." If the majority statement means that after having determined that any of several different actions would serve the direct purposes of

¹ We cannot fail to observe that in 1892 the library and herbarium were removed from temporary housing in Brookline to Jamaica Plain. The library and herbarium remained there for over sixty years.

the Indenture the trustee may then consider related matters in selecting the action to be taken, we would agree. But if this statement means that in the making of that determination the trustee may consider matters other than the direct purposes of the trust, we would disagree. Such a holding we believe to be a violation of the basic principle of the law of trusts, that the trustee must administer the trust "solely with a view to the accomplishment of the purposes of the trust." Scott, Trusts (2d ed.) § 379, p. 2735. In addition, such a holding would permit "general advantages" or great benefit to "other departments" or to "botany as a whole at Harvard" to override even great harm to the Arboretum. On such a theory the fund could be used not merely for general botanical purposes, but for any purpose whatever which would benefit the university. We know of nothing in the law of trusts to justify such a gross departure from the terms of the Indenture. The Corporation, however, seems to have taken precisely this view. The master found "The Corporation acted in the bona fide belief that it was entitled, in determining whether to cause removal, to give controlling weight to" the promotion of "the science of botany at Harvard from an overall standpoint." Another indication of the basic misunderstanding by the Corporation of its responsibility is found in the statement of the Chairman of the Coordinating Committee on the Biological Sciences "that the real beneficiary was the public which would benefit from education, and that the trustee has an obligation to use the funds for those purposes which it deems will best promote educational ends and as much of a duty to use them for those purposes as to use them for the benefit of the Arboretum and like any trustee must exercise its best judgment as to the balance between the two purposes." We do not accept this subordination of the basic purpose of the trust.

Ordinarily, we would agree with the statement in the opinion that "[T]he duty to consider the overall welfare of the university and the ultimate purposes of all its foundations . . . did not disqualify the members of the Cor-

poration in respect of the decision of the Indenture." We say, "ordinarily," because we would expect the Corporation to correctly determine the purpose of the Indenture and if there was doubt as to its purpose we would expect the Corporation to have that doubt resolved by judicial decree. But, in the instant case we are considerably concerned about a possible conflict of interest. This has nothing to do with the issue of good faith. The difficulty here is that the Corporation, mistakenly we believe, "accepted as sound the view . . . that the Arboretum should be regarded as an instrument . . . 'to be used in the development of Botany as a whole and in the over-all interests of the University'" (emphasis supplied).

The holding of the majority that the Corporation acted properly because it believed its action would advance the purposes of the trust rests on the unsupported assumption that the Corporation properly understood the purposes of the trust. The *belief* of the Corporation is not proof that it correctly interpreted the *purpose* of the Indenture. This is true even though that belief was sustained by the legal opinion of its counsel. Because President Conant gave various reasons in support of the position that the work of the Arnold Arboretum may be carried on more effectively' if the move" to Cambridge were made does not vindicate the position of the Corporation if it misinterpreted the purpose of the Indenture.

Further, the Corporation can receive no support from the opinion of outside scientists consulted "at least as a matter of record" after the Corporation had decided to transfer the library and herbarium to Cambridge. They were asked whether the move would be "the best way of carrying out the terms of the trust." Their affirmative answer to this query is of no significance in interpreting the purposes of the Indenture. It is obvious that this required legal knowledge. We observe, too, that the master found that "[t]hey were not asked whether the move would be in the best interests of the Arnold Arboretum." We note with interest that one of these scientists, when

asked as to the effect on the Arboretum, "pointed out . . . what he considered to be the disadvantages of the move from the Arboretum's standpoint."

In fact, the Corporation did not accept the view that "the general and ultimate purpose" of the Indenture was, as expressly stated therein, for "support of an Arboretum." Instead "[t]he Corporation . . . accepted as sound the view . . . that the Arboretum should be regarded as an instrument . . . 'to be used in the development of Botany as a whole and in the over-all interests of the University.'"

It is precisely because "[t]he master's report is well organized, clear, and complete," as the opinion states, that we are able to show that the Corporation failed to properly consider the purpose of the trust. As the majority state, "[i]mplicit in the master's findings is the conclusion that if the Corporation had accepted 'the best interests of the Arboretum' as an important criterion, its members . . . must have decided against the move."

The master found that "At the time of the move . . . the Arboretum library contained about 48,600 bound volumes and 15,400 pamphlets, of which all except approximately 7,000 volumes, including pamphlets, were moved." In addition, "[a]ll but about 4% of the wild specimens were removed from Jamaica Plain to Cambridge, and except for wild specimens in two categories, that is, wild herbaceous weed specimens and wild crataegus specimens, only about 1% of the wild herbarium specimens of the Arboretum were retained in Jamaica Plain."

The master also found that "[t]he decision to move the bulk of the Library and herbaria was not made for the benefit of teaching in the University by or under the direction of the Arnold Professor." Further, "[t]he relief of whatever unsatisfactory housing conditions existed in the Administration Building at Jamaica Plain was not a controlling or significant factor influencing the determination to move the bulk of the library and herbarium to Cambridge." Instead, "[t]he Corporation acted in the bona fide belief that it was entitled, in determining whether to

cause removal, to give controlling weight to . . . [the] consideration" of the promotion of "the science of botany at Harvard from an overall standpoint."

The majority conclude that the purposes of the trust could be advanced by the transfer because "[t]he Arboretum would continue as a part of a group of botanical science departments that was expected to attain outstanding preëminence. . . . [O]utstanding scientists, scholars and students would be at least as much attracted to association with the Arboretum as before, and, in reasonable likelihood, more so, and that their work on the whole would benefit."

This conclusion contrasts sharply with the master's findings that as a result of the move not only have "[t]he reputation and prestige of the Arnold Arboretum . . . been materially injured," but also "the Arboretum library and herbarium at Jamaica Plain were materially impaired for taxonomic, horticultural and other scientific work." It is also in marked contrast with the finding of the master that, despite the advantages to the carrying on of taxonomic research in Cambridge from consolidation of the libraries, "there is . . . a marked disadvantage to the carrying on of such research arising from the separation of books and herbarium specimens from the living collections in Jamaica Plain, from the separation of the wild and cultivated specimen collections and from the division of the Arboretum staff resulting from the move."

When the Corporation between June 7, 1954, and July 9, 1954, moved about six-sevenths of the Arboretum's books and herbarium specimens to Cambridge this could hardly be in the best interests of the Arboretum as a "place" associated with Harvard. This move undoubtedly would result in an increasing number of scholars being attracted to Harvard due to the preëminence of its entire botanical complex. The converse, however, is true of the Arboretum. Its position in the botanical world has been denigrated and it has become a mere adjunct of Harvard. As the majority state, "A decline in the reputation, prestige,

and standing of the Arnold Arboretum as a separate institution was, we think, reasonably foreseeable." Another outcome, however, of the Corporation's decision, according to the majority of the court, was also foreseeable: "[T]he creation of 'a world famous scientific station' with 'one of the greatest libraries and herbaria in the world.'"

The majority say that "[t]he prestige was not, in our view, a capital asset, which, once accrued, could not be expended." Perhaps that is so. We maintain, however, that it could not be expended to the detriment of the Arboretum. While prestige is an intangible asset it can hardly be disputed that its value to an educational and scientific institution is inestimable. Harvard itself is a classic example. The prestige achieved by the Arboretum arose out of the application of the trust funds. Whether "prestige" is a "capital asset" or not it had a *real value* in every sense. To transfer that value to the university, without any quid pro quo, cannot be justified.

Regardless of how altruistic the Corporation's motives may have been, the unalterable fact is that the Arboretum has served as a "tool" for the promotion of "the science of botany at Harvard from an overall standpoint,"² rather than a separate, distinct and identifiable entity, associated with Harvard and not a department thereof.

As we bring this dissent to a close we are mindful that the Corporation's opposition to seeking a judicial decision rested not only on its belief that its position was legally sound, but also because it was "conscious of the fact that there were claims on a believed moral level which a legal decision would not dispose of." We have presented our views on the legal issues. The moral issues remain. They must be left for the ethical judgment of others.

We think there was a breach of trust. "[N]o length of time of diversion from the plain provisions of a charitable foundation will prevent its restoration to its true purpose." *Trustees of Andover Seminary v. Visitors*, 253 Mass. 256,

² See footnote 8 of the majority opinion.

298. Accordingly, we would order the Corporation to return to the Arboretum at Jamaica Plain those books and specimens which are not duplicated there and to refrain from using the trust funds for the maintenance of the Harvard University Herbarium in Cambridge.

John K. Mallory, Jr., Special Assistant Attorney General (*Richard W. Hulbert, Thomas H. Mahony, & Thomas V. Rankin*, Special Assistant Attorneys General, with him), for the Attorney General.

Warren F. Farr (*Donald R. Grant* with him) for the defendant.

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COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court
FOR THE COMMONWEALTH

SUFFOLK COUNTY

EQUITY

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ATTORNEY GENERAL, EX REL.

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REPLY BRIEF FOR PETITIONER

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SUMMARY OF ARGUMENT AND
PRELIMINARY STATEMENT

The respondent's brief reflects a realization that the principal issue in this case is whether, in determining to move the library and herbarium of the Arnold Arboretum, the Harvard Corporation gave proper consideration to the factors which should have governed its decision. At the trial of the case it was common ground between the parties and, as such, accepted by the Master and indeed by the witnesses, that the resolution of this issue would depend on whether, on the one hand as the petitioner asserted, the Corporation had, in fact, in disregard of the interests of

the Arboretum, acted to promote the interests of botany in the University from an overall standpoint, or whether, as the respondent asserted, the Corporation had acted to further the interests of the Arboretum and not those of botany generally or of anything else.* As the case was presented to the Master, this sharp factual dispute was presented—with no more imprecision in usage than is inevitable in any attempt to phrase an abstraction.

The Master's findings on this disputed factual issue being unfavorable to it, the respondent, in presenting its case to the Full Court, has therefore found it necessary to indulge in a semantic about-face, the gist of which is an assertion that the terminology of the Master's report and the verbal dichotomy (the "best interests of the Arboretum", on the one hand, as against "botany at Harvard", on the other) in which the Master stated his findings on the issue of motive, represent, not sharp opposites, as the parties contended at the trial, but in fact synonyms.

This semantic exercise is the heart of the respondent's argument, for it is the basis of the respondent's attempt in Point II of its brief to assert that the findings of the Master, "properly" understood, represent nothing upon which a charge of breach of trust may be predicated. It involves, as any such semantic exercise must, a misuse of terminology which in fact affords no excuse for the con-

* For example, paragraph 105 of the respondent's Requests For Findings Of Fact, filed with the Master, contains the following proposed finding:

"While the Corporation also considered the effect of the removal on all the agencies which might be affected by the move, including the Gray Herbarium, whose library and herbarium were to be combined with those of the Arboretum, and the results it would have on scientific botany, it was not motivated by considerations other than those of the best interests of the Arboretum and did not adopt the resolution for the purpose of benefitting any other department of the University."

fusion which the respondent purports to find in it. The result is an extended definitional prologue which constitutes the bulk (Resp. Brief, pp. 20-44) of the respondent's entire argument on the question of motive. The petitioner thus finds it necessary to devote Point I of this brief in reply (pp. 4-12) to making clear what both the Indenture of 1872 and the Master's report itself make seemingly obvious enough to anyone, the purposes and objectives intended to be fostered by the Indenture.

Point II of this reply (pp. 12-26) is devoted to the respondent's challenge to the Master's findings on motive. Point III (pp. 26-29) briefly replies to the respondent's labored argument that the Corporation's decision has been rendered immune from judicial review because of the supposed authorization of the Board of Overseers. Point IV (pp. 30-38) replies to the respondent's argument on injury. Point V (pp. 38-40) briefly discusses the respondent's argument on the relief requested by the petitioner.

One further preliminary comment is in order. Although it is far from clear that the respondent means to be taken seriously in its challenge to the authority of counsel for petitioner to conduct this litigation, the comments embodied in the footnotes on pages 88 and 92 of the respondent's brief merit a summary response. The respondent appears to question whether the original authorization to the Special Assistant Attorneys General and counsel associated with them survive the assumption of his duties by the present Attorney General. It therefore apparently needs to be said that the authority of Special Assistant Attorneys General Mahony and Rankin was established by letter from Attorney General Brooke dated October 29, 1963 and their authority to engage the services of attorneys Mallory and Hulbert was continued by letter dated November 4, 1963.

Had the respondent at any time desired to see evidence of the authority of counsel for the petitioner, the respondent had only to inquire.*

ARGUMENT

I.

Respondent's Contention That No Breach of Trust Was Committed Is Based on a Misconception As to the Objectives Intended To Be Fostered by the Indenture of 1872; the Contention Must Therefore Be Rejected.

In claiming as it does that the "basic purpose" of the parties to the Indenture was to "furnish education in the field of woody plants by and through Harvard University" (Brief, p. 28), the respondent has strung together a misleading series of ambiguities.

Doubtless there are manifold ways in which education generally, or botanical learning in particular, might have been advanced by application of the Arnold bequest. As the Master's report shows, the Corporation has for many years administered activities related to botany, of which undergraduate and graduate instruction in the College,

* The further comment that the omission of the personal signature of the Attorney General on petitioner's brief is "contrary to the usual practice" (Resp. Brief, p. 88, note 34) is frivolous. The usual practice is sufficiently shown by the briefs in the following cases, brought in the name of the Attorney General on the relation of others, which bear only the signatures of the counsel actually conducting the litigation. See, for example: *Attorney General ex rel. Inhabitants of the Town of Douglas v. Butler*, 123 Mass. 304 (brief for the Attorney General signed W. S. Hopkins, for the relators); *Attorney General ex rel. Prendergast v. Bedard*, 218 Mass. 378 (brief signed James R. Dunbar and Roger W. Dunbar; Dunbar & Rackemann, Frank Leveroni, of counsel); *Attorney General v. Old South Society*, 13 Allen 474 (complainant's brief signed Isaac F. Redfield and Tuxbury & Crocker,

the Gray Herbarium, the Farlow Library and Herbarium, the Botanical Museum, the Harvard Forest, the Biological Laboratories, and the Botanic Garden are only some of the prominent examples (see pars. 5, 52-56, 64, R. 58, 78-80, 82-83). Some of these, the Botanic Garden, for example, were in existence at the time of the execution of the Indenture of 1872 (see par. 14, R. 63), and the purposes and activities of others that were not could, of course, have been made the object of benevolence at the time. The Indenture of 1872 could have been the means by which any one or more of these activities might have received support.

However—and this is the decisive factor in this case—the parties to the Indenture of 1872 did not provide that any ultimately broad educational objective toward which the Indenture might have aimed was to be achieved either through aid of any of these other activities or by such means as might, from time to time, appeal to the Corporation as trustees. On the contrary, the Indenture provided that this objective was to be achieved through the two objects of the trust stated in the Indenture with a particularity which precludes speculation: the Arboretum to be established and supported on the land in Jamaica Plain set aside for the purpose, and the Arnold Professor who was to have the care and management of the Arboretum and to

counsel); *Attorney General ex rel. Methodist Religious Society v. Armstrong*, 231 Mass. 196 (brief of plaintiff signed Russell, Pugh, and Kneeland, Attorneys for Plaintiff); *Attorney General ex rel. Village of Onset v. Onset Bay Grove Assn.*, 221 Mass. 342 (signed Nathan Washburn, Attorney for Plaintiff). As the court stated in *Parker v. May*, 5 Cush. 336, 338, "But considerations requiring the public prosecutor to be regarded as a party do not require him to act personally as counsel; but like every other party in a civil suit, he may appear and act by his attorney and counsel." See also *McQuesten v. Attorney General*, 187 Mass. 185. Respondent (p. 88, note 34) cites *Attorney General v. Methuen*, 236 Mass. 564, a case of no particular relevance because the Attorney General was there acting on behalf of the Commonwealth in a *quo warranto* proceeding.

teach the knowledge of trees, and give "other instruction . . . naturally directly and usefully connected therewith", in the University (R. 146). The clarity and specificity with which the objects of the trust are identified is, of course, made still more explicit by the negative prohibition against the use of the trust for the benefit of any other object "how-ever meritorious, or kindred in its nature" (R. 147).*

If, as the respondent asserts, the Corporation could with propriety employ the assets held by it under the Indenture of 1872 to promote the science of botany as a whole because that "would necessarily aid the particular scientific work of the Arboretum" (Brief, p. 53), and if, as the respondent also asserts, the Corporation could properly have been concerned wholly or in major part with the effect of the transfer on botany as a whole (Brief, pp. 52-53), it requires only a moment's consideration to see that the respondent argues, in effect, that restrictions upon gifts in trust to educational institutions for the support of particular objects are without meaning. Consider, for instance, the possibility that the Corporation might decide that all or a part of the Arboretum endowment should be devoted to the support of the Harvard Forest. Now, no serious argument could be mounted that the Harvard Forest is not directly concerned with the advancement of the "knowledge of trees",

* The respondent's short argument in Point III of its brief (pp. 68-71) that the Corporation's action was not a breach of this explicit provision of the Indenture relies on the assertion that the prohibition applies only to the original fund contributed by the Arnold trustees. This argument completely ignores the immediately following sentence of Article Third, permitting the Corporation to obtain trees, shrubs and plants from the Arboretum for the ornament of the college grounds. This is plainly an exception to the prohibition, yet clearly applies to property other than the initial fund of money and securities contributed by the Arnold trustees. If the prohibition applied only to that fund, as the respondent argues, the exception would of course have been unnecessary.

and it is difficult to see how one might complain of the proposal, if, as the respondent urges (Brief, p. 53), it is enough that the Corporation in good faith should determine that "teaching the knowledge of trees would be carried on more effectively" by such action. Indeed, if the only touchstone is that the activity to be supported share in some measure a concern for some aspect of science which also touches on an arboretum or the knowledge of trees, then, given the fundamental relationships among the manifold disciplines of the natural sciences, the Corporation is wholly unconfined by the Indenture.

What, in short, the respondent really argues is that the Indenture of 1872 was established to support such aspects of the science of botany—and related disciplines—as the Corporation might from time to time not irrationally consider desirable. The petitioner knows of no authority for such a construction of the Indenture, and understandably enough the respondent offers none. And yet the necessities of the case require the respondent to insist on this unprecedented assertion; for if, in reaching the decision it came to, the Corporation was obliged to consider the purposes and objects actually stated in the Indenture of 1872, the Corporation was plainly guilty of a breach of trust.

What has been said really disposes of the respondent's lengthy definitional introduction (Brief, pp. 20-44). Of course, "the Arboretum" is not a *cestui que trust*. It is, however, an object of the trust, as the respondent fails to recognize (pp. 22-23). While the respondent concedes, and indeed emphasizes, that the test is whether the trustee has administered the trust solely with a view to the accomplishment of its purposes (p. 23), the respondent refuses to see that the purposes of the trust are only ultimately and by way of result the general benefit of society; that more immediately they are the promotion of the two objects identified in the Indenture.

The respondent neglects to see that it is central to the proper administration of the trust that the integrity of the denominated objects of the trust is maintained. The Indenture imposes on the Corporation as trustee the duty of maintaining the Arboretum established by its terms. It is clear beyond question that the Corporation could not sell off the Arboretum in house-lot parcels, however reasonably persuaded that horticultural or botanonical study would be better supported by the proceeds than by continued maintenance of the Arboretum. The reason for the result need not at all be put in terms of any requirement that the Corporation preserve the institutional status of the Arboretum; it is enough that the Indenture requires the trustee to maintain and support the Arboretum in Jamaica Plain, which the hypothetical proposal would destroy.*

To put the question in terms of precedents in this Court, one need only refer to the opinion in the McKay case (*President and Fellows of Harvard College v. Attorney General*, 228 Mass. 336). As the passage cited at page 60 of the petitioner's brief-in-chief shows, the Court assumed that the scientific advantages of the cooperative plan proposed there were large. It held, however, that the means contemplated were unauthorized. In short, the Court was focusing on the fact that, while the ultimate charitable objective of the McKay gift was, as the respondent recognizes (Brief, p. 30), "to promote applied science", it was not enough that the proposed plan would do just that. On the contrary, it was decisive for the result of the case that

* The proposal is perhaps not altogether hypothetical. The Bailey Report, as the Master notes, gave serious consideration to abandoning the Arboretum, and, in part at least, only because the living collections had enjoyed such widespread public support ("the goose that lays the golden eggs") was that course not followed (par. 74, R. 85). How the respondent reconciles this approach to the Arboretum with its assertion that "one of its [the Bailey Plan's] purposes was to benefit the Arboretum" (Brief, pp. 59-60) is unexplained, and inexplicable.

McKay had stipulated not only the general charitable objective but also the means by which, and only by which, his gift was to be used to aid it. So, here, while it may be inferred that the ultimate charitable purpose of the trust created by the Indenture of 1872 was, to accept the respondent's phrasing, "the accumulation and dissemination of the knowledge of trees 'as a branch of university education'" (Brief, p. 30), the means by which that general purpose was to be advanced were not left at large but were explicitly identified in the Indenture of 1872.*

Similarly irrelevant to the issue presented here is the labored argument advanced by the respondent that the Arboretum has always been regarded as an integral part of the University. The respondent's obvious purpose is to draw the equation, Arboretum equals University, so that it may assert the conclusion that action taken to promote the University is therefore action taken to promote the Arboretum.

Respondent relies, in support of this contention (Brief, pp. 33-34), on a number of references in University publications of various kinds to the Arboretum as a "department" of the University, such as reports of the library, statements in catalogs, and the like. If the issue were, as it is not, whether the Arboretum has been at times referred

* The specification in the Indenture of the objects through which the general charitable intention was to be pursued, together with the further prohibition against use of the property to aid any other object, "however meritorious, or kindred in its nature", is a vital distinguishing fact which serves to render inapposite the interesting opinion of Mr. Justice Walter in the *Lincoln School* case (*Elliott v. Teachers College*, 177 Misc. 746, aff'd, 264 App. Div. 839, aff'd, 290 N.Y. 747) on which the respondent places so much reliance (Brief, p. 36). The stated purpose of the grant of the General Education Board in that case was "to insure the permanence of experimental work in the field of elementary and secondary education", which at the time of the grant Teacher's College was pursuing in part at least through maintenance of the

to as a department of the University, this evidence would be relevant, although one would also have to consider, as the respondent does not, the evidence summarized by the Master showing that officials of the University have also referred to the Arboretum as exactly that independent entity which the respondent insists it is not (App. B, R. 150, 152). The question, however, is not descriptive but functional. The label as such is meaningless. The respondent's contention, although it rests simply on the label, is that *because* the University has from time to time, although not always and not consistently, referred to the Arboretum as a "department", the obligations of the Corporation as trustee under the Indenture of 1872 are vitally affected. Logically, of course, the conclusion does not follow from the premise. The characterizations remain, as the Master rightly put it, "meaningless for purposes of this case" (App. B, R. 149).

The authorities on which the respondent relies are not helpful. The question presented in the three cases involving Harvard cited on page 32 of the respondent's brief was either whether a graduate school might be divorced from the control and administration of the Corporation (*President and Fellows of Harvard College v. Society for Promoting Theological Education*, 3 Gray 280, and *President and Fellows of Harvard College v. Attorney General*, 228 Mass. 396), or whether a graduate school might be sub-

Lincoln School. The broad objective there was in explicit terms the object of the trust, to which the School, although identified in the instrument of gift, bore only the relationship of the means at the time through which it was pursued. Under the Indenture, on the other hand, the general purpose of aiding the dissemination of knowledge in horticulture and allied areas is only to be found from the stated purposes of the trust, which are the support of the Arboretum and the Arnold Professor. The Lincoln School case would be in point only if the gift in question had been stated merely as one "to support the Lincoln School", coupled with an injunction against use of the fund to assist any other object.

jected to the control and administration of the Corporation (*Trustees of Andover Theological Seminary v. Visitors*, 253 Mass. 256), against the contention, in each case sustained by this Court, that the terms of the property involved prohibited the proposed rearrangement. Here the question concerns the proper administration of property unquestionably held by the Corporation to promote the explicit objectives set forth in the Indenture of 1872. In each of the three cited cases, the short reference in the opinion of this Court to the school in question, existing or proposed, as a branch of the University was obviously nothing more than a reference to the intention of donors on the question whether the Corporation might or might not assume or surrender control of the enterprise in question. That issue is simply not presented in this case.

If the respondent is really asserting no more than the proposition that any property to which the President and Fellows of Harvard College hold title is, by virtue of that fact, part of the University, then of course the Arboretum is part of the University and, equally ineluctably, the books acquired and held subject to the Indenture are part of the University library. The Corporation undoubtedly holds title to the assets subject to the provisions of the Indenture. Having said that, however, one is still in utter confusion as to what, if anything, has been gained, unless one takes the further step, which the respondent understandably forebears to press explicitly, that *therefore* one may pay little if any attention to the explicit purposes of the Indenture and focus instead on the University.

The further argument (Brief, pp. 34-35) that the activities of the Arboretum have been correlated, at least at some times and to some extent, with various botanical activities sponsored by the University in Cambridge or elsewhere is, equally, no basis upon which the Corporation might ignore

the specified objectives of the Indenture. The question presented in this case is whether or not the Corporation was obliged to consider and, if so, did in fact consider the interests created by the Indenture of 1872 in deciding upon the transfer of the library and herbarium of the Arboretum. The petitioner has asserted, and the Master has found, that the Corporation gave at best inadequate consideration to those interests. What may have been done at earlier times with respect to different matters is simply irrelevant to the questions here at issue.

II.

The Master's Findings Afford No Basis for the Respondent's Assertions That the Corporation Acted From a Consideration of the Interests of the Arboretum, and Respondent's Challenge to the Findings Is Without Merit.

In the first portion of Point II of its brief, the respondent attempts the argument that, taking the Master's findings as they stand (see Resp. Brief, p. 45), the Corporation acted in conformity with its obligations under the Indenture of 1872. In the latter portion of Point II (pp. 55-68) the respondent attempts to refute the Master's findings; the petitioner will consider that argument later.

Respondent's argument pressed on the basis of what it asserts are the findings actually made depends, in reality, upon gross distortions of the Master's report. The respondent's failure to appreciate what the Master did find is illustrated by the argument heading on page 44. In that heading the respondent says, without apology, that the Corporation did in fact make a "determination that the

transfer was in the interests of the Arboretum." There is no such finding, and no basis upon which the findings made can be converted into such a finding. On the contrary, the Master first elaborated the "interests of the Arboretum" as created by the Indenture: in paragraph 13 of his report (R. 62) the Master correctly notes that the objects of the Indenture were the two already referred to above. He then proceeds to find, based upon a host of subsidiary findings (most of which were never objected to), that the Corporation ordered the move "wholly or in major part" because it would "promote the science of botany as a whole at Harvard (rather than the interests of particular botanical institutions)" (par. 144, R. 118). The respondent, in referring to this finding (Brief, p. 52), omits to note the final parenthetical "rather than the interests of particular botanical institutions" and thus vitiates its argument.

The respondent can derive no advantage from the Master's finding (par. 143, R. 118) that the Corporation acted in good faith, although once again the respondent misstates the finding made in a critical respect. The respondent says (Brief, p. 45) that the Master found that the Corporation acted "in the bona fide belief that the transfer was consistent with its obligations" under the Indenture. The finding, however, is that the Corporation believed that the move was "consistent with its *conception* of its obligations" (emphasis added). The Corporation's conception of its obligations thus becomes the crucial point. There the Master's findings are wholly clear. As he says in paragraph 146 (R. 119), the Corporation in late 1952 and 1953 "accepted as sound" the view which it had accepted as sound when enunciated in 1950 in the Coordinating Committee report (pars. 98, 101, R. 95-97), namely, "that the Arboretum should be regarded as an instrument . . . 'to be used in the development of Botany as a whole and in the

over-all interests of the University.' "It was this view of the Arboretum, and of what the Corporation might properly do in relation to the Arboretum, that the Master found was held by the Corporation in good faith. As he says in his ultimate conclusion A (R. 142), "Its action was taken, however, wholly or in major part because of a belief that the removal would promote the science of botany at Harvard from an overall standpoint. The Corporation acted in the bona fide belief that it was entitled, in determining whether to cause removal, to give controlling weight to this consideration." The consideration of what, in fact, were the objectives and purposes of the Indenture of 1872 constituting the interests of the Arboretum which appears above (pp. 4-9) demonstrates, however, that no permissible construction of the Indenture justifies a view that the assets held subject to the Indenture might freely be employed by the Corporation "as an instrument" for the benefit of the science of botany. Yet unless that conception of the Arboretum were permissible, no basis exists for the respondent's argument that the Corporation acted from a consideration of the interests of the Arboretum.

The respondent advances an extended argument (Brief, pp. 47-51) that the Corporation was not obliged to act "solely" upon a consideration of the interests of the Arboretum. Inasmuch as the facts found make it utterly clear

* Respondent's Objection 33 (R. 169) to the finding in paragraph 146 was neither pressed before the Single Justice (see respondent's Brief in Support of Respondent's Objections to Master's Report at page 2 where it is stated that "Of those 63 objections [on the ground the evidence was insufficient to support the finding] we do not now press those numbered 1, 5, 6, 7, 10-14, 16, 17, 20, 23, 24, 33, 37, 45-50, 53, 54 and 62," and at page 122 where the prayer for relief addressed to the Single Justice asks that "all the objections discussed herein should be sustained"), nor made a subject of the appeal taken from the order and decree of the Single Justice overruling the objections (with one exception) and confirming the report (see R. 317). No objection to paragraph 146 is therefore before the Court.

that the Corporation did not act even *principally* from a consideration of those interests, the legal issue which the respondent pursues is simply academic. The respondent does not go so far, in pressing its argument, to contend that the supposed obligation to take other interests into account ("the Corporation could not properly have blinded itself to everything except the Arboretum"—Brief, p. 47) constituted a license to submerge any consideration of the interests of the Arboretum in a predominant concern for those other interests. Unless the respondent were prepared to go that far (and were able, in doing so, to persuade the Court of the soundness of the utterly novel proposition of trust law which the respondent would thus be advancing), the respondent's argument does not bear on the case. As the Master found, the Corporation's "conviction . . . reflected in its approval of the Bailey Plan, that a transfer of libraries and herbaria to a new central building in Cambridge would promote the science of botany at Harvard from an overall standpoint (rather than from the standpoint of each component part)", made "after careful and serious deliberation, remained the controlling factor" in the Corporation's final decision (par. 144, R. 118).

The respondent's attempt to convert the Master's findings on the issue of motive into support for the contention that no breach of trust is shown evidently fails to persuade even the respondent, for in the latter part of Point II the respondent executes an about face and launches an assault on the findings themselves. The respondent's principal contentions with respect to the central findings on the issue of motive are the following:

- (1) that the Master's subsidiary findings, far from supporting his conclusory findings, show that "there is no warrant for any conclusion that the Corporation was 'wholly or in major part' concerned with the promotion

of interests other than those of the Indenture" (Brief, p. 59);

(2) that the Court will be able to reach conclusory findings on the motive issue contrary to those made by the Master because two of the subsidiary findings made by the Master discounting possible alternative motives for the move—the findings (a) that the transfer "was not made for the benefit of teaching in the University" (par. 152, R. 120) and (b) that relief of "unsatisfactory housing conditions" at Jamaica Plain "was not a controlling or significant factor" (par. 153, R. 120)—are not supported by the evidence, were based on erroneous law rulings and are inconsistent with other findings (Resp. Brief, pp. 62-66); and

(3) that the Master's conclusions as to motive should be discarded by the Court because they are "tainted by his erroneous rulings of law" (Brief, p. 66), an argument directed to the Master's failure to give respondent's requested rulings 11 and 12.

The first branch of the respondent's attack is an assault on the conclusion, expressed in paragraph 144 (R. 118), that the Corporation's conviction, expressed in its approval of the Bailey Plan and formulated after serious deliberation, that the transfer to Cambridge of the library and herbarium of the Arboretum "would promote the science of botany from an overall standpoint (rather than from the standpoint of each component part)" was the "controlling factor" in the Corporation's final decision. The respondent proceeds, first, by contending that the Bailey Plan itself had no such purpose, but was rather intended to promote the Arboretum, and, second, that even if the Corporation approved the Bailey Plan without thought for the Arboretum, the Bailey Plan was later "scrapped" and so could not have influenced the final decision.

Respondent's attack on the Master's findings regarding the Bailey Plan (Resp. Brief, pp. 59-60) is unconvincing. The most that respondent can bring itself to contend about

the Plan is that "one of its purposes was to benefit the Arboretum" (p. 60); thus, even if this contention were accepted, it would not go very far toward destroying the Master's reliance on the recommendations of the Plan as justifying his motive conclusions. The respondent ignores, however, the first and second sentences of paragraph 71 (R. 84), to which it never objected:

"The aim of the Bailey Plan was to effect a reorganization of Harvard's botanical resources. Its basic objective was to formulate broadly conceived and fundamentally sound plans for the promotion of botanical science at Harvard."

The argument also ignores the Master's finding (par. 75, R. 85), originally the subject of respondent's Objection 6 (R. 166) but not pressed either to Mr. Justice Spalding (see footnote, p. 14, *supra*), or to this Court (R. 317), that:

"The recommendations of the Bailey Report affecting the Arnold Arboretum were not made primarily to further the interests of the Arboretum."

Thus, findings in the report, the correctness of which is undisputed by the respondent in this Court, establish both sides of the proposition: that the recommendations of the Bailey Plan affecting the Arboretum were not intended to benefit the Arboretum and that the purpose of the Plan as a whole was to benefit botany at Harvard rather than particular institutions.

Respondent itself appears to recognize that any argument must be wholly unconvincing that the Bailey Report aimed at promoting anything other than the all-over and integrated welfare of botany at Harvard; for the major portion of the argument for its motive position is devoted, instead, to the proposition that, "even if the Corporation had given no consideration to the Arboretum in 1946" (Resp. Brief, p. 60), concern for "whether the purposes of the Arboretum

would be served by the transfer" (*ibid.*) was the basis of its final decision to move the bulk of the Arboretum library and herbarium.

Respondent attempts to justify this conclusion by stating, as a "fact" (p. 61) that what was done by the Corporation in 1954, the transfer of six-sevenths of the library and herbarium of the Arboretum to the Harvard University Herbarium (par. 165, R. 124), along with the entire library and herbarium of the Gray Herbarium, the herbarium of the New England Botanical Club, the Oakes Ames Orchid Library and Herbarium and the paleobotanical collections of the Botanical Museum (par. 156, R. 122), "was not the transfer proposed by the [Bailey] Plan" of five libraries and herbaria (Resp. Brief, p. 61). The respondent asserts that the supposed failure to bring about this consolidation meant that "the overall reorganization [proposed by the Bailey Plan] was scrapped" and that because this combination was not to take place, the recommendations of the Bailey Plan "disappeared as a reason for the transfer" of the bulk of the Arboretum library and herbarium (p. 61).

This collection of half-truths and surmises will not stand in the light of other unobjected to findings in the Master's report.

First of all, the impression distinctly conveyed by respondent's argument, that the decision not to combine all five libraries and herbaria was made concurrently with the final decision regarding the Arboretum, is misleading. The Master's finding in paragraph 89 (R. 89) makes it plain that even prior to the Coordinating Committee report in 1950 the fund budgeted for the new building was insufficient to accommodate much more than the libraries and herbaria of the Arboretum and the Gray Herbarium. The Coordinating Committee report shows also that this change was

immaterial, for the report said that "almost no value" would be sacrificed by the non-inclusion of collections other than those of the Gray and the Arboretum. On the contrary, the report emphasized that "a failure to construct the new central building would prove almost fatally harmful not only to the reorganization recommended in the Bailey Report but 'to Botany as a whole' as well" (par. 100, R. 96).

All that remains, therefore, of the respondent's assertions that the facts of the move were somehow different from what was essential to the Bailey Plan depends upon the difference between all and six-sevenths of the library and the herbarium of the Arboretum. This fractional difference would obviously constitute no material deviation even were the Master's report not clear that the Bailey Plan, for its part, proposed to sell off duplicates in the collections (par. 70, R. 84), while the move had the effect of converting the Arboretum into a storage warehouse for the one-seventh of its original library and herbarium which proved to consist largely either of duplicate books or herbarium specimens of no current interest (pars. 165, 176, 180, R. 124, 127, 128).

Respondent's case, therefore, comes down to the argument that, although the Corporation in 1954 moved materially everything that it proposed to move in 1946 when it approved the Bailey Plan, it did so from utterly opposite motives. Respondent's argument as to this supposed reversal of motivation, a "wiping clean" of the slate reflecting its prior desires and conclusions, rests on the assertion (pp. 60-61) that "during the period from 1949 to 1953 its attention had been focused on its duty to consider the Arboretum's best interests", by its own counsel, by counsel retained by the Visiting Committee and assertedly by the Board of Overseers.

This assertion comes to grief on the fact that the Corporation's attention had been focused, by those to whom it

listened, on what were not, in fact, the Arboretum's best interests. The principal advice received by the Corporation during the period when it supposedly reversed its mental outlook was the May 1, 1950 opinion of the counsel which represents it in this appeal. That opinion, like the respondent's current brief, misstated the "interests of the Arboretum", for, as the Master found, without objection:

"When the opinion expressed the view that removal of the bulk of the library and herbarium might properly be made only if justified as promoting the interests of the Arboretum, it did not contain an expression that the interests of the Arboretum must be solely or even primarily taken into account in determining whether the move should be made [T]he Ropes, Gray opinion did not advise the Corporation that the promotion of the interests of the Arboretum must be either the sole or major motivation" (par. 116, R. 105-106).

If, in fact, the opinion had instructed the Corporation to consider the best interests of the Arboretum, one would naturally expect any action taken in the light of the opinion to reflect that fact. What did occur, however, was the Corporation's almost immediate decision to announce its intention to leave at the Arboretum the so-called working library and herbarium, a decision solely based on the legal recommendation in the opinion and "not based upon consideration . . . of whether or not a working library and herbarium should, in the interests of the Arboretum, be left at Jamaica Plain" (par. 119, R. 106).*

Finally, this contention that the Corporation's motivation underwent a metamorphic about-face ignores, among many other findings of the Master, the important finding that in late 1952 and early 1953 the Corporation, echoing

* The respondent's original objections 16 and 17 to this finding (R. 167) were neither pressed before the Single Justice (see footnote, page 14, *supra*) nor brought to this Court on appeal (R. 317).

the Buck Forward to the Bailey Report (par. 61, R. 81), and the Coordinating Committee Report (par. 98, 101, R. 95-97), still regarded the Arboretum as an instrument for the promotion of the University's interests (par. 146, R. 119). This finding, together with findings such as that contained in paragraph 161 (R. 123), that the Corporation was unmoved by Professor Howard's report that Director Robbins of the New York Botanic Garden opposed the move as contrary to the best interests of the Arboretum, makes it clear that the Corporation never conceived itself obliged to consider the "best interests of the Arboretum" but rather believed throughout that it could view the Arboretum as an instrument for broader objectives.

The Corporation's determination to move the bulk of the library and herbarium of the Arboretum to Cambridge for reasons other than the promotion of the Arboretum's interests is clear, as the foregoing shows, even without utilizing the Master's findings as to the absence of significant influence on the decision of a desire either to benefit teaching in the University (par. 152, R. 120) or to relieve unsatisfactory housing conditions at Jamaica Plain (par. 153, R. 120). However, since the respondent's second area of attack on the Master's findings is an argument (pp. 62-66) focusing on these points, some answer to the respondent's contentions appears warranted.

Respondent's principal basis for disputing the finding that benefit to teaching in the University by or under the direction of the Arnold Professor was not a motivating factor (par. 152, R. 120) appears to be the Master's reliance, in his summary responding to respondent's objection to this finding (R. 226), on the absence of testimony as to such motivation for the removal as *one* of the bases for the finding. (That it is only one of the bases renders irrelevant respondent's statement (Brief, p. 62) that the finding "cannot be based solely on the absence of evidence to the con-

trary"). The lack of such testimony has more significance than respondent's reference suggests. Three members of the Corporation, each of whom had been a member at the time of the decision to order the move, appeared as witnesses at the hearing and testified at length,* particularly in regard to the Corporation's motive in ordering the move. In their extended testimony no one of the three mentioned teaching by or under the direction of the Arnold Professor as an element motivating the Corporation's determination. Thus, the inference which the Master has drawn is not simply from the bare absence of testimony, but an inference from the absence of testimony on this point by witnesses who gave elaborate testimony on the issue of motive and who would clearly have given testimony on this point had such a consideration been an element in the decision to make the move. As Professor Wigmore states, "the nonproduction of evidence—that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its *tenor is unfavorable to the party's cause*," 2 Wigmore, *Evidence* (3d Ed.) § 285, p. 162 (emphasis in the original), and as Mr. Justice Rugg said in *Howe v. Howe*, 199 Mass. 598, 603:

"The rule prevails in equity as well as in law that the omission by one party to offer evidence, which may be within his reach, to control or explain evidence given by others, adversely affecting his rights or interests, is a circumstance entitled to consideration. It may be regarded as conduct in the nature of an admission."

The respondent also urges that the finding as to absence of a motivation to aid teaching is inconsistent with the findings (i) that the Corporation relied heavily on the recommendations of President Conant in determining to

* The combined testimony of these three witnesses occupied just over 800 pages of the stenographic transcript of the hearing before the Master (Mr. Cabot, pp. 1000-1358 and 1770-1913; Mr. Coolidge, pp. 2074-2218; and Mr. Marbury, pp. 2316-2443.)

move the Arboretum assets to Cambridge (par. 149, first sentence, R. 120) and (ii) that the Conant memorandum of October 15, 1952, in part stressed that the removal would be an aid to teaching (par. 127, R. 110). By this contention respondent seeks to convert the first sentence of paragraph 149 into what it is not, a finding that the Corporation relied heavily on the Conant memorandum. On the contrary, as the further findings in paragraph 149 make clear, the Conant views which the Corporation relied on were that the removal "would benefit Harvard University and its botany and that the reorganization of Harvard's botany depended on such a transfer" and that a failure to make the move "would prove harmful not only to the reorganization proposed by the Bailey Plan but to the promotion of the science of botany as a whole in the University." Not a reference to the Arboretum, and still less to teaching by the Arnold Professor. Paragraphs 152 and 149 are completely consistent, and paragraph 127 is irrelevant to both.

Respondent's objection to the findings in paragraph 153 of the report (R. 120)—that relief of whatever unsatisfactory housing condition existed at Jamaica Plain was not "a controlling or significant factor" influencing the determination to make the move to Cambridge—is similarly baseless. First, the Master does not say in his finding that no consideration was given to this point but only that it was neither "controlling" nor "significant" in the final determination. Second, this finding is clearly supported by sufficient evidence, summarized by the Master in response to the objection (R. 226-27). This evidence and the other findings referred to in the course of the summary show that the library had substantial excess capacity and that the number of specimens was little more than the capacity of the herbarium. Given these facts, the Master is plainly justified in concluding that relief of asserted overcrowding at Jamaica Plain was not a significant or controlling

element in the determination, which was that 85% of both the books and the specimens should be moved to Cambridge. After the move only some 7,000 books and pamphlets remained at Jamaica Plain, together with approximately 100,000 specimens (par. 165, R. 124). Reading these totals against the available capacity of the library and herbarium at the Arboretum, it is simply not possible to credit an assertion that relief of overcrowding was either "significant" or "controlling".

The respondent argues that this is not necessarily conclusive and points to evidence which might have suggested a different conclusion. The respondent ignores, however, the fact that the issue at this point is simply whether the finding actually made is supported by evidence. It is. The respondent's citation of authority (Brief, p. 66) for the proposition that the Master has disregarded the elementary rule that a court will not substitute its own judgment for that of a trustee, completely misconceives what is involved. The issue presented here is not whether a trustee within the scope of discretion committed to it might not reasonably have concluded that conditions required a remedy of one kind or another, but whether this trustee was in fact motivated to order the removal in any significant or controlling way because of housing conditions at Jamaica Plain. The question at issue is a fact in litigation and not review of a trustee's exercise of discretion.

The Master's conclusion on this issue is supported also by the finding, which is now conceded by virtue of the respondent's abandonment of Objection 45 (see footnote, p. 14, *supra* and R. 317), that from 1951 on the Arboretum endowment was sufficient to finance the construction of a new wing on the Arboretum administration building at Jamaica Plain to relieve whatever unsatisfactory housing conditions existed. From this fact, it is apparent that, if a concern for unsatisfactory housing had been a significant

or controlling consideration in the Corporation's determination, it would have sufficed to construct an addition at Jamaica Plain to provide any needed or improved space. The fact that the "solution" adopted involved, instead, the removal of the great bulk of both the library and the herbarium to Cambridge thus provides additional support for the Master's finding that consideration of housing conditions played neither a significant nor controlling part in the actual decision taken.

Finally, respondent advances a confusing argument on pages 66-68 of its brief centered on the Master's refusal to grant respondent's requested law rulings 11 and 12. The Master properly said in Appendix D to his Report (R. 163), that he could not thus be compelled to rule and that "these requested rulings . . . relate to findings which have not been made." In short, these were not rulings of law "arising in the course of his duty"—to quote the order referring this case to the Master—which the Master was required to make. That alone should suffice to dispose of the respondent's contentions.

These requests were improper also as attempts to bring to the Court questions of fact merely by asserting that certain conclusions on the evidence are required, a tactic condemned by Mr. Justice Lummus in his opinion in *Minot v. Minot*, 319 Mass. 253, 260, in these words:

" . . . A party cannot convert a question of fact into one of law by merely asserting that certain conclusions are required by the law, and thus cause practically all the evidence in the case to be summarized and reported."

These requests for rulings were improper in still another respect, for they plainly constituted essentially nothing more than requests for particular findings incorporating petitioner's views of the case. Requests of this kind have been condemned by this Court, as for example, in *Stone v.*

Malcolm, 332 Mass. 705. In that case the Court held a Master justified in refusing to rule on requests which, like respondent's requests here, were "advisory in character setting forth counsel's views of the facts and of the law and virtually suggesting the conclusions the master should reach on various aspects of the case" (332 Mass. at 707).

III.

The Corporation's Action as Trustee Derives No Immunity From the Supposed Approval of It by the Overseers.

The respondent's argument (Brief, pp. 71-78) that the decision taken by the Corporation somehow is rendered immune from review because of the supposed authorization of it given by the Overseers, as general visitors, rests on a series of misconceptions, each fatal to the contention. They will be briefly considered. But at the outset it should be observed that, having made the contention, the respondent at the last moment recoils from it and concludes this segment of its argument (Brief, p. 77) with the statement that the Overseers authorized the Corporation to decide upon the move only if the Corporation concluded that it was in the best interests of the Arboretum. Since, as the facts show, the Corporation never made the determination in the light of any such consideration, the action of the Overseers is, at best, irrelevant. Indeed, assuming for a moment that the Overseers do have the powers claimed for them by the respondent, the Corporation's failure to observe the stipulation laid down by the Overseers would in itself confirm the breach of trust.

For the rest, the argument can be dismissed on any one of at least three grounds: (1) there is no warrant for claiming that the Overseers are "general visitors of the University"; (2) the question at issue, the move of the library and herbarium of the Arboretum, was not subject to whatever

jurisdiction the Overseers may have had; and (3) even if the Overseers had the function of visitors in relation to the Arboretum with power over the question at issue, their approval could not, even had it been given, sanctify a breach of trust.

First, there is no basis for the respondent's assertion that the Board of Overseers have the function of general visitors of the University. The Master's finding (par. 3, R. 57) defining the relationship between the Corporation and the Board of Overseers makes no reference to general visitorial powers held by the latter body. The respondent has cited the next finding of the Master (par. 4, R. 57) where it was stated "The Board of Overseers also performs visitorial functions," as the basis for the respondent's conclusion that the Overseers act as "general visitors of the University" (Brief, p. 71). This in spite of the careful delineation in paragraph 4 of the "investigatory" nature of the Overseers' function, in which they are aided by the several visiting committees. It seems clear that the Master was not describing anything more than this investigatory activity, but the respondent has equated this with general visitorial functions. The latter involves a precise legal concept (see Tudor, *Charities* (5th ed., 1929) p. 199). Although the respondent cites various cases where the Harvard Corporation was a party, none is or can be cited to support the theory that the Harvard Overseers possess legal powers of visitation.*

* Even if the Overseers have the relation of visitors to the University, it is far from clear that they have that relation to the trust created by the Indenture of 1872. As this Court said in *Trustees of Andover Theological Seminary v. Visitors*, 253 Mass. 256 from which the respondent quotes incompletely (Brief, p. 73), the visitors of an original foundation are visitors of a new gift only if the new gift is made "without erecting either a special trust or a distinct visitor" (253 Mass. at 272-73). It would seem clear that the Indenture of 1872 constituted precisely such a "special trust".

Respondent's attempt (Brief, p. 72) to invoke the Act of September 27, 1642 (Mass. Bay Rec., II, 30) and the Charter of the University, May 31, 1650 (Mass. Bay Records, IV (pt. 1) 10-12), as well as the Constitution of the Commonwealth, Pt. II, c. 5, s. 1, art. 3, to support the theory of a general visitorial power inherent in the Overseers, is without foundation. The 1642 Act originally gave the Overseers complete control of the College, not a visitorial power. Thus, even if one accepts the respondent's statement (Brief, p. 72) that the 1642 authority of the Overseers was recognized and preserved in the Charter and confirmed by the Constitution of the Commonwealth, there is no basis for the contention that the Overseers stand in the relation of visitors. S. E. Morison, in his historical study, *Harvard College in the Seventeenth Century* (Cambridge, 1936) p. 10, distinguishes the traditional English college system providing official college "visitors", from the Harvard system with its "Overseers."

Second, even if it be assumed that the Overseers were visitors of the trust created by the Indenture of 1872, the fact remains that the action taken by the Corporation was not subject to approval or veto by the Overseers. This is explicitly found by the Master (without objection), when, in connection with the Bailey Report, he states: "The Overseers were not asked to approve the Report, as the

* An ironic sidelight to the respondent's current argument for general visitorial power in the Overseers is that, to have been consistent in the attributed role, the Overseers qua "visitors" would have relied upon the aid of the appropriate visiting committee (par. 4, R. 57), in this case the Arboretum Visiting Committee. As the Master's Report shows, beginning in October, 1949 (par. 91, R. 91) to December, 1952 (par. 133, R. 111), the Arboretum Visiting Committee opposed the transfer, and throughout this period the Overseers instead relied upon the advice of the Coordinating Committee on the Biological Sciences, made up of a chairman and nine Overseers, "each of whom was the member of a Visiting Committee in the biological field" (par. 91, R. 92).

Corporation's action in approving it was not a matter subject to the Overseers' right of veto" (par. 82, R. 87). Inasmuch as the Bailey Report proposed a move to Cambridge of all of the Arboretum library and herbarium, the immunity of that step from approval by the Overseers must, of necessity, have made unnecessary any approval by the Overseers of the step actually taken, the move of six-sevenths of the library and herbarium. Even the respondent does not assert that action by a visitor is of consequence except "where a visitor has given a decision within his powers . . ." (Brief, p. 75).

Third, even if it be assumed, for argument, that the Overseers were authorized to visit the Arboretum trust and had power over the matter at issue, the Overseers were not by this token authorized to usurp the prerogatives or the duties of the trustee, the Harvard Corporation, nor would their approval provide immunity against the charge of a breach of trust. The proposition just stated goes to the heart of the respondent's assumption that the Overseers' supposed support of the transfer granted validity to the Corporation's decision. In turn, this assumption depends either upon the erroneous assumption that a trustee may delegate his duties, which is contrary to a fundamental tenet of trust law (2 Scott, *Trusts*, 2d ed., 1956, § 171), or upon the equally erroneous notion that approval by a visitor would sanctify a breach of trust. As this Court said in *Trustees of Andover Theological Seminary v. Visitors*, 253 Mass. 256, 284: "The duty of the courts touching the determination by visitors acting within their general jurisdiction is to interpose to prevent action contrary to law in the administration of the trust."

IV.

*Respondent's Attacks on the Master's Findings of
Substantial Injury to the Arboretum
Are Without Merit.*

The respondent's effort to avoid the conclusions compelled by the Master's findings, that the move resulted in substantial injury to the Arboretum, is unconvincing. In some respects the Master's findings of injury go wholly unnoted in the respondent's brief. Thus, the Master found that one result of the move was the "marked disadvantage" to taxonomic work resulting from the division of the staff, the separation of the library and herbarium from the living collection, and the division between Cambridge and Jamaica Plain of the wild and cultivated herbarium specimens (par. 210, R. 137). The respondent deals with this aspect of injury simply by ignoring it.

Even where the respondent attempts to challenge the Master, the showing is no more impressive. The respondent dismisses the injury to the facilities at the Arboretum as being "self-evident" (Resp. Brief, p. 81), but somehow irrelevant. The respondent wholly omits to note that the library and herbarium were developed, and found their justification, in the undisputed fact that the value of the living collections directly depended upon them (see pars. 15, 32, R. 63-64, 69-70).

The issue of joint appointments and indiscriminate salary allocations is given similarly inadequate treatment. It does not mitigate the injury to suggest, as the respondent does, that after all, prior to the move the Arboretum bore the entire salary whereas after the move it bore something less (Brief, pp. 81-82). This is no answer for at least two reasons. One of the appointees, the assistant curator, was prior to the move employed and paid only by the Gray

Herbarium, the Arboretum bearing no part of his salary (par. 191, R. 132). And in any event, the assertion that, after the move the Arboretum paid less than it previously had paid, would equally well cover the case where the appointee performed no services whatever for the Arboretum but was paid some part of his salary from Arboretum funds. The Court will not be persuaded that that arrangement would be proper.

The respondent's argument that, inasmuch as the Master found the allocation of 42% of the maintenance expense to the Arboretum to be reasonable, it does not constitute an element of injury, misconceives the issue. The petitioner's contention is not that an allocation of the largest portion of the maintenance expense was itself a breach of trust, as to which the reasonableness of that allocation would be relevant, but rather that the allocation to the Arboretum, whether reasonable or not, was directly occasioned by the move as the consequence of a breach of trust. In the petitioner's view, the trust should be reimbursed for an expense which, but for the breach of trust, it would not have been compelled to pay. This position was clearly stated at page 81 of the petitioner's principal brief, and the respondent does not contest it.*

The respondent's principal challenge, however, is to the facts of injury to the reputation and prestige of the Arboretum resulting from the move.

* The suggestion (Resp. Brief, p. 82) that Article Fifth of the Indenture expressly sanctioned the charge of 42% of the maintenance expense to the Arboretum is simply fanciful. The provision of Article Fifth on which the respondent relies (see Resp. Brief, pp. 70-71) permits a charge to the Arboretum endowment of no more than the ratio of that endowment to the entire property of the Corporation. The Court will not be misled into supposing that the Arboretum endowment at the time of the move, some \$4,000,000 (par. 200, R. 135), constituted 42% of the endowment of the University.

Faced with the Master's unequivocal and logically-developed conclusions regarding the injury to the prestige of the Arnold Arboretum resulting from the removal of the main portion of its library and herbarium to Cambridge, respondent (Brief, pp. 78-87) attempts to discredit these findings through the same type of tortured and inconsistent reasoning processes which it earlier employed to dispute the Master's findings regarding the Corporation's motivation in making the move.

The Master's findings on the injury question are that:

(a) Three elements affect the standing of an arboretum: its living collections, the adequacy of its library and herbarium for research, and its publications (par. 205, R. 136).

(b) Prior to the removal of the main portion of its library and herbarium to Cambridge, the Arboretum had a reputation of its own as a botanical institution, high throughout a period beginning at least as early as 1920 and continuing for more than 25 years thereafter (pars. 30, 36, 39, 204, R. 69, 71, 72-73, 136), a reputation separate and distinct from the reputation of Harvard University or of the other botanical enterprises administered by Harvard (par. 204, R. 136).

(c) As a result of the move of the books, pamphlets, periodicals and herbarium specimens of the Arboretum to the Harvard University Herbarium, these materials are commonly looked upon as those of Harvard rather than those of the Arboretum; and the Arboretum itself has come to be looked upon as an appendage to the Botanic "Department" at Harvard, the prestige of the Arnold Arboretum's library and herbarium has in effect been transferred to Harvard, and the reputation, prestige and standing of the Arboretum have "markedly declined" (par. 206, R. 136) and "have been materially impaired" (ult. conclusion B, R. 143).

Respondent first attempts to refute these findings by attacking the finding (in par. 204, R. 136) that prior to the move of the vast bulk of the library and herbarium of the

Arboretum to Cambridge, the Arboretum had "a reputation of its own separate and distinct from Harvard" (Resp. Brief, pp. 86-87).^{*} The principal basis of respondent's attack is the contention that the finding is inconsistent with the respondent's evidence summarized in the first paragraph of Appendix B to the Master's report and the respondent's evidence, offered but excluded on objection, which is summarized in the fourth paragraph of Appendix B. The evidence in question was offered to show that at times the Arboretum has been referred to as a "Department" or "administratively a department" of the University or that in some other turn of phrase the Arboretum had an intimate association with the University.

There is no inconsistency between the finding, which is directed to the existence of a reputation, and respondent's evidence summarized in Appendix B. That evidence, as discussed above (pp. 9-10, *supra*), shows, at most, that the Arboretum was described, largely in internal University communications, as a "department" of Harvard. No evidence, however, was offered to support respondent's assertion that "these characterizations necessarily had an impact on persons whose views would contribute to a consensus as to the Arboretum's reputation" (Brief, p. 87). Absent such a showing, there is simply no connection at all between the respondent's Appendix B evidence and the finding in question.

Moreover, an argument based on inconsistency must rest on inconsistency between findings, not on the ground that a finding is inconsistent with evidence offered by one party

* Beyond the defects in the respondent's argument as stated, the Court will observe that the finding stated in paragraph 204 is little more than a repetition of findings in paragraphs 30, 36 and 39 (R. 69, 71 and 72-73), to none of which did the respondent object. These findings, the correctness of which is not challenged, would suffice to establish the fact of the long-established reputation of the Arboretum prior to the move.

or the other. In any case where there is dispute about the facts, the findings will be inevitably be inconsistent with some of the evidence, but an argument of inconsistency cannot properly be based thereon. To frame an argument in those terms, as the respondent has really done here, is simply to argue that the finding is unsupported by the evidence. As appears from the Master's summaries in response to Objections 55-58 (R. 233-237), the Master's finding is based on ample direct evidence, which includes testimony both of the petitioner's witnesses Avery, McDaniel and Teuscher, and of the respondent's witnesses Fogg, Howard and Taylor.

The respondent also attempts to give the impression that the Master's findings regarding the reputation of the Arboretum are based only on what "some people . . . thought" (Resp. Brief, p. 83). That the Master has not so based his finding is revealed by his response to respondent's requested law ruling No. 23 (R. 163), in which he correctly paraphrases the law of Massachusetts, as laid down in *Walker v. Moors*, 122 Mass. 501, 504, in stating that:

"[R]eputation with respect to a particular subject requires that the subject have been sufficiently discussed and considered that there is in the public mind a uniform and concurrent sentiment which can be stated as a fact. By the public mind is not meant the mind of the whole public but of that portion of the public which is cognizant of and interested in the matter of inquiry."

Sensing that the Master must surely be sustained in concluding that the Arboretum did, indeed, have a separate reputation, which was both clear and highly favorable, prior to the move of the vast bulk of its assets to the Harvard University Herbarium, respondent is next faced with the task of proving that this reputation has not, as the Master finds, markedly declined. Respondent's only basis, however, for attacking this finding—that as a result of the move of the vast portion of the assets of the Arboretum to the Harvard University Herbarium, these materials are

looked on as those of Harvard rather than of the Arboretum—is to claim, again wrongly, that this is only the view of "some people" who labor "under a misapprehension" and to assert, without any citation of authority, that

"The Corporation cannot properly be charged with having damaged the reputation of the Arboretum because people mistakenly think that it did something it did not do." (Resp. Brief, p. 86).

This ignores the obvious fact that reputation is what the concerned public mind has concluded with respect to a subject, even if the respondent may choose to regard the conclusion as "mistaken".

Respondent also attempts to dispute the conclusion that the Arboretum's reputation has been transferred to Harvard by claiming that this finding is inconsistent with other findings concerning the work which people being paid with Arboretum funds are doing and by pointing to the fact that the total materials of the Arboretum, both in Jamaica Plain and in Cambridge, are still as effective for research as ever. From these facts it concludes, boldly, that "None of the elements which go to make up the reputation of an arboretum have been changed" (Brief, p. 86) (emphasis added). With respect to this claim of inconsistency it should be noted that respondent originally (Obj. 70, R. 174) included the findings in paragraph 215 of the Master's report in its list of findings with which the Master's conclusion as to the decline in the Arboretum's reputation, prestige and standing supposedly conflicts. Respondent's current list of supposedly conflicting findings (Resp. Brief, 84-86), however, omits paragraph 215. This omission is not accidental; for the findings in this paragraph (that the result of the move has been an enhancement of the prestige of the University, which the Master has found was a principal purpose of the move) make almost inevitable the cor-

relative finding in paragraph 206 that the reputation of the Arboretum, on the other hand, has declined.*

Finally, the respondent is driven to making a contention which, simply stated, is that, even if the Arboretum had a separate reputation, and even if such reputation has been transferred to Harvard, the Arboretum has suffered no legal injury because the respondent had no obligation to create a reputation for the Arboretum, and having had no such initial responsibility, had no obligation to protect such reputation from injury or destruction (Resp. Brief, pp. 83-84). With a feigned innocence unworthy of those whose skill in fund raising is almost unmatched, respondent asserts that "the public interest in the knowledge of trees is

* The respondent, in the course of its argument directed to the Master's findings regarding reputation, has again indulged in a distorted presentation of the record by stating (Resp. Brief, pp. 83-84) that "The library and herbarium, both the part located in Jamaica Plain and the part located in Cambridge, are still the library and herbarium of the Arboretum; the books and specimens are all clearly marked with the name 'Arnold Arboretum' ". The sentence is misleading. The word "clearly" nowhere appears in either finding cited by the respondent, and the statement completely ignores the more important factual findings of the Master, found in paragraphs 169 and 170 (R. 125) that (1) "the Arboretum books housed at the Harvard University Herbarium are not identified by the card catalog there as Arboretum books", (2) it "... is not possible to determine [from the card catalog] whether any book in Cambridge is an Arboretum book without going to the shelves and examining the book", (3) "... the card catalog at Jamaica Plain, since the move, lists only books located at Jamaica Plain so that one working at Jamaica Plain cannot determine from the catalog there whether a book not there is in Cambridge," and (4) "the herbarium cases are not, however, marked and one must examine each sheet in a case [some two million in total (pars. 156, 165, R. 122, 124)] to determine its ownership." These facts, revealing a strong tendency to obscure the connection of the assets in the Harvard University Herbarium with the Arboretum, have without doubt been contributing factors to the belief that these assets have become property of the University and thus to the decline in the standing of the Arboretum.

not served by the reputation of the instrumentality through which such knowledge is acquired and disseminated" (Brief, p. 83). This argument, of course, ignores the facts of modern life. It is, more than that, an assertion one hears with disbelief from the trustee of an enterprise intended, as the terms of the Indenture of 1872 make plain, to stand forever as a memorial to the wisdom and benevolence of the donor whose generosity made it possible. Such an assertion does no credit to the ancient lineage or long traditions of Harvard University.

Furthermore, respondent's argument that the Corporation's failure to preserve the reputation, prestige and standing of the Arboretum was no breach of trust because the Corporation had no duty to preserve them misconceives what is at issue. The petitioner contends, and the Master found, that as a consequence of the Corporation's action—taken because it refused to act in the interests of the Arboretum—the injury to the reputation, prestige and standing followed. This can, of course, be true as a matter of fact and legal injury regardless of whether, standing alone, the injury to reputation would itself constitute a breach of trust.

Beyond any of the foregoing considerations, however, one is unable to understand the novel theory of trust law upon which the respondent's assertion is based, that even if the Arboretum did acquire the reputation, prestige and standing which the Master's findings show, the Corporation had no obligation to preserve them (Resp. Brief, pp. 83-84). The trustee of the ordinary private trust of course has no duty to make strikingly large capital gains in the administration of the trust. He will not be surcharged if he does not. But it is too obvious for citation of authority that if, in fact, such gains are realized, they become property of the trust which the trustee has a duty to protect. Reputation, of course, is a species of property, and it is, to say the

least, unclear why a trustee has no obligation to preserve it, even if one were to accept the respondent's contention that the trustee had no duty to develop it.

V.

The Respondent's Argument as to Relief

The respondent does not contend that the Court should not order appropriate relief against the Corporation if the Court determines that the Corporation committed a breach of trust. Respondent does complain, however, of several specific provisions of the decree proposed by the petitioner.

First, the respondent complains that the decree would "strait jacket" the activities of the Arboretum by requiring the headquarters of the Arboretum staff to be located at the Arboretum rather than at the Harvard University Herbarium (Brief, pp. 89-90). Respondent exaggerates the effect of this provision by implying that it would prevent members of the staff from also having offices in Cambridge. This is neither the intent nor the effect of the provision.

Next (Brief, p. 90), respondent criticizes its being required to keep all of the books and specimens at the Arboretum whether or not they "are required or can be put to a useful purpose" and despite what respondent says is a finding that "segregation at Jamaica Plain of a library and herbarium devoted to horticulture might result in more effective work." This is a misstatement of the Master's finding. The finding states that "segregation at Jamaica Plain of a library and herbarium devoted to horticulture from the balance of the library and herbarium *there*" might have enabled more effective work (par. 209, R. 137) (emphasis added). The proposed decree allows such a segregation. Also, returning the books and specimens would remove the "marked disadvantage" resulting from the

separation of the library and herbarium from the living collection, from the division of the Arboretum staff, and from the separation of the wild specimens from the cultivated specimens (par. 210, R. 137). The purpose of this provision in paragraph 6 of petitioner's proposed decree (R. 320-321) is clear; it prevents the Corporation from retransferring the books and specimens to Cambridge and continuing to use the Arboretum as the tool to further the Corporation's own botanical interests.

The respondent complains that, under paragraph 3 of the proposed decree (R. 319-320), the Corporation *must* undertake construction at the Arboretum properly to house the returned library and herbarium (Brief, p. 90). To avoid any possibility that these provisions may be too onerous, the petitioner would have no objection to the addition of a proviso at the end of the paragraph reading as follows: "provided, however, that in the event that the Corporation determines that the library and herbarium of the Arboretum will be housed properly and that the interests of the Arboretum will be best served without such construction, the Corporation may apply to this Court, with notice to the Attorney General, and for good cause shown it will be relieved from the provisions of this paragraph." Surely this provision will satisfy the respondent.

Respondent also attacks requirements that it serve certain reports on an attorney designated by the relators on the ground that the relators are not parties to the case (Brief, p. 90). Certainly the Court has the power to order the Corporation to serve such reports on non-parties. However, since the Corporation does not object to filing such reports with the Court and the Attorney General, the petitioner would be content with the elimination of any requirement that a designee of the relators also be served.

Respondent's main argument as to relief (Brief, pp. 92-95) is devoted to opposing the payment of reasonable

counsel fees out of its general funds. The petitioner submits that there is ample authority for such an order and for an order preventing respondent from paying its own counsel fees and expenses of defending the case out of funds of the Arboretum endowment. The justification for such an order is sufficiently set forth in petitioner's main brief (pp. 82-88).

CONCLUSION

For the reasons stated herein and in petitioner's main brief, petitioner asks that a final decree be entered as proposed by petitioner.

Respectfully submitted,

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No. 6643

ATTORNEY GENERAL, EX REL.

JOHN S. AMES, JR. AL,

VS.

PRESIDENT AND FELLOWS OF
HARVARD COLLEGE

REPLY BRIEF FOR PETITIONER

SUFFOLK COUNTY

FILED UP REGISTER IN CLERK'S OFFICE

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court
FOR THE COMMONWEALTH

OCTOBER SITTING 1965

SUFFOLK COUNTY

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BRIEF FOR PETITIONER

This is a proceeding brought by the Attorney General to redress certain wrongs alleged to have been committed with respect to the Arnold Arboretum, a public charitable trust of which the respondent is the trustee. This brief is filed in support of petitioner's proposed final decree (R. 318-323) which would adjudge the respondent guilty of breaches of trust in the administration by it of the Arnold Arboretum and impose appropriate relief to remedy the breaches and prevent their repetition. The case has been reserved and reported to the Full Court by Mr. Justice Spalding for entry of a final decree upon the report of the Master, Henry E. Foley, Esq., which was confirmed by interlocutory decree entered May 7, 1964.

Also before the Court are the questions presented by the respondent's appeals from interlocutory decrees denying respondent's motions with respect to the Master's report and overruling the respondent's objections to the report. Inasmuch as the respondent is the appellant as to these questions, this brief does not argue these appeals. To the extent necessary, these matters will be dealt with in petitioner's reply brief.

PRIOR PROCEEDINGS

This suit was begun December 4, 1958, and the revised information in equity upon which the case went to trial was filed June 25, 1959. The information charged, in summary, that the respondent, President and Fellows of Harvard College (hereinafter "the Corporation"), in its capacity as trustee of the Arnold Arboretum, violated its duty of loyalty to the Arboretum to act solely with a view to the interests of the Arboretum and committed breaches of certain provisions of the trust instrument pursuant to which the Arboretum was established. The action alleged to constitute this breach of trust was the transfer by the Corporation in 1954 of the bulk of the library books and herbarium specimens of the Arboretum from the historic central headquarters of the Arboretum in Jamaica Plain to the Harvard University Herbarium in Cambridge, a common repository of botanical books and herbarium specimens of various Harvard botanical institutions, with the purpose and effect of aiding Harvard's general botanical interests and improving the standing of the University and with the further effect of severely damaging the Arboretum.

The respondent demurred and moved to strike certain portions of the information. After argument and briefs the demurer was overruled, and with minor exceptions the motion to strike was denied, by order dated November 12, 1959.* The respondent then answered.

* The respondent's appeal from this ruling has apparently been abandoned.

Thereafter, upon the joint nomination of both parties, Henry E. Foley, Esq. was appointed Master by order entered October 30, 1961. Hearings before the Master for the reception of evidence began on March 7, 1962 and concluded on June 1, 1962. The transcript of the hearings before the Master contains 2,996 pages, and during the hearings the Master received in evidence as exhibits thousands of pages of documents. In September, 1962 the parties filed lengthy requests for findings of fact, and two days of oral argument on these proposed findings were held on September 19 and 20, 1962.

The Master then prepared and submitted to the parties his draft report. Pursuant to the rules of the Court, a hearing on the draft report was held on May 14, 15 and 16, 1963. The Master then prepared and submitted to the parties his final report, dated June 19, 1963, which occupies 88 pages of the printed record (R. 56-143), exclusive of the appendices. The respondent filed 93 objections to the Master's report, with respect to many of which the respondent requested summaries of evidence. Petitioner filed no objections. On October 1, 1963, the Master filed with the Court his report, together with a response to the respondent's requests containing the Master's summaries of the evidence. This response, filed with the Court as Appendix F to the Master's report, occupies 86 pages of the printed record (R. 179-264).

The respondent moved on November 29, 1963, to recommit the Master's report for further findings, to require the Master to append to his report a summary of the evidence with respect to certain findings of fact, to require the Master to report to the Court certain evidence or, in the alternative, a summary thereof, and to strike certain portions of the Master's report or summaries of evidence appended thereto by the Master. This motion was denied in its entirety by order made and decree entered January

24, 1964 (R. 313). The petitioner then moved for confirmation of the Master's report. After briefing and argument, the Court, by rulings and order made April 22, 1964 (R. 315-316) and decree entered May 7, 1964 (R. 316-317), confirmed the report with the exception of one insignificant sentence.

On June 1, 1964 the petitioner and the respondent filed motions for entry of a final decree. The respondent's proposed decree would dismiss the information with costs against the relators and obviously proceeds upon the assertion that the Master's report provides no basis upon which relief may be granted. The petitioner's motion asks for entry of a decree with injunctive and other provisions appropriate to the conclusion, which is clearly compelled, that upon the facts found by the Master the respondent has committed breaches of its duty as trustee under the Indenture of March 29, 1872, establishing the Arnold Arboretum.

On September 28, 1964, Mr. Justice Spalding reserved and reported the case to the Full Court.

STATEMENT OF FACTS

The facts were found by the Master after hearing the witnesses and studying the voluminous documentary evidence presented. The witnesses, except for three experts called by petitioner and one called by Harvard, were Corporation members, professors or employees of Harvard, current members of the Committee to Visit the Arnold Arboretum appointed by Harvard's Board of Overseers*, and one witness who had been chosen for consultation by

*The composition and functions of the Board of Overseers and the Visiting Committee are explained in the footnote on page 30, *infra*.

the Corporation as an outside scientist in January, 1953. The documents introduced in evidence were largely taken from the Corporation's files, having been written by Corporation members or by persons connected with Harvard and sent to the Corporation.

The principal issue in the case throughout the trial was whether the Corporation acted consistently with its duty of loyalty to the Arboretum and the great bulk of the evidence was directed to that issue. Also at issue was the question whether the move benefited or injured the Arboretum. The petitioner took the position that the Corporation had not acted with a view to the interests of the Arboretum, but rather with a view to its other general botanical interests, and that the move had substantial adverse effects on the Arboretum. The respondent, on the other hand, took the position that the Corporation's primary motive in making the move was to further the interests of the Arboretum, not the interests of botany generally or anything else. The respondent also took the position that the move of substantially the entire library and herbarium of the Arboretum benefited the Arboretum.

The facts material to the questions presented fall under four heads. First are the facts as to the establishment and development of the Arboretum and as to its status prior to the move (pp. 5-14); second, are the facts as to the move ordered by the Corporation (pp. 14-20); third, the Corporation's purposes in ordering the move (pp. 21-45); and finally, the injury to the Arboretum resulting from the move (pp. 45-49).

Establishment and Development of the Arboretum

The Arnold Arboretum was established under the terms of an Indenture dated March 29, 1872 between the trustees

under the will of James Arnold and the Corporation, a copy of which is included in the Master's Report as Appendix A (R. 144-148). Under the terms of the Indenture, Arnold's trustees transferred to the Corporation \$100,000 in cash and securities to be held by the Corporation "in trust" and "as a separate and distinct fund" for the purpose of applying substantially all of the net income every year (after an accumulation of income had brought the fund to \$150,000)

"to the establishment and support of an Arboretum, to be called the Arnold Arboretum, which shall contain, as far as is practicable, all the trees shrubs and herbaceous plants, either indigenous or exotic which can be raised in the open air at the said West Roxbury, all which shall be raised or collected as fast as is practicable, and each specimen thereof shall be distinctly labeled, and to the support of a Professor, to be called the Arnold Professor, who shall have the care and management of the said Arboretum, subject to the same control by the said President and Fellows to which the professors in the Bussey Institution are now subject, and who shall teach the knowledge of trees in the University which is in the charge of the said President and Fellows, and shall give such other instruction therein as may be naturally directly and usefully connected therewith." (R. 146)

The Indenture further stated that as the entire fund was barely sufficient to accomplish the proposed object "it is expressly provided that it shall not be diminished by supplementing any other object, however meritorious, or kindred in its nature" (R. 146), except that the Corporation should be allowed to obtain from the Arboretum free of cost, to ornament the college grounds, any plants which the Arnold Professor determined could be spared from the Arboretum without injury to it.

In the Indenture, the Corporation acknowledged receipt of the property transferred by Arnold's trustees and agreed "to hold the same, and all future property so received,

upon the trusts herein declared" (R. 147). The Indenture provided that in consideration of the payment, and subject to certain life estates, the Corporation dedicated exclusively to the purpose of the Arboretum 137 acres in West Roxbury (now Jamaica Plain) devised to the Corporation by Benjamin Bussey (par. 13*, R. 62).

In June 1872 Charles Sprague Sargent was appointed by the Corporation as Curator of the Arnold Arboretum and in the next year, when the land described in the Indenture came into the possession of the Corporation, Sargent was appointed Director of the Arnold Arboretum (par. 14, R. 63). In 1879 the principal of the James Arnold Fund, augmented by the accumulations directed in the Indenture, had reached \$150,000 and the Corporation proposed to carry out its obligation under the 1872 Indenture by appointing Sargent "Arnold Professor of Arboriculture" and by giving him as Arnold Professor the care and management of the Arboretum as required by the Indenture (par. 15, R. 63). Before accepting the appointment, Sargent pointed out to the Corporation that the Arboretum was then without either a library or a herbarium and that the Corporation's offer to him did not provide for either. Sargent expressed the view that without a herbarium of specimens of trees and shrubs of the temperate zone and without a library of works of general systematic botany, horticulture and forestry it would be impossible either to carry on the current operations of the Arboretum (which to that point had been largely preliminary) or to make it a center of dendrological investigation and research (par. 15, R. 63-64). The Corporation responded by voting to establish the Arnold Professorship of Arboriculture, to elect Sargent to such Professorship and to appropriate from the income of the Arnold Fund a thousand dollars a year for three years to be expended by the Arnold Profes-

* References to paragraphs (cited "par.") are to the numbered paragraphs of the Master's report unless otherwise identified.

sor on the collection and care of books and to provide specimens for the Arboretum (par. 16, R. 64).

The land of the Arboretum

The original land area of the Arboretum established under the Indenture of 1872 was increased by the dedication by the Corporation in 1894 to the purposes of the Arboretum of an additional 72 acres of Bussey land, and by addition of further parcels of land from time to time so that in 1927 the area of the Arboretum in Jamaica Plain was approximately 250 acres (pars. 25-26, R. 67-68). The land area of the Arboretum as it was originally established, and the addition in 1894, were taken by the City of Boston for park purposes under enabling legislation and leased back to the Corporation on long term leases at the symbolic rental of \$1 per year (pars. 23, 25, R. 66-67, 67-68). Under these leases the premises, to be called the Arnold Arboretum, were leased to the Corporation "upon and for the same trusts, uses and purposes" under which the land had been held by the Corporation prior to the taking. Further provisions of the leases obliged Boston to construct and maintain driveways and to police the grounds, while the Corporation for its part agreed that the Arboretum would be open to the public (par. 23, R. 67).

The first planting of trees in systematic arrangement in the Arboretum was begun in 1885. In time, a collection of approximately 6,500 species and varieties of living trees, shrubs and woody vines was assembled at Jamaica Plain, gathered from the temperate and cooler regions of North America, Europe and Asia. The living collections were particularly rich in varieties from Japan, China, Siberia and the Himalayas, and also included all species of trees, shrubs and vines known to be native to the northern United States east of the Rocky Mountains. Expeditions, in part financed by contributions for the purpose, were sent by the Arboretum

to many parts of the world, including North America, China, Tibet, Cuba, Africa, Europe, Australia, and the South Pacific. In the first 50 years of the Arboretum some 2,500 specimens and varieties of plants were introduced into the United States through its agency and more than half of these were first brought into cultivation anywhere by the Arboretum (pars. 27, 29, R. 68-69). In the course of its development, the Arboretum acquired a worldwide, highly favorable reputation for its living collection and, in particular, for its introduction and demonstration of new species and varieties of plants (par. 30, R. 69).

The library and herbarium of the Arboretum

The development of the library and herbarium of the Arnold Arboretum began even earlier than the acquisition of the living collection of plants and was financed initially by the appropriation voted by the Corporation in 1879 (par. 33, R. 70). Work on the organization of the herbarium was begun in 1880 and continued thereafter. In 1892 Professor Sargent brought back a thousand specimens from Japan, constituting the first Asiatic specimens in the herbarium. The preparation of Professor Sargent's 14-volume work on the silva of North America, published between 1891 and 1902, made necessary the acquisition of a large herbarium and accessions to the herbarium increased (*ibid.*). By 1920 the herbarium contained approximately 177,400 specimens, and at the time of Professor Sargent's death in 1927 it had increased to just short of 300,000 specimens, three times as many as the Corporation left at the Arboretum in 1954 (pars. 33, 165, R. 70, 124). The herbarium was best represented in woody plants of North America, but there were included even in 1927 plants from all parts of the world (par. 33, R. 70). By 1946, after continued acquisitions, the herbarium contained 630,000 specimens, and at the time of the move in 1954, it contained approximately 700,000 speci-

mens (pars. 33, 165, R. 71, 124). Of these about 75,000 were specimens of cultivated plants and 625,000 were specimens of non-cultivated plants (par. 180, R. 128), many of the latter being specimens of genera or species growing or capable of growing in the Arboretum (par. 180, R. 128-129). The presence of wild specimens related to the living collection and to cultivated specimens is important from the standpoint of botanical research and bears heavily on the quality of a herbarium (par. 181, R. 129). Like the living collections, which were largely confined to trees and woody shrubs and vines (par. 28, R. 68), the herbarium was largely limited to specimens of woody plants and contained proportionally little herbaceous material (par. 35, R. 71). The specimens acquired by the Arboretum were in some cases purchased with funds held for the Arboretum or, in others, given for its purposes and were acquired with the knowledge and authorization of the Corporation which held them subject to the Indenture of 1872 for the purposes of the Arboretum (pars. 202-203, R. 135).

The herbarium of the Arnold Arboretum early acquired and long enjoyed a reputation as an outstanding collection of specimens of woody trees and shrubs (par. 36, R. 71). The publications of the Arnold Arboretum beginning at least as early as the turn of the century contributed greatly to the prestige of the Arnold Arboretum and the herbarium was an essential tool for much of the research underlying those publications (*ibid.*). The development of the herbarium of the Arnold Arboretum was an essential element in the development of the reputation of the Arboretum, which long prior to 1945 was that of an outstanding center in this country, and one of the three principal centers in the world, for the study of woody plants (pars. 36, 205, R. 71, 136).

The library of the Arnold Arboretum developed out of books acquired by Professor Sargent beginning in 1873 for

assistance in arranging the trees and the living collection of the Arboretum (par. 38, R. 72). By 1892 Professor Sargent had accumulated a collection of 10,000 books and pamphlets on dendrology, systematic botany, silviculture, forestry and geography, which in that year he gave to the Corporation for the Arboretum. At the same time Sargent gave \$10,000 to the Corporation for the purchase of additional books for the Arboretum library (*ibid.*). Thus, the Arboretum library had more books in 1892 than it had after Harvard moved the bulk of the library in 1954 (par. 165, R. 124). In 1919 the Corporation accepted a bequest of \$5,000 from Professor Sargent's wife and in 1928 it accepted a bequest of \$20,000 from Professor Sargent, the income from both bequests to be used to increase the library of the Arboretum (par. 38, R. 72). By 1909 the library contained more than 20,000 volumes and at the time of Sargent's death in 1927 the library contained about 37,000 volumes and 8,600 pamphlets, and in 1954, approximately 49,000 volumes and 15,000 pamphlets (*ibid.*). The acquisitions resulted from gifts and from purchases with funds held for the purpose of the Arboretum and were made with the knowledge and authorization of the Corporation, which immediately prior to the move in 1954 held the books subject to the Indenture of 1872 for the purposes of the Arboretum (pars. 38, 202-203, R. 72, 135).

As long as forty years ago the library of the Arboretum had acquired a reputation as one of the greatest libraries in the world in the field of woody plants. Second only to the British Museum it contained the largest collection of books relating to plants published in the 15th and 16th centuries. By the time of Sargent's death in 1927 the library constituted the most complete collection of printed matter assembled anywhere bearing on the woody plants of the world (par. 39, R. 72). The resources of a library, so the Master found, are essential to most areas of botanical research, and the library of the Arnold Arboretum was an

essential element in the development of the Arboretum's international reputation for scientific research related to woody plants (pars. 39, 179, R. 72-73, 128).

Prior to 1892 the books and specimens of the Arboretum were temporarily housed in Brookline awaiting provisions for suitable accommodations on the grounds of the Arboretum itself (par. 40, R. 73). In that year, \$30,000 was given to the Corporation to finance the erection of a building on the grounds of the Arboretum to house the herbarium and library. As soon as the building was completed, the library and herbarium were placed in the building (*ibid.*).

In 1901 and 1902 the attic of the building was fireproofed at the expense of a donor, and, in 1908 the building was enlarged by the construction of a four-story fireproof wing to house the herbarium (par. 40, R. 73). As a result of the addition in 1908 the herbarium of the Arboretum in the Administration Building had a capacity for approximately 600,000 specimens housed in steel herbarium cases (par. 41, R. 73). The total capacity of the library in 1945 was in the neighborhood of 58,000 volumes and 16,000 pamphlets, or approximately 20% more than the number of books and pamphlets housed there (*ibid.*). The Master found that in 1954 the library was not overcrowded with books or pamphlets, although he found also that storage conditions at the Arboretum were not satisfactory and that there was a serious fire hazard (par. 41, R. 73-74). These conditions principally reflected the fact that the total number of herbarium specimens exceeded by approximately 15% the storage capacity available in steel herbarium cases (see pars. 41, 165, R. 73, 124).

As noted, Master found that the resources of a library and herbarium are essential to most areas of botanical research (pars. 36, 39, 179, R. 71, 72-73, 128). They are also important elements in the standing of an arboretum and

the library and herbarium of the Arnold Arboretum were essential to the development of the reputation of that institution (pars. 36, 39, 205, R. 71, 72-73, 136). As Professor Sargent informed the Corporation in 1924 (par. 32, R. 70):

"The experience of the last fifty years shows that *such an institution must consist of three departments:*

"First, *the herbarium; second, the library; third, the collection of living trees and shrubs.* The third department is chiefly for the benefit of the general public and for persons interested in gardening and living in climates similar to that of New England. It was visited probably by nearly a million persons during the year, and the number of visitors is constantly increasing. It is through the third department that the Arboretum has greatly enriched the gardens of the northern states and of many European countries. *The value of this department is dependent on the first department or collection of dried plants, and this is dependent on the second department, the collection of books.*" (Emphasis added.)

The endowment of the Arnold Arboretum

The property held by the Corporation for the purposes of the Arboretum consists of the endowment fund, the land, buildings and living collections in Jamaica Plain, land and living plants in Weston and the library and herbarium (par. 200, R. 134-135). As of 1954 the Arboretum had an endowment of more than \$4 million (*ibid.*). While many of Harvard's botanical institutions were in poor financial condition, the Arboretum was clearly not one of these institutions (pars. 53, 57, 99, 153, R. 78-79, 80, 96, 121). In 1944, at the time of the Bailey Report, hereinafter discussed (see pp. 21 ff., *infra*), the endowment and income of the Arboretum equaled the endowment and income of the other eight botanical agencies connected with Harvard (par. 57, R. 80). As the Master specifically found, the Arboretum endowment was sufficient to finance the construction of an

addition to the Administration Building at the Arboretum adequate to house the entire library and herbarium and to relieve whatever unsatisfactory housing conditions might have existed (par. 153, R. 121).

The Move

The Corporation, having formally voted in January 1953 to move the bulk of the library and herbarium of the Arboretum to Cambridge (par. 140, R. 115), completed the Harvard University Herbarium in February 1954 (par. 155, R. 121) and moved 57,000 of the 64,000 books and pamphlets in the Arboretum library and 600,000 of the 700,000 specimens in the Arboretum herbarium to the Harvard University Herbarium in June and July 1954 (par. 165, R. 124). At the same time the 45,000 books and pamphlets and 1,375,000 herbarium specimens of the Gray Herbarium were moved to the Harvard University Herbarium, as were the herbarium of the New England Botanical Club, the Oakes Ames Orchid Library and Herbarium, and the paleobotanical collections of the Botanical Museum (par. 156, R. 122). The Harvard University Herbarium is located on Divinity Avenue in Cambridge between the Museum of Comparative Zoology and the Farlow Library and Herbarium and is also adjacent to the Biological Laboratories, to all of which it is physically connected (par. 155, R. 122). The combined library and herbarium in the Harvard University Herbarium is one of the best in the world from the standpoint of equipment, physical conditions and the range of material (par. 172, R. 126) and constitutes one of the great libraries and herbaria in the world (par. 215, R. 139). What the Corporation required the Arboretum to contribute to this "world famous scientific center identified with Harvard" (par. 215, R. 139) was the bulk of its staff, six-sevenths of its library and herbarium, and substantial sums annually for maintenance.

The move of the staff of the Arnold Arboretum

Before the move the headquarters of the Arboretum and of the Arnold Professor were located at the Arboretum, and there were present at the Arboretum a librarian of the Arboretum library and a curator of the Arboretum herbarium (pars. 22, 47, 173, R. 66, 77, 126).

Since the move in 1954, the Arnold Professor's headquarters have been located at the Harvard University Herbarium in Cambridge although he spends about half his time at the Arboretum (par. 174, R. 126). Of the staff members, only 6 out of 14 now have Jamaica Plain as their headquarters (*ibid.*). There is no librarian or curator located at the Arboretum; they were moved to the Harvard University Herbarium in Cambridge and spend only a small portion of their time at the Arboretum (par. 173, R. 126).

The move of the library of the Arnold Arboretum

Preparation for the move of the library involved the selection of the relatively few books to be left at the Arboretum, for unless a book was specifically marked for retention at the Arboretum, it was taken to the Harvard University Herbarium (par. 164, R. 124). After the books had largely been selected, the Arnold Professor prepared a recommendation as to the types of books to be retained at the Arboretum, and, as he was required to do under the Corporation's resolution of January, 1953, discussed this with the Harvard University Librarian, who quickly approved it without change (pars. 157, 158, R. 122). On May 17, 1954, the Arnold Professor appeared before the Corporation and discussed the recommendation, which was approved by the Corporation (par. 161, R. 123).

The librarian of the Arboretum, who was largely responsible for the selection, and the Arnold Professor, who was ultimately responsible under the Corporation's resolution, examined the library of the Gray Herbarium in the early spring of 1954 and became aware of which Arboretum books were duplicated at the Harvard University Herbarium (par. 177, R. 127). This information was the basis for the selection of the books to be left at the Arboretum, books duplicated in the Gray Herbarium being left at the Arboretum because they were not needed at the Harvard University Herbarium (pars. 176, 177, R. 127). More than one-half and possibly some 80% of the 5,000 bound volumes left at the Arboretum were duplicates left for that reason (par. 176, R. 127). In addition, some 2,000 Arboretum books have been returned to the Arboretum from the Harvard University Herbarium since the move (par. 167, R. 124), not, however, because there was any need for them at the Arboretum but because they too were duplicates and not needed in Cambridge (pars. 176, 177, R. 127). While there was no evidence that members of the Corporation were personally aware of the basis of selection (par. 178, R. 127-128), there is no doubt that the Arnold Professor, as the Corporation's agent designated by the Corporation's resolution, was aware of this and was acting for the Corporation in making the selection (pars. 141, 158, 161, R. 115-116, 122, 123).

The 57,000 books and pamphlets moved to the Harvard University Herbarium were physically integrated into the library of the Gray Herbarium (pars. 165, 168, R. 124, 125). Identification of Arboretum books is no longer possible without removing the books from the shelves and examining the book-plates inside the books or, as to books newly bound, by noting the embossed name "Arnold Arboretum" on the spine (par. 168, R. 125).

The library card catalogue at the Harvard University Herbarium does not identify Arnold Arboretum books (par. 169, R. 125). It does show whether a book is located at Cambridge or Jamaica Plain since it is a complete catalogue of all books at the Harvard University Herbarium and the Arboretum (*ibid.*). However, the catalogue at the Arboretum lists only books located there; it does not list the Arboretum books at the Harvard University Herbarium (*ibid.*). Thus, one working at the Arboretum has no way of determining the Arboretum books at the Harvard University Herbarium.

Since the move, the acquisition of books for the library of the Arboretum, whether the books were to be located in Cambridge or Jamaica Plain, has been limited to books relating to plants of the Old World (par. 197, R. 134), although the Arboretum living collection includes all woody plants native to large portions of the United States (par. 27, R. 68). Very few accessions have been made for the Arboretum at Jamaica Plain. Out of 608 acquisitions of books with Arboretum funds in 1957 and 1959, only 12% of such books were for deposit in the Arboretum library at Jamaica Plain (par. 199, R. 134). The remaining 535 acquisitions were for the Harvard University Herbarium (*ibid.*).

The move of the herbarium of the Arnold Arboretum

Before the move, the Arnold Professor prepared a recommendation as to the herbarium specimens to be retained at the Arboretum, and in compliance with the Corporation's resolution of January 19, 1953, he consulted Mr. Robbins, the Director of the New York Botanic Garden (par. 159, R. 122). The recommendation recited, just as the Corporation

resolution recited, that the move was "in the best interests of the Arnold Arboretum" (par. 159, R. 123). Robbins insisted that this recital be deleted before he signed the recommendation and the Arnold Professor shortly thereafter informed the Corporation of this and of Robbins' view that the move was not in the best interests of the Arboretum (pars. 159, 161, R. 123). Nevertheless, the Corporation approved the Arnold Professor's recommendations (par. 161, R. 123).

The specimens to be retained were selected and only 100,000 specimens were retained (par. 165, R. 124). Approximately 600,000 were taken to the Harvard University Herbarium (*ibid.*), and there they were integrated with the 1,375,000 specimens of the Gray Herbarium in several hundred steel cases (pars. 156, 170, R. 122, 125). They are arranged according to a recognized system so that both Arnold and Gray specimens are intermingled in any particular case (par. 170, R. 125). The specimen sheets are stamped "Arnold Arboretum" or "Gray Herbarium" but the steel cases are not marked and one must therefore examine some two million sheets to determine the Arboretum specimens located in the Harvard University Herbarium (*ibid.*).

Of the 100,000 specimens left at the Arboretum, some 75,000 are specimens of cultivated plants and 25,000 are specimens of wild plants (par. 180, R. 128). More than one-third of the total are of no current interest to the Harvard University Herbarium staff (pars. 165, 180, R. 124, 128).

Almost all of the specimens of wild plants, although they are important to botanical and horticultural research and contribute importantly to the quality of a herbarium, were taken from the Arboretum (par. 181, R. 129). Except for specimens in two categories of no current interest, only

5,000 wild specimens were left at the Arboretum, and a substantial number of wild specimens of genera or species growing at the Arboretum were taken away (par. 180, R. 128-129). Again, while members of the Corporation may not have been personally aware of this removal of wild specimens (par. 182, R. 129), there can be no question that it was the trustee's designated agent who performed the act (par. 141, R. 117).

As with the library, accessions of specimens since the move by the Arboretum have been limited to specimens of Old World plants while accessions of New World plants have been assigned to the Gray Herbarium (par. 197, R. 134).

The use of Arboretum funds to house and maintain the Arboretum collections in the Harvard University Herbarium

Since July 1, 1954, the Arboretum has borne 42% of the annual cost of maintaining the Harvard University Herbarium (par. 185, R. 129). The balance of the cost has been borne by the Gray Herbarium (38%), the Botanic Museum (10%), and the Faculty of Arts and Sciences (10%) (*ibid.*). The allocation to the Arboretum was determined in 1955 by the University's Department of Buildings and Grounds on the basis of information supplied by the Arnold Professor and the Director of the Gray, respecting the space in the Harvard University Herbarium occupied by the Arboretum (par. 185, R. 129-130). In determining the square footage of Arboretum occupancy of the building, the library and herbarium space were treated as being equally occupied by the Arboretum and the Gray, without an attempt to calculate actual occupancy (par. 186, R. 130). On the express assumption that a reasonable judgment as to the proportionate amount of space used by the Arboretum and the

Gray could be taken as the basis for an allocation of space, rather than an actual physical measurement which the Master found would be impracticable, the Master found the 50-50 division of space reasonable (par. 187, R. 130).

As noted, the former librarian of the Arboretum and its herbarium curator were shifted to the Harvard University Herbarium with the move of the library and herbarium (par. 173, R. 126). Beginning in the fiscal year 1954-55, they were appointed, respectively joint librarian and joint curator of the Arboretum and the Gray, and a former staff member of the Gray was appointed joint assistant curator of the herbaria of the Gray and the Arboretum (par. 189, R. 131). During substantially all of the period of the joint appointments of the librarian and the curator, the portion of the salary of these two appointees paid by the Arboretum has been more than 50%, although there is no evidence that either divided his time between Gray and Arboretum specimens or books in the proportions of his salary allocation between the Gray and the Arboretum (pars. 191, 198, 194, R. 132). At the time of the move, the herbarium of the Arboretum had only half as many specimens as the herbarium of the Gray, and accessions to the Gray Herbarium since the move have been approximately two and one-half times as numerous as herbarium accessions to the Arboretum (par. 192, R. 132). No consideration was ever given to apportioning the curator's salary on the basis of the respective numbers of Arboretum and Gray specimens housed in the Harvard University Herbarium (par. 193, R. 132).

The Master concluded that the basis on which salary allocations of joint appointees was made was not clear (par. 195, R. 132). He found further that, if the respondent has the burden of justifying the allocation, no justification has been shown, and also that if the petitioner must affirmatively show a loss to the Arboretum or a diversion of its funds, the showing has not been made (par. 195, R. 132-133).

The Corporation's Motive and Purposes in Ordering the Move

This section of the brief will deal with the purposes of the Corporation in taking the action just described with respect to the Arboretum property. Was this action taken with a concern for the interests of the Arboretum or was it taken to further Harvard's own botanical interests and to increase Harvard's prestige? This is the crucial question in the case and the Master's findings leave no doubt as to the answer. The facts are overwhelming that throughout the period the Corporation's purpose was unwavering—to move the Arboretum library and herbarium to the Harvard University Herbarium so that they could be used to promote the science of botany at Harvard from an overall standpoint rather than the interests of the Arboretum and to promote the standing of the University in the botanical field.

The Bailey Report

A consideration of the Corporation's purposes must begin, as did the Master, with the Bailey Report, for its approval of that Report represented the Corporation's initial determination to combine the library and herbarium of the Arnold Arboretum with the libraries and herbaria of the other botanical agencies.

In 1944 Professor Irving Bailey, who had volunteered for the task, was requested by the Provost of the University, Professor Paul Buck, to make as complete a study as possible of the "total botanical situation of the University" (par. 58, R. 81). President Conant of the University had earlier suggested to the Provost that such a study be made (*ibid.*).

The principal institutions which made up the "total botanical situation" at Harvard were, in addition to the

Arnold Arboretum, the Gray Herbarium, the Farlow Library and Herbarium, the Botanical Museum, and the Harvard Forest (par. 52, R. 78).

The Gray Herbarium, located in Cambridge adjacent to the site of the former Botanic Garden, was engaged in systematic botany or taxonomy (the classification of plants and the study of their relationships) in the field of phanerogamic or flowering plants. In 1944 its resources were a herbarium of 1,300,000 herbaceous specimens, a library of 43,000 books and pamphlets, and an endowment yielding an income covering only two-thirds of its annual operating cost. The deficit was covered by advances from the University (par. 53, R. 78-79).

The Farlow Library and Herbarium, which had developed out of the researches and collections of Professor Farlow, was, like the Gray Herbarium, engaged in taxonomy, but in the field of cryptogamic plants (fungi, algae, mosses, etc.). The Farlow Library and Herbarium was also housed in Cambridge. In 1944 its resources were a large herbarium, a library of 36,000 volumes, and an endowment yielding a restricted income which was slightly less than the annual cost of its operation and which prevented any large volume of outstanding research. In 1944 it was evident that the income available to the Farlow was inadequate for its future survival as an independently housed and administered institution (par. 54, R. 79).

The Harvard Forest at Petersham, Massachusetts, had a small endowment yielding an inadequate income capable of supporting only the director and one assistant as members of the scientific staff. During the decade preceding 1944 the Harvard Forest had led a precarious existence, dependent upon annual gifts, transfers of salaries to other institutions and other emergency measures for survival (par. 56, R. 80).

The Botanical Museum, located in Cambridge, included a number of botanical collections, including the famous collection of glass flowers, a collection of economic plants, a collection of plant fossils, the extensive economic botanical collection of Professor Oakes Ames, his herbarium of economic plants, an orchid herbarium, and a library of orchidology. Its resources yielded an income equal to less than half its cost of operations, the balance of the cost being made up by University expenditures for building maintenance and by annual sums in excess of \$10,000 in total from the Biology Department, the Bussey Institution, and the Arnold Arboretum, for the salary and research budget of Professor Mangelsdorf, the Assistant Director of the Museum (par. 55, R. 79-80).

On the other hand, the Arnold Arboretum in 1944 had an endowment and income equal to the combined endowments and income of the other eight botanical institutions affiliated with Harvard. Its endowment in 1944 was approximately \$3,000,000, with a further \$500,000 in prospect, and its endowment income exceeded its annual expenditures. In addition, the Arboretum had received in the previous decade annual gifts averaging about 10% of its annual income. Furthermore, its income was used to contribute annually \$2,800 paid to the Superintendent of the Atkins Garden in Cuba, \$2,500 toward the salary of the Assistant Director of the Botanical Museum, and two-thirds (or \$8,000) of the salary of Professor Merrill as Administrator of Botanical Collections (par. 57, R. 80).

Professor Bailey's study resulted in a report entitled "Botany and its Applications at Harvard", submitted to the Provost in June 1945, commonly referred to as the Bailey Report (par. 59, R. 81). The Bailey Report pointed out what it described as the uncorrelated development of the several institutions concerned with botany during a period from 1870 to 1930, their isolation from each other,

the lack of uniformity in salary and other policies, the antagonisms and disagreements between them and a resulting duplication of research and of herbarium and library facilities (par. 62, R. 82). The Report made sweeping proposals for the reorganization of botany at Harvard (par. 63, R. 82).

First, the Report suggested the establishment of two so-called Institutes, for administrative and budgetary purposes, each under its own Chairman (par. 64, R. 82). One of the Institutes, denominated the "Institute of Research in General Plant Morphology", was to include the institutions and fields of research dependent upon accumulations of preserved material, such as taxonomy, phytogeography (the study of fossil plants), comparative anatomy, and the descriptive aspects of economic botany. The specific institutions or collections recommended to be included in the Institute for Research in General Plant Morphology were the Gray Herbarium, the Earlow Library and Herbarium, the herbaria, library and collections of the Botanical Museum, and that part of the Arnold Arboretum consisting of its library and herbarium, which the Report proposed be renamed "The Sargent Library and Herbarium" (*ibid.*).

The other Institute recommended to be established in the Report, denominated the "Institute for Research in Experimental and Applied Botany", was to include the institutions and fields of research concerned with plant genetics (plant heredity), plant physiology (the functions of living plants), horticulture, silviculture, and experimental aspects of economic botany. This Institute was to include the Atkins Institution, the Botanic Garden, the Harvard Forest, the Bussey Institution, the Cabot Foundation, and the grounds and living collections of the Arnold Arboretum and, until disposed of (as the Report recommended), the Case estates in Weston which consisted of more than 150 acres of land given for the purposes of the Arnold Arboretum (par. 64, R. 82-83).

Second, the Bailey Report recommended that all botanists of professorial rank should receive salaries equivalent to those paid in the Faculty of Arts and Sciences in the University, which included the Biology Department, and proposed an arrangement, thereafter commonly referred to as the so-called "*quid pro quo*", under which one-half of each salary was to be paid by the University and the remaining one-half by one or more of the botanical institutions through the Institutes (par. 66, R. 83).

Third, the Report, after taking the position that the maintenance of five separate and overlapping herbaria and libraries in the same general field was wasteful and inefficient, recommended that all five libraries and herbaria, including the library and herbarium of the Arnold Arboretum, should be combined and housed in a central building in the closest possible proximity to the biological laboratories in Cambridge (par. 67, R. 83).

Fourth, the Report in an appendix analyzed in detail the extent of apparent duplication in the various botanical libraries and recommended that duplicates be disposed of (par. 70, R. 84).

The Bailey Report contained little discussion of the Indenture of 1872 and did not state whether the Indenture established a trust (par. 74, R. 85). In the course of the Report, in considering the possibility of an abandonment of living collections of the Arboretum, the Report characterized the Arboretum as the "goose that lays the golden eggs" and recommended against abandonment of the living collections for these and other reasons (*ibid.*).

The aim of the Bailey plan was to effect a reorganization of Harvard's botanical resources through a formulation of broad plans for the promotion of the science of botany by eliminating waste and inefficiency in the various botanical institutions (par. 71, R. 84). In recommending the combination of libraries and herbaria, including the library and

herbarium of the Arnold Arboretum, the Bailey Report aimed in important part at increasing Harvard's prestige and enabling Harvard to assume leadership in the botanical field (par. 72, R. 84). The report contemplated that the combination of libraries and herbaria would give to the resulting agency a prestige comparable with that of the larger European herbaria (*ibid.*).

It was Professor Bailey's view that the accomplishment of the objectives of the Report depended on the recommended unification of the botanic libraries and herbaria, including those of the Arnold Arboretum and the Gray Herbarium. Indeed Professor Bailey went so far as to express the view that "the future of Harvard's botany" depended upon the recommended unification (pars. 73, 90, R. 84-85, 90-91).

The recommendations of the Bailey Report affecting the Arnold Arboretum were not made primarily to further the interests of the Arboretum (par. 75, R. 85).

The Report won the favor of Provost Buck, who wrote a foreword to the Report which concluded with the following passage (par. 61, R. 81):

"What we are primarily concerned with is the health and vigor of Botany itself and what Harvard with its particular set of resources can contribute best toward this central aim. The time has come, it seems to me, when this central aim must be clearly stressed and when each part must constantly be assessed in terms of whether it is contributing toward or detracting from the strength of the whole. I trust this point of view will govern the deliberation upon which we are embarking."

Provost Buck recommended the adoption of the recommendations of the Bailey Report to President Conant on the ground that they would aid botany at Harvard (par. 77, R. 85). President Conant favored the plan after discussion with the Provost and prior to its submission to the Corporation (*ibid.*).

The Bailey Report was first submitted to the Corporation by President Conant on October 15, 1945 with the statement that the Report seemed to have the support of all the botanists and that he himself believed the plan would improve botany at Harvard (par. 78, R. 86). Although no formal vote was taken, it was the sense of the meeting that the recommendations contained in the Report ought to be approved (*ibid.*). On January 7, 1946, the Corporation formally voted approval in principle of the reorganization of botany contained in the Bailey Report and also voted to authorize the Provost to implement the recommendations of the Report, authorized the raising of a fund of up to \$1,000,000 for a central botanical building to house, among other things, the combined libraries and herbaria, and authorized the sale of duplicate botanical books and surplus equipment, the proceeds of which were to be added to the building fund (par. 81, R. 87).

In approving the Bailey Report the Corporation had as its purpose the solution of the problems of botany, and the promotion of the science of botany, in the University. The plan was presented as a plan for the over-all benefit of botany or, as it was sometimes put, botany as a whole at Harvard. The Corporation was of the opinion that combining the libraries and herbaria would contribute significantly to Harvard's resuming an outstanding position in the field of botany and would improve Harvard's prestige. No member of the Corporation expressed the view that the provisions of the Bailey Report that affected the Arboretum should be considered only in terms of the interests of the Arboretum, and the Corporation did not obtain, prior to the vote of January 7, 1946, any legal advice with respect to the soundness of the recommendations contained in the Report (par. 83, R. 87-88).

Implementation of the Bailey Report

Acting upon the authorization voted by the Corporation on January 7, 1946, the Provost recommended as Chairmen of the two Institutes Professor Bailey and Professor Mangelsdorf of the Botanical Museum (par. 84, R. 88). The nominees, however, delayed accepting their appointments until Professor Merrill, the incumbent Arnold Professor and Director of the Arboretum, had been subjected to their powers as chairmen (par. 85, R. 88). This was accomplished by an agreement of April 4, 1946, which left Professor Merrill with his titles until July 1, 1948 or his earlier resignation but stripped him of the authority associated with them, leaving him free to exercise only such powers as might be delegated to him by the Chairmen, and then only so as to promote the reorganization of botany proposed in the Bailey Plan (par. 85, R. 88-89). The agreement further provided that if the arrangement contemplated failed to function effectively, Professor Merrill would relinquish even his title as Director at any time upon the decision of the Chairmen in consultation with the Provost (*ibid.*).*

The agreement, so the Master found, was suggested by the Provost in carrying out the authorization to him by the Corporation to proceed with implementation of the Bailey Report (par. 86, R. 89). The Provost's action was known and approved by President Conant (par. 87, R. 89).**

* As the Master noted, in reference to this agreement, the Corporation, contrary to the Indenture of 1872, has committed the care and management of the Arboretum to others than the Arnold Professor even when there was an incumbent in the Arnold Professorship (par. 221, R. 141).

** While there was no evidence that any other member of the Corporation was personally aware of this agreement, or that the Corporation "expressly" authorized it (par. 87, R. 89), there is no question that Provost Buck, the Corporation's designated agent in the implementation of the Bailey Report (see page 27, *supra*), suggested and approved it as part of his duties in implementing the Report (par. 86, R. 89).

Professor Merrill resigned as Director of the Arnold Arboretum effective July 31, 1946 and was succeeded as Director by Professor Karl Sax (par. 88, R. 89). Professor Merrill retained his title as Arnold Professor until his retirement in 1948 (*ibid.*). The office was then vacant for six years until the appointment, effective February 1, 1954, of the present incumbent, Professor Howard (par. 21, R. 66).*

In early 1946 the Provost appointed a committee to consider plans for the proposed new building and the allocation of space in it among the various institutions (par. 89, R. 89). However, because of the post-war inflation the plans required continuous revision to accommodate the proposed building to the \$1,000,000 fund authorized to build it (*ibid.*). During this period of delay, which extended for several years, pronouncements by Professor Buck, Bailey and Mangelsdorf in official annual reports, in which President Conant concurred, showed their belief that the important recommendations of the Bailey Plan could not be implemented until the central building was completed and that a failure to construct it promptly would be extremely harmful to botany at Harvard. Professor Bailey, for example, expressed the view that if the recommended changes in the "morphological area" (which included the library and herbarium of the Arboretum) were deferred too long "the efficiency of Harvard's botany and its prestige in this and other countries will be seriously impaired." In a later report Professor Bailey expressed the view that "many of the most vitally important recommendations" of the Bailey Report "cannot be implemented until the various libraries, herbaria and other collections and their staffs are housed in close proximity to the Biological Laboratories." Professor Mangelsdorf, in a report, said that "from the standpoint of the welfare of the University as a whole, a certain degree of integration is not only highly

* During 12 of the 27 years between the death of Professor Sargent in 1927 and the move in 1954 the Corporation permitted the Arnold Professorship to stand vacant (par. 221, R. 141).

desirable but virtually essential." Provost Buck expressed the view, with which President Conant also agreed, that the efficiency of Harvard's botany and Harvard's prestige would be seriously impaired if the implementation of the Bailey Plan were deferred too long (par. 90, R. 90-91).

The Coordinating Committee Report and the Corporation's adoption of the view that the Arboretum was a tool to be used to benefit botany as a whole and the over-all interests of the University

Because of these firmly held convictions, the President and the Provost found "hardly comprehensible" the substantially unanimous objections to the application of the Bailey Report to the Arboretum which were voiced beginning in October 1949 by the Overseers' Committee to Visit the Arboretum (par. 91, R. 91-92).^{*} The objections raised were directed to various aspects of the Bailey Report, particularly the proposed removal to Cambridge of the Arboretum library and herbarium. Provost Buck met with a subcommittee of the Visiting Committee and thereafter, with President Conant's approval, referred the complaints to the Coordinating Committee of the Board of Overseers

^{*} The Board of Overseers is a body of 32 men, the President and Treasurer, ex officio, and 30 others elected by ballot of all graduates of the University, which possesses certain powers of review over major actions taken by the Corporation, including appointments to the Corporation and to teaching and administrative positions for more than one year. The Board also performs certain visitorial functions in inquiring into the conduct of various units. As an aid in the performance of its visitorial function, the Board appoints Visiting Committees consisting of an Overseer as Chairman and from five to twenty additional members who usually are not directly connected with the University (pars. 3-4, R. 57). The Arboretum Visiting Committee comprised approximately twenty-five persons during the period here in question (par. 91, R. 92).

on the Biological Sciences, composed of the chairmen and Overseer members of the Visiting Committees in the biological field and then under the chairmanship of Mr. Walter Edmonds (*ibid.*). Even before Mr. Edmonds began his investigation, Provost Buck told him that the Bailey Plan was good for Harvard and botany as a whole at Harvard (par. 92, R. 92).

In the course of his investigation Mr. Edmonds heard statements in opposition to the Bailey Plan from, among others, Professor Merrill, then Arnold Professor Emeritus; from Professor Sax, then Director of the Arboretum; and from Professor Oakes Ames, Professor Merrill's predecessor in the Arnold Professorship. Statements in support were received from Professor Howard, the present Arnold Professor but at that time a botanist on the staff of the Biology Department, from Professors Bailey and Mangelsdorf, and from others (par. 93, R. 93).

In January 1950 the Coordinating Committee asked the Corporation to retain independent counsel for the Committee, Edmonds not knowing that the Corporation had not previously obtained legal advice with respect to the plan but believing it impossible for the Committee to write a report without advice from counsel not serving as counsel for the Corporation (par. 95, R. 93-94). Alfred Lowell, Esq., who was retained by the Corporation for this purpose, rendered an opinion in March 1950 which concluded that the proposed removal of the Arboretum library and herbarium was not improper, but pointed out that insofar as the January 7, 1946 resolution of the Corporation authorized the application of the proceeds of sales of duplicate botanical books and surplus real estate to the building fund it ought to be rescinded. The Lowell opinion was discussed by the Corporation at its meeting of April 3, 1950, at which time the Corporation voted to delete from the 1946 resolution the provisions recommended to be deleted by the opinion (pars. 95-96, R. 94).

After receipt of the Lowell opinion and the completion of Mr. Edmonds' investigation, the Coordinating Committee prepared a report to the Board of Overseers, which was unanimously approved by the Board at a meeting in May 1950. President Conant and Treasurer Cabot were present at the meeting and, as members of the Board, voted to approve the report, the President strongly opposing the suggestion of Mr. Edward Weeks, chairman of the Arboretum Visiting Committee, that an attempt be made to meet the objections raised by his Committee (par. 97, R. 94-95). The report itself, after reviewing the background of the complaints, concluded that with a single immaterial exception the objections raised by the Visiting Committee were without justification (par. 98, R. 95). The major premise underlying the conclusions of the Coordinating Committee report was stated in the report in the following terms (*ibid.*):

"The Coordinating Committee believe that the present controversy is rooted in two opposed and apparently antagonistic schools of thought regarding the position of the Arboretum, and that of the other botanical research institutions, in the educational and administrative structure of the University.

"The Arboretum can either be regarded as an independent institution, a Corporate entity, of which the President and Fellows happen to be trustees, or as an integral department of the University, separately endowed, it is true, but a tool to be used in the development of botany as a whole and in the overall interests of the University. The Coordinating Committee believe the second to be the proper concept."

The report stated further that the sole criterion of the proposed move of the Arboretum library and herbarium should be whether it would further the advance of botanical knowledge without impairing the usefulness and vigor of horticultural activity at Jamaica Plain and that if

the move strengthened botany as a whole within the University, it would inevitably react to the welfare of the Arboretum (par. 98, R. 96). The Committee report firmly expressed the view that a failure to construct the central building, and to move to it the libraries and herbaria of the Gray Herbarium and the Arboretum (by then the principal collections still intended to be moved, as a result of the reduction in the projected size of the building because of rising costs), would prove almost fatally harmful not only to the reorganization recommended in the Bailey Report, but also to botany as a whole at Harvard (par. 100, R. 96).

The Coordinating Committee report was received with approval by the Corporation (par. 101, R. 96). The Corporation accepted the report's major premises (quoted above) as correctly stating the relationship of the Arboretum to the University. Thus, the Corporation agreed that the Arboretum was to be regarded as an instrument to be used by the Corporation to further the interests of botany as a whole and the over-all interests of the University (*ibid.*, R. 96-97).

The Visiting Committee, however, sought time in which to reply to the Coordinating Committee report, and the Corporation accordingly voted in June 1950 to defer further action on the proposed new building until the Board of Overseers had an opportunity to act upon a formal report of the Visiting Committee (pars. 102-103, R. 97). The delay was voted notwithstanding the view of President Conant expressed prior to the vote that the Coordinating Committee report and the Lowell opinion had settled all questions both as to the wisdom and legality of the proposals affecting the Arboretum contained in the Bailey Report (par. 103, R. 97).

Legal opinions supplied to the Corporation

Following the June 1950 vote, the Visiting Committee retained the late John Wells Farley, Esq. to render a legal opinion regarding the Bailey Report (par. 103, R. 97). Mr. Farley's opinion was submitted to the Visiting Committee in September 1950 (par. 104, R. 97) and concluded that various features of the Bailey Report as applied to the Arboretum constituted or would constitute breaches of trust. Mr. Farley stated that four features of the Bailey Report were objectionable: (1) the loss of identity of the Arboretum as an institution; (2) the proposed use of Arboretum funds; (3) the *quid pro quo* salary system; and (4) the proposed removal of the Arboretum library and herbarium to Cambridge (pars. 105-108, R. 97-101).

After receipt of the Farley opinion, the Visiting Committee by substantially unanimous vote adopted a series of resolutions calling on the Corporation (1) to suspend application of the Bailey Plan to the Arboretum, (2) to restore the authority of the Director of the Arboretum, (3) to withhold any expenditure or commitment of Arboretum funds for the removal to Cambridge of its library and herbarium or for the construction or maintenance of the proposed new building, and (4) to authorize construction of a new wing on the existing Administration Building at Jamaica Plain (par. 109, R. 101).

Both the Farley opinion and the resolutions of the Visiting Committee were received and considered by the Corporation in October 1950. President Conant expressed impatience at the "legal niceties" and Mr. Marbury, another member of the Corporation, commented on what he characterized as the erroneous legal premise on which the Farley opinion was based. It was suggested by a Corporation member that the Farley opinion "required an answer" and the Corporation unanimously voted to consult Harvard's counsel, Ropes, Gray, Best, Coolidge & Rugg (par. 110, R.

101-102). The resolutions of the Visiting Committee, in turn, were referred by the Overseers, also at a meeting in October 1950, to the Coordinating Committee, of which Mr. Laird Bell had become chairman (par. 112, R. 102).*

During October 1950, Mr. Grenville Clark, then still a member of the Corporation, requested an opinion of the late Robert G. Dodge, Esq. for his own guidance as to whether carrying out the Bailey Report would involve breaches of trust with respect to the Arboretum. Mr. Dodge's opinion, submitted in January 1951 and also sent to and considered by the Corporation, expressed agreement with the conclusions of the Farley opinion (par. 114, R. 103).

In May 1951 Ropes, Gray submitted an opinion to the Corporation which concluded (1) that the administrative provisions of the Bailey Report were authorized, (2) that the proposed expenditures of Arboretum funds were proper, (3) that the *quid pro quo* salary system presented sufficiently serious administrative and accounting difficulties that consideration should be given to abandoning its use in the case of the Arboretum, and (4) that the proposed removal of the library and herbarium of the Arboretum was proper, provided (i) that the removal be justified as promoting the purposes of the Arboretum, (ii) that such books and specimens "as are required to provide a working library and herbarium at Jamaica Plain should be retained there", and (iii) that any additional operating expenses to the Arboretum be justified by a determination of the extent to which the purposes of the Arboretum would be benefited by the move. The opinion expressed the view that the Arboretum property was held by the Corporation subject to two trusts, one under the Indenture of 1872, applicable to the James Arnold Fund and other gifts made prior to

* Mr. Bell had been a member of the Coordinating Committee in May 1950 and, as such, had approved the "tool concept" enunciated in the Committee's report (par. 97, 125, R. 94, 109).

1927, and the other on the terms of the Sargent Memorial Fund of 1927 and gifts made subsequent to it. The opinion advised the Corporation that this second trust might permit a wider scope of Arboretum activities and broader participation in the work of "other" Harvard botanical stations and departments (par. 115, R. 103-105). The Ropes, Gray opinion did not contain any advice to the Corporation that the interests of the Arboretum must be solely or even primarily taken into account in determining whether the move should be made (par. 116, R. 105-106).

A few days after receipt of the Ropes, Gray opinion, the Corporation, acting solely on the basis of the recommendation contained in the opinion, voted that if the move were made a "working" library and herbarium should be left at Jamaica Plain (par. 118, R. 106). The Corporation's vote did not reflect any consideration whether or not in the interests of the Arboretum such a library and herbarium should be left at at Jamaica Plain (par. 119, R. 106). At the same time the Corporation voted that it was "prepared" to eliminate the *quid pro quo* in so far as it related to the Arboretum (par. 118, R. 106), although the *quid pro quo* was not finally eliminated until the Corporation's vote in January 1953 (App. C, par. 1, R. 153).

Following issuance of the Ropes, Gray opinion, the Visiting Committee sought from Mr. Farley's firm and from Mr. Dodge a fuller statement of their views (par. 120, R. 106). The Farley-Dodge opinion was submitted to the Visiting Committee on March 1, 1952, and copies of it were sent to all members of the Corporation. It contained six major conclusions: *First*, that the Corporation, as trustee of the Arboretum, had a duty actively and diligently to promote the trust purposes and must not be diverted from a single-minded performance of those duties "by a desire to benefit Harvard botany or to advance the interests of the University"; *Second*, that the Bailey Plan was formulated with the purpose of furthering the interests of Harvard University

at large and not those of the Arboretum; *Third*, that the implementation of the Bailey Plan as regards the Arboretum would involve breaches of trust; *Fourth*, that the proposed removal of the greater part of the library and herbarium of the Arboretum to Cambridge would be contrary to the interests of the Arboretum and therefore improper, among other reasons because it was inconsistent with the existence of the Arboretum as an institution; *Fifth*, that there was no basis for the view expressed in the Ropes, Gray opinion that the 1927 Sargent Memorial Fund and later gifts to the Arboretum endowment were not held subject to the Indenture of 1872 but on broader terms, but that, even if the then Ropes, Gray view were accepted arguendo, the proposed action would not be proper; and *Sixth*, that there was no basis for the view emphasized in the Ropes, Gray opinion, that the Arboretum was merely a "department" of the University (par. 120, R. 106-108). The Farley-Dodge opinion concluded with the statement that, since material questions of law were involved, the matter should be submitted for judicial determination (par. 121, R. 108).

The Visiting Committee in the spring of 1952 sought to implement the conclusions of the Farley-Dodge opinion in a series of resolutions, adopted with a single dissent, calling for (1) rescission of the Bailey Plan as far as the Arboretum was concerned, (2) abandonment of the plan to move the library and herbarium of the Arboretum, and (3) submission for judicial determination in advance of any attempt to apply the Bailey Plan to the Arboretum (par. 122, R. 108).

*The Corporation's adoption
of the resolution of October 1952*

Although the Arboretum question was still in the hands of the Coordinating Committee, to which the Board of Overseers had referred it in October 1950 (par. 112, R.

102), the Corporation in the summer or early fall of 1952, following receipt of the Farley-Dodge opinion, itself undertook to assure that the Coordinating Committee and thereafter the Board of Overseers would act on the matter in a way satisfactory to the Corporation's objectives (pars. 123-127, R. 108-110). To this end, President Conant and counsel discussed the possibility of arranging for the adoption by the Coordinating Committee of a resolution which would urge the Board of Overseers to recommend to the Corporation that it would be in the best interests of the Arboretum to move the library and herbarium. The President and counsel, however, decided that the text of the resolution should be approved by the Corporation before the question of the Coordinating Committee's making such a recommendation was raised with its Chairman, Mr. Bell (par. 125, R. 109).

Accordingly, at President Conant's request, counsel prepared a draft resolution regarding the Arboretum which yielded on the formal point that the Bailey Plan, *qua* Bailey Plan, should not apply to the Arboretum, but insisted on the central provision of the Bailey Plan as it affected the Arboretum, namely, the removal of the library and herbarium to Cambridge (pars. 123, 140, R. 108-109, 115). With changes, some of them proposed by President Conant, a revised draft of October 2, 1952 was prepared, which recited that "the Corporation has determined that it is in the best interests of the Arboretum and will promote the purposes of its endowment to remove to a central building in Cambridge the bulk of the library and herbarium of the Arboretum" (par. 123, R. 108-109).

The draft of October 2 was considered by the Corporation at a meeting in early October, 1952, and, changes having been proposed, a revised draft, dated October 14, 1952, was submitted to Mr. Bell, who had not theretofore been advised it was in preparation (par. 125, R. 109). The

principal changes effected were (1) to delete from the October 2 version the recital that one purpose of the resolution was to continue the identity of the Arboretum, (2) to make more equivocal the statement in the October 2 draft of the resolution that the income of the Arboretum was first to be applied to the support of the Arnold Professor, the living collections, and the library and herbarium, and only then to other activities, and (3) to substitute, for the provision of the earlier draft that the Arboretum should bear no part of the maintenance expense of the new building, a provision requiring the Arboretum to bear a portion of such maintenance. The "best interest" recital was unchanged (par. 126, R. 109-110).

After the resolution was submitted to Mr. Bell, President Conant submitted to the Corporation a memorandum dated October 15, 1952, arguing at length in favor of the removal of the library and herbarium. The memorandum, which characterized the Arnold Professor as a "part of the University", stressed the aid to teaching the knowledge of trees in the University which would result from the presence in Cambridge of the library and herbarium and pointed out that the removal would "assist all those concerned with a knowledge of botany" (par. 127, R. 110).

The Corporation, in October 1952, approved the October 14 draft (par. 129, R. 110). Thereby, as the Master found, it implicitly made the decision to order the removal of the main part of the library and herbarium of the Arboretum to a central building in Cambridge, to be housed with the library and herbarium of the Gray Herbarium (*ibid.*).

On November 7, 1952, the Coordinating Committee unanimously adopted as its own, with insignificant changes, the October 14 draft resolution already approved by the Corporation (par. 130, R. 110). The resolution was submitted to the Overseers who authorized it to be transmitted to the Corporation (par. 131, R. 111). It was also submitted to

representatives of the Visiting Committee, who met on November 23, 1952 with the Coordinating Committee and thereafter on December 15, 1952, with a subcommittee of the Corporation itself, consisting of the President, and Messrs. Cabot (the Treasurer), Coolidge and Marbury (par. 133, R. 111-112). The December 15 discussion of the November 7 resolution of the Coordinating Committee (no indication was apparently given of the Corporation's prior action on the resolution) and of the Visiting Committee objections was wholly fruitless. The Visiting Committee representatives, Mr. Dodge, Mr. Clark, Mr. Farley and Mr. John Ames, strongly urged that the Corporation had a duty to look "solely" to the interests of the Arboretum in reaching a decision (*ibid.*).

On December 22 the Visiting Committee representatives submitted to the Corporation a counter-statement, which differed from the November 7 resolution (or the October 14 draft) in numerous details but basically differed in two important respects, first, that the Corporation as trustee of the Arboretum recognized that it was obliged to act "with a view solely to the best interests of the Arboretum" and, second, that the library and herbarium should not be moved to Cambridge (par. 134, R. 112). Shortly thereafter the Corporation's counsel advised that the quoted language suggested by the Visiting Committee was "unjustifiably restrictive" (par. 135, R. 112).

The Visiting Committee counter-statement, the memorandum of counsel and a report of the meeting of December 15 were considered by the Corporation on January 5, 1953, and as a result the November 7 resolution was modified in certain respects, none of them matters of substance, and the resolution was then submitted to the Coordinating Committee (par. 136, R. 112-113). The slightly revised resolution was adopted by the Coordinating Committee on January 11 and by the Board of Overseers on January 12 (par. 137, R. 113-114).

*Consultation with the Corporation's
selected outside scientists*

At its meeting of January 5, 1953, the Corporation was informed that Professor Lawrence, director of the Bailey Hortorium at Cornell, and Professor Slate of Cornell had criticized the proposed move of the library and herbarium in memoranda which were presented to the Corporation. After hearing this view, the Corporation decided that "at least as a matter of record" it would be advisable to consult other outside scientists, and a subcommittee of the Corporation, consisting of the President and Messrs. Kane and Marbury, was appointed for the purpose (par. 136, R. 113). The subcommittee conferred in New York on January 17, a Saturday, with Messrs. Harrar, Sears and Keck, although the basis on which the three were chosen, or by whom they were chosen, does not appear. As the Master found, the qualifications of Harrar and Sears nowhere appear of record, and their titles as of the date of the conference "give no basis for placing confidence in their judgment on the matters presented to them for opinion." The three were not asked whether the move would be in the best interests of the Arboretum, and Dr. Keck, at least, was asked whether the move would be desirable from the standpoint of botany at Harvard. Furthermore, Dr. Keck, the only one of the three who appeared as a witness before the Master and who was called by petitioner, informed the subcommittee of what he considered to be the disadvantages of the move from the point of view of the Arboretum (par. 139, R. 114-115).

Two days after the Saturday conference in New York, the Corporation adopted the resolution of January 19, 1953, the text of which is annexed to the Master's Report as Exhibit C (R. 153-156).

The resolution of January 19, 1953

The resolution of January 19, 1953 was substantially identical with the draft resolution of October 2, 1952 so far as matters material to this proceeding are involved (par. 140, R. 115). The January 19 resolution recited that the Bailey Plan should not be applicable to the Arboretum but that the library and herbarium of the Arboretum should be moved to a central building in Cambridge, except that a "working library and herbarium should be retained at Jamaica Plain". It acknowledged that the property and endowment held by the Corporation for the purposes of the Arboretum were held in trust and that in administering the trust the Corporation was to act with a view to the best interests of the Arboretum. It further provided that since the duties of the Arnold Professor were largely administrative, he should be removed from this position for grave misconduct or neglect of duty and also if, having in mind only the Arboretum's interests, the Corporation determined that his administration was not a successful one. In this connection, it is interesting to compare the Corporation's view that it could look "only" at the interests of the Arboretum in determining the success of the Arnold Professor's performance while at the same time it refused to look solely at the interests of the Arboretum in determining to move the library and herbarium (compare pars. 1 and 4 of the resolution, R. 153, 154; see also pars. 133, 150, R. 111, 120).

The resolution also provided for appointments to the staff of the Arboretum, the expenditure of Arboretum funds, and other procedural matters.

In ordering the removal of the bulk of the library and herbarium, the resolution recited, in the same words as the October 2, 1952 draft resolution prepared by counsel, that "the Corporation determines that it is in the best interests of the Arboretum and will promote the purposes of its

endowment" to move to the central building in Cambridge the main body of its library and herbarium related to research. It provided that the Arnold Professor would consult with the Harvard University librarian and recommend to the Corporation through the President the books to be retained at Jamaica Plain and that the Arnold Professor and the Director of the New York Botanic Garden should recommend to the Corporation through the President the specimens which were to be retained at Jamaica Plain.

The Corporation's reasons for the vote

The Corporation's decision to direct the removal to Cambridge of the main body of the library and herbarium of the Arnold Arboretum was made, wholly or in major part, because of a belief that, although the removal was consistent with the Corporation's obligations as trustee of the Arboretum and would not constitute a breach of trust, it would promote the science of botany as a whole at Harvard as distinct from the interests of particular botanical institutions. The Corporation believed that it was entitled, and indeed obliged, to consider the interests of botany as a whole at Harvard and the standing of the University in the botanical field. The conviction, first reflected in the approval of the Bailey Report, that a unification of libraries and herbaria in Cambridge would promote the science of botany from an overall standpoint remained the controlling factor in the final decision (par. 144, R. 118).

In passing on the various draft resolutions in the fall of 1952 the Corporation considered, wholly or in major part, the effect the move would have on the promotion of botany generally at Harvard, and in approving the move, the members of the Corporation were concerned with botany generally and believed that the move would promote botany (pars. 145-149, R. 118-120).

The Corporation throughout the entire period accepted as sound the view underlying the language of the first Coordinating Committee report in 1950, that the Arboretum should properly be regarded as an instrument "to be used in the development of botany as a whole and in the overall interests of the University" (par. 146, R. 110).^{*} The Corporation refused to state in the resolution that it was acting "solely" in the interests of the Arboretum because it was aware that it was not so acting (par. 150, R. 120). As the Master found, the Corporation was not even principally motivated by a concern for these interests (pars. 144-149, R. 118-120).

The decision to move the library and herbarium was not made for the benefit of teaching in the University by or under the direction of the Arnold Professor (par. 152, R. 120), and no greater amount of teaching has in fact been carried on by the Arnold Professor since the move than was done by staff members of the Arboretum prior to the move (par. 213, R. 188).

The decision to move the library and herbarium was likewise neither controlled nor significantly influenced by any purpose of relieving whatever unsatisfactory housing conditions existed in the Administration Building at Jamaica Plain. The capacity of the Administration Building made unnecessary a move of anything approaching six-sevenths of the library and herbarium for this purpose, and during the period in question the endowment of the Arboretum was sufficient to finance the construction of an addition at Jamaica Plain to relieve any unsatisfactory housing conditions (par. 153, R. 120-121). However, instead of taking

^{*} Much the same view was set forth in Provost Buck's foreword to the Bailey Report, where the Provost said that each of the institutions "must constantly be assessed in terms of whether it is contributing toward or detracting from the strength of the whole." See page 26, *supra*.

action to improve whatever unsatisfactory housing conditions existed at the Arboretum, the Corporation could accomplish its purposes only by centralizing the libraries and herbaria at the Harvard University Herbarium in Cambridge.

Consequences of the Move

The move had the effect intended by the Corporation throughout its consideration of the question. The Corporation was successful in furthering the interests of botany as a whole and in creating a famous scientific station identified with Harvard (par. 215, R. 139). However, from the standpoint of the Arboretum the move proved to be injurious, as had been predicted by at least two of the outside scientific experts selected and consulted by the Corporation (see pages 18 and 41, *supra*). As a result of the Corporation's action the Arboretum suffered direct and substantial injury.

Impairment of the facilities at the Arboretum

The Master found, as noted (page 36, *supra*), that the Corporation's decision to leave at Jamaica Plain the so-called "working library and herbarium" was not the result of any consideration of scientific requirements, but simply of a recommendation of counsel. He further found that no reasonably adequate library or herbarium was in fact left there (par. 175, R. 126-127).

As to the library, the Master found that the resources of a library were "essential to most areas of botanical (including horticultural) research" (pars. 39, 179, R. 72, 128), that prior to the move the library of the Arboretum contained a wide range of materials useful in such research (*ibid.*), that in the course of the move a majority of those

works were taken to the Harvard University Herbarium (par. 179, R. 128), the library left behind being principally a collection of duplicates not wanted in Cambridge (pars. 176-177, R. 127) and that in consequence the library at Jamaica Plain was materially impaired (par. 179, R. 128).

As to the herbarium, the Master found that the presence in a herbarium of wild specimens related to the living collection and to cultivated specimens "is important from the standpoint of botanical (including horticultural) research and bears heavily on the quality of a herbarium" (pars. 36, 181, R. 71, 129), that approximately 99% of the wild specimens in the former Arboretum herbarium (exclusive of specimens of no current interest) were removed to Cambridge, leaving a relative handful behind (par. 180, R. 128-129), and that in consequence the herbarium at Jamaica Plain was materially impaired (par. 181, R. 129).

*The marked decline in the standing,
reputation and prestige of the Arboretum*

Prior to the removal of most of its library and herbarium, the Arboretum for a long time had had a reputation of its own as a botanical institution (pars. 30, 36, 39, 204, R. 69, 71, 72-73, 136), separate and distinct from the general reputation of Harvard University or of other botanical institutions administered by Harvard (par. 204, R. 136), and this reputation depended upon three factors, the living collections, the adequacy of the library and herbarium for research, and the repute of its publications (par. 205, R. 136). Prior to the move, the Arboretum had "an outstanding reputation not only for the quality and variety of its living collections but also for the accumulation of one of the great libraries and herbaria of the world" (*ibid.*). The Arboretum was one of the three principal centers in the world for the study of woody plants (par. 36, R. 71).

As a result of the move, however, the reputation, prestige and standing of the Arboretum have markedly declined. Since the removal, the books and specimens now housed at the Harvard University Herbarium are no longer regarded as those of the Arboretum, and in consequence the prestige of the library and herbarium has in effect been transferred to Harvard University. The Arboretum is now looked upon merely as an appendage to the botany department at Harvard (par. 206, R. 136).

That the move had this effect is hardly surprising in view of the facts found by the Master. As a consequence of the move, the headquarters of a majority of the members of the staff of the Arboretum, including the Arnold Professor, the librarian and the curator, were moved to Cambridge (see page 15, *supra*), the acquisitions of books and specimens for the Arboretum have been severely and artificially curtailed and limited geographically, particularly acquisitions for the so-called working library and herbarium at Jamaica Plain (see pp. 17, 19, *supra*), and the books and specimens of the Arboretum which were transferred to Cambridge have been so organized as to make their identification as Arboretum assets almost impossible, while at the same time the catalog at the Arboretum does not even list the Arboretum library now housed at the Harvard University Herbarium (see page 17, *supra*). As a result, "the books, pamphlets, periodicals and herbarium specimens of the Arboretum at the Harvard University Herbarium are commonly looked upon as those of Harvard rather than those of the Arboretum, and thus the prestige of the Arnold Arboretum's library and herbarium has in effect been transferred to Harvard University" (par. 206, R. 136), and "a world famous scientific station identified with Harvard" (par. 215, R. 139) has been created.

*Salary payments not shown to be
proportionate to any benefit
received by the Arboretum*

Joint appointments to the staff of the Arboretum and the Gray resulting from the combination of the libraries and herbaria in the Harvard University Herbarium have led to arrangements under which, on a basis not clear of record, the Arboretum has annually contributed to the salaries of a librarian and curators whose services to the Arboretum have not been shown to be proportionate to the portion of the salary paid by Arboretum funds (pars. 189, 191-194, R. 131-132).

*Enforced contribution to the
maintenance of the Harvard
University Herbarium*

Since the move the Arboretum has been compelled to bear 42% of the cost of the maintenance of the Harvard University Herbarium (par. 185, R. 129), to which the bulk of its library and herbarium were moved not out of any concern for adequacy of housing or teaching by the Arnold Professor or any other significant consideration of the interests of the Arnold Arboretum, but rather, as the Master found, out of a concern for the promotion of the science of botany generally and the enhancement of the University's prestige and its standing in the botanical field (pars. 144-150, R. 118-120).

Other consequences

The Master has found no countervailing benefits to the Arboretum which resulted from the move, at least in the sense that the move was required to achieve them.

The unsatisfactory conditions at Jamaica Plain have been remedied and adequate housing of books and specimens

moved to Cambridge has been provided, but neither required for its accomplishment the move to Cambridge (par. 207, R. 137).

There is no evidence that the segregation of materials devoted to horticulture at Jamaica Plain has resulted in more efficient work there, and in any event could have been accomplished without the move (par. 209, R. 137). There is likewise no showing that the move to Cambridge has resulted in any overall benefit to the taxonomic work carried on there by persons employed with Arboretum funds. Any advantage to taxonomic research in Cambridge arising from the larger collection there is offset by the "marked disadvantage" to research resulting from the division of the wild and cultivated herbarium specimens and the division of the Arboretum staff (par. 210, R. 137). There is likewise no showing that more effective or improved work has been done by persons employed with Arboretum funds working in Cambridge or that these persons have taken any advantage of their greater proximity to other botanical facilities or personnel in Cambridge (par. 211, R. 138). The best that can be said is that the work performed by persons employed with Arboretum funds has not been shown to have been terminated or impaired, although there is no evidence of any improvement (par. 212, R. 138).

SUMMARY OF ARGUMENT

The respondent, the trustee of the Arnold Arboretum under an express trust (Point I, pp. 52-53), held the library and herbarium of the Arboretum and their contents subject to the terms of the Indenture of 1872 (pp. 53-54). In its capacity as trustee, the respondent was obligated to act upon a consideration of the best interests of the trust, and the respondent's other and broader charitable purposes as

an educational institution afforded no justification for action with respect to the Arboretum other than with regard to the interests of the Arboretum (pp. 54-64). The Master's report shows in elaborate detail that, in ordering the removal of the bulk of the Arboretum library and herbarium, the respondent acted, not out of any consideration of the interests of the Arboretum, but "wholly or in major part" for the benefit of its other interests (pp. 64-69). The respondent's action thus constituted a clear breach of its duty of loyalty.

The removal of the bulk of the library and herbarium of the Arboretum to Cambridge in aid of the respondent's other interests constituted a violation of the explicit term of the Indenture which prohibits the employment of assets of the Arboretum in aid of any other purpose "however meritorious or kindred in its nature" (Point II, pp. 69-74). The prohibition of the Indenture against such a use of the trust assets applies to the use of the library and herbarium of the Arboretum (pp. 70-72). On the clear findings of the Master as to the intent and effect of the move, the move of the library and bulk of the Arboretum library and herbarium to Cambridge was a violation of the explicit term of the Indenture (pp. 72-74).

The relief sought in the final decree proposed by the petitioner is appropriate and necessary to undo the wrong committed and to guard against its repetition (Point III, pp. 75-88). The relief requested includes the return of the library and herbarium to the Arboretum (pp. 77-78), the provision of appropriate quarters to receive the returned books and specimens (page 78), the repayment of amounts charged to Arboretum funds to bear a major part of the annual expense of the maintenance of the Harvard University Herbarium in the years since the move (page 81), injunctive restraints against the employment of Arboretum assets other than in the interests of the Arboretum (page 81),

provisions requiring the respondent to take appropriate action to fill vacancies in the Arnold Professorship and restraining the respondent from committing the care and management of the Arboretum to others than the Arnold Professor in violation of the Indenture (pp. 79-80), and provisions regarding counsel fees (pp. 82-88).

ARGUMENT

I

IN ORDERING THE REMOVAL OF THE ARBORETUM LIBRARY AND HERBARIUM, THE CORPORATION WAS MOTIVATED "WHOLLY OR IN MAJOR PART" BY CONSIDERATIONS OTHER THAN THE INTERESTS OF THE ARBORETUM, AND ITS ACTION THEREFORE CONSTITUTED A BREACH OF TRUST.

The cardinal duty imposed by law upon a trustee, whether of a private trust or, as here, of a charitable trust, is the duty of loyalty, the obligation to act in relation to the trust upon a consideration of the interests of the trust. In ordering the removal of the Arboretum library and herbarium to Cambridge, the Corporation acted, however, as the Master found, not out of concern for and upon a consideration of the interests of the Arboretum, but upon a consideration of what would serve the University's interests in the general field of botany (par. 144, R. 118). It is the petitioners' contention that this action, so motivated, constituted a breach of trust.

In the succeeding subsections of the brief, we will show that the Corporation's relationship to the Arboretum as established by the Indenture of 1872 was that of formal trustee, that the library and herbarium of the Arboretum were held by the Corporation as trustee of the trust established by the Indenture, that as trustee under the Indenture

the Corporation was legally obliged to act with regard to the trust only upon a consideration of the interests of the trust, and that on the facts found by the Master the Corporation conspicuously failed to perform its legal duty.

A. *The Corporation's duties and responsibilities under the Indenture of 1872 are those of a trustee of an express trust.*

There is no room for any contention that the Indenture of 1872 cast upon the Corporation any role other than that of trustee of an express trust, or that its conduct in the administration of the Arboretum is to be measured against any standard other than the time-honored code of conduct imposed by law upon trustees. The Indenture itself makes the point clear beyond doubt, and the resolution adopted by the Corporation on January 19, 1953 and annexed to its answer to the Revised Information concedes it.

The Indenture was executed by Messrs. Emerson, Dixwell and Parker as trustees under the will of James Arnold and recites their determination that the disposition of the property entrusted to them in the Arnold will upon the terms of the Indenture "is and will be the most suitable and proper execution of their trust, and will most effectually provide for the continuance of the trust for the future . . ." It recites further the delivery of that property to the Corporation, as party of the second part, "to have and to hold the same to the said party of the second part, and their assigns forever, in trust, with full power of sale and reinvestment upon the trust following . . ." There then follows, in six paragraphs, the substantive provisions of the instrument, including, in the last of these, the following language:

"Sixth, The said Party of the second part acknowledge the receipt of the property and money named in

the schedule aforesaid, and agree to hold the same, and all future property so received, upon the trust herein declared. . . ."

The resolution of the Corporation adopted on January 19, 1953, the text of which is annexed as Exhibit A to the answer to the Revised Information, contains in paragraph 1 the following language:

"The Corporation recognizes that the property and endowment held for the purposes of the Arboretum are held by the Corporation in trust . . ."

Finally, had the Corporation intended to challenge the allegations of the Revised Information that its status was that of trustee, G.L. c. 231, §30 required it to file, within the time specified therein, a specific demand for proof. This the defendant has not done, and the allegations therefore are to be taken as admitted.

B. *The books and specimens constituting the library and herbarium of the Arboretum were acquired as additions to, and were and are held by the Corporation subject to the terms of, the trust established by the Indenture of 1872.*

The specific finding of the Master in paragraph 203 of his Report disposes of any question as to the terms on which the Corporation held the books and specimens of the Arboretum immediately prior to the move in 1954.

"The library and herbarium specimens housed in the Administration Building at Jamaica Plain immediately prior to the move in 1954 had been acquired, and were held by the Corporation subject to the terms of the Indenture of 1872, for the purposes of the Arnold Arboretum" (R. 135).

This finding was originally the subject of respondent's objection No. 54 (R. 171). The objection was overruled by

the order of the Single Justice of April 22, 1964, and the appeal taken from that order by the respondent does not assign the overruling of this objection as a point of appeal (R. 317). The point therefore has been abandoned and the finding stands unchallenged.

In any event, the finding stated in paragraph 203 of the Master's Report is amply supported by the subsidiary findings of the Master, none of which is the subject of an objection, as to the development of the library and herbarium of the Arboretum and the increase of its endowment (see par. 16, R. 64; par. 31, R. 69; par. 38, R. 72; and par. 202, R. 135). The law is well established that subsequent gifts for the purposes of the Arboretum are assumed, absent an indication of a contrary intention, to have been made as additions to the James Arnold Fund and upon the terms of the Indenture of 1872. *Cary Library v. Bliss*, 151 Mass. 364, 376-77; *Trustees of Andover Theological Seminary v. Visitors*, 253 Mass. 256, 273; *Boston v. Curley*, 276 Mass. 549, 564. The Master's findings explicitly show that the initial appropriation for the acquisition of books and specimens was made from the income of the James Arnold Fund itself in 1879 (par. 16, R. 64) and that subsequent acquisitions were made by purchases with funds held for the purposes of the Arboretum or given for that purpose (par. 202, R. 135).

C. *As trustee of the Arnold Arboretum, the Corporation was obliged by law to act upon a consideration of its best interests.*

That the respondent has the obligations of a trustee with respect to the Arboretum, by virtue of the Indenture of 1872, and that the library and herbarium of the Arboretum were and are held by the Corporation subject to the terms of the trust established by the Indenture, are clear,

as has been shown. The propriety of the removal to Cambridge of the library and herbarium of the Arboretum, and the other actions taken by the Corporation as part of that move, must therefore be viewed in light of the obligations which the law imposes upon trustees and judged against the standards applicable to their conduct.

Foremost among the obligations of a trustee is the duty to administer his trust solely with a view to its best interests. The standard is high, it is inflexible, and it has been rigorously enforced by this Court and by all other courts to which the issue has been presented. Scott summarizes the point in these terms: "The most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty. . . . It is the duty of the trustee to administer the trust solely in the interest of the beneficiaries. He is not permitted to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries." 2 Scott, *Trusts* sec. 170, p. 1193 (2d ed. 1956).

The decided cases summarized in Scott's formulation are legion. This Court stated the rule in *Boston Safe Deposit & Trust Co. v. Lewis*, 317 Mass. 137, 140, in these terms:

"A trustee must exercise good faith and act solely in the interests of the beneficiaries in administering the trust. He must lay aside self-interest when it becomes adverse to the rights of the cestuis que trust, for the office of trustee cannot be subverted to fostering the personal advantage or individual gain of the incumbent. There can be no divided loyalty. This principle has always been rigorously enforced."

The same view had been enunciated by this Court in the earlier case of *Hayes v. Hall*, 188 Mass. 510, 511:

"The rule that a trustee in the management of property held by him in trust shall not be permitted directly or indirectly to derive any personal advantage from its use or sale, but must act solely for the interests of those

beneficially interested, has often been referred to, and approved by this court." (Citing eleven Massachusetts cases)

A more elaborate statement appears in the opinion of this Court in *Quinn v. Burton*, 195 Mass. 277, 279:

"It is a principle universally recognized, as founded not only on common business morality but on a sound public policy, that persons who act in a representative capacity, whether styled executors, administrators, trustees or agents, are not permitted in the performance of their duties to put themselves in a position antagonistic to the interests of those whom they represent. (Citing cases) If, in fact, their principal suffers no harm, or may have been benefited, this inquiry is unimportant, as the object of the law is to secure fidelity in the discharge of fiduciary duties, uninfluenced by considerations which necessarily are corrupt in their tendencies. (Citing an English case) An agent who places himself in this situation creates the opportunity, and is exposed to the temptation, of taking advantage of his principal. In attempting to serve two masters, the presumption is that he will act for his own mercenary interest, and by assuming a double relation, he becomes disqualified to perform faithfully the services for which he was originally employed, and his conduct is fraudulent."

The principle finds complete support in the decisions of other jurisdictions. The New York Court of Appeals has adverted to it in the same uncompromising terms. Thus, in *City Bank Farmers Trust Co. v. Cannon*, 291 N.Y. 125, 132, 51 N.E.2d 674, 676, in considering the propriety of the retention by a corporate trustee of its own stock in the corpus of the trust, the Court said:

"We do not for a moment suggest that the trustee did not act in the utmost good faith. Both courts below so found. But that is not enough for when the trustee has a selfish interest which may be served, the law does not stop to inquire whether the trustee's action or failure to act has been unfairly influenced. It stops the inquiry when the relation is disclosed and sets aside the trans-

action or refuses to enforce it, and in a proper case, surcharges the trustee as for an unauthorized investment. It is only by rigid adherence to these principles that all temptation can be removed from one acting as a fiduciary to serve his own interest when in conflict with the obligations of his trust. (Citing four earlier New York decisions.) The rule is designed to obliterate all divided loyalties which may creep into a fiduciary relationship and utterly to destroy their effect by making voidable any transactions in which they appear."

In the later case of *Albright v. Jefferson County National Bank*, 292 N.Y. 31, 53 N.E.2d 753, the Court of Appeals had before it the question whether a purchase by a corporate trustee for the trust of securities sold to it by an affiliated corporation, the stockholders and directors of which were substantially identical with those of the trustee, constituted a breach of trust. In holding that it did, Chief Judge Lehman said:

"This court has recently said in considering a similar problem that the question is not whether a corporate trustee and an affiliated corporation are 'separate legal entities' but whether the trustee has placed itself in a position 'where its interest was or might be in conflict with its duty. Either is sufficient to cause surcharging of the trustee.' (Matter of Ryan, 291 N.Y. 376, decided December 2, 1943). The court pointed out in that case that the rule is 'inflexible' that a trustee may not deal with himself or put himself in a position where his interest might be in conflict with his duty. Included within its scope is every situation in which a trustee chooses to deal with another in such close relation with the trustee that possible advantage to such other person might influence, consciously or unconsciously, the judgment of the trustee who is in duty bound to consider only the interest of his *cestui que trust*." (292 N.Y. at 39, 53 N.E.2d at 756).

Citations of authorities to the same effect could be multiplied almost without end, for the principle stated here is not merely the "weight of authority", but is all the authority there is on the question, deemed by the courts which have

considered it as the fundamental principle without which the law of trusts, as we know it, could not have developed. It is thus as a true "restatement" of the law that section 170(1) of the *Restatement of Trusts, Second* provides:

"The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary."

Authorities in this jurisdiction and elsewhere, establish that the trustee of a charitable trust is subject to the normal duties and obligations of trustees generally. Thus, in *Attorney General v. Bedard*, 218 Mass. 378, 386, this Court held that the trustees of a charitable trust were subject to a trustee's normal obligation to keep trust funds segregated from his own and to apply them only to proper trust purposes. The opinion contains no suggestion that the rule, as applicable in the case before it, was any different than would have been the case had the trust not been a charitable trust. So, too, in *Attorney General v. Armstrong*, 231 Mass. 196, 214, this Court said that a trustee of a charitable trust who purchased an obligation of the trust at a discount and attempted to enforce it at face was guilty of a breach of his duty, again without any note of distinction because the trust was charitable. Scott states the law generally on this question as follows:

"The duties of the trustee of a charitable trust are similar to those of trustees of a private trust. . . . The trustees of a charitable trust, like those of a private trust, are under a duty of loyalty; they must administer the trust solely with a view to the accomplishment of the purposes of the trust and not with a view to promoting their own interests. Self-dealing is clearly improper." 4 Scott, *Trusts* sec. 379, p. 2735 (2d ed. 1956).

See also *Restatement of Trusts, Second*, Section 379 and Comment a.

It will obviously avail the Corporation nothing to argue here, as it has before, that it has no interests of its own,* that all its activities are charitable and have the same beneficiary, the public, as the Arboretum, and all it does or can do, whether as trustee of the Arboretum or as administrator of its general educational enterprise, is for the benefit of that same public and so can involve no possible conflict of interest or breach of any duty of loyalty imposed on a trustee. This argument is little more than a play on words, for it would justify the grossest breaches of a particular trust so long as the diversion, or whatever, had a charity rather than a personal interest as its object.

Quite clearly Harvard University, empowered to promote broad educational purposes, has objectives other than the special purposes contemplated by the Indenture of 1872. Of course, aspects of the university's general purpose may touch upon the restricted purposes of the Arboretum trust, as they obviously do in the area of botany. But the respondent *qua* university looks to the relation of its botanical activities to its activities as a whole. The respondent as trustee must see to its trust. What may be done in the name of the university may not necessarily be done in the name of the trust which respondent administers as trustee, even though the public is ultimately the beneficiary of both. Surely that is the teaching of the McKay endowment case. *President and Fellows of Harvard College v. Attorney General*, 228 Mass. 396.

* The fact that the Corporation is composed of seven individual members should not cause the Court to lose sight of the fact that it is the Corporation which is the trustee. While the individuals could not personally benefit by using Arboretum property for other university purposes, and in that sense had no personal conflicting interests, the Corporation, which operated those other interests (pars. 1, 2, R. 56-57), could and did have other interests of its own that could be served by such a use of Arboretum property.

In that case, the university had received large sums of money, in trust, under the will of Gordon McKay, the income only to be used for promoting applied science. The university proposed to affiliate its Scientific School with M.I.T., under elaborate arrangements for the admission of Harvard students to the joint institution and the transfer of the more than a dozen professors to its faculty. Harvard sought instructions as to the legality of the proposal. This Court held that Harvard had no authority to divert three-fifths of the income of the McKay endowment to the support of this proposal. In so holding, this Court distinguished with unmistakable clarity between the university as a congeries of general purposes and the university as an administrator of restricted funds:

"The Attorney General has not raised any question of *ultra vires*, and we assume that the University legally may use its general funds to carry out the agreement in question." (228 Mass. at 407)

It cannot be said, therefore, that what the respondent may lawfully do with its general funds, its "own" property, it may therefore do with trust funds. The Court in the McKay case held precisely to the contrary, without regard to the benefit to be expected.

"It may be assumed also that a co-operative plan like that proposed would be advantageous to both of these great institutions by creating one school of applied science of the highest efficiency, with economy of expenditure and effort, to take the place of the two private schools. But so far as the agreement attempts to dispose of the McKay gift, the controlling question is whether it is authorized by the terms and conditions of the trust upon which the gift was made and accepted." (*Ibid.*)

Not only must it be accepted that the respondent as a trustee has purposes narrower and more restricted than its purposes as a university, it must also be accepted that the financial consequences to the University as such and to

the respondent as trustee of the Arboretum trust are quite different. The Arboretum trust has a separate endowment, which the respondent has acknowledged that it holds subject to the Indenture of 1872. That endowment, and the income of it, may be used for no purpose other than as authorized by the Indenture, except as a court may authorize in exercise of its powers under the *cy pres* doctrine and no occasion for the application of that doctrine is presented. The activities of the Arboretum trust in its special field of botany are carried on at no cost to the respondent; the respondent has not paid for the land, buildings, library, herbarium, or staff of the Arboretum.

It is in the context of these relationships that the respondent's duty of loyalty must be considered. In this context the meaning of the injunction of this Court in *Quinn v. Burton*, 195 Mass. 277, 279, becomes clear.

"It is a principle universally recognized . . . that persons who act in a representative capacity . . . are not permitted in the performance of their duties to put themselves in a position antagonistic to the interests of those whom they represent."

The respondent, as a trustee, may not subordinate the purposes of the Arboretum trust in the pursuit of other objectives. If, as the Master found, the respondent acted without a concern for the purposes and benefit of the Arboretum trust, then it violated its duty. When, as here, the trustee acts to further purposes other than those of trust, a breach of trust is committed and the transaction will be set aside, as the authorities already cited show.

An application of these principles to a case which affords some striking parallels to the present case may be found in the decision of the Connecticut court in *Conway v. Emery*, 139 Conn. 612, 96 A. 2d 221. In that case the testatrix had been deeply interested in the Avon Old Farms School and during her lifetime had contributed \$7 millions to its sup-

port. By her will she left her house and its contents to individual trustees to be maintained as a museum and gave \$400,000 to a corporate trustee as an endowment, the income therefrom to be used for the support of the museum, any surplus income to be applied for the benefit of the school. The will further provided that if, at any time more than three years after the probate of the will, the individual trustees by a two-thirds vote should "in their absolute discretion determine that there is not sufficient public interest in the Museum to warrant continuing it", the trust should terminate and the house, its contents and the endowment should be applied to the benefit of the school.

In the few years immediately following the death of the testatrix the museum acquired a wide reputation and a high regard among experts and it commanded a substantial public attendance and interest. However, five years after the death of the testatrix, moved by the perilous financial condition of the school which would benefit from a closing of the museum, the trustees by more than the required two-thirds vote determined to close the museum.

"Some of those voting in the affirmative took into consideration their personal ideas of what the testatrix would wish to do if she were living, financial difficulties which they feared the museum might encounter in the future, the financial plight of the school, and that the museum should be closed in order that the school might remain in existence."

• • •

"No trustee who voted in favor of the motion was actuated solely or principally by the belief that there was not sufficient public interest in the museum to keep it open. Public interest was not even a topic of discussion at the meeting of April 30, 1951. All of the trustees of the museum and all of the directors of the foundation are honorable ladies and gentlemen. None of them was actuated by a personally selfish motive." (139 Conn. at 617-618, 96 A.2d at 223-224).

The court held, affirming the decision of the trial court, that the trustees had committed a breach of trust.

The decision of the court was premised both upon the language of the will which explicitly set forth the considerations upon which the trustees were authorized to close the museum, and upon the time-honored duty of loyalty imposed by law upon trustees.

"A trustee must always be loyal to his trust, 2 Scott, Trusts § 170. In his dealings with his beneficiary, he must not be influenced by the interest of a third party. 3 Bogert, Trusts & Trustees, § 543; Restatement, 1 Trusts § 170, comment p. 'Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. (*Wendt v. Fischer*, 243 N.Y. 439, 444, 154 N.E. 303). Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.' *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546, 62 A.L.R.1.

"To be sure, the trustees did not act for personal advantage. Indeed, they appear to have been motivated by a desire to assist a worthy project. They were, nevertheless, trustees of the museum . . ." (139 Conn. at 621, 96A2d at 225)

In its insistence upon a loyalty to the trust, the *Emery* decision reflects the principle which, in this case, required the Corporation to act in the interest of the Arboretum trust. In the *Emery* case, the competing interest which concerned the trustees, the welfare of the school, was a concern for an institution which, as a remainderman, was a

beneficiary of the trust itself. Harvard University generally occupies no such position under the Indenture of 1872.

It is the contention of the petitioner that the requirement imposed by law upon the defendant as trustee under the Indenture of 1872 was that, in considering the proposed removal of the library and herbarium, it should have had concern solely for the interests of the Arboretum trust. The authorities heretofore cited establish that proposition beyond question. In fact, given the findings of the Master, it would be enough to entitle the petitioner to relief that the law asked only that the Corporation have given at least as much consideration to the Arboretum as it gave to other matters, for even that the Corporation did not do.

- D. *The finding that the Corporation ordered the removal of the library and herbarium of the Arboretum upon a consideration "wholly or in major part" of interests other than those of the Arboretum establishes that the Corporation committed a breach of its duty of loyalty.*

The relationship of the Corporation to the Arboretum has been shown to be that of a trustee, and its duties as trustee have been shown to include the obligation to administer the trust with a view to its interests. The findings of the Master demonstrate beyond question that, in ordering the removal of the library and herbarium to Cambridge, the Corporation did not act in accordance with that duty. Instead, the controlling consideration which underlay the decision was a concern for the welfare of the University's botanical enterprise and a concomitant failure to give even a principal concern, still less an undivided concern, for the interests of the Arboretum.

The statement in the earlier portion of this brief of the facts found by the Master shows the extent of the Corpo-

ration's failure to discharge its fiduciary duty. There is no need here to do more than call to the Court's attention the principal findings in the Master's report which bear on the question.

First, the Corporation was aware that it was not acting "solely" in the interests of the Arboretum (par. 150 R. 120). It believed that it was entitled to consider other interests than those of the Arboretum in making the decision (par. 144, second sentence, R. 118), and had been advised by counsel that the proposition that the Corporation should act in the matter solely with a view to the interests of the Arboretum was "unduly restrictive" (par. 135, third sentence, R. 112). Throughout the period the Corporation had accepted as sound the premise that the Arboretum should be regarded simply as "a tool to be used in the development of botany as a whole and in the overall interests of the University" (pars. 101 and 146, R. 96-97 and 119). In view of these facts, it would have been surprising indeed had the Corporation acted with a view to the interests of the Arboretum.

Second, in reaching its decision, the Corporation, as the Master found, gave its entire or principal attention to the effect of the proposed consolidation of libraries and herbaria, and thus of the move of the Arboretum library and herbarium, on the promotion of the science of botany from an overall stand-point and on the reorganization of botany and the prestige and standing of the University in the botanical field (pars. 144, 147 and 149, R. 118-120). The Master's detailed findings show the same concentration of interest:

- (a) The Corporation approved the Bailey Report in 1945 and 1946, which recommended the consolidation of libraries and herbaria, without consideration of the interests of the Arboretum and with a view to the interests of botany as a whole at the University and the University's prestige and

standing in botany. This is shown by the aim with which the Report was written, the personal convictions of its author, the understanding of it conveyed by Provost Buck's forward to the Report, the view of President Conant, and the matters considered by the Corporation in voting for approval (pars. 71-75, R. 84-85; par. 61, R. 81; pars. 77-78, R. 85-86; and par. 83, R. 87-88).

(b) The consolidation of libraries and herbaria in Cambridge was understood by those in charge, including President Conant, to be central to the reorganization advocated by the Bailey Report (par. 90, R. 90-91).

(c) The initial implementation of the Report was undertaken in a way which demonstrated an almost unbelievable disregard for the interests of the Arboretum and the obligations imposed by the Indenture of 1872 and a concentration, instead, upon the interests of the University and of the reorganization advocated by the Report (pars. 85-88, R. 88-89).

(d) The Coordinating Committee Report of 1950 defended the Bailey Report, including the consolidation of libraries and herbaria, on grounds which insisted that the interests of the Arboretum were not to be the basis of judgment, and the Corporation agreed with that view (pars. 98 and 101, R. 95-97).

(e) The reaction of the Corporation to the legal opinion of Mr. Farley, which insisted that the touchstone must be a consideration of the interests of the Arboretum, was one of impatience at the "legal niceties" (par. 110, R. 101-102).

(f) The slight alteration in the terms of the move as proposed in the Bailey Report which resulted from the Corporation's 1951 vote to keep a "working" library and herbarium at Jamaica Plain if the move were made was not the result of any consideration of whether the interests

of the Arboretum would thus be served, but simply a reflection of legal advice (par. 119, R. 106).

(g) The chronology of events in the late summer and fall of 1952 in the formulation of the resolution formally adopted on January 19, 1953, shows that the principal concern of the Corporation was obtaining expressions favorable to the move from the Coordinating Committee and the Board of Overseers, not with any evaluation of the proposal in terms of the interests of the Arboretum (pars. 123 and following, R. 108 and following).

(h) The fact that the final decision, to all intents and purposes, was made in October, 1952 long prior to the eleventh hour consultation with "outside scientists" (pars. 129 and 145, R. 110 and 118-119), shows that the determination to consult them was not the consequence of any real concern for the interests of the Arboretum.

(i) The focus of the interviews with the outside persons on the expected impact of the move on botany as a whole (par. 151, R. 126) shows where the Corporation's concern lay, as does the absence of effect on the decision of the statements of Dr. Keck, one of those interviewed, that the effect of the move on the Arboretum would not be beneficial (last three sentences of par. 139, R. 115); and by the fact that the later statement of Dr. Robbins, director of the New York Botanic Garden, to the same effect (pars. 159 and 161, R. 122-123) was likewise disregarded.

Third, it is quite clear that concern for particular aspects of the work of the Arboretum did not provide the motivation for the move. The decision to leave the so-called working library and herbarium at Jamaica Plain was, as already noted, the product of nothing but a legal recommendation and was taken without consideration of whether the Arboretum would thus be benefited (pars. 119 and 175, R. 106 and 126-127). The decision to make the move was

not the result of any conclusion that teaching in the University by or under the direction of the Arnold Professor would benefit (par. 152, R. 120). Nor was relief of whatever unsatisfactory housing conditions existed at Jamaica Plain a controlling or significant factor in the decision (par. 153, R. 120-121). To achieve that purpose it would not have been necessary to move anything approaching six-sevenths of the herbarium or the library (*ibid.*), and indeed the Master specifically found that the existing library facilities at Jamaica Plain had considerable room for expansion (par. 41, R. 73-74). Moreover, had relief of housing conditions been a factor, the Arboretum endowment was adequate to finance the construction of an addition at Jamaica Plain (par. 153, third sentence, R. 121).

Fourth, the severely adverse consequences of the move to the Arboretum coupled with the benefits to the prestige of the University resulting from the consolidation of the collections in the Harvard University Herbarium are themselves evidence of the motives behind the move. Of course, results achieved are not always those intended, and the injury to the Arboretum and benefits to the University flowing from the move would, alone, perhaps not constitute conclusive evidence of the purpose, but here, in the context of other findings bearing on motive, they are significant additional evidence that that purpose was not to benefit the Arboretum but rather to benefit botany as a whole at the University.

It is, as the authorities already discussed have shown, immaterial that the members of the Corporation individually neither profited nor sought to profit from the decision or, as the Master found, that they acted in good faith,* or, as the petitioner willingly concedes, that the matters on

* "Good faith is not a defense to a claim of disloyalty." Bogert, *Trusts and Trustees* §543 (2d ed.).

which the Corporation focused attention, the benefit of botany as a whole at the University and the University's prestige and standing in the field of botany, were in themselves worthy purposes. To paraphrase the statement of the Connecticut court in *Conway v. Emeny, supra*: "To be sure, the trustees did not act for personal advantage. Indeed, they appear to have been motivated by a desire to assist a worthy project. They were, nevertheless, trustees of the Arboretum." As trustee of the Arboretum the Corporation was "under a duty to . . . administer the trust solely with a view to the accomplishment of the purposes of the trust . . ." 2 Scott, *Trusts* sec. 379, p. 2735 (2d ed. 1956). Its failure to do so constitutes a breach of its trust, for which the petitioner is entitled to relief.

II

THE REMOVAL TO CAMBRIDGE OF THE LIBRARY AND HERBARIUM OF THE ARBORETUM CONSTITUTED A BREACH OF THE TERMS OF THE INDENTURE OF 1872.

In the preceding portion of this brief, it has been shown that the Corporation acted in gross disregard of the interests of the Arnold Arboretum in directing the removal to Cambridge of the bulk of its library and herbarium and thus in breach of the duty of loyalty imposed by law on the trustee of every trust. That showing without more entitles the petitioner to the relief sought, which is principally the return to the Arboretum of the books and herbarium specimens thus wrongly transferred. However, quite apart from the Corporation's breach of the duty of loyalty implied by the law, the removal of the library and herbarium to benefit the general botanical interests of the University constituted a breach of express terms of the Indenture of 1872. For this reason, as well, the petitioner is entitled to the relief sought.

A. *The Indenture of 1872, which governs the property held by the Corporation as trustee for the Arboretum, expressly prohibits the use of that property for the benefit of interests other than those of the Arboretum.*

The Indenture of 1872 is a carefully drawn, detailed instrument which shows explicit recognition of the fact that the trustee chosen to act under it had then (as it has now) other interests apart from the Arboretum, which might conflict with the arboretum contemplated by the instrument. The instrument quite carefully marked the bounds of expenditures which might properly be made of the funds transferred to the Corporation by the Arnold trustees.

Paragraph "Third" of the Indenture provides that the Corporation "shall devote the remainder of the said net income in every year [after the required accumulation of 5%] to the establishment and support of an Arboretum, to be called the Arnold Arboretum. . . ." This provision is not precatory but mandatory ("shall devote") and in itself excludes any basis for argument that the funds may properly be devoted to objects other than the Arboretum. Not content, however, with that direction, paragraph "Third" further mandates that the fund thus established "shall not be diminished by supplementing any other object, however meritorious, or kindred in its nature." Thus, the affirmative direction as to how the fund is to be employed is complemented by a negative injunction in express terms against the use of the fund for any other purpose "however meritorious, or kindred in its nature." That this last term of the Indenture was not ill-considered verbiage, lightly to be disregarded, is made clear by the one carefully phrased exception to the general injunction against the aid of other objects: the Indenture goes on to say that "the said President and Fellows shall be allowed to obtain from said Arboretum, free of cost, any trees, shrubs, and herbaceous plants, which, in the judgment of the Arnold Professor

[not, it should be noted, in the judgment of the Corporation] can be spared from said Arboretum, without injury thereto; the same to be used for the ornament of the college grounds, at Cambridge or elsewhere."

The prohibition contained in the Indenture of 1872 runs against the use of the fund transferred by the Arnold trustees, plus the mandatory accumulation of 5% of the income. The Indenture does not in terms apply the prohibition to library books or herbarium specimens; indeed, the Indenture contains no explicit mention of either a library or a herbarium. None of these points, however, provides the slightest basis for an argument that the Corporation is free to employ the library and herbarium resources of the Arboretum without regard to the restriction.

First, it is familiar law that the proceeds of trust funds, or property into which trust funds are commuted, are equally subject to the restrictions imposed by the trust instrument as the property in its original form. The whole law of trust investments is predicated on this principle, and denial of it would make the successful commission of a breach of trust the ridiculously simple matter of exchanging original trust property for something else and making off with the substitute.

Second, the Indenture of 1872 itself applies the prohibition of paragraph "Third" to future property acquired under the trust. As noted above, the general prohibition against the use of the fund to aid other objects is coupled with an express exception as to the use of excess trees and shrubs. The exception is directed, not to any original trust property, which was money and securities (par. 13, third sentence, R. 61), but to a species of property which would become part of the trust corpus only in the future. It is therefore clear, as a matter of the text of the Indenture itself, that the prohibition extends to property acquired with original trust funds as well as to the original fund itself.

Third, as noted above at page 54, additions to a trust fund, absent an indication of a contrary intention, are to be received and administered as additions to the original fund and on the same terms. Here, as has been pointed out, with a few noted exceptions principally in aid of the Arboretum library specifically, additions to the endowment of the Arboretum have been made without any such indication of a contrary intention, and thus are to be taken as made upon the terms of the Indenture of 1872.

Fourth, it is clear from the Master's report that the herbarium and library developed, in part, from appropriations from the income of the James Arnold Fund itself (par. 16, R. 64) and, in part, from gifts in kind or from the income of funds given specifically for the purpose or from expeditions conducted or financed by the Arboretum without identification of the particular funds so used (par. 33, R. 70-71; par. 38, R. 72; par. 202, R. 135; and par. 203, R. 135). From what has already been said, it is clear that the library and herbarium so acquired were at the time of the move subject to the terms of the Indenture of 1872 and thus, specifically, to the prohibition contained in paragraph "Third".

B. *The removal of the Arboretum library and herbarium to aid the University's general botanical interests violated explicit provisions of the Indenture of 1872 and constituted a breach of trust.*

No elaborate citation of authorities is required to sustain the proposition that with exceptions not relevant in this case a trustee must act within the confines of the instrument establishing his trust, or the further proposition that this principle is as applicable to charitable trusts as to private trusts.

"Insofar as the trust instrument expressly or by implication imposes duties or confers powers upon the trustee, the terms of the trust determine the extent of his duties

and powers, except so far as the performance of the duties or the exercise of the powers is or becomes impossible, or the provision is illegal, or there has been such a change of circumstances as to justify or require deviation from the terms of the trust." 2 Scott, *Trusts* sec. 164, p. 1153 (2d ed. 1956)

The foregoing statement, made with respect to private trusts, is recognized by its author to be equally applicable to charitable trusts as well.

"The trustees of a charitable trust, like the trustees of a private trust, have such powers as are conferred upon them in specific words by the terms of the trust or are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust." 4 Scott, *Trusts* sec. 380, p. 2736 (2d ed. 1956)

No showing has been made or attempted that it is impossible or illegal for the Corporation to comply with the provision of the Indenture of 1872 that the assets of the Arboretum trust should not be employed to aid other objects, or that circumstances justify ignoring the provision.

It has long been understood, and has frequently been enunciated by this Court, that a trustee's notions of desirability or convenience, however disinterested or praiseworthy in the abstract, afford no basis for disregard of the terms of the trust being administered. It is enough to refer, as one example, to the opinion in the McKay endowment case:

"It may be assumed also that a co-operative plan like that proposed would be advantageous to both of these great institutions by creating one school of applied science of the highest efficiency, with economy of expenditure and effort, to take the place of the two private schools. But so far as the agreement attempts to dispose of the income of the McKay gift, the controlling question is whether it is authorized by the terms and conditions of the trust upon which the gift was made and accepted." *President and Fellows of Harvard College v. Attorney General*, 228 Mass. 396, 407.

What the law would thus command in any event is an explicit provision of the Indenture, which in terms denies to the trustee any power to employ the assets of the trust for other objects, whatever their merit.

Because the Indenture prohibits the employment of Arboretum assets in aid of any other object "however meritorious, or kindred in its nature" and this prohibition is applicable to the Arboretum assets represented by the library and herbarium, the Corporation's action in ordering the removal of the library and herbarium to Cambridge constituted a breach of the trust if that removal was in aid of objects other than the Arboretum. The Master's Report does not leave that question in any doubt. The facts found show beyond any cavil that the Corporation was not moved by consideration of the Arboretum in ordering the removal but, on the contrary, aimed at aiding the University's general botanical concerns and increasing the University's prestige and, further, show that the result of the move was in fact injurious to the Arboretum and beneficial to these other interests intended to be benefited. In running roughshod over the provisions of the Indenture, the Corporation ignored the intention of the Indenture that the Arboretum was the end to be fostered, and substituted for that conception the formulation, expressed in the 1950 report of the Coordinating Committee, that the Arboretum was simply "a tool to be used in the overall development of botany as a whole and in the overall interests of the University." The prohibition against the use of the Arboretum as an aid to other interests was thus superseded by the Corporation's conception that the Arboretum had no other function. It was this view, so the Master found, which underlay the Corporation's decision. One strains to conceive of a more flagrant perversion of the Indenture of 1872.

III

THE RELIEF REQUESTED IS NECESSARY AND APPROPRIATE
TO CURE THE BREACH OF TRUST

Inasmuch as this proceeding to redress breaches of trust is brought in equity, the full range of equitable remedies may be drawn upon in preparing the Final Decree (or, if actual preparation of the Decree is to be left to the Single Justice, in establishing the guidelines therefor). As Professor Bogert has stated:

"Equity is primarily responsible for the protection of rights arising under trusts and will provide the cestui with whatever remedy is necessary to protect him and recompense him for loss, in so far as this can be done without injustice to the trustee or third parties. The court is not confined to a limited list of remedies, but will rather mold the relief to protect the rights of the beneficiary according to the situation involved." Bogert, *Trusts and Trustees* § 861 (2d ed.).

Moreover, to the end that further proceedings will not be necessary, the Court is entitled to follow the principle, summarized by Chief Justice Rugg in *Field v. Field*, 264 Mass. 549, 550, that "a suit in equity fully heard on its merits ought to be decided by a decree which settles for all time the issues involved." Indeed, the Court should find this case, which is concerned with events that commenced in 1944, an especially appropriate instance in which this principle should be followed.

The reason for ordering positive relief against a trustee who has violated the duty of loyalty owed to his trust or ignored the provisions of his governing trust instrument is obvious: only by such strictness in imposing consequences on defaulting trustees can the rules be maintained to which trustees are subject. This principle was well stated in

Judge Cardozo's opinion in *Wendt v. Fischer*, 243 N.Y. 439, 443-44, 154 N.E. 303, 304:

"Finally we are told that the brokers acted in good faith, that the terms procured were the best obtainable at the amount, and that the wrong, if any, was unaccompanied by damage. This is no sufficient answer by a trustee forgetful of his duty. The law 'does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case'. (Citations omitted) Only by this uncompromising rigidity has the rule of undivided loyalty been maintained against disintegrating erosion."

It follows from this rationale that a trustee is not permitted to justify a breach of trust.

"So drastic is the rule in the foregoing situations or in any similar circumstances involving a breach of the trustee's duty of loyalty that the transaction will be regarded as constructively fraudulent and, at the option of the beneficiary, will be set aside; the trustee is not given an opportunity to justify his action; an untrammelled choice of affirmance or rejection rests with the beneficiary." Loring, *A Trustee's Handbook* sec. 19, p. 70 (6th ed.) (Farr Revision of 1962).

Even where the trustee is found to have had the positive motive of aiding the trust objectives, his action cannot be defended if the means employed to produce such benefit violated his governing instrument. *Mosser v. Darrow*, 341 U.S. 267; *Witherington v. Nickerson*, 256 Mass. 351, 356-57. Moreover, that the trust or the beneficiaries thereof have not been harmed or, indeed, have benefited, is likewise irrelevant if a breach of trust is found to have been committed. *Jose v. Lyman*, 316 Mass. 271, 279.

In this case the Master has found that the Arboretum, the subject of the trust here sought to be protected, has been materially and severely injured (*supra*, pp. 45-49). It is therefore not necessary for this Court to reaffirm, in the most extreme context in which they apply, the strictness of the rules calling for reversal of trustee actions constituting breaches of trust. It is, however, important to recall the pervasive and universal nature of these rules, for they render irrelevant any argument that the Arboretum library and herbarium should not be returned to the Arboretum headquarters at Jamaica Plain because this step would not be beneficial to botany in general or to Harvard's botany. The law of trusts is built on the premise that the commands of the trust instrument and loyalty to the trust are not to be sacrificed to the trustee's notions of a "better approach" to the use of the trust assets.

The Attorney General's statutory authority to commence this suit being "to enforce the due application of funds given or appropriated to public charities within the Commonwealth, and prevent breaches of trust in the administration thereof," G.L. c. 12, § 8, the provisions of the decree requested by the Attorney General (R. 318-23), based on the principles above outlined, are chiefly aimed at restoring the Arboretum to its position prior to the move. If the books and specimens are allowed to remain at Harvard, the library and herbarium at the Arboretum will remain inadequate; the reputation, standing, and prestige of the Arboretum will remain in the state of decline to which it has fallen since the move or will decline even further; the staff will remain divided and the Arboretum will be without a librarian or curator; and the "marked disadvantage" to research (par. 210, R. 137) resulting from the separation of the library and herbarium from the living collections will continue.

On the other hand, the return of the library, herbarium and staff will, at the very least, give the Arboretum the

opportunity to regain its former standing and prestige as "one of the three principal [centers] in the world for the study of woody plants" (par. 36, R. 71). Of course, the Arboretum will not regain its former position at once; time will be required to eliminate the damage done by the move. However, each day that the Corporation leaves the books and specimens at Harvard, using them for its other botanical interests and to enhance the reputation of Harvard, it is acting in violation of its duty as trustee of the Arboretum. Only by returning the library, herbarium and staff can the trustee in the future act in the interests of the Arboretum as it is required to do under the law.

The provisions of the decree proposed by petitioner require, first, that the Corporation return, within six months, approximately two-thirds of the books and specimens taken from the Arboretum (paragraph 1 of the proposed decree). The record shows no dispute that these assets can be properly housed at the Arboretum, and there should be no quarrel with the six months' deadline when it is recalled that Harvard, between June 7, 1954 and July 9, 1954, moved many more books and specimens than it is here being asked to return (par. 165, R. 124).

Petitioner also prays (paragraph 3 of the proposed decree) that Harvard be required to cause to be constructed with Arboretum funds an extension to the present building to house the library, herbarium and staff of the Arboretum. This request is made because Harvard has contended that the library and herbarium are ill-housed at the Arboretum and because the Visiting Committee also proposed the construction of such an extension (par. 109, R. 101). The Master has found that the Arboretum has ample funds to construct such an extension (par. 153, R. 121), and there can be no doubt that the Corporation has a duty properly to house these valuable collections.

Petitioner also believes that the one month deadline, after completion of construction, for return of the remaining books and specimens to the Arboretum (paragraph 2 of the proposed decree) is sufficient, inasmuch as preparation for the move can begin well in advance of the completion of construction.

A further provision (paragraph 4 of the proposed decree) requires the Corporation to arrange the library and herbarium at the Arboretum in a satisfactory manner according to some recognized system of arrangement. This, of course, is to prevent a disorganized arrangement of the books and specimens at the Arboretum following their return. In addition, paragraph 5 requires that the Corporation return to the Arboretum, from the Harvard University Herbarium, its staff headquarters, which was moved with the books and specimens and as a part of the move. Such relocation is an essential element of re-transferring from Harvard the prestige of the Arboretum and of reviving the Arboretum functionally.

The proposed injunction (paragraph 6 of the proposed decree) prohibits Harvard from removing the books and specimens from the Arboretum after they have been returned. This provision does not prevent the Arboretum from lending materials to other libraries or from temporarily removing materials from the Arboretum, but obviously does seek to bar the Corporation from returning the books and then promptly removing them to Cambridge again.

The revised information alleges that the Corporation has allowed vacancies to the Arnold Professorship to remain unfilled for long periods of time (R. 8). The Master has found that the Corporation has failed to take action to fill vacancies for a total of twelve years out of the twenty-seven years since Professor Sargent's death (pars. 21, 221, R. 66, 141) and that, even at times when there has been an incumbent Arnold Professor, he has not been allowed to exercise the

care and management of the Arboretum committed to him by the Indenture of 1872 (par. 221, R. 141).

To remedy this, the proposed decree (paragraphs 7 and 8) provides that the Corporation must not allow vacancies to continue for longer than one year, unless good cause can be shown, and prevents the Corporation from committing the care and management of the Arboretum to anyone other than the Arnold Professor.

Paragraph 7 of the suggested decree also provides that the Corporation may not impose or exercise any control over the Arnold Professor other than as provided for in the Indenture. The Master has found that the Arnold Professor, instead of being subject to the same control by the Corporation as professors in the Bussey Institution were subject in 1872, as provided in the Indenture of 1872, has been made an administrative officer by the Corporation's vote of January 1953 and is subject to dismissal at will (par. 219, R. 141). In 1872, Bussey professors could be dismissed only for inadequate performance or neglect of duty or misconduct (par. 218, R. 140). Although the Master has stated that there is no charge in the revised information that this exercise of control, inconsistent with the express terms of the Indenture, constitutes a breach of trust, petitioner urges the Court to construe the clear description, set forth in paragraph 5 of the revised information (R. 6), of the degree of control to which the Arnold Professor should properly be subject, and the general allegation that "The Corporation has committed breaches of trust in other respects as set forth in previous paragraphs of this information" (R. 23) as constituting such an allegation. The Court in an equity proceeding is not limited by the specific prayers for relief and can

"decree appropriate relief on . . . material allegations [of the bill] which were supported by any evidence [the trier of facts] might have received, and which relief was

not inconsistent with specific relief prayed for." *Manassis v. Dahood*, 302 Mass. 290, 293.

The Master having found facts that constitute a breach of the express terms of the Indenture of 1872, the Court, petitioner believes, should grant appropriate relief now.

Paragraph 9 of the proposed decree prohibits the Corporation from taking any action in the future with regard to Arboretum property except where the Corporation considers, and acts for, the benefit of the interests of the Arboretum. The need for this relief is obvious in view of the Master's many findings which show that, in making decisions about the Arboretum since 1946 (chiefly in considering the move of the Arboretum library and herbarium and in housing them at the Harvard University Herbarium), the Corporation has viewed the Arboretum as an instrument to be used to benefit the University and has acted accordingly.

Paragraphs 10 and 11 of the proposed decree will prevent the Corporation, in the future, from using Arboretum funds to pay for services not performed for the Arnold Arboretum or to pay for the maintenance of the Harvard University Herbarium.

Paragraph 12 orders the return to the Arboretum endowment of funds therefrom previously paid for maintenance of the Herbarium building. This provision is appropriate to restore to the Arboretum endowment expenses charged to it as the consequence of the move in breach of the trust. But for the move, and the breach, these expenses would not have been incurred by the Arboretum, and thus the Arboretum should be reimbursed for them.

Paragraphs 13, 14 and 18 are designed to insure compliance with the decree. The Arboretum staff should be notified promptly of the decree, as paragraph 13 directs, and paragraph 18 is a conventional provision that agents

of the Corporation and persons in active concert with the Corporation will be bound by the provisions of the decree if they have knowledge of it, so that it can be carried out effectively. The reporting provisions of paragraph 14 will enable the petitioner to review the situation periodically to see if the decree is being observed.

Paragraph 15 of the proposed decree asks, first, that the counsel fees paid by the relators be reimbursed and, second, that they be reimbursed by the respondent out of its own funds rather than out of the Arboretum trust fund.

Awarding counsel fees to successful relators in charity informations is, of course, a practice of long standing in Anglo-American law. Thus, in *Attorney General v. Kerr*, 4 Beav. 297, 303, counsel fees for the suit were allowed to relators who set aside a conveyance and reversionary leases of property left for the benefit of a hospital. In *Attorney General v. Mayor of Stafford*, Barn. Ch. 37, 27 Eng. Rep. 543, a fund was donated to the Corporation of Stafford to be loaned in small sums and without interest, in some cases, to the poor inhabitants of the town. After following the donors' instructions for a time, the Corporation found the fund depleted and thereupon "followed advice" to make loans with interest only to those who could give good security. The Corporation felt that following the declared purposes of the trust would not inure to the benefit of the poor as it would be "an encouragement to make them idle." Holding that the intention of the donors had to be followed, the Lord Chancellor overturned an agreement between the Attorney General and the Corporation that the former's fee should be paid from the funds of the charity and ordered the Corporation to pay it and costs. See, in accord, *Attorney General v. The Drapers Company*, 4 Beav. 305, 308.

These English equitable principles were incorporated into the law of Massachusetts by *Frost v. Inhabitants of*

Belmont, 6 Allen 152, 165, and *Attorney General v. Old South Society in Boston*, 13 Allen 474. *Old South Society* involved an information charging that certain funds which should have been in the custody of the ministers and deacons of the Old South Church in Boston, for the use of that church, were actually in the possession of the Old South Society which was using them to defray its general and current expenses. As in this case, it was alleged that these funds, appropriated to public charity, were in danger of being misapplied and perverted. Sustaining only part of the allegations in the information, the Court ordered relator's counsel fees to be paid out of the charity fund and defendants to bear their own costs. In *Frost*, a suit by taxpayers in the nature of a breach of trust, the Court awarded plaintiffs' counsel fees out of the funds recovered by plaintiffs.

Later, in *Trustees v. Greenough*, 105 U.S. 527, the United States Supreme Court, citing *Attorney General v. Old South Society* and the English precedents, made the principle of award of counsel fees one of general application in American law. In that case bondholders prevented trustees from continuing to waste and destroy a fund securing their bonds by selling pledged land at nominal prices. Approving a total of \$60,131.96 to the bondholders to pay counsel fees and expenses, as well as to compensate one of the bondholders for his personal services, the Supreme Court stated:

"It is a general principle that a trust estate must bear the expenses of its administration. It is also established by sufficient authority, that where one of many parties having a common interest in a trust fund, at his own expense, takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts. This has long been the rule in relation to proceedings for restoring property to

the uses of a charity, which has been unjustly diverted therefrom." (105 U.S. at 532-33).

It is especially appropriate in this case to grant counsel fees. This case, like *Attorney General v. Old South Society*, *supra*, has been supported entirely by the relators at their own expense in an effort to protect the Arnold Arboretum. The purpose of the case throughout has been to assist the Arboretum trust and to regain for the Arboretum at Jamaica Plain the property taken from it by the Corporation. Particularly should this Court allow reasonable attorneys' fees where, as here, those who have had to finance litigation on behalf of a charitable trust, instead of standing silent when the trustee was considering the action later found to be a breach of trust, urged the trustee to seek instructions from this Court (par. 154, R. 121).

The case is an important one, not because the respondent is the President and Fellows of Harvard College, but because the enforcement of the duty of loyalty by a charitable trust is important to the administration of trusts. It is seldom that the Attorney General acts to prevent breaches of trusts involving charitable trusts (4 Scott, *Trusts* sec. 391, pp. 2753-56 [2d ed. 1956]), no doubt due partly to the fact that interested persons, because of trouble and expense, do not choose to become involved in a dispute when they have no possibility of personal gain. In this case the relators have no possibility of gain; in fact, whatever fees and costs the Court may award cannot possibly compensate them for the considerable time and money they have spent pursuing this matter from 1949 to the present time. The relators are not requesting that they be compensated for this time and personal expense, nor are they requesting an allowance for expenses incurred by them for legal services rendered between 1949 and the commencement of this action, although such expenses were awarded in *Trustees v. Greenough*, *supra*.

The prosecution of meritorious cases against trustees of charitable trusts would be sharply discouraged by any rule which denied relators recovery of the expenses of successful litigation. To require interested persons, who must succeed, first, in convincing the Attorney General to allow suit to be brought in his name and, second, must succeed in vigorously contested, time-consuming and expensive litigation, to bear the burden of financing such litigation would go far to insulate trustees from litigation attacking their management of charitable trusts.

Should this Court find that an award of counsel fees to the attorneys for petitioner is warranted, petitioner submits that this Court should require the Corporation to pay such award out of its general funds, as the Court has discretion to do. *New England Trust Co. v. Triggs*, 339 Mass. 453, 456; *Edelstein v. Old Colony Trust Co.*, 336 Mass. 659, 666; *Spilios v. Papps*, 292 Mass. 145, 147-148; *Attorney General v. Mayor of Stafford*, *supra*. In *Triggs* this Court held a managing trustee liable for failing to invest trust funds and for depositing them in its general account, without reaching the question of whether such conduct constituted a breach of trust, and awarded Triggs \$30,000 from the trust company's general funds, as counsel for himself as trustee of another fund and as counsel for the estate of a beneficiary. In so holding, the Court said:

"We are of the opinion that despite the policy of restraint in the allowance of counsel fees in the matter of contested accounts (*Berkshire Trust Co. v. Booth*, 317 Mass. 331, 336) the award was justified in the instant case under Section 45 [G.L. c. 215] which provides that [i]n contested cases before a probate court *** costs and expenses in the discretion of the court may be awarded to either party to be paid by the other *** as justice and

equity may require. The underlying facts here are such that justice and equity support the award to Mr. Triggs.

* * *

"We must not overlook the fact that all of this litigation was initially brought about by the manner in which the trust company handled the funds of the trust." (339 Mass. at 456-57).

In the case at bar, the underlying facts to support an award of counsel fees out of the Corporation's general funds are stronger than those in *Triggs* because here a breach of trust has been established and because, as the Master found, "[t]he Corporation was requested on several occasions to seek the opinion of a court before moving the main body of the Arboretum library and herbarium to Cambridge" (par. 154, R. 121). Had the Corporation acceded to these requests, it would have saved the relators the additional expense of litigating to remedy the Corporation's obvious breach of trust, and would itself have avoided the expense of this controversy.

The Supreme Judicial Court may award costs and expenses to either party to be paid by the other in an appeal from probate courts. G.L. c. 215, § 45. Costs and expenses include counsel fees. *Spilios v. Papps*, *supra*. Since this statute merely extended to probate courts the power to allow expenses which already existed in equity proceedings, it is clear that the Court in this case has such power. The extension of this power, exercised historically by Courts of Chancery in England, was recognized in *Lewis v. National Shawmut Bank*, 303 Mass. 187, 189:

"No doubt the primary motive for the passage of the statute of 1884 was to extend the power of the court in probate proceedings, and the power to allow expenses to parties already existed without any statute in equity proceedings."

New York also follows this rule that a trustee who leaves beneficiaries without any adequate protection except resort to the court is to be held liable for their expenses. In *Steinway v. Von Bernuth*, 82 App. Div. 596, 81 N. Y. Supp. 883, the trustee of an estate joined in claims against the estate of which he was trustee and executor, thereby leaving the beneficiaries without protection. Holding the trustee liable for the costs of the beneficiaries' action, the Court stated:

"There certainly is no good reason why the plaintiffs in the action, who have been obliged to invoke the aid of a court of equity to prevent the defendant from sacrificing their trust interests, should be compelled to pay the costs, either personally or out of the funds which they have preserved to the estate, and as the learned court at Special Term has not implicated the co-executors in the wrongdoing, there would appear to be no one else upon whom the burden may properly fall." (82 App. Div. at 607, 81 N.Y. Supp. at 889).

While petitioner has not included a provision in the decree to this effect, it should go without saying that the Corporation should not be allowed to charge Arboretum funds for the expenses and legal fees it has incurred in trying to defend its failure to discharge its duty of loyalty. If the Corporation has used Arboretum funds for such purposes, the Court should order the Corporation to refund these amounts to the Arboretum endowment. It is well settled that the Corporation should not be allowed to charge the trust fund for such expenses when the litigation is caused by the Corporation's own wrongdoing. *Comstock v. Boules*, 295 Mass. 250, 262; *Blake v. Pegram*, 109 Mass. 541, 558; *Bogle v. Bogle*, 3 Allen 158, 161; 2 Scott, *Trusts* sec. 188.6, p. 1905 (2d ed. 1956). In *Blake v. Pegram*, *supra*, a guardian-trustee neglected to invest a surplus of income for the benefit of his ward and the trust. When the guardian-trustee asked that his expenses, including counsel fees in-

curred during a Master's hearing, be charged to the trust, this Court rejected his request stating: "... as the controversy was occasioned in great measure by his own fault, he should not be allowed to charge any part of the expenses to the trust estate or to his ward." (109 Mass. at 558). In *Bogle*, which concerned a trustee who mingled the trust fund with his own property, this Court stated, in denying costs of suit and imposing liability for Master's fees:

"[the trustee] had a right to ask the direction of the court, and to charge the expenses of the suit upon the fund, provided he had been in no fault. But he has mingled the trust fund with his own property, and in rendering his account, he admitted only a portion of what was due from him. For this reason he should not be allowed costs, and should be charged the master's fees which were incurred in the investigation of the account." (3 Allen at 161). (Emphasis supplied)

Petitioner submits that the Corporation in the case at bar could have avoided incurring large counsel fees merely by following the suggestions of relators and others that the directions of this Court be obtained.

CONCLUSION

For the reasons stated, the petitioner asks that a final decree be entered in the form proposed by petitioner.

Respectfully submitted,

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APPENDIX

General Laws, Chapter 12, Section 8.

He shall enforce the due application of funds given or appropriated to public charities within the commonwealth, and prevent breaches of trust in the administration thereof.

General Laws, Chapter 215, Section 45.

In contested cases before a probate court or before the supreme judicial court on appeal, costs and expenses in the discretion of the court may be awarded to either party, to be paid by the other, or may be awarded to either or both parties to be paid out of the estate which is the subject of the controversy, as justice and equity may require. In any case wherein costs and expenses, or either, may be awarded hereunder to a party, they may be awarded to his counsel or may be apportioned between them. Execution may issue for costs awarded hereunder.

General Laws, Chapter 231, Section 30.

If it is alleged in any civil action or proceeding that a party is an executor, administrator, guardian, trustee, assignee, conservator or receiver or is a corporation, or that a place is a public way, such allegation shall be taken as admitted unless the party controverting it files in court, within the time allowed for the answer thereto, or within ten days after the filing of the paper containing such allegation, or within such further time as the court may allow on motion and notice, a special demand for its proof.

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No. 6643

ATTORNEY GENERAL, EX REL.

JOHN S. AMES, ET AL.,

VS.

PRESIDENT AND FELLOWS OF
HARVARD COLLEGE

BRIEF FOR PETITIONER

SUFFOLK COUNTY

PRICE OF SET, IN CASE CO., NINTEN